The International Scientific Session

– CKS 2011 –

Challenges of the Knowledge Society

Bucharest, April 15–16, 2011, 5th Edition

PRO UNIVERSITARIA
BUCUREŞTI
2011

ISSN 2359-9227
ISSN-L 2068-7796

Indexed by EBSCO-CEEAS, DOAJ, Index Copernicus Database and Ulrich`s

OVERVIEW OF THE PROHIBITION OF REFORMATIO IN PEIUS IN THE HUNGARIAN CRIMINAL PROCEDURE

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Abstract
The prohibition of reformation in peius has two meanings in the Hungarian legal terminology, such as the prohibition of increasing punishment and the so called reformation in peius. In the effective Hungarian legal system it is regulated, within the rules of the criminal procedure, regarding the ordinary and extraordinary legal remedies, separate procedures and, in addition to the criminal procedure, it is regulated even regarding the law of minor offences. Furthermore, the reformation in peius is not an inevitable consequence of the rule of law, but only a legal favour, and many questions and problems emerge in the light of fundamental principles and constitutionality concerning this prohibition. The prohibition of reformation in peius may be regarded as a legal guarantee for the defence to be able to file an appeal without the risk that the judgment might be altered to detriment of the accused. Therefore, it is a case of favour defensionis and as such it plays a huge role in sentencing, especially when the judgment was appealed in order to increase the severity of sentences.
This paper examines the connection between the prohibition of reformation in peius and the principle of constitutionality, as well as the its relation to the aggravating and mitigating factors of sentencing taken into account by the court of appeal.

Keywords: *Reformatio in Peius; Criminal Procedure; Constitutionality; Waving the Prohibition of Reformatio in Peius, Sentencing, Criminal-Policy*

Introduction

The expression „reformatio in peius" was mentioned for the first time in a roman legal case connected to procedural law, however it was unknown to the criminal procedure law in the 18th century (KLEINSCHROD). At the beginning of the 19th century, GONNER pointed out that the alteration of the judgment to the detriment of the accused through ordinary legal remedy (reformatio in peius) should not be required. These two sources led to ineffectual debates regarding the origin of the expression.

The prohibition of reformation in peius describes, in a wider sense, the right of state bodies entitled to permit the alteration of a decision to the detriment of the receiver (KOPP). In procedural law, reformatio in peius is mentioned in case an organ of higher degree passes a decision to the detriment of the accused, while a more favourable decision was expected to be passed thereby (SARTORIUS). In the course of time, more differentiated opinions were born regarding the expression, and the prohibition of reformation in peius was determined as the alteration of every single decision passed by the new court, and concerned the main question of the case to the detriment of the person against whom it was taken, however in favour of the person by whom the appeal was filed (RICCI). The restriction of reformation in peius focused only on the main questions of the decision.

In Hungary the prohibition of reformation in peius has two meanings which derived from the German influence where it is defined with the same differences: prohibition of increasing punishment and the prohibition of reformation in peius.

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Although the first Hungarian Criminal Procedure Code (henceforth CPC) of 1896 included provisions regarding the prohibition of reformation in peius, these rules had been abolished by the following CPC on the grounds that the purpose of the legal remedy is the enforcement of substantial justice and not the safeguarding of the position of the accused ("the substantial justice prevails over all" as stated by CSÉKA). The situation changed when in 1954 the Modification of the CPC introduced the relative prohibition of reformation in peius which was improved by the following CPCs (of 1958, 1962). After the historical improvements, the effective CPC of 1998 (Act XIX of 1998) still did not succeed to have the perfect rules regarding this legal institution which may arise out of ordinary and extraordinary legal remedies, separate procedures and, in addition to the criminal procedure, it is regulated even regarding the law of minor offences. Even the Civil Procedure Code (Act III of 1952) specified in its section 253 (3) that the court of second instance shall alter the decision of the court of first instance only within the limits of motion for appeal (joint appeal) and the counter-motion for appeal (section 247). According to this rule the court of second instance may pass a decision on matters concerning rights enforced in the course of the law suit, as well as matters set up as a defence in contradiction of such rights and has not been heard by the court of first instance or no decision has been passed thereon.

The prohibition of reformation in peius as a basic requirement can be traced back to several fundamental principles of the criminal procedure. The most important one is favour defensionis which includes several favours granted for the defence, therefore it is closely linked to the principle of defence. In addition, it is also connected to the principles of legality, opportunity, right to legal remedy. The other very important principle is the principle of prosecution, given that the aggravation of the punishment is only allowed in cases where the prosecutor filed an appeal for this reason. It can be stated, that this prohibition is a "procedural protection-right", as GRETHLEIN said, which shall balance the factors hindering the submission for legal remedy, furthermore, L. MOLNÁR calls the prohibition of reformatio in peius the "principle of appeal without fear" with good reason. Some other quite popular principles should be mentioned as well, such as the requirement for fair trial, and the principle of constitutionality.

1. The prohibition of reformatio in peius and the principle of constitutionality

According to KORINEK, as for the constitutional procedure, this key-definition came into the limelight basically in the German legal literature. The prohibition of double jeopardy and the command of equity are the basis for the prohibition of reformatio in peius. However, the prohibition of reformatio in peius is not an inevitable consequence of the rule of law, ~~but~~ only a legal favour.

The mostly proclaimed counter-argument against the prohibition of reformatio in peius is that in certain countries (some provinces of Switzerland, Great-Britain) this institution is unknown, but still there is no doubt about the constitutionality of these countries. Though, this cannot be a conclusive argument against the definition deriving from the principle of constitutionality. The reference to the legal order of other countries solely does not give grounds to refuse the constitutional basis for the prohibition of reformatio in peius, as a criminal procedural institution. The required persuasive power of this argument is shown by HAUSER, when he says, that on such grounds the CPC of Luzem province is not constitutional, because it has a provision saying that the accused does not have the freedom of confession during interrogation. It cannot be stated that the criminal procedure law is not constitutional for the lack of one detailed provision, although the right to remain silence (nemo tenetur se ipsum accusare) belongs to the basic principles of the criminal procedure, and expresses the human dignity as well. The admission of the right to remain silence is a necessary element of the fair process. However, not only Luzem province, but most of the provinces of Switzerland have no regulation on advising the accused of such rights, but still, Switzerland is a state founded on the rule of law. This reasoning justifies that the definition of constitutional principles cannot be determined by the mere comparison of legal institutions.

The principle of constitutionality is found in the development of specific law and order, which is not constant and is not laid down in writing for ever. MEYER-GROßNER indicates many clauses which support the 'general fundamental principle'-character regarding the meaning of prohibition of reformatio in peius. First of all, the prohibition of reformatio in peius is restricted by several provisions which allow the aggravation de lege lata, notwithstanding that the judgment was appealed only in favour of the accused. In German law such restriction is the order of hospitalizing in a psychiatric institution or in an institution suitable for detoxication cure, which can be ordered if the judgment of first instance did not stipulate such measure, and no appeal was filed to the detriment of the accused against the judgment of first instance. Both measures can be taken posterior in the procedure of legal remedy or beside other punishments or measures. The prohibition of reformatio in peius does not restrict this in Germany either. This regulation is therefore an exception to prohibition of reformatio in peius. In Hungary the law gives even more possibilities to increase the severity of setences despite the prohibition of reformatio in peius, since in the procedure of the second instance several detrimental decisions can be taken for the lack of appeal filed to the detriment of the accused (but e.g. in the course of extraordinary remedies, all kinds of increase is forbidden by law if the extraordinary remedy was initiated in favour of the accused).

2. The right to wave the prohibition of reformatio in peius

The question arose in the scientific literature that can the accused wave the defence provided by the prohibition of reformatio in peius, well, in some cases he may live to see like the prohibition of reformatio in peius hinders the possibility to pass a subjectively favourable decision for him (e.g. if the suspended imprisonment means smaller harm to him than the fine to be executed). Two groups have been formed regarding the question of the permissibility of waiver: who agree with it and who don't. The second group allows some exception when defining the disadvantage from a general objective point of view, such as the factual surveillance (FRISCH, SCHLÜCHTER); the wish of the accused (GRETHLEIN), the attitude oriented to the case (PAULUS). Usually who refuse the right to waiver, stipulate the possibility to replace measures. We think that there is no need for the possibility of right to waiver because the actual request of the concerned party has been considered at the first level of adjudication of increase. FRISCH regards the structure of waiver as a solution that one is forced to adopt. GRETHLEIN reject the possibility of waiver due to loss of rights, which considered to be a dogmatic ground, because the criminal claim of the state is independent of the influence of the accused, therefore the state cannot enter into an agreement with the accused on the extent of punishment permissible by law.

The group of objectivity thinkers, on the contrary, explicitly suggests the possibility of waiver, because they take the general objective judgment of prohibition of reformatio in peius as its starting-point, which either does not render at all or renders only possible to replace measures in a restricted manner. Thus, e.g. the right to waiver is emphasized as a protective order of the criminal procedural instructions of prohibition of reformatio in peius by GERHARDT, i.e. it allows the accused to waive the rights protecting him.

From our point of view, the accused is not allowed to waive the prohibition of reformatio in peius in a state founded on the rule of law. The prohibition of reformatio in peius provides certain boundaries for the state regarding the extent of punishment. These boundaries cannot be shifted, and it shall be not permitted on the basis of the subjective choice of the accused. The requirement of legal security and predictability of procedure of the second instance shall always prevail. If the waiver of the effects of prohibition of reformatio in peius was permissible, then its boundaries should also be determined.

3. The prohibition of reformatio in peius and the factors related to imposition of punishments

The general preamble of the opinion No. 56/2007 of the Penal Council, entered into force on November 14 2007, on appreciable factors in the course of imposition of punishment, lays down that

the Penal Council of the Supreme Court took the Recommendation No. R (92) 17 of the Committee of Ministers of Council of Europe concerning consistency in sentencing and several decade-old judicial practise, as a starting-point. The Appendix of this Recommendation specify in 11 points the viewpoint of the Committee of Ministers of Council of Europe related to the imposition of punishment, from among these points only two concerns the question of increasing and mitigating circumstances. Point 3 of Part B deals with the penalty structures and records that the "sentencing orientations" shall indicate ranges of sentence for different variations of an offence (according to the presence or absence of various aggravating or mitigating factors), but leave the courts with the discretion to depart from the orientations. The so called "starting points" indicate a basic sentence for different variations of an offence, from which the court may move upwards or downwards so as to reflect the aggravating and mitigating factors.

Part C of the Appendix of the Recommendation deals with the aggravating and mitigating factors. According to this, the factors taken into account in aggravation or in mitigation of sentence should be compatible with the declared rationales for sentencing. The Recommendation does not render obligatory to clarify the major aggravating and mitigating factors only in law, but makes explicitly possible to determine these in legal practice. Where a court wishes to take account, as an aggravating factor, of some matter not forming part of the definition of the offence, it should be satisfied that the aggravating factor is provided beyond reasonable doubt. In the same manner, the principle of favour defensionis prevails regarding the provision of the Recommendation which says that before a court declines to take account of a factor advanced in mitigation, it should be satisfied that the relevant factor does not exists.

The imposition of sentence is always the task of the court, which requires complex evaluative work. Pursuant to the Commentary, the personality of the judges obviously gains importance in the course of this evaluative work, but the consistency and uniformity of the sentencing practise are both important requirements and social interests. This job demands remarkable thoroughness and responsibility from the court, since the imposition of sentence cannot constitute a reason for review itself, just like the fact that the provisions of section 37 and 83 of the Criminal Code (CC), the aggravating and mitigating factors and Opinion taken into account either.

The section 83 of the CC determines the principles of imposition of punishment. On the score of this, the following should be taken into account when sentencing:

- the purpose of the sentence: such as the protection of society, the special and general prevention factors (BALOGH-KŐHALMI);
- restrictions set forth by law: besides the upper and lower limit of the sentence available, it includes all the provisions of the General Part of the CC which made it possible for the courts to impose a sentence above the upper limit or under the lower limit (Commentary);
- the danger posed to society by the offence: cf. "sentence proportionate to the act" (M. TÓTH);
- the level of the danger posed to society by the offender: the offender poses a potential danger to society not in general, but because of committing a specific crime (F. NAGY);
- the level of guilt: intention or negligence (KIS), and the levels of these, which, according to F. NAGY, is a competition to the danger posed to society by the offender. Though the danger posed to society by the offender is similar to guilt, because – according to GYÖRGYI – it means the psychic relation to the specific crime, therefore it is necessary and reasonable to separate these by law;
- other aggravating and mitigating factors.

The application of the word "other" before the aggravating and mitigating factors means that the legislator constitutes the danger posed to society by the offence and by the offender, furthermore, the level of guilt as aggravating and mitigating factors. However, it highlights these factors due to their importance from among the normative factors of imposition of punishment.

The aggravating and mitigating factors – with the exception of the above mentioned highlighted factors – were not mentioned by the former Criminal Codes on substantive criminal law, and so it is in the effective CC. The list of examples was drafted partly by the scientific literature and partly by the Supreme Court. In the following table the attempts at classifying the aggravating and mitigating factors are summarized:

SCHULTEISZ	**MOLNÁR**	**KÁDÁR**	**ANGYAL-RÁCZ**	**FÖLDVÁRI**	**Opinion of the Supreme Court**
1. factors affecting (increasing or mitigating) the danger posed to society by the offence 2. factors affecting the danger posed to society by the offender 3. factors affecting guilt 4. factors affecting the materialization of the aim of punishment	1. factors related to the subjective side of the crime 2. factors related to the objective side of the crime 3. indifferent factors related to imposition of punishment 4. factors effective regarding certain crimes	1. factors increasing the danger deriving from the crime to the society 2. factors increasing the danger deriving from the personality of perpetrator to the society 3. factors increasing guilt 4. factors not provided by the legal definition of other crimes	1. level of guilt 2. the objective importance of the crime 3. the accused person 4. exogenous factors of crime 5. objective and subjective factors arose after the commitment of crime 6. aggravating and mitigating factors typically effective regarding special crimes	1. the danger posed to society by the the offence and the offender 2. perpetrator's crime 3. aggravating and mitigating factors of objective nature 4. aggravating and mitigating factors of subjective nature	1. subjective factors affecting the sentence 2. objective factors affecting the sentence

As it's evident according to the table, the Opinion, which is normative for the present legal practise, contains much easier classification than the legal literature when it examines only from two points of view (objective or subjective circumstances) the aggravating and mitigating factors which are normative for the imposition of punishment. On the other hand, the factors highlighted by the legislator (danger posed to society by the offence and the offender, level of guilt) is not regarded to be emphasized by the Opinion, but it discusses them within the scope of the two main groups. Besides, the estimation of several circumstances accepted in the legal literature (HONIG, SCHOTT). Such circumstances e.g.:

- collective evaluation of the attacked social conditions;
- examination of collective evaluation;
- the termination of the demand directed to the defence of society (FÖLDVÁRI);
- the heavier injury fails to come off;
- perpetration under the influence of force and threat;
- repeated perpetration (even is it does not constitute legal unity);
- different forms of perpetration attained simultaneously;
- perpetration encumbering the discovery;
- circumstances related to the place of the commitment of crime;
- circumstances related to the time of the commitment of crime (at a definite hour; circumstances existing at certain moment; other dates and intervals) etc.

The evaluation of these circumstances made in the course of the imposition of punishment is not excluded by the Opinion, since the enumerated factors give only basis for the judge when he passes his judgment in a special case. Furthermore, the same circumstances shall also be evaluated by

the court of appeal, when it decides on whether the court of first instance had judged the normative factors for the imposition of punishment properly, or the mitigation – if the prohibition of reformatio in peius did not take effect - or increase of severity of sentences shall take place besides the accurate evaluation.

4. The prohibition of reformatio in peius within the restrictions of criminal-political ideas

From among the three levels, distinguished by FINSZTER regarding criminal-politics (1. respondent criminal-politics: the answers of the investigating and the judiciary bodies to the committed violence of law; 2. structural criminal-politics: legislative plans, ideas of system-development and financing the operation of the legislator and government based on the prediction of delinquency; 3. strategy on public safety: political sphere, institutions and actions of the civil society and economy), the first level has special significance in terms of the prohibition of reformatio in peius. According to FINSZTER, the guarantee of legality belongs here among others, like the differentiation of enforcement of the criminal claim of the state, the speed of the procedures and the trial-parsimony. Nevertheless, these factors crucially specify the scope of prohibition of reformatio in peius.

BÁRD laid down three criminal-political basic models in the Criminal-political Conception published in 1993:

- The first is a restrictive-intervening model which protects the collective interest in the first place, and concentrates on the change or isolation of the convict (so-called strict right-wing approach).
- The second model (liberal approach) is the assisting-supporting alternative, which places the personal interest at the first place, and the public interest just behind this (not the treatment-segregation of a certain convict, but the prevention of opportunity of crimes, general prevention). When interpreting the definition "public interest", ADAM's conclusion shall be taken into account, whereas the constitutional interest contains requirements and limits for the state and citizens, and attention shall be payed at all times to not to let these values to "sink into unworthy, formal category". SAJÓ came to the conclusion that the "public interest" definition serves as suppressing or ruining the private interest and privacy, and it is applied only in order to let certain private interest get advantage in comparison to others.
- The third one is the state founded on the rule of law or constitutional alternative, which selects the behaviours to be criminally punished originated from the primacy of law. In terms of prohibition of reformatio in peius, it is obvious that only the second and the third model has significance, since the conception, which regards the convict crazy from the beginning and applies forceful retribution, cannot be made consistent with the restriction of the judicature of second instance.

In the last two decades of the 20th century and in the first decade of the 21st century, five main events took an unexpected turn regarding criminal legislation:

- In the 1980-1988 period, MÁRKI thought that the criminal-politics drifted away from reality, because the ideal of "strong state" of the party-state could not keep a tight hand on crime. Anyway, the requirement of re-socialization is attached to this period as well.
- In the 1989-1992 period the constitutional criminal law appeared, however, MÁRKI said this was, regarding the criminal-politics, the "age when the rein was thrown among horses": the prisons became somewhat empty, but this could be attributed to general pardon and de-criminalization (GÖNCZÖL).
- The main point of the change in 1993 (Act XVII of 1993) was liberalization, but to some extent this period can be described both by increase of severity and additional criminalization. Though the requirement of change in conception can be placed to this period regarding criminal

procedure law. The requirements for the new CPC were determined by the Ministry Decision 2002/1994. (I. 17.). BÓCZ mentions the stronger expression of right of disposal as a requirement as well, which supports the existence (and incidental amplification of its scope) of prohibition of reformatio in peius anyway.

- The Act LXXXVII of 1998 broke radically away from liberalization (though it kept some part of it), which was based on the requirement of proportionality composed by the Constitutional Court: if it is necessary and expected by proportionality (for the constitutional examination, see SZABÓ), the aggravation of the amount and conditions of penalty shall be demanded from punitive-politics.
- A newer change in 2003 (Act II of 2003) turned to liberalization without the termination (setting aside) of every strict criminal-political provisions.

The provisions of prohibition of reformatio in peius were not concerned specifically by any of the criminal-political changes, its modifications were exhausted by enacting the principles of former authorative ruling of the Supreme Court, but these did not constitute essential change. One cause thereof is hidden in a critique composed rightly by FINSZTER of criminal procedure legislation, whereas, the legislation urged the new act to become early effective without cause instead of having a thorough impact-research and condition-analysis completed.

None of the reasons laid down by legality and opportunity, in their debate, can be supported exclusively insomuch that one of them could be excluded completely when passing a judgment regarding a precisely stated situation. The development between legality and opportunity requires the legal-political evaluation of multitude counter-arguments, especially if it concerns the constitutional balance between legal security and legality of a certain case. This statement is effective, in the first place, regarding in what manner the aims of criminal-politics can be fulfilled the best. The interests of trial-efficiency are favourable to loosen the principle of legality as possible, but then a problem arose that how can the law-enforcement display subjective, individual approach in the course of judging a case, since the requirement of uniform criminal investigation can be curtailed easily. This can be offended even in the case of prohibition of reformatio in peius, whereas the omission of an appeal, which should have been filed by the prosecutor acting alongside the court of first instance (to the detriment of the accused), can cause that the court of the second instance shall impose such sentence to the accused which would be significantly aggravating in other case.

It shall be officially admitted that a certain limitation of the principle of legality is inevitable. This requires from the legislator to provide alternative solutions (better personnel and financial possibilities, de-criminalization measures) in order to hinder this development whenever it is possible. This is even more effective if the principle of opportunity becomes primary in comparison to the principle of legality (due to necessary diminishing of the principle of legality because of economical reasons).

No exact boundaries can be determined where does the territory of "enemy of the rule of law" starts, but the solution (aside from obvious cases) shall be left to the legal-political decision of the legislator and the law-enforcement bodies. This circumstance does not constitute a speciality of the difference between the principles of legality and opportunity, but it is a rare phenomenon which describes a general weak point of the constitutional argument. The possibility to develop the adequate relation between the principle of legality and opportunity cannot be given up. Therefore, the clause of the prohibition of reformatio in peius is necessary on the condition, that it should better fit the constitutional considerations, while accepting the critical observations, in order to not to let the prohibition of reformatio in peius to become – by using ERDEI's comparison related to another legal institution - only a birdlime, which has mighty little honey.

Conclusion

Theoretical and practical problems arise in case a detrimental alteration of the judgment is initiated, not like in case of reformation in melius which means exactly the opposite, hence, the alteration in favour of the accused no matter that the appeal was filed in favour or to the detriment of the accused. The topic of reformation in peius and the prohibition thereof have not been discussed thoroughly, and as it was shown above, some countries do not even either know or have regulation concerning it. This fact was brought up as one of the most proclaimed counter-argument against the prohibition of reformation in peius stating that these countries are still constitutional regardless to having or not any regulation about this prohibition. However, the criminal procedure law cannot be deemed to be unconstitutional for the lack of only one legal institution, if some other instructions of the law may cover it, even if it is not detailed. Furthermore, even in Hungary, despite the prohibition of reformation in peius exists; there are several possibilities to increase the severity of sentences.

Concerning the question whether the accused can or cannot waive his right to prohibition of reformation in peius it shall be taken into consideration that in case it was allowed the state would have gain even more power and the aim of the CPC trying to balance the position of the prosecution and defence would lose its significance.

Since the imposition of a heavy or light sentence lay in the hands of the judge, the factors playing a role in the evaluation process thereof shall be determined both by the legislator and –more detailed - by judicial practice, as it is in Hungary; the examples were drafted mostly by legal literature and the Supreme Court. The mitigating and aggravating factors shall be considered wholly and complexly, especially because the imposition of a sentence does not create a cause for review itself. These circumstances shall be considered by the court of first instance and also by the court of appeal when it examines whether these normative factors were properly adjudicated concerning the imposition of punishment.

The requirement of prohibition of reformation in peius was not concerned expressly by the criminal-political changes. The different criminal-political ideas vary according to the range of interest of the state (public) or of the person. The debate between the principle of legality and opportunity calls for a legal-political evaluation of several counter-arguments, but it shall be high lightened that certain limitation on the principle of legality is necessary, such as even the prohibition of reformation in peius.

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CONDITIONS OF PAROLE FOR LIFE IMPRISONMENT

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Abstract
Parole in Romania has experienced great changes in the new Criminal Code, so it is necessary to study them for use by law enforcement system works in the execution of punishments and those who are direct beneficiaries of the new provisions. Parole with jobs and duties are completed after release so that the person is free to be able to re-socialize the best possible conditions and in a short time. Establish a monitoring period of time equal to the completion of the sentence is likely to warn the person convicted to the fact that it is possible to return to prison if it has a behavior consistent with the obligations

Keywords: *Parole in Romania, changes, new Criminal Code, execution of punishments, compared law, purposes.*

Introduction

Conditional release or parole is particularly designed to lead to normalization of the convict's life after serving a sentence of imprisonment, due to the fact that during the performance of the penalty it creates normal conditions, facilitating the transition from effective execution of punishment in places of detention, to assuming responsibilities in free life.

Parole is an institution used since ancient times, the belief that not the punishment is the one that re-socializes, but the confidence in the convicts possibilities and life in society, makes it so that the length of the sentence is not more important than the moment in which the punished person realizes that a life of crime should be avoided at any cost.

Offenders are sent to places of detention punished and not to be punished. This concept, accepted as a philosophy of performance of the penalty since the eighteenth century, became the reason to conclude as soon as possible the stage in which convicted persons are in state custody, and their conditional release under penalty of execution of all punishment, in order to be reinstated in the community from which they have been removed for longer or shorter periods of time.

Romanian penal philosophy of the twentieth century has been oriented, as in other European countries, towards the gradual enforcement of sentences, after the auburnian or Philadelphian system, with draconian regimes in the early period of penalty and their improvement after periods of time considered sufficient to correct criminal behavior. These regimes were continued even with conditional release of prisoners, which reflected the idea of prison "treatment" and Christian humanism of performance of penalty[1]. All inmates, including those punished with hard labor for life,

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[1] Criminal Code of March 17, 1936

- Those sentenced to hard labor for life, after serving 15 years of sentence, who gave evidence of referral would be sent to a penal colony, and after serving 5 years in prison could be released on parole;

- Those sentenced to hard labor for a specific period of time were sent to a penal colony after the execution of two thirds of the sentence and could have been released on parole after serving a ¾ of the total penalty;

- After the execution of two thirds of his sentence, the one sentenced to heavy prison, which, through incentive to work and good behavior, gave hope to referral was sent for the remainder of the sentence, to penal colony, and after serving 3 / 4 of the total penalty could get parole;

- Those sentenced to correctional imprisonment up to 2 years were detained a quarter of their sentence, separated day and night in individual cells, for a perios that may not exceed one year, two quarters of their sentence at

those with heavy prison sentence, correctional prison, rigorous imprisonment, penal servitude, simple imprisonment, began the execution by a period of isolation in cells, of different durations depending on the nature of punishment, continued with joint work under the regime of silence, and then were transferred to a penal colony, and after serving a fraction of the sentence were released conditionally.

Parole during the communist regime was a way to force all inmates to work, even if the forced labor penalty no longer existed. Under the guise of re-education through labor, through by exceeding standards you gained executed days, inmates were encouraged to push up to the physical existence the reduction of prison sentences, reduction that was optimally granted by the prison board. The Decree 720/1956 and the Act 23/1969 used the system of reduced penalty through days considered executed as a result of their work, but without applying a compulsory deduction, but as a system by which convicts entered into the discussion of the board of parole. In this way the prisoners were used for productive activities of achieving state objectives without adequate payment and in a fast pace.

The new Penal Code substantially modified the institution of parole by a new philosophy, both in terms of conditions for granting and especially on the process of social reintegration of prisoners, through the direct involvement of state institutions, by probation services, in providing qualified support for every specific situation. If the institution of parole, in the previous legislation, did not require that the convict make concrete steps towards reintegration, but not to commit new crimes, for the period from release until the end of the sentence , the new Penal Code has a new vision, continuing the rehabilitation activities by the need to fulfill other conditions under the control of probation services so as to achieve effective reintegration into society by the deadline set for the penalty.

2. The new Criminal Code in relation to the previous law

In the new penal code parole is introduced in Title III - Punishments, Chapter V - Customizing punishment, Section 6, Art. 99-106, so it becomes a separate institution to be applied according to general criteria of individualization of punishment, taking into account the seriousness of the crime and the dangerousness of the offender. In the previous Criminal Code conditional release was part of the general part of the same title, but was established under the rules on life imprisonment and prison art. 55^1, respectively art. 59, 59^1, 60 and 61, and considered to be another way of execution of sentence, without deprivation of liberty.

Although the institution of parole has special rules in the new penal code, both codes have common features that trace the continuity of the institution and its progress in the development phase of the current penal policy. These features are:

a) conditional release is provided in criminal law, following general regulatory criteria which relate to both punishment and the condemned person, so punishment can be applied individually for each situation;

b) conditional release is not discriminatory, so that when the performance requirements of law are fulfilled, any condemned person can benefit them;

c) conditional release can operate only after serving part of the sentence under the deprivation of liberty, period considered sufficient to achieve the effect of coercion, so as the convicted person would be warned about the need to respect the laws, but also to stimulate the convicted so he would wish to benefit from the execution of the sentence in custody;

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work during day and as much as possible separated in cells at night and the remaining 1 / 4, if they proved good behavior incentive to work, could be executed, half in penal colony, half on parole;

- Those convicted of political crimes to rigorous imprisonment, penal servitude or simple imprisonment, could ask to be transferred in a penal colony, where they would be separated from other inmates, then they could ask for parole, under the same terms and conditions as convicts sentenced to corresponding common law punishments.

d) to qualify for conditional release inmates must meet certain conditions of conduct, so that the stimulatory effectiveness of the institution is enhanced and thereby constitutes a continuing incentive for others, both in terms of behavior in the place of detention, and perseverance in meeting the system's requirements and programs[2];

e) being a means of performance of an imprisonment penalty, the released convict is still considered to serving the sentence, so that the time spent in custody until the date of expiration of the period of execution is used to calculate the duration after which the penalty is considered fully executed;

f) conditional release may be granted by the court, as a vocation for the condemned, discussion, postponement or refusal of application is related to persuading the court that serving the remainder of the sentence on parole is more useful for a faster rehabilitation of the convict. The court may deny parole based on circumstances surrounding the criminal act or the convicted person, but also on considerations of an enhancement in the efficiency of punishment in periods when the preventive effect of this institution falls;

g) although parole is an institution that can be applied as a result of the subjective belief of judges, it objectifies through the fulfillment of conditions related to the execution of punishment, such as serving a portion of the required sentence in the established regime, achieving the conditions of conduct and the position of regret towards the offense, the victim, compensation, completion of specific training programs, gaining skills, rehabilitation.

Both criminal codes have set conditions for granting parole, in both documents the fulfillment of these conditions must be found by the Board of proposals for conditional release or by the convicted person, who will address the court to ascertain the veracity of their completion. Law 275 / 2006 Art. 77 shows that the commission proposes parole taking into account the fraction of the sentence actually served, the duration of punishment which is considered as served on the basis of work performed, the conduct of the convicted person and his efforts for social reintegration, particularly in the educational, cultural , therapeutic, psychological and social assistance, training and vocational training schools (for the duration of punishment considered as served as a result of participation in training activities), the responsibilities entrusted, the rewards granted, the disciplinary sanctions imposed and his criminal records.

The Commission, that consists of director, the deputy director for detention security and prison regime, the deputy director for education and psychosocial support, probation counselor, prison doctor, a worker in the production service, with participation of the judge designated for the execution of prison sentences, as Chairman, prepares a report, together with the documents proving the above claims, and forwards them to the court in whose jurisdiction lies the place of detention, proceeding to trial the conditional release. The convicted person may apply the request himself, only the court beeing the one able to establish the fulfillment of conditions for parole.

3. Elements of compared law

Conditional release was examined at the Committee of Ministers of the European Council on the occasion of the Council's Report on Criminal Cooperation in preparation of Recommendation R (99) 22, which was adopted on the 30th of September 1999.

The Recommendation concerned measures regarding the overcrowding and growth of population in confinement, so parole occupied an important place in the economy of this document, taking measures to stop the inflation of prison population was one of the desiderata in the field of crime control.

[2] DONGOROZ Vintilă, KAHANE Siegfried, OANCEA Ion, STĂNOIU Rodica, FODOR Iosif, ILIESCU Nicoleta, BULAI Constantin, ROŞCA Victor - Theoretical Explanations of the Romanian Penal Code, General Section, Vol II, Ed II Ed Romanian Academy, Bucharest, 2003, p. 39 et seq.

In respect to conditional release in European countries, the report noted a particularly high growth in the number of population subjected to custodial measures, in the first decade of our century, especially in economically developed countries[3]. The large fluctuations of convicted persons that occurred in the first decade were due to the events of 1989, the opening of borders, misunderstanding of democratic systems and the migration of large numbers of criminals from one state to another. In these circumstances parole appears to be a tool for displacing prisoners from crowded prisons to other systems of enforcement. The range of possible alternatives to imprisonment to be taken in European countries are:

a) Alternatives to sending in penal institutions:

- Limitation of preventive detention;
- Introduction of alternative sanctions or other measures without deprivation of liberty;

b) Alternatives to continuance of deprivation of liberty:

- With a reduction in the period of detention (parole, unconditional release) which would have as a result early release, intensive supervision, electronic monitoring, etc.;
- Without reducing the period of detention (semilibertate, a leave from the prison, working outside the prison) that can create conditions for a pardon, amnesty, redemption.

As can be seen, the measures envisaged by the 1999 Recommendation R (99) 22, have been implemented in the Crminal Code, with emphasis in the new Criminal Code, in the Act for enforcement, so the current number of people in holding places does not exceede 33 000 people, solving the problem of overcrowding. However parole continues to be used, furthermore it became a means of individualization of punishment, another way of serving a sentence.

Recommendation Rec (99) 22 proposes to Member States several ways of serving the sentence, to reduce the penalty by extending the effective length of parole. It recommends reducing the part of sentence to be served in detention, shortening the minimum time to be spent in prison, and the introduction of a graduated system of enforcement of sentences in transitional stages between the deprivation of liberty and unconditional release. Our country has adopted measures for each recommendation, has reduced the maximum length of specific punishments, has introduced a progressive system of enforcement that uses semi-open and open regime as stages before parole, and introduced the institution of exit permission, leave. Among the preventive measures judicial review (art. 211-215 of the Criminal Procedure Code) and house arrest (art. 218-222 of the Criminal Procedure Code) were introduced as new institutions of European recommendations.

In the German Criminal Code a similar institution of parole is suspension for the remainder of the sentence. The suspension for the remainder of the sentence applies after the execution of two thirds of the length of the sentence, but after the execution of at least two months' imprisonment, if the offender is not a danger to society, the defendant accepts the suspension and the measure takes into consideration the convict's personality, criminal records, the circumstances of committing the crime, the importance of judicial values that would be harmed in the case of recurrences, the convicted's conduct, livelihoods, and the consequences of suspension for the convicted person. Suspension may be granted at the execution of ½ the sentence if the convicted person is at his first sentence, and has spent at least six months in prison.

If the case of life imprisonment suspension of the remainder of the punishment may be ordered by the court after serving 15 years of the sentence and continuance of imprisonment is not imposed further because of the particular gravity of the offense. In the case of imprisonment as a "total punishment" due to the fact that it is a composition of several concurrent sentences, the suspension is applied in terms of each single sentence.

[3] Netherlands - 240%, Spain - 192%, Portugal - 140%, Luxembourg - 76% Ireland - 66%, Switzerland - 56%, Greece - 43%, England and Wales - 43%, Cyprus - 40%, France - 39%, Belgium - 28% Scotland - 21%, Norway - 19%, Sweden - 18%, Denmark - 6%, Czech Republic - 50%, Romania - 150%, Hungary - 55%, Poland - 60%, Ukraine - 80%, Latvia - 20% 40% Lithuania, Croatia - 100%

The Spanish Penal Code establishes the circumstances in which this institution is applied in Title III - Section 3, Art. 90[5], 91[6], 92[7], 93[8] regarding parole. Parole applies to those who are in the third year of imprisonment, have served three quarters of the sentence imposed, or the condemned showed good conduct and there is a good prognosis for reintegration and the fulfillment of civil responsibilities derived from misdemeanor in the cases and according to the criteria established in law enforcement.

For persons convicted of terrorist or criminal offenses committed within organizations, it will be understood that there was a prediction for social reintegration when demonstrating, in an unmistakable manner, that he has abandoned the goals and means of terrorist activity and cooperated with authorities, either to prevent the occurrence of crimes by armed gangs, organizations or terrorist groups or to mitigate the effects of his crime, to identify, capture and prosecute the persons responsible for terrorist acts.

The supervisory judge may impose, on granting parole, the performance of rules of conduct or legal actions.

Proposals for parole are made after serving half the sentence, up to 90 days for each year of actual performance, excepting crimes of terrorism. Offenders who met the age of 60 years or meet it during serving the sentence and fulfill the conditions laid down, unless they served three quarters of it, or, where appropriate, two-thirds, will be able to obtain parole.

The same criteria will apply to patients who suffer from serious incurable diseases, according to medical reports. If the danger to the subject's life, because of illness or due to old age, is obvious, as evidenced by the report of the forensic medical services and the establishment of the prison, the judge may authorize parole without any formalities other than the prison's report with the final outcome, in order to make the assessment referred by in the Criminal Code.

The probation period consists of the remainder unexecuted period of time of the sentence. If the convicted person will commit crimes, or will not follow the rules of conduct imposed in this period, the supervisory judge shall revoke the parole and the convict shall be imprisoned in the corresponding period and serving year, without prejudice to the calculation of time spent on parole.

In the case of those convicted for terrorist crimes the supervisory judge may require reports to enable him to prove that conditions for parole exist. If during this period of probation, the defendant commits crimes, does not follow the rules of conduct or does not meet the conditions which have enabled it to gain access to parole, the judge shall revoke the release granted and the prisoner will return to prison during the proper prison year.

Some elements of comparative law in connection with parole regulations that differentiate the institution from Romanian law would be the following criminal codes:

- The Greek Criminal Code introduces the release of drug addicts provided that they seek treatment. Also, during the holding detainees who turn 70 years can be released conditionally;

- In Portuguese law it exists the institution of commutation of sentences for prisoners who have a serious and irreversible end-stage disease who can be admitted to hospital or under house arrest;

- Since 1995, the Polish penal legislation introduced parole and suspended sentences for convictions for failure to pay fines;

- The Dutch penal code system introduced house arrest during evening or weekend, combined with participation in rehabilitation programs during working hours;

- The Swiss criminal law introduced electronic monitoring of prisoners outside the penal institutions. The base and scope of the conditional release was broaden by reducing the minimum period of performance of two thirds of the sentence to half of it, as was necessary for effective enforcement.

In 42 States that participated in the Council of Europe study on parole in 1999, alternative measures have been taken to the serving of the sentence of imprisonment, with the conditional

reduction of the period of detention and surveillance measures of the condemned during the remainder of non-custodial sentence.

4. The notion of conditional release from a custodial sentence

Conditional release is a way of executing the sentence without deprivation of liberty under the conditions imposed by the Penal Code and the Law of enforcement of penalties.

In the previous Criminal Code, the punishment (art. 52) was a measure of restraint and a means of rehabilitation of the defendant, its purpose being general and special prevention, aiming to form a correct attitude towards work, towards the law and the rules of social coexistence.

This definition, adopted in 1968, along with the adoption of the Criminal Code, resisted although there have been many changes in the law as a whole, in the sentences in their nature and content, due to developments in the state and crime.

The purpose of punishment can not be the same in this century, when convicted citizens have rights that confer them the possibility of acting in detention, of course, with limited freedom of movement, under the same conditions as in freedom. The purpose of punishment is radically changed, and release before the exhaustion of penalty time, is considered a moral, material, communicational, educational advantage and another way of serving the sentence.

Through conditional release the criminal law notes that the punishment can be individualized setting criteria (74 Criminal Code) on the seriousness of the crime and the dangerousness of the offender, as well as conditions on the concrete conduct of the convict during the period of deprivation of liberty (art. 99-100 Criminal Code).

In these circumstances, conditional release is not a complementary institution[4] but a part of the punishment enforced, in continuing the deprivation of liberty, with multiple conditions that the convict must assume, under the penalty of revoking it.

The purpose of parole is given by the means of obtaining it and by the way it is executed to the end of the sentence. The convict's compliance of numerous conditions during imprisonment, along with fulfilling all the conditions for transition from a maximum security regime or semi-closed to a semi-open or open system, creates, from the first day of detention, a progressive program of assuming responsibilities, that lead to awareness in the convict's mind, that only the accumulation of positive results can lead to the belief of the court that such conditions can be met without deprivation of liberty. The continuance in fulfilling conditions from the beginning of the sentence until the deadline, puts parole in the stage of assuming responsibilities as free citizens, but under the control of probation services to ensure the efficiency of the penalty. This continuity distinguishes conditional release from ancillary and complementary sentences, because the conditions put the released convict on an active position, to meet requirements, unlike ancillary or complementary sentences that consist of restrictions and prohibitions, which put the convict in a position to not do certain things, to refrain from the exercise of certain activities.

We can say that parole is a means of individualization of punishment, by continuing execution at large, by the continued fulfillment of conditions laid down by law, and by assuming responsibilities as free citizens, but under the control of probation services with the purpose of social reintegration.

Parole does not guarantee that the released convict will not commit another crime, but states effective actions so that, during the execution of punishment in this way, the convict would be effectively controlled, would be constantly warned about his conduct, under the possibility to return executing under deprivation of liberty if they do not comply with surveillance measures.

[4] DONGOROZ Vintilă, KAHANE Siegfried, OANCEA Ion, STĂNOIU Rodica, FODOR Iosif, ILIESCU Nicoleta, BULAI Constantin, ROȘCA Victor - Theoretical Explanations of the Romanian Penal Code, General Section, Vol II, Ed II Ed Romanian Academy, Bucharest, 2003, p. 40.

5. Preparing prisoners for release

By the resolution adopted on August 30, 1955 at the United Nations first Congress for Crime Prevention and treatment of offenders, which was held in Geneva, Switzerland, from August 22 to September 3, 1955, it is stated that custodial sanctions and measures are to protect society against crime. Such a goal will be achieved only if the period of detention is used for the purposes of obtaining, if possible, that the offenders, once released, are not only willing, but also able to live by respecting the law and caring for his needs. "To this end, the prison system must resort to all curative, educational, moral, spiritual and other means, and all forms of assistance it may have, trying to apply them in accordance with individual treatment needs of the offenders."

Rule 60 states the principle aspects of the gradual normalization and social reintegration " The regime of places of detention must seek to reduce differences that may exist between life in prison and free life, to the extent that these differences tend to weaken the sense of responsibility of the detainee or the dignity of his person. Before the end of execution of a sentence or measure, it is desirable to take steps to ensure the prisoner a gradual return to life in society. This goal can be achieved, if necessary, by a preparatory arrangement for release, organized even in the place of detention, or another institution nearby, or a sample or control release, which should not be entrusted to police but will include effective social assistance. "

Rule 61 refers to the principle of community involvement in preparing for release and reintegration post-detention: "Treatment should not focus on the exclusion of prisoners from society, but rather on the fact that they continue to be part of it. To this end, should be used where possible, cooperation of community organizations to help the prison staff in the task of reclassification of prisoners. Social workers, in collaboration with the places of detention, would have the mission to maintain or improve relations with the prisoner's family and social authorities which may be helpful. Steps must be taken to safeguard, to the extent consistent with law and punishment to be executed, the rights relating to civil interests, social security benefit rights and other social benefits of prisoners."

In preparation for release, all physical or mental deficiencies or illnesses that could be an obstacle to the reintegration of a prisoner must be removed (Rule 62). Rules 66 and 67 outline the basic issues (needs) to be considered in the preparation for release: "The treatment of individuals sentenced to imprisonment or deprivation of liberty should aim, as long as the length of the sentence allows, creating the will and skills will enable them to live after their release respecting the law and meeting their needs. This treatment must be such as to spare them respect for themselves and to develop their sense of responsibility. To this end, we must rely mainly on religious concerns in countries where it is possible, to train, guide and qualify professionally, providing means of individual social assistance, advice on work, building the physical and moral character education according to individual needs of each detainee. Must take account of social and criminal history of the convict, his physical and mental abilities and his personal inclinations, the length of the sentence and the prospects for reintegration. "This information is summed in the personality assessments made during the detention of the detainee, but also in the probation report, if such report has been prepared.

An important aspect of post-prison reintegration capacity is the work of prisoners. Prison labor should not be degrading. Prisoners should be given productive work to deal with plentiful during a normal working day. This work should be, wherever possible, such as to maintain or increase their ability to earn an honest living when set free. The organization and methods of criminal work should be as close as possible to those applied to a similar work outside the establishment, in order to prepare prisoners for the normal conditions of free labor (Rules 71-72).

Particular attention should be given to maintaining and improving relations between prisoners and their families if they are desirable in the interests of both parties. It should be taken into account, early in the sentence, the prisoner's future after his release. He should be encouraged to maintain or establish relationships with outside persons or bodies that can facilitate the interests of his family and his own social rehabilitation (Rules 79-80).

Services and bodies, social or otherwise, which help released inmates to find their place in society, should, if possible, ensure them the identity documents required, to provide them housing, jobs, suitable clothing for appropriate climate and season, as well as means to reach thier destination and to sustain himself during the period immediately following the release. Representatives of such bodies, that were granted approval, should have access inside the imprisonment place and should be able to get in touch with the prisoners. It is desirable that the work of these bodies would be as centralized or coordinated as possible, so that the best use of their efforts could be ensured (Rule 81).

The intensity of intervention for the release is directly proportional to the level of risk that could lead to community protection and the prevention of future crimes, so prisoners should make constructive use of the time spent in prison, to develop and enhance social and cognitive skills or self-control, to recover or to maintain contact with their family and the community and to initiate the supervision phase after release.

In the latter period of detention, which can be a year long for long term penalties and of 3 to 6 months for medium and short term sentences, it is necessary to to intensify the activities in preparation for release, through specialized programs that can enhance the social reintegration prospects of the prisoner, oriented towards outlining the skills needed for life in freedom, programs with simple but strictly necessary content for life in community, with the most diverse topics such as:

- Skills for everyday life;
- Personal hygiene skills;
- Money management;
- Skills on housing and use of community resources;
- Managing a house of their own;
- How to benefit from the assistance of public institutions and services?
- Social and relationships skills;
- Embracing one's own identity;
- Caring for one's own family;
- Emotions and conflict management;
- Communication;
- Leisure management;
- Skills for an individual activity and work;
- Learning skills;
- Employment skills;
- Initiative on their own business.
- The above programs and any other activities designed to help adapting the detainee to the reality of social life outside.

Society's expectations about the effectiveness of imprisonment, correctional programs, the belief that prison inmates are approached so that they will improve their ability to adapt to the demands of society when they leave prison are prejudices. In a broader sense, there is a concept in the judiciary system, that prisons may reduce crime rates, particularly recidivism. As it concerns crime rates, there are serious doubts among criminologists around the world about the positive effect of Prisons. Too many countries have gone through the experience of increasing penalties that have not influenced at all the decrease of crime rate.

As for the function of preparing prisoners for release it follows a truly institutionalized system, starting with a specialization of prison for planning the performance of sentences, completing specialized programs for the positive development of conduct of prisoners, following the route of progressive system of performance with an emphasis on assuming individual responsibility, passing to an semi-opne or open system with enforcement rules similar to life in freedom, intensive training in the latter part of the sentence, before discussing with the parole commission, for gaining the status of responsible and free person, but supervised and obliged to the fulfillment of conditions imposed by law.

Preparing for release, conditional or unconditional, is the imminent stage before the departure of convicted persons in the community, where due to the support of probation services, volunteers, their families and their own will, they will be advised on how they must and may integrate in compliance with the laws of the country.

6. Conditions of parole for life imprisonment

Those sentenced to life imprisonment can be conditionally released if they meets the following conditions:

a) The convicted person actually executed 20 years imprisonment. This provision leaves no benefit reduction for the days considered served as a result of work performed in prison. Those days can be taken into account for the situation where life imprisonment was replaced by imprisonment of 30 years, in which case the periods actually performed and those won as a result of the working days or as a result of participation in training programs will be deducted. In the case of life imprisonment, the convict must perform effectively 20 years to meet the proportion necessary for the committee to discuss the proposal for parole. Of course in relation to the age at which the convict begins serving the sentence of life imprisonment, he can appreciate when he meets the 20 years of effective enforcement, if it's not the situation of reaching the age of 65 years in this period, in which case the penalty can be replaced with imprisonment of 30 years. In this situation there is no longer the case of effective enforcement of the penalty, but rather applying the conditions of parole for a prison sentence.

b) The convicted person showed good conduct throughout the sentence.

Good Conduct covers the period until the decision of conditional release, as well as during subsequent surveillance.

For the 20 years of effective enforcement of the sentence good conduct should be characterized by:

- Obeying the rules imposed by the maximum-security system or closed system, by abbiding the obligations, restrictions and prohibitions that make these systems;
- Acceptance of prison life without disciplinary proceedings that would determine the penalties introduced by Law 275/2006;
- Persistence and constance in the system specific socio-cultural, instruction or training activities, in working activities where he is used, performance of the working programs for which he receives awards established by law;
- Carefully keeping of the goods entrusted for use, maintain collective cleanliness and personal hygiene;
- Respecting the rules of civilized coexistence, showing respect for prison staff and people he enters in contact with, use of decorous language towards other detainees;
- Voluntary participation in activities organized inside the prison service, and ocurring activities and incidents such as heavy snowfalls, floods, fires, earthquakes, blood donations, or similar, proving his intentions of becoming a responsible citizen;
- Refusal to initiate or participate in collective violations such as protests, rebellion, serious damage or destruction of objects, noise or disturbance of the daily schedule of the detention;
- Informing the personnel about aspects concerning prison life, shortcomings that may cause adverse events, also intervention to give first aid for those who are threatened, assaulted, or those who injure themselves intentionallty until staff intervention;
- To show in all the circumstances that he understood the consequences of his act, he regrets the earlier criminal conduct and is trying to prove that he directed in the sense that will not commit another crime in the future.

The period of 20 years of effective enforcement of the penalty represents a long time of reflection and meditation for the convicted person, and showing good conduct in a world of criminals

is particularly difficult, especially because the offender had a long period of negative conduct prior to conviction and that it is harder to change dramatically right away. Therefore a multi-stage extension in discussing the parole by the board will fulfill the desire of serving 20 years with good conduct. Since in the first part of the sentence, the first two or three years, the defendant can not waive his radical criminal conduct, the discussion of parole, after the 20 years of effective enforcement, is not an exception but a way of ensuring that the message set by the punishment was intercepted and that the law will be respected in the future, regardless how hard it would be for the one who has to opt for the letter and spirit of the law. The periods of deferred penalty execution are times of testing the good conduct, even if the sentenced person had an exceptional conduct, in the period before the committee would discuss the proposals for release.

c) The condemned person has fully complied with civil obligations established by the sentence, unless he proves that he had no possibility to perform.

This condition is a new provision in the Criminal Code, and represents the concrete evidence of the convict's regret towards the offense, the consequences and his desire for compensation of material damages to victim, the injured party or the state. The required condition of fully complying with civil obligations established by the court, was regulated just to emphasize the importance of paying liabilities before parole, in order to prevent giving the fraction of 20 years of imprisonment a greater role than the payment of expenses to which the convict is sentenced. The purpose of paying the civil obligations is that it proves that the convicted person actually understood the moral and material values of society, and that repairs caused by the offense are not less important than the sentence. Full compensation does not allow partial payment of civil obligations, enabling the sentenced person to "forget" about the due obligations, once released, creating the risk of delay or failure of performance of civil obligations. The mandatory provision does not allow any transaction for the convicted person, for future payment of the obligations, but sets their performance as a condition of parole.

However, the court may grant the conditional release without the fulfillment of this requirement if the convict shows that he had no opportunity to fully meet civil liabilities. He will prove he does not own goods that can be sold to fulfill civil obligations, not money or securities, that he failed to obtain through work the amounts necessary to pay the obligations, although he tried to pay a part of these obligations, proving to be of good faith. The court may take account of these efforts to show that there was no possibility, denying parole, or to consider that this obligation is not so important as to lead to a denial of parole. It is possible that the injured part would waive the requested expenses so that civil obligations would not exist until the discussion of the request for parole.

d) The court is convinced that the convicted person has straightened and can be reintegrated into society

In order for the court to build it's belief on regarding the possibility of reintegration in society of the person convicted to imprisonment for life it should consider his specific situation from at least two views.

The first aspect is the analysis of the 20 years of execution of the life sentence, by observing the proposal of the parole committee under Law 275/2006.

A second aspect that the court must review is if the convicted person is able to observe the conditions of supervision and obligations imposed by court for the next 10 years after release, according to art. 101 Criminal Code.

If under the previous Criminal Code for conditional release, the convict had no obligations after the release, other than not committing another crime, and there was no rule relating to the supervision of his activities, under the current Penal Code there is such an obligation and the court must take it into account, because if the conditions are not met, the probation service should propose changes, termination, revocation or cancellation of parole.

In connection with the system of execution of the sentence with life imprisonment, in every penitentiary was organized a committee for the individualization of penalty performance system (art. 77 para. 2 Law 275/2006), which consists of director, deputy director for imprisonment safety and prison regime, the deputy director for education and psychosocial support, probation counselor, prison doctor, a worker from the service of production, with the participation of the judge for execution of sentences, as President, who proposes parole in view of the part of sentence actually served, the convicted's individual behavior and social reintegration efforts, particularly in the educational, cultural, therapeutic, psychological and social assistance activities, learning and training, assigned responsibilities, the rewards granted, the disciplinary sanctions imposed and his criminal history.

The Commission of proposals for the admission of parole reviews weekly (Art. 191 - Government Decision no. 1897/2006 - Law Enforcement Regulation 275/2006) the state of prisoners that qualify for conditional release based on period, based on individual file of imprisonment, in presence of the convicted person, enlisting the conditions to be met if the rest of the sentence is to be run on parole.

The minute prepared by the probation committee shall be submitted to the court in which jurisdiction lies the prison, together with documents proving the claims contained therein. If the committee rejects the proposal for conditional release, it shall notify the convicted person informing him, under signature, that he can apply directly to court with a request for parole. The period of deferment of discussion for the new conditional release proposal is one year.

The convict who addresses the request for conditional release directly to court, will attach the report prepared by the commission for parole proposals, with all the particulars and documents evidencing the state of the convict. In order to fully understand the concrete situation of the convict's case, the court may require the convicted person's imprisonment file.

The court of jurisdiction where the place of detention lies, will analyse the convicted person's request for conditional release or the proposal from the comission of prison regime and shall order, under art. 587 of the Code of Criminal Procedure – Conditional release, parole or rediscussion after a further period of time, not exceeding one year. This period starts from the moment the decision becomes final. This decision may be challenged by appeal to the court in whose jurisdiction is the place of detention within three days from notice. The prosecutor's appeal submitted at tribunal shall stay the execution.

If the court gives a parole decision that becomes final, the imprisonment place shall be notified, and a copy of the decision will be forwarded to the probation service and proximity police, that will take necessary measures for receiving the convict under the surveillance system for the next 10 years from release.

In accordance with art. 99 para. (2) Criminal Code, the court must argue their decision for parole, the reasons behind it, but it must also make a reminder for the convict on "his future conduct and the consequences he is to be exposed if he will commit more crimes, or will not comply with the surveillance measures or will not perform its obligations during the term of supervision ".

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THE CRIMINAL PROTECTION OF THE FETUS AND A NEWBORN CHILD IN THE ACTUAL AND NEW CRIMINAL CODE

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Abstract
The article presents the way in which is achieved the criminal protection of the fetus and the newborn child, especially using the means of incriminating abortion and infanticide. The study emphasizes the lack of real protection for the intrauterine life, as a promise for life, which is trying to be remedied, in accordance with other European legislations, through the new Criminal Code.

Keywords*: abortion, infanticide, fetus, newborn child, criminal protection.*

1. Introduction

In the actual Criminal Code a very important place is taken by the protection of the life of the person incriminating the offences against life. But this protection is available only for already born human beings, namely for a person. If the Civil Law offers protection to the child, when we are talking about his rights from the moment of his birth, in the Criminal Code this protection is partial. The wording and placement of the two offences which mainly insure the criminal protection of the fetus and the newborn child, namely abortion and infanticide, reveals an antiquated and limited vision of the Romanian legislator. The new Criminal Code, in line with other European legislations, has managed to expose social and legal reality which cannot be neglected: life begins and must be protected from the very moment of conception. Synchronizing, in terms of protection and rights, the civil and criminal legislations, a unique vision is created. We used a few bibliographic sources. There are not many comments about the new Criminal Code, while there are many analysis and interpretations. However, such a synthetic analysis on this subject has not yet been made, I allowed myself to bring an original contribution to the comparative study of the actual regulation in this area.

2. Criminal protection of the fetus and the newborn child in the actual Criminal Code

2.1. The criminal protection of the newborn child. Starting from the constitutional provision of Art 22, Para 1, we notice that the fundamental law protects the right to life of every person, as well as the person's right to physic and psychic integrity. In accordance with these provisions, the actual Criminal Code protects the person, and almost not at all the fetus. Distinguishing between person and fetus, it is proper to define the two terms. Thus, by *person* we understand, criminally, every human being, regardless of his/her age, since the moment of his/her birth and till the moment of his/her death. *Person* shall also include the newborns, babies, children, teenagers, young men, grownups or elders. Some differentiations of this term can criminally create differences of legal classification, as that of the newborn. The term of *fetus*[1] represents the result of conception between two human beings of opposite sex starting with the eight week of pregnancy,

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[1] Medically, the stages of evolution of the result of conception are: immediately after fecundation it is formed the **zygote**, after the cell division the zygote transforms itself in **blastocoels**, beginning the cell differentiation process which creates the **embryo** which, in the final stage of evolution, starting in the eight month till birth, creates the **fetus**.

when the cell differentiation process has been completed and the result of conception begins to take a specific form of the human species.

A closely look over the criminal legislation at this moment reveals the fact that only the person, in his/her different stages of evolution is under protection.

Thus, starting from the baby, child and until the elder, regardless of sex, the person's life is protected against any direct aggression committed with purpose, firstly by incriminating murder, a complex incrimination stated by three provisions, from Art 174 to Art 176[2]. This crime was completed with other offences against life, whose perpetration affects this fundamental attribute, with the difference that in their case, the immediate consequence of the perpetration is the result of facts committed either involuntary, as the involuntary manslaughter – Art 179 Criminal Code – or with prater intention, as in the case of assault or other violence causing death – Art 183 Criminal Code. Also, the Romanian legislator decided to incriminate the offence of determining or easing suicide – Art 179 Criminal Code, thus creating a full protection of the ways in which the life could cease, either without the person's consent, or being encouraged, instigated or even supported by other persons to take his own life.

These offences are not the only ones attempting to human life. The Romanian legislator incriminated in the special part of the Code other offences whose immediate consequence is the victim's death, offences which mainly affects other social relations, such as the security of the state[3], freedom of the person[4], sexual freedom of choice[5], patrimony[6], justice[7], safety on railroads[8], the established regime for certain activities stated by the law[9], public health[10], other social cohabitation relations[11], peace or humankind as the inheritance of humanity[12].

But, as stated above, all these offences refer to the criminal protection of the person. Analyzing a subcategory of the person, the newborn child has a certain protection, for the moment insufficient in the actual Criminal Code. Thus, if it is about killing right after birth of a newborn child, namely still wearing the marks of birth, the offence is classified as infanticide[13] if it is committed by the mother being in a disorder caused by birth, and murder if it is committed by any other person, including by family (father, grandparents, brother, mother if the offence overcomes the previously mentioned conditions)[14].

Regarding his health state or physical or psychical integrity, currently, the Criminal Code does not state any difference of criminal protection based on the age of the person. Though were

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[2] Art 174 C Code incriminates the simple murder, Art 175 C Code incriminates the first degree murder and Art 176 C Code incriminates aggravated murder. The Romanian legislation did not keep the term of assassination, as in the case of other criminal legislations, for example the French one.

[3] Attempt threatening security of the state – Art 160 C Code, attempt against a collectivity – Art 161 C Code and offences against the representative of a foreign state – Art 171 C Code.

[4] Illegal deprivation of freedom – Art 189 Para 6 C Code.

[5] Rape – Art 197 Para 3 C Code, sexual act with an infant – Art 198 Para 6 C Code and sexual perversions – Art 201 Para 5 C Code.

[6] Theft – Art 211 Para 3 and piracy – Art 212 Para 3 of the C Code.

[7] Torture – Art 267^1 Para 3 of the Criminal Code.

[8] Failure to fulfill professional obligations or poor service of negligence – Art 273 Para 2 C Code, intentioned failure to fulfill professional obligations or poor services – Art 274 Para 2 C Code, leaving working post and presence at work being drunk – Art 275 Para 2 C Code, destruction and false signals – Art 276 Para 3-5 C Code .

[9] Non-compliance with the nuclear and other radioactive materials – Art 279^1 Para 5-7 C Code and non-compliance with the explosive materials regime – Art 2801 Para 5-7 C Code .

[10] Food or other products forgery – Art 313, Para 3 and 5 C Code .

[11] Scuffle – Art 322 Para 3 C Code.

[12] Genocide – Art 357 C Code and inhuman treatments – Art 358 C Code.

[13] Infanticide is stated by Art 177 C Code.

[14] Aggravated murder – Art 175 Para 1 Point c) and d) C Code, against a relative and taking advantage of her helplessness condition to defend.

positively modified in 2000 by the Law 197/2000[15], introducing the members of the family[16] as active and passive subjects of assault, other violence[17] or personal injury[18], these offences does not state a qualified form whose main objective is the protection of the infant against physical or psychical abuses committed by persons other than his family or those who are in charged with his protection.

Criminal legislation in its whole states a partial and a very unsatisfactory protection of health or physical or psychical integrity based on the person's age. If, for instance, the age was considered in offences against freedom or sexual life[19] of the person, creating a special protection for infants, in the case of offences against body and heath integrity the legislator did not manifested such a wish, which from our point of view represents a deficiency, which should be immediately corrected by a new modification of the Criminal Code. In fact, the Criminal Code in its special part only states two offences which indirectly protects the health and physical or psychical integrity of the infant, and, thus, of the newborn child. We are talking about the abandon of domicile[20] and the offence of bad treatments applied to infant[21]. The special legal object of these two offences is represented by family relations, whose normal development requires the protection of the normal development of the infant[22], not the protection of infant or newborn child's health or physical or psychical integrity. If the newborn child, still wearing the marks of birth is hit by his mother being in a disorder caused by birth, right after this moment, with the intention to kill, but the result does not occur, her offence represents attempt of infanticide, not yet sanctioned, which could be re-qualified as hitting or other violence, body injury or serious body injury, the first two of them in qualified circumstances over a family member[23] or in simple circumstances, unless it is proven that the infant was living or household with his mother. The last circumstance can sometimes be less probable since the mother, right after birth intents to definitively get rid of the newborn, causing his death. The introduction of the active and passive subjects, namely the family members, about whom we know that are those relatives living and house holding with the offender, can create difficulties in the establishment of a real degree of the social danger of the offence. It is true that at the introduction of this term, the legislator wanted to separately incriminate family violence, but family relations are endangered regarding children even if the parent no longer live together with them, and not only in the limited circumstance of living and house holding together.

Outside infanticide, if the newborn child is physically harmed by the father or other relatives[24], the incriminatory solution chosen by the legislator is pretty devious. We shall have, according to the Decision No 37/2008[25] of the High Court of Cassation and Justice, an ideal contest

[15] Law No 197/amending and suplementing some provisions of the Criminal Code was published in the Official Gazette No 568/15.11.2000.

[16] For the definition of the term of *family member* see Art 149[1] C Code .

[17] Hitting and other violence – Art 180 C Code.

[18] Personal injury – Art 181 C Code.

[19] We refer here to the offence of aggravated illegal deprivation of freedom – Art 189 Para 2 C Code, to aggravated rape – Art 197 Para 2, Point b, b[1], Para 3, the offence of sexual intercourse with a minor – Art 198 C Code, the offence of seducing – Art 199 C Code, to the offence of aggravated sexual perversion – Art 201 Para 2-5 C Code, sexual corruption – Art 202 C Code.

[20] Abandonment of domicile – Art 305 Para 1 Point a) C Code.

[21] Bad treatment of the infant – Art 306 C Code.

[22] Tudorel Toader, *Drept penal român. Partea specială*, 4th Edition, Hamangiu Publishing-house, Bucharest, 2009, pp. 392-393 and 398. Alexandru Boroi, *Drept penal. Partea specială*, C.H. Beck Publishing-house, Bucharest, 2006, pp. 582 and586.

[23] The offence of aggravated hitting and other violence – Art 180 Para1[1] and Para 2[1] C Code, qualified body injury offence – Art 181 Para 1[1] C Code and aggravated body injury offence – Art 182 C Code.

[24] The term *close relative*, in its criminal sense, is defined by Art 149 C Code.

[25] Decision No 27/2008 stated in an appeal for the law by the High Court of Cassation and Justice, published in the Official Gazette No 177/23.03.2009.

of offences between hitting and other violence, body injury or serious body injury and bad treatments of children. But the offence of bad treatments supposes a repetition to realize that was seriously endangered the physical, intellectual or moral development of the child[26]. As well as infanticide, the application framework of this offence is limited because of the active subjects, who can only be the parents, legal guardians or the educators of the child. But if the infant or the newborn child is injured by the medical staff at birth or subsequent, as result of their negligence or by any other person not related with his education or who does not have a legal obligation of maintenance, then the newborn child is not properly protected, nor the infant is completely protected against abuses[27]. Let us not forget about the situations emphasized by the mass-media showing the lack of interest and illegal negligence of the medical staff regarding the protection of newborns in maternity right after birth.

This leads to the conclusion that infants, as well as newborns can be and are harmed beyond the family or educational relations' framework, for which situation the Criminal Code did not inserted a proper protection.

Actually, what we are suggesting is either the creation of a new text of law which must join the regulations regarding offences against physical or psychical integrity or the creation of a separate title or chapter which must criminally and legally completely protect the newborns and the infants, from the view of this fundamental value, namely health and physical and psychical integrity.

The noted issues were not completely remedied by the new Criminal Code[28].

Looking for solutions to such a protection of the child we noticed that not even the Law entirely dedicated to him, Law No 272/2004[29], does not state any kind of offences which criminalize hitting or body injuring the newborn child or the infant, this law stating only civil penalties. Though it states in its Art 2 the principle of the superior interest of the child, and though it states in Art 90 that "*physical penalties of any kind are forbidden, as well as the deprivation of the child of his rights protecting life, physical, mental, spiritual, moral or social development, body integrity, physical or psychical integrity both in family or in any institution charged with the protection, care and education of children*", Law No 272/2002 does not also state the precise and criminal mechanisms to insure the compliance with this legal obligation. This law is a civil one focused on the family protection of the child, on finding solutions to solve the situations in which the infant is unprotected, or when he has committed different criminal offences, not being liable, because is under aged.

Therefore, we have one more reason, not to leave such an area as sensitive to chance and to take attitude towards the violence against infants and the situations in which newborn children are physical or psychical injured, either by negligence, by intention or by prater intention.

2.2. Regarding the criminal protection of the fetus, in the actual form, the Criminal Code states even fewer elements for his protection. Promoting a simple thinking, tributary to some philosophical and too materialistic views, the actual Code excluded or did not even questioned the

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[26] Tudorel Toader, *quoted work*, p. 399. Alexandru Boroi, *quoted work*, p. 587.

[27] Of course that the actual Criminal Code did not left unprotected such a situation. The actions of some medical staff, as a consequence of professional negligence, have lead, or precisely has as immediate result the death of the newborn child or his body injury, are qualified as murder by negligence in aggravated form – Art 178 Para 2 C Code, and in the second hypothesis have as result the body injury by negligence, with the condition that this offence to have resulted in an injury requiring medical care for more than 10 days – Art 184 Para 1-4[1] C Code. But in this latter case, now we are thinking about the newborn children injured by medical staff, of whom some have remained with lifelong after-effects, if it is sufficient the penalty of imprisonment for 3 months up to 2 years of fine – Art 184 Para 1-3, or even imprisonment for 6 months up to 3 years? Let us not forget that these newborn children are the future and it is the way we raise, protect and care them that will make them grownups. On the other hand, the failures of the medical system are not negligible, being here in a vicious circle.

[28] The new Criminal Code – Art 286/2009, published in the Official Gazette No 510/24.07.2009.

[29] Law No 272/2004 on the protection and promotion of the rights of children, published in the Official Gazette No 557/23.06.2004.

issue of intrauterine life and the way in which the development of the fetus could later influence life and physical and psychical development of the future child.

The fetus, or precisely the result of the conception in its various stages of development, does not explicitly appear as the subject of criminal protection in any text of the Criminal Code. There are, though, some regulations which indirectly protect it. First is the incrimination of abortion[30]. Except the fact that the *special legal object* of the typical offence of abortion is represented by the social relations regarding the protection of the health and body integrity of the woman against illegal termination of pregnancy, and not the protection of intrauterine life of the fetus. In other words, what the offence of abortion protects are not those social relations who protect the result of conception, for it to benefit of a normal development insuring his birth and the manifestation as a newborn child, but those social relations allowing a pregnant woman to have a normal physical and psychical health subsequent to an improper abortion which could have endangered her health, procreation capacity or even her life. Such a view places in foreground an already existing life, that of a pregnant woman, towards that of the fetus, which is considered to be a promised life, thus placed in the background. Although the protection of life, physical and psychical integrity and health of a pregnant woman is undoubtedly important, same is the criminal legal protection of the fetus, situation remedied by the regulations of the new Criminal Code.

The other criminal provisions, which indirectly protects the fetus are those related to the aggravation of murder if the victim is a pregnant woman[31] and those related to the aggravated form of body injury, committed with intention or prater intention and has as result the abortion of the pregnant woman[32]. That is about all that the actual Criminal Code states in this matter. Unsatisfactory.

3. The criminal protection of the fetus and the newborn child in the new Criminal Code

The new Criminal Code brings important changes of view, writing and regulations. Its study from the perspective of the analyzed area offers the satisfaction of a wealth of texts and the belief that a modern view shines through its provisions, view which could not leave outside life, and thus outside its criminal protection, the result of conception. Actually, the new code brings to the fore what the actual regulation fatally ignores – the fetus. If regarding the newborn child the new code amends the regulations on body injuring him, the fetus is for the first time protected in the Romania legislation, partially, when it is a sure hope of life, thus being made important steps for recognizing it some rights.

3.1. The criminal protection of the newborn child.

As we have mentioned in the preamble of this paper, the newborn child is not totally ignored. One of our previous observations, considered by the legislator, regards harming the newborn by the mother, right after birth, without the offence being considered as infanticide, eventually as a simple, or qualified, form of general offences resulting in the body and health injury of the newborn.

Specifically, the new Criminal Code by its Art 200, Murder or body injury of the newborn child committed by the mother, incriminates both the situation in which the mother intentionally or prater intentionally causes the death of her child, and when, after birth she causes him a body or health injury.

[30] The offence of illegally inducing abortion – Art 185 C Code.
[31] Art 176 Para 1 point e) C Code states that the murder of a pregnant woman is first degree murder.
[32] See Art 182 Para 2 C Code.

However, the innovations brought by this text are not neglected. Thus, the actual offence of infanticide disappears, the Code using a more complex phrase designed to cover also the extenuating version of the offence (*murder or injury caused to the newborn child by the mother*).

In terms of the already existing conditions, modifications appear regarding the special legal object. If in the actual regulation infanticide is an offence against life, it becomes in the new Code an offence against a family member, its legal object becoming complex, injuring both family relationships, as main legal object, as well as relations of life, in the simple form, or life, health and body integrity in the extenuated form, as secondary legal object.

Regarding the offenders, they are the same, mentioning that from the very name of the offence the active subject, namely *the mother*, is emphasized, fact that makes us believe that such an offence is considered by the legislator to be less aggravated only from the perspective of the active subject and his condition when committing the offence.

From the material element's point of view, the new text has significant differences. Thus, it is precisely delimited the time in which the offence may occur for it to be qualified according to Art 200; this time, exactly, this period, is an interval of 24 hours, starting from the moment of birth, comparable to the actual situation in which the phrase "*immediate after birth*" had to be amended by the interpretation of the doctrine and the jurisprudence, in the meaning that the newborn child is considered murdered immediate after birth if he still carries the marks of birth. Of course that in the case of a suspicious death of the newborn child is the responsibility of the forensic expert to determine the exact date and time of birth, where possible, the doubt must benefit to the offender. Likewise, if in the current regulation the mother must be in a disorder mandatory caused by birth, for her offence to be infanticide, the new Code removes this wording, preferring one with a larger content, namely "*physical disorder condition*". We notice that this *physical disorder condition* refers to all kinds of disorders, regardless of the cause, allowing a broader specification of this offence. The disorder can be caused by birth, obviously, but it can be also caused by an unstable psychical condition of the mother, who, for instance, being abandoned by the husband or lover, living in harsh conditions or subjected to public opprobrium, could resort to such a thoughtless gesture. The new regulation also includes, as we can see, those past and present situations when the mother, though she is disordered, her condition was not the result of birth, but of other causes, as the above-mentioned, situations determining the qualification of first degree murder[33]. The mental disorder must be established by medical documents after a psychiatric examination.

From the subjective point of view, the offence is intended, in both its ways, the intellectual factor being affected, in the meaning of the existence of a reduced capacity of discernment than the normal one of the mother, caused by her disorder condition. We believe that there may be some legal qualification issues when the offence is committed with indirect intention, because it could be easily mistaken with prater intention, guilt specific to the mitigated form of the offence.

Regarding the applicable sanction it is still prison, but with lower limits, from 2-7 years in the actual Code to 1-5 years in the new one.

The offence is mitigated, having in its turn several means of committing, an absolute novelty in the area. Among the first means of committing is hitting, other violence or body injury[34] of the newborn child by the mother, in the same conditions as the classic form, namely right after birth, but no longer than 24 hours, the mother being in a psychical disorder condition. The text including a standard reference is amended by Art 193-194 of the new Criminal Code, which incriminates hitting, other violence and body injury, texts which are different from the actual one. If the immediate result of the offence is health or body injury of the newborn child, then the offence is intentioned, as well as in the previous regulation.

[33] According to Art 175 Para 1 Line c) and d) of the Criminal Code.

[34] The new Criminal Code reduces the offences of injuring committed with intention from 3 to 2, aggravated body injury being incriminated both in the aggravated form of the offence of injuring and other violence – Art 193 Para 2 C Code, as well as in the body injuring offence – Art 194 Para 1 Point b) C Code.

The second mean of committing refers to the situation in which the result of the injuries caused by the mother, in the previously shown situations, is the death of the newborn child[35]. We notice that as well as in the previous phrase, the immediate consequence is the death of the victim, but the essential difference is in the form of guilt that the act is committed, talking here about prater intention.

The life of the newborn child is under criminal protection because it represents a fundamental value, and is incriminating by a new offence, *domestic violence* – Art 199 of the new Criminal Code, offence consisting of intentioned murder committed by any member of the family, including relatives or the mother, but committed outside the conditions stated by Art 200 of the new regulation. It is in fact the first degree murder of the husband or any relative, but which received a special regulation, in a new chapter including all kind of violence against family members[36]. It is also considered violence against family members when the death of a member is the result of the prater intentioned offence, namely an aggravated form of the offence of injuries causing death, inserted in this article for humanitarian provisions, as well as in the case of the previously debated Art 200.

From the perspective of the protection of health and body integrity of the newborn child, it is again achieved by a special criminal protection, the future Criminal Code stating in the same Art 197 the hypothesis in which hitting, other violence and body injuries are intentionally committed against a family member.

Otherwise, Art 199 Para 1 refers to five previous legal texts, namely Art 188, 189, 193-195, stating family violence as their aggravated form[37], with the notable difference that the subjects of this offence must be family members.

We can notice that in the case of *family violence*, as well as in the case of *murder or injury against the newborn child committed by the mother*, the legislator did not understood to separately regulate the situation in which the murder or health or body injury is the result of guilt, thus applying the common law text. The special mention is the fact that in the case of intentionally committing body injury against a family member, the criminal proceedings are started ex officio, not only based on a filled complaint[38].

3.2. The criminal protection of the fetus. Remarkable for the new Criminal Code is the fact that it introduces as a possible passive subject of some offences, the *fetus* itself. The term is explicitly used in the naming of Chapter IV *Offences against the fetus*, as well as in the marginal text of Art 202, *injuring the fetus*. The idea of offering to the fetus a special regulation was borrowed from the Spanish Criminal Code; with the difference that in the Spanish regulation, the offence of abortion is stated in a separate title, Title II – *Abortion*[39], while the injuries against the fetus are found in Title IV, consisting of two articles[40]. But the Spanish criminal legal provisions protecting the fetus are different from the ones incriminated by the Romanian legislator. If the Spanish Criminal Code protects the fetus during the entire period of the pregnancy against any injuries against it, committed either by intention, or guilt, including medical guilt, offences which may endanger it normal development during the pregnancy and becoming a vivid and viable newborn child, the Romanian Criminal Code especially protects the fetus when it is about to be born, and only in certain circumstances during the pregnancy.

[35] We believe that is indirectly created a mitigated form of the offence of hitting and injuries causing death.

[36] The term of *family member* is broader in the new Criminal Code. The new term includes the wife/husband, ascendants, descendents, brothers and sisters and their children, as well as the persons adopted by the family, according to the law, without including the condition that they all must live and household themselves together with the offender, but also the persons who have established similar relationships to those between husbands (concubines) or between parents and children, if they cohabit.

[37] The special maximum of the penalty stated for each offence is increased by a quarter.

[38] According to Art 199 Para 2 of the new Criminal Code.

[39] According to Art 144-146 of the Spanish Criminal Code.

[40] Art 157 and 158 of the Spanish Criminal Code.

Chapter IV states two incriminatory texts: Art 201 regulating *abortion*, and Art 202 regulating *injuries against the fetus*.

The first one, *the abortion*, represents the text of the actual Art 195, which incriminates it. It is easily seen that the legislator enjoyed changing the articles' names!

Analyzing the new offence from the perspectives of the differences with the new regulation, we notice that its legal special object is totally opposite to the present one. Firstly, we appreciate that in this case, for all forms of the offence (Art 201 Para 1-3 new Criminal Code) the legal object becomes more complex. For the specific form, the main legal object is the protection of the life of the fetus and its normal development, while the secondary legal object is represented by the possible injury caused to the pregnant woman. Regarding the aggravated form stated by Para 2, the secondary legal object is represented by the social relations on the freedom to decide of the pregnant woman, and in Para 3 the secondary legal object is represented by the social relations which protect the health of the pregnant woman against a body injury or an offence against her life.

In terms of the material element, in the context of the simple form a single modification occurs, stating even more clearly the conditions for committing the offence. We are talking about Art 201 Para 1 Line b), which states that the abortion is an offence if it committed by *a doctor not specialist in obstetrics and gynecology, but has the right to practice it*, a new condition towards the regulation in force.

For the next paragraphs the text closely follows the actual regulation of Art 185 Criminal Code. A modification occurs regarding the attempt. The new text states[41] that the attempt is punishable only in the case of the simple form and of the qualified form stated by Para 2, namely when the abortion was produced without the pregnant woman's consent, without including here Para 3. The logical conclusion regarding this regulation is that the offence stated by Para 3 is committed with prater intention, attempt not being allowed.

Also was made a new clarification of the text regarding the punishments. In the actual code are stated as grounds for impunity the cases in which the abortion was caused to save the life, health or body integrity of the pregnant woman from a serious and imminent danger which could not be eliminated in any other way, or when the abortion is required for therapeutic reasons, even if the pregnancy exceeds 14 weeks, or when the abortion is made without the consent of the pregnant woman, being impossible for her to express her will *and* this action being required for therapeutic reasons. Stating it as situations for impunity the legislator created for the offender a delicate situation, because even if he wants to make a good deed to the pregnant woman, will not be acquitted and considered not guilty, but his action will be an offence, without being punished, ceasing only the criminal proceedings. Moreover, the first of these three situations is actually a situation for removing the penalty, namely the criminal liability[42]. Reverting to the new Criminal Code, it states that the action is not an offence, namely it removes the criminal liability when *the abortion is therapeutic, being made by an obstetrics and gynecology specialist, up to 24 weeks of pregnancy, or the subsequent interruption of pregnancy for therapeutic reasons, in the best interest of the mother or the fetus*. Differences are very important. The new text regulates that the action is not an offence only when it is about an abortion in any other circumstances that the ones already shown for therapeutic reasons, when the action is committed in these circumstances by the obstetrics and gynecology specialist, establishing a maximum limit of 24 weeks of the pregnancy (almost 6 month), the exceeding of this term being possible also for therapeutic reasons, considered in the interest of the mother, as well as of the fetus.

[41] Art 201 Para 5 in the new Criminal Code.

[42] Matei Basarab et al., Codul Penal comentat, 3rd Volume, Special Part, Hamangiu Publishing-house, Bucharest, 2008, p.203.

Finally, another innovation of the regulation refers to the express statement of the fact that the abortion committed by the pregnant woman is not punishable, this becoming a new reason for impunity in the future code.

Injuring the fetus is a new offence stated by the Romanian Criminal Code. It has a simple form[43], two aggravated forms[44] and four mitigated forms[45], as well as a clause for removing the criminal liability for the offence[46] and a clause for impunity[47].

The special legal object of this offence exclusively refers to the criminal protection of the fetus during pregnancy against any injuries which could affect its normal development towards the superior phase as a newborn child or could even lead to its death during pregnancy or after the birth.

Though are not express stated, in our opinion the active subjects of the simple and the first aggravated form of the offence – Art 202 Para 1 and 2 of the new Criminal Code, can only be the medical staff assisting the birth, because it seems hard to believe that today, the birth could occur without medical assistance. In the aggravated form stated by Art 202 Para 3, the offence can be committed by any other person, because as well as in the case of the mitigated form stated by Art 202 Para 4, the offence can only be committed by the mother. Regarding the passive subject, it is obviously the fetus, being a qualified passive subject.

We objectively notice that for all four forms the legislator added to the material element a certain period for the offence, conditioning the existence of the offence by it being committed in that time.

The simple form of the offence consists of the injury against the fetus *during birth* with the condition that it encumbers the manifestation of the extra uterine life. This assumes that, as a result of the injuries against the fetus during birth, it is born dead, not leading to a normal life, that of a newborn child.

The second form of the offence consists of injuring the fetus during birth, but in this case the child will be born, but as a result of the injuries he suffers a body injury (this is the mitigated form), or may subsequently die (the aggravated form). The difference in this latter case is that in the first case the child is not born, the fetus dying during birth, while in the second case the fetus is born, it becomes a newborn child, but subsequently dies. The legislator does not state a specific time for the child to live, he could live for from a few minutes, days, weeks or even months, but the immediate consequence, his death, occurs as result of the injuries caused during birth.

For the third aggravated form, a body injury of the fetus is produced, but this time *during birth*, namely starting from the 8th week of pregnancy until the beginning of birth, when the result of the conception is called a fetus, and as a consequence of this injury the future newborn child is harmed or dies, subsequent to the birth because of these injuries. If the fetus dies because of the body injuries occurred during birth, the offence will legally be considered as the offence of body injury if intentioned – Art 194 Para 1 Point d) of the new Criminal Code, and as negligent injury – Art 196 Para 2 of the new Criminal Code.

The last of the forms refers to the situation in which the mother injures the fetus during birth, for this situation, the text adding a second condition regarding the mother, namely that she must be in a psychical disorder. This new regulation shall end the doctrinal dispute, according to which the murder of the fetus[48] during birth by the mother psychically disordered because of the birth is not considered to be infanticide, but it is qualified by certain doctrinaires as abortion (a more realistic

[43] Art 202 Para 1 of the new Criminal Code.

[44] Art 202 Para 2 and 3of the new Criminal Code, when the death of the child occurred.

[45] Art 202 Para 2, 3, 4 and 5 of the new Criminal Code, when the physical injury of the child was caused by any person, when the physical injury was caused by the mother or when the previous actions were committed by misconduct.

[46] Art 202 Para 6 of the new Criminal Code.

[47] Art 202 Para 7 of the new Criminal Code.

[48] For the moment, the injury of the fetus during birth is not punished.

solution, because we are talking about a fetus, not a child-person)[49], while others legally consider the action as first degree murder[50].

Regarding the subjective side, the offence is committed with all its elements of guilt. Thus, mainly it is intentioned. According to Art 202 Para 5 of the new Criminal Code, the offences stated in the previous paragraphs can also be committed of negligence, then the limits of punishment being halved. The perpetration of this offence of negligence is very possible during the medical act or in the case of some accidents to which the pregnant woman is a victim. The offence is committed with prater intention when as a result of the injuries against the fetus, either during pregnancy, or during birth the child dies.

As stated at the beginning, the new regulation introduces a new clause of removing the criminal liability of the offence. According to Art 202 Para 6, the offences stated by Para 1-3, so when are intentionally committed are not an offence if are committed by *a doctor or a person authorized to participate at the birth* (midwife or nurse) *or to monitor the pregnancy, it was committed during the medical act, following medical specific procedures made in the interest of the pregnant woman or of the fetus, as a consequence of the risk inherent to the practice of medicine*. We consider that the wording of this removing clause of the criminal liability of the offence can raise contradictory solutions, remaining to the judge to decide situations as *compliance with the procedures specific to the profession, the interest of the pregnant woman or the fetus or the risk inherent to the medical act*.

The last element is represented by the fact that if the pregnant woman injures her fetus during pregnancy, the offence is not punishable, the situation being impunity[51].

4. Conclusions

The actual Criminal Code has served the society for over 40 years and continues to do it with syncope and lacks inherent to a more rapid human evolution than the legislative one. In the area of offences against life, health and body integrity, except tightening or changing penalties, among the most important modifications, and that only after 1989, were those regarding the introduction of new qualified active or passive subjects, as well as the introduction of the aggravated forms of *family violence*. Criminological proven as a widespread plague, not only in our country, but even at the European and world level, family violence has found in the new Code a more faire incrimination, though it could be easily improved. The existence of a separate chapter called *Offences against family members* is an example that the Romanian legislator has begun to consider and adapt to the situations generated in society by this offence. Moreover, it understood that in order to create a healthy society, from all perspectives, an important aspect is the protection of the fetus against any injuries or hurting, regarding which numerous psychiatric and infantile psychology studies which have emphasized that it depends the normal psychic development and health of the future child. For that it was inserted in the new Criminal Code a chapter called *Aggressions against the fetus*, incriminating offences in order to protect this hope of life, especially at birth, and in special conditions, during pregnancy. Such regulations can only enjoy us and give us hopes that the entire society and the medical act of bringing a child to the world shall be unfolded with a greater responsibility and kindness, both for the pregnant woman, who represents the archetype of motherhood, and for the fetus.

[49] Alexandru Boroi, quoted work, p.106.
[50] Art 202 Para 7 of the new Criminal Code.
[51] Art 202 Para 7 of the new Criminal Code.

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MONEY LAUNDERING TECHNIQUES COMMONLY USED. GENERAL APPROACHES

CONSTANTIN NEDELCU[*]

Abstract
Upward trend of criminality in Romania is the result both of the impact of serious social and economic problems typical of the period of transition to a market economy, and misunderstanding of freedoms by a lot of people interested in reaping benefits by evasion, doubled by the tendency of subjects infringing the law to set up illegal contacts in other countries, particularly among immigrant groups and even within some structures of "organized crime". The provisional state that existed in all sectors of socio-political and economic life, including in respect of public order observance, facilitated expansion of criminal phenomenon, particularly in the area of violent crimes and against public and private property, inappropriate settlement of each and any social tension and conflict created precedents that led to escalating protest demonstrations and personal or collective justice. In the study hereby, we shall approach a number of money laundering techniques commonly used, limiting ourselves to their general overview, exclusively.

Keywords: *money laundering, illicit income, drug trafficking, organized crime, illegal migration*

Introduction

After December 1989, white-collar crime included in its complexity practically all economic and financial spheres, starting with the technical and material supply in the economy and ending with the process of privatization and settlement of banking and financial operations. Amid a sharp state of indiscipline and disorder of an attitude of defiance, of economic legislation on the management and protection of public assets, there have occurred acts of embezzlement, abuse and negligence, beneficial for money-making subjects, numerous assets being valued outside Romania on account of aggravated smuggling.

By setting up connections in the underworld, internationally and crossing the border, using false documents or passing through locations other than those subject to customs control, there has been exploited a broad range of products, from the ones standing for the population's basic needs up to national heritage assets and radioactive substances.

On account of shortcomings in the law, abuse, negligence and other unlawful acts that are committed in connection with natural resources and environmental protection, there have been introduced in the country toxic wastes and residues under cover of products required for domestic market, as well as other goods threatening population's health and the environment, such as: lacquers, paints, pesticides, herbicides, fungicides, etc.

Within the banking and financial institutions system, abuses and corruption acts relating to loans' granting, default of duties and taxes payment, etc. have seen considerable growth.

Additionally, there became particularly widespread acts of deceit, forgery and use of forgery on account of private companies issuing limited amount bad checks (no funds available in the account) for the payment of goods or services, bringing about considerable damage, sometimes difficult to imagine by a sound mind.

There is a continued increase in customs exchange frauds and in relation to the non-compliance of import and export operations, which are substantially detrimental to the State. The escalation of corruption in all spheres of economic life and committing these acts by public servants,

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often led to economic mechanisms' dysfunction and considerable damage brought to the public and private sector. In the economic and financial area there may be recorded a trend towards the restructuring and multiplication of organized crime, reflected in criminal acts, complex in terms of numbers of participants, methods used, damage caused, weight of economic agents and relevant institutions (state-owned companies, budgetary institutions, bank credit system, etc.).

Money Laundering Basic Rules

a) Anonymity - is one of the money laundering rules under which transaction with proceeds of crimes should be similar to other legal transactions in the field or place where they occur. Fundamentally, cash must not leave any trail leading to its source. In economies where cash is often used for purchases of smaller or greater value, its arrangement entails no risk for the offender. However, in most countries, almost all transactions involving large amounts of money are not performed cash, but by using other means of payment (checks, bills of exchange, credit cards), therefore spending or storing large amounts of cash raises suspicion.

For this reason, criminals have developed various techniques and methods of funneling cash into the financial system, namely:

- structuring, *i.e.* broking large amounts into smaller amounts and depositing them by several people in various bank accounts or using relevant amounts of money in order to purchase other payment instruments, such as bearer securities or money orders;

- cash smuggling, by simply illegally withdrawing outside the country a cash amount and placing it in another jurisdiction, generally with less rigorous rules, usually by courier or hiding the amount on cargo ships;

- interference of illegal funds with funds coming from a legitimate business with cash, amounts which are subsequently deposited together.[1]

b) Speed - Fast-movement of assets, so they can not be detected. Once the cash is pumped into the financial system, whether or not in the country of origin, the money launderer may use the benefits entailed by information technology progress (IT), modern methods of transferring money to put it quickly into service. Electronic bank transfers can move large amounts of money almost anywhere in the world in just a couple of minutes, without the owner having to go to the bank or involve bank employees.

c) Complexity. By broking its funds into several transactions and on account of the speed of these operations, the money launderer makes is difficult and sometimes impossible for investigators to follow the money track. Transfers from one account to multiple accounts in other countries and subsequent redirection from those countries create a multinational electronic complex circuit that makes it difficult to be tracked by research bodies.

d) Secrecy. Despite the fact that bank secrecy bears a legitimate purpose and a commercial justification, it can lead to the emergence of tax havens, which provide protection for criminals, worldwide operating approximately one million anonymous corporations, which impose strict financial secrecy and protect foreign investors from investigations and judicial inquiries[2].

Techniques to cover-up the illicit source of income

- overvaluing a good's price under an invoice with a value greater than its true value or under a partially or totally false invoice;

- false commercial transactions inserted into a legal business by: cash transactions from one currency to another repeatedly and quickly, using multiple bank accounts, their recurrent opening and closing, bank account wire transfers from legal entities' accounts to individuals' account, external

[1] C. Voicu, *Spălarea banilor murdari (Dirty Money Laundering)*, Bucharest, SYLVI Publishing House, 1999, page 102.

[2] C. Voicu, *op. cit.*, page 109.

remittances of large amounts using multiple monetary instruments, bank or travel checks, credit operations, investments, fictional guarantees;

- method of returned loan. A portion of the funds illegally transferred abroad revert to the offender or the company it controls as a loan. This operation is then followed by returning the amount borrowed, plus interest and possibly late penalties agreed by the parties, leading to increasing amounts, thus entering the legal circuit;

- insurance policies, on account of frequent changes of beneficiaries, payment of higher premiums than normal due ones and subsequent claim for refund to be made to a third person, receipt of insurance premiums by brokers or financial intermediaries in offshore centers that fail to observe registration or evidence rules, to which in fact they are not intentionally contractually bound.

Systems used in money laundering

a) Offshore destinations. Offshore havens are countries or territories, often islands or group of islands, which support fictitious implantations of companies, simply used as mailbox, elastic regulations areas in terms of currency exchange control and great freedom of taxes, providing at the same time, almost without exception, impenetrable bank secrecy and many relevant rights to private companies.

Once the money is converted into a form that can be transferred or which may be smuggled, they usually take the path of an offshore center.

This system offers real practical advantages that criminals are aware of. First, funds are placed in the geographical areas protected by jurisdictions that do not allow the influence of jurisdictions in which profits were obtained. On account of involving another jurisdiction, there emerge several legal and financial barriers in the way of investigative bodies, both in terms of achieving, as well as in terms of conserving or exploiting the evidence that can be upheld in court. Secondly, many countries are still facilitating money receipt from abroad irrespective of their origin or remittance method, money that can go directly and discreetly in the conventional banking system, since there is no obligation to pay taxes, there is no evidence of share capital, no double taxation agreement, no obligation to keep accounting records, no directors or shareholders registered, ignorance of people who hold decision-making power in the company, ignorance of the identity of the beneficial owner, etc. Typically, owners of companies are not resident in countries of incorporation of their companies, these persons being represented by proxies, who receive orders via previously agreed encoded methods.

Tax havens are one of the most common procedures used in fraud and tax evasion at international level.[3]

b) Shell companies. Essentially, shell companies are those that exist only on paper. The company's incorporation documents may include a valid bank account and something more than the name or address of lawyer or agent in charge of setting up the company, proxy and perhaps any shareholders.

It comprises those companies having no significant assets or own business operations that are used by their owners to conduct their business or to maintain control over other companies. A shell company is registered in the country of incorporation, but it is not traded on capital markets, and does not operate independently. Being not in themselves illegal, money launderers, white-collar criminals and terrorist financers can relatively easily convert and use them to disguise illicit source of income. These companies are easy to set up and can be connected with other shell companies in the world. If a shell company is incorporated in a jurisdiction with a rigorous legislation in terms of bank secrecy, it is almost impossible to identify true owners or directors of the company and, therefore, it is impossible to monitor illicit funds reimbursed to the beneficial owner.

[3] M. Mutu, *Off-shore – între legal şi ilegal (between legal and illegal)* // Revista Națională de Drept (*National Law Review*), no. 7/2003.

A successful technique used by law breakers is to set up shell companies in order to sell shares to "foreign investors". These "foreign investors" are, actually, intermediaries employed by money launderers. Buying shares is performed on account of legally required documentation and, thus, the money comes legally into possession of offenders.

Usually, setting up shell companies is performed not by owners, but by agents, who select jurisdictions that offer the advantages of fast incorporation, low cost of registration, minimum clauses or in search for those geographical areas which facilitate the emergence of companies "thick and fast", locations where no information about the owners is required or where the disclosure of such information is strictly prohibited[4].

c) Employing freelancers. Lawyers, notaries, accountants and other freelancers carry out a significant number of activities in support of their clients, organizing and administering their financial and commercial businesses. First and foremost, they assist individuals and corporations in areas such as investments, company incorporation, administration, management, optimization of their financial standing and other legal transactions. Moreover, legal advisers also prepare, and, if necessary, gather necessary documentation for the setup of companies. In many cases, in return for substantial material benefits, such professionals may be directly involved in carrying out specific types of financial transactions, for example, keeping money or paying the price for the purchase or selling of real estate. Some of these freelancers come to specialize in identifying companies or offshore locations for using them in money laundering schemes, fabricating all necessary professional documentation, providing thus a semblance of business legality.

Essentially, freelancers employed as intermediaries possess knowledge and skills that can be used by law breakers for converting illegal profits into legal income.[5]

d) **Alternative money transfer systems**. Alternative fast money transfer systems (SAT) allow money to be in circulation around the world without using the conventional banking system. SAT may be used for both legal and illegal purposes, and can exist in various forms. Records of all operations are usually kept, but these may be done in dialect, in abridged form or under unfamiliar language to investigators and therefore it may be difficult or impossible to interpret it.

For obvious reasons, SAT is an attractive and widely used system by organized crime networks and dangerous offenders. SAT is used not only to launder proceeds of crime, but also to avoid tax fees and customs duties. Anxiety is manifested internationally relating to the fact that SAT can be easily used in terrorist financing. It is estimated that there are thousands of SAT bankers in Europe, mainly falling under the heading of Asian communities, and their customers are ordinary individuals and not offenders.

Although it is a discrete business, underground economy bankers are probably known and respected within the Community for the services provided in terms of transferring money earned abroad to home families, often at a better exchange rate and under a commission lower than that of banks or official fast money transfer systems.

Money transfers are usually used by people who do not keep a traditional relationship with the bank and who want to transfer money to their country of origin, with minimum expense. These transfers can also be used by money launderers. Through the medium of an international network of agencies located all over the world, one person can electronically transfer money quickly (usually within about 10 minutes), reliably, conveniently and in exchange for charm prices to any other person in one of more than 150 countries.[6]

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[4] N. Moldoveanu, *Criminalitatea economico-financiară în societățile comerciale (Corporate White Collar Crime)*, Bucharest, Global Print Publishing House, 1997, p. 87.

[5] Th. Mrejeru, *Evaziunea fiscală (Tax Evasion)*, Tribuna Economică Publishing House, Bucharest, 2000, page 82.

[6] *Paradisuri financiare, Sinteze (Tax Havens, Syntheses)*, no. 1/2000, M.I. Publishing House, Bucharest, page 14.

e) Casinos and the Internet. A casino is a commercial gambling club that offers various types of gambles, such as slot machines, which asks for coins or chips to be activated.

Casinos are vulnerable to being manipulated by money launderers due to the speed and intensive nature of cash games and because in a large number of countries casinos provide their customers with a wide range of financial services. These services available in casinos are similar in many cases with those provided by banks and may include credit or debit accounts, facilities for sending or receiving funds directly from other institutions, as well as foreign exchange services and cash collection checks.[7]

Casinos in Romania have not yet applied formal financial services, but we can not exclude the fact that they might be interested in these services in a short period of time.

Risk of money laundering is considerably high because the Internet at use in these clubs provides easy and almost universal access, eliminates face-to-face contact and is extremely fast and efficient in the removal of borders. There are three features of the Internet, which together tend to aggravate some conventional risks of money laundering:

- easy access via the Internet;
- contact between the customer and the institution is depersonalized;
- speed of electronic transactions.[8]

f) Registered and bearer bonds companies. Shareholder certificates are documents attesting priority over the corporation or the company. In most countries, the shareholder is registered and any transfer of shares to another person must be registered in an official register. However, some jurisdictions can provide ownership or transfer of shares under a "bearer" form.

These bearer shares confer ownership rights over the company more than the current ownership of shares. These "bearer" shares do not imply any record of the shareholder and the person who is in physical possession of the shareholder certificate is the owner of a relevant part in the company. It is therefore likely that the true owner of the company may not appear in any records of companies or any government statistics. When the identity of shareholders is not registered by the time of issue and transfer of shares, ownership is anonymous. Such companies represent an excellent means for acquiring, holding and transferring wealth anonymously, under cover of financial control or judicial bodies.[9]

g) Using non-profit organizations. Non-profit organizations collect hundreds of billions of dollars annually from donors and distribute this money to beneficiaries –after paying their administrative costs. Both their administrative expenses and the amount and necessity of beneficiaries' expenses may be exaggerated and their usefulness difficult to assess.

Use in bad faith of non-profit organizations for money laundering and terrorist financing is a method commonly used by organized crime networks, these entities being for the most part established for such purposes specifically[10].

This issue came to the attention of the International Financial Action Task Force (FATF)[11], the G8 and the United Nations, as well as the attention of domestic authorities in several regions.

Out of the studies carried out globally, there come to the front the **following sources of "dirty money":**

1. drug trafficking;
2. smuggling of weapons, ammunition and explosives;

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[7] Gh. Nistoreanu, *Infracționalitatea în domeniul informaticii (Cybercrime)*, in Dr., no. 10, 1994.

[8] T. Amza, *Criminalitatea informatică (Cybercrime)*, Lumina Lex Publishing House, Bucharest, 2003, page 59.

[9] M. Coșea, *România subterană (Underground Romania)*, Economica Publishing House, Bucharest, 2004, page 105.

[10] Gh. Mocuța, *Metodologia investigarii infracțiunilor de spălare a banilor (The Methodology of Investigating Money Laundering Offences)*, Noul Orfeu Publishing House, Bucharest, 2004, page 230.

[11] The International Financial Action Task Force.

3. illicit traffic in cultural heritage assets, gold, jewelry and precious stones;
4. tax evasion;
5. kidnapping followed by ransom;
6. trafficking in human beings (prostitution and pimping);
7. political corruption;
8. counterfeiting trademarks, banknotes or any other means of payment;
9. bank frauds and tax frauds[12].

An important indication of a serious anomaly in the international circuit of economic transactions is the fact that the total amount of overall balance of payments is zero.

More specifically, the total goods and services exported from any country and all countries should be equal to the total imported goods and services. Accordingly, the total balance of payments deficits of all countries should strive towards zero.

Since 1970, the difference between the global value of imports and exports has emerged and continues to increase, reaching a maximum of $ 100 billion in 1994, level still conserved.

This difference can be explained only by the fact that methods of recording international transactions are not working properly or that a substantial part of these transactions occur outside the legal and official framework.

A hypothesis under which it may be explained this apparent aberration is the one based on illegal capital flows, unrecorded in official statistics and caused by the double invoicing of exports and payments by beneficiaries residing abroad, failing to declare them to legal authorities.

In order to understand to some extent the explosive growth of the mass of speculative capital that flows through the veins of international finance, it is necessary to analyze some more or less common processes, whose association with money laundering has not been reviewed so far.

One of these is the process of development and integration, both nationally and internationally, of illicit markets. This development of illegal markets, especially in the last two decades has resulted in a corresponding expansion of transnational white collar crime and the need for them to establish connections with institutions hosting "countryless" capitals. It can be asserted with certainty that any major criminal action, which seeks maximum gains, continuity of operations and counteraction of official organizations, shall reach the critical moment of integration requirement into the banking and financial system.

Techniques used for "money laundering" originating from illegal businesses are greatly diversified and, presumably, many of them are unknown to specialists within bodies charged with financial control and fight against law infringement.

It can be asserted that, fundamentally, the basic technique comprises four successive stages:

1. The establishment of lock boxes - Money originating from illicit business is deposited in various lock boxes. These accounts are real bank deposits to be transferred. These accounts are designed to camouflage and are usually established on behalf of fictitious companies, being therefore hardly identifiable.

2. Bank wire transfer from lock boxes to accounts opened with foreign banks - Monies accumulated in lock boxes are transferred to accounts in foreign countries, through a number of complex operations which aim to prevent identifying the real source of money. In order to successfully carry out this stage, two types of countries are preferred:

a) countries guaranteeing bank secrecy and making it a state policy (Switzerland, Liechtenstein);

b) countries facing economic difficulty and which, under laws developed, are constantly struggling to attract foreign capital (developing countries, third world countries);

[12] C. Păun, *Crima organizată sau organizarea crimei? (Organized Crime or Crime Organization?)*, Al.I.Cuza Police Academy, Bucharest, 1993.

3. Investing monies in illicit businesses yielding benefits;

4. Reimbursement of "laundered" money. - Repatriation of benefits now smelling "clean", which accounts for the entire operational complex from the perspective of interested parties.

It should be noted that, regardless of the complexity of the technique of "laundering" money originating from illicit business, it can not be translated into practice devoid of the public servant's seduction and participation[13].

Towards a better understanding therein, we shall mention thenceforth some of the money "laundering" techniques most commonly used.

1. Double invoicing.

Accordingly, a company buys at overvalued prices goods or services of a company incorporated in a country, preferably with favorable tax laws. This system allows the export of surplus capital. Typically, the company in the haven country is a business affiliate or falling under the heading of the same corporation.

2. Real estate speculation simulated

It deals with purchasing a property by underestimating its real value and reselling it after making some "improvements" to its fair value. Ex.: A person buys a property which is worth 5 million lei, but official documents set forth the price of 3 million lei, the difference being made up "as agreed" in cash. Subsequently, the same property is sold at its fair value.

3. Loan in cash, followed by reimbursement through the instrumentality of banking tools.

This reimbursement may be covered through fictitious contracts hardly controllable (e.g. consulting, know-how, etc.) Bogus loan technique is also applicable.

4. Money laundering in casinos legally established, a system that allows laundering of dirty money and counterfeit banknotes, as well.

The system employed is based on that gambling chips can be unlimitedly purchased with cash, while earnings may be transferred, upon request, directly into the personal account or the account of another person, company, their origin being grounded. Holders of such liquid capitals accumulated out of "dirty" money take advantage of this situation and organize a real circuit of legality. However, this technique is quite laborious, it implies the assumed risk of losing substantial amounts of money and does not allow "laundering" of large amounts of money. The system is widely used by counterfeit currency launderers (obviously high-class counterfeit currency)[14].

Sources of dirty money

a. Trafficking in Human Beings ("mass" prostitution and pimping).

An explosive phenomenon manifested immediately after December 1989, which lately has assumed a more organized form, stands for prostitution and pimping.

The alarming evolution of prostitution, especially among minors, in some cases caused by blackmail and forced determination spread abroad, entailing the risk of sexually transmitted diseases and even AIDS.

The eagerness for easy and quick earnings determined that many subjects from balanced families, decent and honest, with a high school or even university education enter the crime scene of this kind of facts that amplified the phenomenon alarmingly.

However, many active prostitutes on record, disposing of capital, associated with old pimps becoming entrepreneurs and owners of commercial establishments but, in parallel and in disguise, also deal with the placement of young women to different people, especially foreigners, in exchange for safe and consistent profits.

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[13] C. Voicu, *Investigarea criminalității financiar-bancare (White Collar Crime Investigation)*, page 201.

[14] Șt. Popa, *Economia subterană și spălarea banilor (Underground Economy and Money Laundering)*, Bucharest, Expert Publishing House, 2000, page 211.

Another category of prostitutes and pimps, promptly exploiting existing facilities moved their territory of action in other countries, especially Turkey, Greece, Cyprus, Austria, Hungary, Italy, Germany.

Investigation of individuals from these categories, claims filed by some parties as well as data and information obtained through relevant work methods, revealed that some young women, many of them underage, failing to get employed after graduation fell victims to some "entrepreneurs" who recruited and enchanted them, offering them travels abroad to earn money by providing various services, such as: dancers, housekeepers, waitresses, babysitters etc.

In fact, upon arrival at destination, lacking material possibilities for maintenance or getting back home which have not been provided as promised, a lot of young girls were forced or encouraged to accept pimps and employers' "advice" to practice prostitution, for their benefit.

There are also prostitutes and pimps operating in hotels and catering complexes in urban centers, on international traffic routes or in the mandatory parking or standing places for foreign vehicles, especially truck trailers (TIR).

Prostitutes often commute from one country border to another, in the company of foreign drivers to whom they provide sexual services in return for local and foreign currency amounts or items of clothing, cosmetics, jewelry and more.

Trends and new forms of manifestation of crime in this area, in full accordance with the general evolution of the criminal state, urged police units to act more resolutely in fighting crimes of this nature.

There have been cases where misunderstandings arose between group pimps, in terms of placing prostitutes, which have resulted in assaults that also endangered the physical integrity of other people, happening to be in the relevant area at that very instant.

b. Motor vehicle theft and international trafficking in stolen vehicles.

This international business spread extensively, focusing mainly on stealing luxury West vehicles, which are then turned to profit on different channels, where the Romanian law breakers have begun to make their presence increasingly felt and active within the Italian, German, Polish and Bulgarian networks of thieves and smugglers.

So far, 567 luxury vehicles stolen from Western European countries have been frozen, 186 of them being returned to legal owners, for which criminal proceedings were discontinued.

Investigation of these cases, including verification and exploitation under evidence of data and information obtained during the judicial inquiry processes, records difficulties due to lack of personnel specialized in the investigation of such facts, and the diversity of operation methods and forged or counterfeit documents by offenders, circumstances that make it extremely difficult to prove their guilt.

It is therefore ascertained the existence of a criminal collaboration between these networks, particularly in taking advantage of stolen vehicles, covering actions by fabrications, transporting stolen vehicles and even exchanges of similar vehicles.

c. Trafficking in counterfeit money

In the context of growth and diversification of white collar crime internationally, forgery of money and other securities, as well as trafficking in similar counterfeit or forged payment methods are experiencing an alarming recrudescence, which is why all the police in the world and other specialized bodies in the field of banking services are on permanent alert, constantly seeking new ways to counter-balance the phenomenon.

On these lines, frequent breach of regulations in force has been manifested by Romanian citizens concerned to procure, by any means, freely convertible currencies and multiple opportunities have been created for false or counterfeit banknotes to be placed on the territory of our country[15].

Radiography of forgeries investigated by the judicial police, the correlation of data and information obtained on different channels prove the fact that in Romania there have been organized networks of smugglers, who operate according to mafia principles, their purpose consisting almost exclusively in the procurement of false currency.

To this fact it should be added the large inflow of foreigners coming to Romania, many of them exchanging money "under the counter", thus avoiding specialized units, which stands for another circumstance favorable for the placement of counterfeit banknotes.

Taking our stand upon these conclusions drawn from the analysis of recorded cases, from data and information obtained during relevant police work, there have been undertaken appropriate training activities for fighting against law infringement targeting population and especially the staff within public and private specialized units, which carry out foreign trade and exchange operations.

In this respect it has been provided qualified training of agents working in foreign exchange offices, and in order to prevent citizens, there were brought forward by means of mass - media, real cases, highlighting the risks they are exposed to when accepting foreign currency acquisition by other means than the legal ones.

During 1991 - 1992, especially after the abolition of specialized stores with payment in foreign currency, Romanian and foreign subjects charged with placing money directed their attention primarily to individuals, amateurs of travels abroad or buying foreign currency for the purpose of converting it into treasury bills.

This is because subjects charged with placing money have been notified of the risks and difficulties encountered in carrying out their criminal concerns to the detriment of the state or private establishments, specializing in the field, whose staff is well trained, managing to detect counterfeits ever since their introduction[16].

During specific activities undertaken to prevent and combat international trafficking in counterfeit money, there have been obtained on multiple channels data and information attesting the presence in Bucharest of a powerful criminal organization, led by Western German citizens – bosses of disco "Le Baron" in Floreasca district that introduces and places fake currency in Romania.

In order to acquire significant financial benefits, they organized the placement of counterfeit banknotes through the medium of disco staff recruited Romanian citizens.

In conclusion, it should be noted that, in the context of manifestation of crime in counterfeiting and its trend of expansion, there is a real danger hanging over the national currency, although up to now, at domestic level, there were only four cases of placement of 500 and 5,000 lei banknotes, respectively, rudimentary executed by black and white reproduction, subsequently colored, that were placed in crowded places or at night and only in one case, eng. Tafta Gheorghe from Bucharest, respectively, it was used a color copier that made over five million lei, the forger being promptly uncovered.

This threat is primarily due to the introduction in Romania by private companies of a large number of color copiers, which stands for the biggest practicability of banknotes forgery by almost perfect reproduction, with the laser beam, which simultaneously achieve both their faces, methods of payment and other bonds.

d. Trafficking in works of art

Protecting national cultural heritage, national and universal cultural value present in our country has been a concern of the Romanian state since the last century, Romania ranging among the

[15] I. Melinescu, *Investigațiile financiare în domeniul spălării banilor (Financial Investigations in the Field of Money Laundering)*, Bucharest, Imprimeria Națională Publishing House, 2004, page 77.

[16] N. Moldoveanu, *op. cit.*, page 56.

first countries in Europe to pass a bill on ancient monuments and objects in 1892. Subsequently, the legal status of these values has been enriched and broadened through the enactment of new laws, among which we mention the Law for the conservation and restoration of historic monuments of July 28th, 1919, the Law on the organization of public and municipal libraries and museums of April 14th, 1932, Regulation on public monuments of December 16th, 1938, Decree Law no. 803 of September 20th, 1946 on the organization of national museums and Decree No. 46 of March 6th, 1951 on scientific organization of museums and conservation of historic and artistic monuments.

Protection of these artistic cultural values integrated into the Romanian national cultural heritage was regulated until early 1990 by Law 63/1974 and other regulations issued in implementation thereof, identification, recording, preservation, conservation, scientific and commercial exploitation, as well as public release of all goods that made up the national cultural heritage being enacted in a uniform manner all over the country.

Throughout the entire period, as long as Law 63/1974 has been in force, it was acted firmly in order to identify goods which may be part of the national cultural heritage and for their owners, individuals or legal entities to meet their incumbent legal duties.

Therefore, in consequence of the measures taken, there were recorded in the offices of the national cultural heritage over 15 million units of cultural property declared by religions museums, state bodies, public organizations and individuals following specialized tests performed thereupon, appreciating that approx. 4.5 million represent assets which may be part of the national cultural heritage of Romania.

Of these, under specialized expertise performing at the end of 1989, there were selected 620,591 assets from national cultural heritage, of which 35,027 were included on the list of personal property with particular value, 8,489 on the list of historic and cultural monuments, 372,939 were recorded as numismatic pieces and objects of metal and precious stones, and 117,220 were entered into the general inventory of assets belonging to the former monarchy.

Repeal of Law no. 63/1974 and other regulations issued in implementation thereof lifted all barriers and obstacles that stood in the way of smuggling and illicit trade in works of art and increased interest of businessmen and private collectors in Western Europe, North and South America, and Japan in recent years, in the acquisition of such items.

In the former Czechoslovakia, for example, from 1990 until now, there were stolen and taken out of the country over 30,000 works of art, of which less than 8% were recovered.

In Poland, all that stood for valuable work of art has been stolen or sold, unlawful removal of such property across its borders reaching incredible levels.

This was also facilitated by untrustworthiness of Polish customs officers, which led the authorities in Warsaw to lay off more than 160 customs officers caught in the act of bribery.

Concurrently, analysis of existing data and information at European level leads to the conclusion that the legal trade of such assets has become insignificant, being overshadowed by the illegal market, supported and supervised by specialized networks with well established organizational and hierarchical structures.

According to the most recent data, the illegal market of works of art in Europe pulls in annually illegal income amounting to more than $ 6 billion and is controlled by two well-organized trafficking networks, consisting mainly of criminals in the former Yugoslavia, but with connections and accomplices in all European states.

Cases investigated emphasize the fact that, in our country, illicit trade and illegal trade in works of art, facilitated in many cases by persons nominated to undermine the relevant process, experienced considerable expansion.

Only the case investigated in Cluj proves that, under a single branch organized in Cluj County, but with connections in Bihor and Arad Counties, as well, in which were involved over 20 people, including specialists from the Heritage Departments and customs controllers, there were

illegally moved out of the country works of art and assets pertaining to the national cultural heritage, assessed at several tens of millions of lei.

This case has not been and is not singular, existing information referring to real networks of traffickers in such assets, well-organized acting in Romania and having established branches and connections in major Western capitals. It is well known that many people, current and former Romanian citizens live a secure life for many years in major European capitals on account of "tipping-off", relating to the existence of valuable works of art in private, public or religious collections in our country, which are subsequently smuggled out, being acquired illegally, and in some cases even stolen from their owners and holders.

Concurrently, the number of works of art stolen from private collections, museums and religious units grew disquietingly, as the result of express request of private virtuosi or even accession to some catalogs specially designed for this particular purpose.

"The illicit trade in art" stands for a case in a class of its own.

The relevant explosion of units performing activities relating to marketing, assessment, expert appraisal and even authentication, restorations or endorsements of works of art, as well as those brokering such businesses is unprecedented. No rules are observed, non existence of depositors or purchasers records, unauthorized or unqualified people to that end are employed as specialists, invaluable cultural heritage assets are being threatened to fly to the winds, to be undervalued in order to evade customs duties or other legal provisions or that the market be flooded with fakes that have been authenticated as original works.

Faced with this real phenomenon, police in most Western European countries set up police units or divisions specialized in this area, among which those in Italy and France are considered to be the most effective.

Watching closely international and national crime developments and trends, bearing also in mind the recommendations of OIPC (*Office of the Information and Privacy Commissioner*)- Interpol addressed to Member States and in view of the emergence and accentuated development of this form of "organized crime" in Romania, it has been ordered the reorientation of the entire business on this line, taking effective measures aimed at getting familiar with and mastering to the utmost extent the criminal phenomenon, both domestically and in terms of international routes of organized crime.

e. Illegal emigration ("Moving across the border") – "guides to the West"

There is increasing criminal activity of trafficking networks dealing with the illegally crossing of our country by some groups of immigrants, usually from Sry Lanka, Pakistan and Bangladesh, which are recruited in their countries also on the route Singapore - Moscow – Chisinau, aiming to reach Western Europe countries.

Participants in the network of introduction in Romania of Asian citizens and their taking out towards neighboring western States receive large amounts of foreign currency, which in some cases are laundered through the instrumentality of companies and private agencies set up in our country.

Networks in question show thoughts to organize clandestinely and as strictly as possible, establishing strong points of support such as buildings, companies, hosts and reliable persons in several countries on the transition section, aimed to provide increased security to this business involving large amounts of money and foreign currency, as rumored.

To prevent removal of illegal immigrants from our country by the Romanian authorities, being returned to States where they came from, they are advised by the heads of networks and guides to destroy their identity documents and other supporting documents (invitations, visa, currency values) issued by countries crossed.

In the years 1993 - 1994 alone, at least 54,000 foreigners have been tracked down during illegal border crossing and sent back by border officers to neighboring countries (Hungary, Bulgaria, Moldova), numerical preponderance being held by citizens of Sry Lanka, Pakistan and China.

In addition to these, on the Romanian territory there is currently a significant number of immigrants who are staying at different addresses, and especially within the area of towns adjacent to the western border of our country, awaiting to cross the border illegally to neighboring countries.

f. Trafficking in radioactive materials, toxic waste and weapons

Although there were no clear warning signals recorded in time on this issue, cases discovered surprised, though, in terms of the large number of people engaged in various acts of law infringement and the special implications they could have in the society.

Considering that trafficking in polluting wastes and residue and radioactive materials stands for a high threat for Romania, there were carried out within jurisdiction appropriate specific activities to counteract the concerted actions of a foreign specialized criminal organization in the setting up of disguise transfer connections and channels for such products in our country[17].

g. Drug Trafficking

Opening of borders entailed a huge increase in the number of persons, means of transportation, goods and services entering or leaving Romania. This extremely favorable situation was and is still speculated by trafficking organizations that use Romania as an important beachhead connecting the East to the West.

Alongside the special geographical position held by our country, another issue to be considered is the current situation in former Yugoslavia. Due to the conflict in this country, the center of gravity of drug trafficking moved to the second segment (as it was considered so far) of the "Balkan route", which also includes Romania. Criminal organizations avoid thus the loss of large amounts of drugs pumping them big gains.

In close relation to this last point, it is worth mentioning that fabulous amounts entailed from drug trafficking attract Romanian citizens, as well. Foreign criminal organizations are sending their emissaries in search for connections among Romanian law breakers, operating thus with the view to organize and internationalize drug trafficking.

On these lines, if in 1991 and 1992 only one Romanian was involved in drug trafficking, in 1993 the number has risen to 15, while in the first six months of this year it reached 27, which represents almost 60% of the total persons investigated for such acts.

Another category involved in this kind of crime is represented by people who left the country several years ago, settling and living abroad. Many of them were drawn in different international networks, acting currently as intermediaries or messengers. Over time, they collected large sums of money, which they have invested in Romania after the revolution, where they returned and actually live.

Mafia-type organizations to which the said persons belong spread thereby their tentacles in our country, and according to some data, part of "dirty money" resulting from drug trafficking is "laundered" in Romania.

On grounds of good cooperation between the competent bodies in our country and around the world, there can be achieved good results in terms of fighting against drug abuse and trafficking and there have been undertaken efforts for close cooperation with bodies and organizations both in Europe and in America and Asia.

It also turns out an intensification of criminal organizations in South America and other parts of the world, on account of diversification of methods of introducing in our country drugs bound for Western Europe and with the participation of groups of criminals in Europe, Colombia, U.S.A., Asia, Africa and Romania.

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[17] I. Pitulescu, *Considerații referitoare la infracțiunea de spălare a banilor (Approaches on the Money Laundering Offence)*, Dreptul (*Law*), 2002, no. 8, page 99.

As regards the illicit production and legitimate movement of drug substances and products, precursors and essential chemicals, there is a strict control of production and units producing medicines containing narcotics and units producing opium poppy for medical use, but also economic agents in the chemical industry. These measures that have been taken jointly by the concerned bodies and organizations in Romania prevented from occurring cases of fraudulent use of narcotics and precursors in the illicit production.

To the same purpose, there have been approved measures of accreditation by the relevant Ministries of imports and exports of essential and precursor chemicals that can be used to manufacture or illicit conditioning of drugs, and a draft law on the legal status of these substances was recently issued by the Ministry of Health in collaboration with other institutions and with the support of the European Community (under the Phare programme for the fight against drugs), which shall be submitted to the relevant Ministries and other competent institutions for approval and adoption.

On account of this set of rules implemented, it can be asserted with certainty that there are no clandestine laboratories in our country and that no synthetic drugs have been discovered so far.

Although to date there were reported no cases of drug addicts among Romanian citizens requiring hospitalization in rehabilitation centers, the data held reveal that there are people who take drugs occasionally (mainly marijuana and hashish). These people come especially from among youth, especially high school students or prostitutes, and the number of flagged ones is ever-growing. This fact should pose a significant policy concern for both bodies responsible for the suppression of illicit drug trafficking, and those holding prevention responsibilities (Ministry of Health, Ministry of Education, Ministry of Labor and Social Security and other governmental or non-governmental bodies).

Likewise, the Romanian authorities are facing lately a relatively new phenomenon that is spreading rapidly. It is about consumption (inhalation) by some underage and young people of volatile substances, which are not drugs in the word's meaning itself, but we argue that they might stand for the gateway to the genuine drugs. Educational measures were undertaken as regards these people, in joint connection to educational factors, such as: child welfare authorities, charities, schools, medical institutions.

Although there was a significant step taken in the legislative field by joining the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances in Vienna in 1988 by Decree no. 121 of June 24th, 1992, the Romanian legislation on drugs has not rallied to the international one, which hampers the work on this line, being completely overcome as to the existing reality. The new draft law on establishing and sanctioning substances and psychotropic offenses, on account of its provisions relating to the amount of sanctions, the measures to be taken against traffickers and modern methods of combating illicit consumption of drugs, etc. shall create the legal framework requisite to carry out an efficient activity in these areas, in line with international standards.

We believe it is worth pointing out that within the 48th Plenary Meeting of the UN held between 26th and 27th October 1993 attended by heads of government and ministers charged with coordination of overseeing health and social protection in 130 countries, it was put forward the issue of international cooperation against the illicit production, sale, demand, traffic and distribution of narcotic drugs and psychotropic substances.

It has been highlighted that all authorized bodies in this area are deeply alarmed and concerned by:

- constant uncontrolled rising trend in drug abuse, illicit production of and trafficking in narcotic drugs and psychotropic substances that threaten the health and well-being of millions of persons – in particular the youth, in all the countries of the world;

- growth of the drug problem which entails increasing economic costs for governments, causes irreparable loss of human lives and threatens the economic, social and political structures of the countries affected by acts of violence;

- growing violence and economic power of the criminal organizations that engage in the production, trafficking and distribution of drugs, arms and precursors and essential chemicals, which at times place them beyond the reach of law;

- intimate acknowledgement of the existence of obvious causal connection between poverty and the increase in the production of and trafficking in narcotic drugs and psychotropic substances and that the ideal solution for solving this problem is the international cooperation and its permanent development in all its aspects (information, logistics, material, direct and coordinated action, ongoing exchange of experience, etc.).

It was also substantially argued that the magnitude of organized crime, drug trafficking in particular, requires the formulation of new strategies, approaches, objectives and enhanced international cooperation that, respectful of the sovereignty of States, deal more effectively with the international operations of those who get rich through the illegal traffic in drugs, precursors and essential chemicals, threatening the stability of many societies in the world.

Conclusions

Conclusions drawn from the white collar criminal phenomenon review ground the fact that, on account of failure to adopt new regulations specific to market economy such as: bankruptcy act, tax evasion indictment law, the regulation on the transfer of currency, etc., as well as decriminalization of offenses on public property, the criminal phenomenon is increasing. In this context, the application of provisions relating to crimes on public property by the small amount of sanctions does not achieve the requisite general prevention, being even stimulating in some cases. Not incidentally, decision-making factors in the economy have been corrupted or bribed, directly participating in economic crimes with great impact on the state's assets, public-owned companies' patrimony in favor of private operators. Smuggling takes on an organized character mainly on account of the use of false or formal documents of criminal ties abroad and border crossing in places other than those subject to customs control.

"Dirty" money is a concept as innovative as it is unclear. Mainly, it is used by criminal organizations, or by other subjects, as a method of earning income and withholding taxes. It is difficult to track "dirty" money, on the grounds that it may take different forms, and the destructive power of "dirty" money movement is called *money laundering offense*. The very concept of "*money laundering*" is relatively recent in legal vocabulary, but the necessity to disguise the nature or existence of proceeds of crime, or at least, doubtful emerges in the twentieth century.

Money laundering encompasses methods and procedures allowing for acquiring funds or other property generated from illegal business and concealment, disguise of their origin, or lending their sources a clean-looking semblance. The offence under review is growing into one of the most common types of white collar crimes, both nationally and internationally.

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NEW TRENDS AND PERSPECTIVES IN THE MONEY LAUNDERING PROCESS

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Abstract
Due to its complexity, the crime of money laundering can be committed through a variety of methods which are in a constantly evolving. It seems that money launderers are always one step ahead of authorities. They find new and various ways to launder the proceeds of crime despite the efforts of the law enforcement authorities to develop the best tools to stop or at least to make difficult the criminal activity of money laundering. This study aims to analyze the latest money laundering typologies approaching online payment systems, virtual casinos, electronic auctions and Internet gambling.

Keywords: *Money laundering, money laundering typologies, online payments systems, online casinos, virtual games*

Introduction

The advantages of electronics and the Internet, that is hiding the true identity, the possibility to operate quickly, anywhere and anytime, the countless transactions and digital identities, are unfortunately vulnerable to the complex operations of money laundering process, unable to remain unexploited to criminals.

This study proposes an analysis of the vulnerability of new technologies in the face of the financial criminals, in terms of money laundering crime, the focus being on the role of electronic payment systems, casinos, virtual games and other gambling activities in order to achieve different stages of money laundering.

Far from being over and clarified, the new typologies of money laundering connected to modern reality technology have been and still are a subject to research both in international[1] and national[2] literature.

The usage of new methods of payment for money laundering is monitored in the Annual reports on various money laundering typologies by the International Financial Action Task Force

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[2] ONPCSB, *Manual de instruire privind combaterea spălării banilor și finanțarea actelor de terorism,* (Bucharest Published by C.N. Imprimeria Națională S.A., 2010); Camelia, Bogdan, *Spălarea Banilor, Aspecte teoretice și de practică judiciară,* (Bucharest, Universul Juridic Publishing House, 2010); Dan Vasilache, *Plăți electronice. O introducere, (*Bucharest, Rosseti Educațional Publishing House , 2004).

(FATF).[3] The FAFT reports on the new methods of payment used by money launderers from 2002 to 2010 represent the starting point of this study.[4]

The importance of understanding the mode of operating of the financial criminals who use the benefits of present technology to carry out the criminal intentions contributes undoubtedly to the efficient and effective fight against money laundering.

International, European And National Concerns In Matters Of Money Laundering

In terms of the concerns registered at international, European and national level in matters of money laundering and in point of defining the offense, we can mention the following documents:

- The ***United Nations' Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances***,[5] adopted on 19 December 1988, Vienna, defines this process as: *the intention of concealing the origin, nature, disposition, the movement, or the owner of funds that come from illicit drug trafficking, including the movement or conversion by electronic transmission processes, in order to give the appearance that these funds are derived from legal activities*.[6]

- The ***Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the proceeds from crime***,[7] in article 6, defines money laundering as: *processing and transfer of property of which the one who used them knew that they are proceeds of crime, in order to conceal or disguise the illicit origin of goods or for helping any person involved in committing the major crime to escape the legal consequences of his action; concealment and disguise of the nature, origin, location, disposition, movement or real ownership of property or the rights thereof, which the owner knew that the products are proceeds of crime; purchasing, procurement and use of goods, which the person who acquired, hold or used them, knew, at the moment of receiving products, that are proceeds of crime; participation in one of the offenses set out previously or any other form of association, attempt, or complicity by providing assistance or advice in order to commit the crime.*

- The ***UN Convention against transnational organized crime***,[8] uses both terms laundering of proceeds of crime and money laundering. Thus, **article 6** of the Convention called ***Incrimination of laundering of proceeds of crime***, calls on states to adopt the fundamental principles of its internal law, legislative and other measures necessary to establish the offense, when the act was committed intentionally:

a) (i) change or transfer of property to the one who knows that they come from crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person involved in committing the offense to evade from the legal consequences of his acts;

(ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of property or other related rights, whose perpetrator knows that they are proceeds of crime;

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[3] FATF is the intergovernmental body that aims at developing and promoting national and international policies to combat money laundering and terrorism financing.

[4] FAFT, *Money Laundering Using New Payment Methods*, (Paris, FATF/OECD, 2002); FAFT, *Report of New Payments Methods*, (Paris, *FAFT/ OECD*, , 2010).

[5] Opened for signature on 20 December 1988 in the framework of the sixth Plenary Session of the UN Conference in Vienna on Psychotropic Substances. Romania acceded to the Convention by Law no. 118 of 15 December 1992, published in Official Monitor of Romania, Part I, no. 341 of December 30, 1992.

[6] Article 3, letter b), c).

[7] Ratified by Romania by Law no. 263/2002, published in the Official Monitor of Romania no. 353 of May 28, 2002.

[8] Ratified by Romania by Law no. 565 / 2002 and published in Official Monitor of Romania no. 813/8.11.2002. Romania has signed on 14 December 2000 in Palermo, the United Nations Convention against Transnational Organized Crime and its two protocols adopted in New York, 15 November 2000: 1. Protocol on preventing, suppressing and punishing trafficking of persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime; 2. Protocol against the smuggling of migrants by land, sea, and air, supplementing the United Nations Convention against Transnational Organized Crime.

b) and subject to the basic concepts of its legal system:

(i) the acquisition, possession or use of property which the one who purchases, possesses or uses them, knows, at the moment of the receive, that they are proceeds of crime;

(ii) participation in one of the offenses provided for under this article or any other association, understanding, attempt or complicity by assistance, help or advice in order to commit it.

According to ***European Union Directives:***[9] "Money laundering" means the following actions, when committed intentionally: a) the conversion or transfer of property, knowing that such property is derived from criminal activity or an act of participation in such activity, in order to conceal or disguise the illicit origin of property or to support any person involved in the commission of such activity in order to evade the legal consequences of his actions; b) the concealment or disguise of the nature, source, location, disposition, movement, the real rights on their property or possession, knowing that such property is derived from criminal activity; c) the acquisition, possession or use of property, knowing, at the time of receipt, that such property originates from a criminal activity or from an act of participation in such activity; d) participation, association, attempt to commit and aiding, abetting, facilitating, counselling in order to commit any of the actions mentioned in the previous paragraphs.

At national level,[10] the **Law no. 656 / 2002** for the prevention and punishment of money laundering, and instituting some measures to prevent and combat financing acts of terrorism,[11] regulates in article 23 the crime of money laundering, as follows: *(1) The crime of money laundering is punished with imprisonment from 3-12 years: a) change or transfer of property, knowing that they come from committing crimes, in order to conceal or disguise the illicit origin of property or in order to help the person who committed the offense from whom the goods come from, to evade prosecution, trial or execution of sentence; b) the concealment or disguise of the true nature, source, location, disposition, movement or ownership or rights over their property, knowing that the goods come from committing crimes; c) the acquisition, possession or use of property, knowing that they come from crime."*

FATF defines money laundering as the *de facto* financial part of all crimes through which the profit is gained. It is the process by which criminals attempt to conceal the origin and the actual possession of their income that comes from criminal activities.

The Stages Of Money Laundering

Money laundering is a complex process achieved, usually in the traditional scheme of the three stages, namely: *placement, layering, and integration*. The complexity of money laundering process is given by different techniques chosen by the perpetrator.[12]

The *placement* consists of the offender's attempt to bring illegal money in the financial system, involving the physical movement of money, in order to put a distance between them and the illicit source of funds, avoiding their confiscation. The introduction of illegal profits in the financial

[9] Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering and the Directive 2001/97/EC of 4 December 2001. These Directives have been repealed by the Directive 2005/60 EC of the European Parliament and of the Council on prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

[10] Prevention and punishment of money laundering were initially regulated by Law no. 21/1999 on preventing and sanctioning money laundering, published in Official Monitor of Romania, Part I, no. 18 of January 21, 1999, repealed in the article 31 of the Law no. 656 / 2002.

[11] Published in the Official Monitor of Romania no. 204 of December 12, 2002, as amended and supplemented by GEO no. 53/2008 regarding the amendment of Law no. 656/2002 on preventing and sanctioning money laundering and instituting measures to prevent and fight against terrorism financing, published in Official Monitor Part I, no. 333 of April 30, 2008, and **GEO no. 26/2010** for amending and supplementing GEO no. 99/2006 on credit institutions and capital adequacy and other normative acts, published in Official Monitor or Romania no. 208 of April 1, 2010.

[12] Camelia, Bogdan, *Spălarea*, p. 87 – 138.

system can be done by splitting the cash in smaller amounts (below the minimum reporting threshold). In this stage, online payment systems present a risk in terms of customers' anonymity, rendering difficult monitoring the transactions that form the channel for dirty money, because of the possibility of customers' multiple registration, detecting the source of the money due to used payment instruments.[13]

Layering is the movement of money between different accounts, in order to hide their source. In other words, criminals want to erase any connection between the illicit source and the money. At this stage, money launderers resort to transforming the cash placed in various instruments of payment (checks, promissory exchange) or purchase real estate.

Referring to the two phases of money laundering, Aaron Elkins exemplifies the hypothesis of dividing the illicit cash in more checks, then transmitted electronically from the A account of Bank 1 to B account in Bank 2, dividing and recombining so that illegal origins of the cash will be lost somewhere in cyberspace.[14]

Speed, the sheer volume, and the international feature of electronic transactions are likely to prevent authorities to investigate money laundering at this stage.

The *integration* of whitening capital in the economic and financial circuit is the final stage of money laundering. It is the objective pursued by criminals, to have a legal façade to the illegally obtained income. Specific to this stage is the purchase, by money launderers through the commercial website, of some valuable items, precious metals, real estate, and for their payment they use electronic systems.

The stages of money laundering can exist separately, simultaneously or may overlap, their achievement depends on the existing ways of laundering and criminal organizations requirements.

Specific Techniques Of Money Laundering Stages

Each stage of money laundering has specific techniques used by criminals such as:

For the *placement* stage criminals resort to techniques such as: cash smuggling, currency conversion tools or values, the banks' aid and abet, structuring funds, the introduction of illegal funds in lawful money, money transfer systems, Internet and casinos.[15] In the virtual world, money launderers can overcome the placement stage, because the money (or other values) is already in the electronic form.[16]

The most common techniques used by launderers during layering stage are: stock and holding companies, sale of shares purchased with cash, numerous electronic transfers, shell offshore companies.[17]

The most important stage of money laundering, *the integration,* is carried out mostly by: loan - back schemes, real estate purchases, ghost commercial transactions, fake import-export documents, legitimate business and credit cards.[18]

Synchronization Of Money Laundering Techniques With Technological Developments

Putting cash into the financial system, moving it to other destinations across the border, and transfer cash into and from the financial system, these are vulnerable steps to money launderers in terms of the risk of being detected.

The evolution of technology and cyberspace enables criminals to easily overcome these obstacles, money launderers are increasingly resorting to the use of virtual platforms and electronic

[13] FAFT, *Money Laundering Using New Payment Methods*, FATF/OECD, Paris, 2002, p. 23.
[14] Elkins, A., *Twenty*, p. 208.
[15] ONPCSB, *Manual de instruire privind combaterea spălării banilor şi finanţarea actelor de terorism*, printed by C.N. Imprimeria Națională S.A., Bucharest, 2010, p. 33.
[16] Wojciech Filipkowski, *Cyberlaundering: An Analysis*, p. 15 – 27.
[17] ONPCSB, *Manual*, p. 34.
[18] ONPCSB, *Manual*, p. 35.

payment systems; these technological tools enable them to control the illicit funds, to conceal the origin of the illicit funds and the identity of persons involved in criminal activity and ultimately to benefit from these illegally obtained funds.

In the following we will analyze the latest tendencies of offenders in achieving money laundering, tendencies that are always "updated" and adapted to the technological evolution.

Electronic Payment Systems

Electronic payments are actual payments from commercial activities or transfers of funds from commercial or non-commercial activities, and they are achieved by electronic means (computers - from the type of personal PC to the complex server systems and telecommunications).[19]

According to the ***European Parliament*** and ***Council Directive no. 2009 / 110 / EC*** concerning the access to activity, pursuit and prudential supervision of the activity of the institutions' issuers of electronic money, amending ***Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC***: *"electronic money" means any monetary value stored electronically, including magnetic, representing a claim on the issuer which is issued upon receipt of funds for the purpose of making payment transactions as defined in article 4, section 5 of* ***Directive 2007/64/EC***[20] *and it is accepted by a person or entity other than the issuer of electronic money.*[21]

Compared to traditional off-line payment systems, the on-line payments have the advantage to purchase goods or services without using cash or complete checks.

The main electronic payment instruments are: cards, electronic money and electronic wallet.

The parties involved in e-cash system are: the issuing bank of electronic money, the customer (payer) and the dealer.[22]

The best known techniques used by money launderers in the electronic payment systems are the electronic transfers (using a false identity, trading money through offshore companies); investing the electronic money into financial products (bank checks, bonds and shares) or in virtual gold. The role of electronic payment systems is very well defined in money laundering matters in relation to companies, there are the transfers via SWIFT.

In the *Report of New Payments Methods*, in October 2010, FAFT does not include in the electronic payment systems category the mobile prepaid cards, having rather the feature of intermediary value reserve.[23]

Most online payment systems (transfer, mobile payment systems) are used by money launderers in the layering stage, when carrying out transactions between different accounts, countries or people.[24] For the placement stage of money, criminals are using prepaid cards.[25]

The advantages of these payment systems are very attractive to criminals. Thus, due to the mobility of electronic payment systems, there can be instantaneously achieved transfers in a network that is not subject to any jurisdictional restrictions, the cash can be stored in an unregulated financial institution.[26] The amounts stored on a card or a personal computer may not always be controlled by the competent authorities; the Internet and electronic systems facilitate fund transfer and ensure anonymity through some encryption techniques, etc.

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[19] Dan Vasilache, *Plăți*, 2004, p. 40.
[20] Directive 2007/68/EC refers to payment services in the internal market.
[21] Article 2, line 2.
[22] Rolf Oppliger, *Security Technologies for the World Wide Web*, Artech House, 2002, p. 225.
[23] FAFT, *Report of New Payments Methods, FAFT/ OECD,* Paris, 2010, p. 14.
[24] Lech Janczewski and Andrew M. Colarik, *Cyber*, p. 143.
[25] Ibidem.
[26] Commonwealth Secretariat, *Combating*, p. 45.

Virtual Casinos And Gambling

Gambling is a bet on a sum of money or something of material value in a situation with uncertain outcome, mainly aimed at winning the money and / or additional material goods. In the gaming category there are included: gambling services, lotteries, casinos and mobile or on the Internet gambling, etc.

The huge gains resulted from the gambling practice organized in casinos, which are apparently legitimate and justifiable earnings for the existing currency in this industry, have created, with good reason, the suspicion of the existence of money laundering in the casino business.[27]

Thus, the appearance of legality of illicit proceeds and transfer of such amounts can be achieved also through casinos.

Virtual casino sites offer visitors the experience of real casino games.[28]

Casinos may have a series of transactions similar to financial institutions, according to Directive 2001/97/EC, in the category of entities required to report suspicious transactions are included also the casinos, all customers are required to identify themselves when selling, or buying gambling chips, whose value exceeds the sum of 1000 Euro.

To access the games on the virtual casino's website, there must be created an account on the website, download the gamming software and use a credit card or electronic funds transfer service to cover the bets and gambling earnings.

Money launderers can speculate the possibility that the virtual casino websites offer, asking them to send money coming from illicit sources in the accounts they open on these websites, justifying the origin of money obtained from gaming winnings.[29]

International Financial Action Group, in the Report on Casinos' Vulnerabilities and other gambling activities, listed a series of methods and techniques used for money laundering through casinos – the usage of casinos' value instruments (cash, casino chips, game machines credit, gift certificates); refining or structuring; use of casino accounts - credit accounts, markers, operating foreign accounts; intentional losses or gains; aiding and abetting employees (e.g. the falsification by the casino employees of assessments and other records that refer to the player in order to justify the accumulation of chips or of credits from game machines), foreign exchange, credit cards (for example, laundering of the proceeds from a stolen card) - or debit cards, false documents, etc.[30]

The value tools of the casinos are used often by money launderers in converting the illicit funds into another form.

Regarding the typologies of money laundering through casinos, the FATF exemplified: the **purchase of casino chip with cash or using a casino account**, then it is sought a ransom payment by check or by a transfer to your casino account. This method can be performed via a chain of casinos where the chips that were bought with illicit funds are then converted to credits then transferred to other jurisdictions where there is a unit of the casino chain.

In the European Parliament Report of 10 March 2009 relating to the **integrity of online gambling**,[31] it is stated that the development of online gambling industry offers increased opportunities for corrupt practices such as fraud, arranged games, illegal bookmakers and money laundering, considering that online gambling can be quickly created and removed from the market due to the proliferation of offshore operators. The European Parliament calls on the Commission, Europol and other national and international institutions to closely monitor and report on the findings in this area.

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[27] Malcolm Greenlees, *Casino*, p. 413.

[28] Lilley, P., *Dearty Dealling*. 115.

[29] Camelia Bogdan, *Spalarea.*, p. 128.

[30] FAFT Report, *Vulnerabilities of Casinos and Gaming Sector*, March 2009, p. 28, http://www fatf-gafi.org/dataoecd/47/49/42458373.pdf.

[31] Published in the Official Journal of European Union C /87/ E, p. 32.

The proxy auctions are a very effective tool for money launderers, being on a large scale expansion on the Internet. The user can register and then he can open to sale or purchase of various products.

For security reasons for people who buy and sell on auction sites, some of the auctions companies offer only certain basic financial services.[32]

The buyer sends money to the bank account of the company and the seller sends the product. If the promised product for sale is according to the one received by the buyer, the company transfers the money to the seller.

The proxy auctions give the whole operation a legitimate appearance, given the existence of a company's auction reputation and a bank account.

The proxy auctions have as object virtual goods which have a counterpart in the real world.

Online Games

The emergence of online games, such as Entropia Universe and Second Life, offers new opportunities for money launderers to transfer or conceal fraudulent income. These online games belong to a broader category of virtual games called MMORPGs (Massively Multiplayer Online Role-Playing Game), being accessed by over half a million participants interconnected online and producing profits that exceed 1.5 million PED (Project Entropia Dollars), representing the player's virtual currency.[33]

Thus, illicit money that have to be transferred from one destination to another, are changed in a virtual currency that belongs to the virtual platform.

To operate in the virtual gaming platform, the user must create a virtual identity called avatar. Theoretically, for each user it must be an avatar, but given the fact that this identity is created electronically, there can be no limit and control over the possibility that the same user may use multiple avatars.[34]

The players involved in virtual games through the so-called *Avatar,* sell virtual goods and properties for a real compensation. These avatars were able to enrich people that sell virtual goods. Players can convert virtual money into real money by simply selling them on the auction websites.

In the virtual world of games, a person who retains its anonymity, pays no taxes and is not obliged to report can produce significant amounts of financial products.[35]

Money launderers use virtual games because the virtual products can be purchased and transferred anywhere, and once the funds are withdrawn from a virtual account, they are considered legal and their source cannot be identified.

Conclusions

This scientific approach has been developed starting from the international (***The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Council of Europe Convention on Laundering, Search, Seizure and Confiscation of proceeds from crime, the UN Convention against transnational organized crime borders***), European (Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering and the Directive 2001/97/EC of 4 December 2001, Directive 2005/60 EC of the European Parliament and of the Council on prevention of the use of the financial system for the purpose of money laundering and terrorist financing) and national concerns (**Law no. 656/2002** *on preventing and sanctioning money laundering, and instituting measures for preventing*

[32] Wojciech Filipkowski, *op. cit.*, p. 15-22.
[33] According to the virtual exchange rate 10 PED worth 1 USD.
[34] Dyonisyos S. Demesis, *Technology*, p. 8.
[35] Miller, M. and Jentz, G., *Business*, p. 467.

and fighting against the financing the acts of terrorism) in matters of money laundering, and in the presentation of the process stages of money laundering (placement, layering and integration), with the ***synchronization of money laundering techniques with technological developments*** and ending with the analysis of some new types of laundering adapted to the new payment systems, casinos, gambling and virtual games.

Money launderers resort to the new opportunities offered by technological development because of the benefits of the online payment systems and the virtual world, in terms of facilitating the crime of money laundering. Due to the anonymity, the speed of transactions, anytime, anywhere, the virtual platforms are the perfect environment for trading currency and smuggled goods.

The profits derived from criminal activities can easily be transformed, disguised, transferred in order to conceal their illicit origin through electronic payments, casinos and other gambling activities, by artificial buying and selling on proxy auction sites and by creating digital identities on the platforms of online games in order to sell virtual products into a virtual currency which will ultimately be converted into real money.

A solution to fight against the phenomenon of money laundering through modern technology would be tracking and monitoring money flows, they are able to suppress the criminal activity before it even started.

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- 14.Rolf Oppliger, *Security Technologies for the World Wide Web, (*Artech House, 2002);
- 15.Wojciech Filipkowski, *Cyberlaundering: An Analysis of Typology and Techniques*, International Journal of Criminal Justice Sciences, Vol. 3 no. 1 (January – June 2008)

MONEY LAUNDERING OR LAUNDERING OF THE PROCEEDS OF CRIME?

ANA ALINA DUMITRACHE[*]

Abstract

*This paper aims to analyses which of the phrases **money laundering** or **laundering the proceeds of crime** is more appropriate to describe the crime provided by art. 23 of Law no. 656/2002 on prevention and sanctioning money laundering, as well as for setting up some measures for prevention and combating terrorism financing. In this respect, the article includes a survey of the important international documents in this matters ratified by Romania - United Nations Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention), the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime, The United Nations Convention against Transnational Organized Crime, Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism. To remove any ambiguities arising from the approach of the money laundering concept and to reach a conclusion, there are also presented the controversial views regarding the use of the expression money laundering in both Title and content of Law, views expressed in specialized literature.*

***Keywords**: concept of money, money laundering, laundering the proceeds of crime, organized crime, subject to a tranzaction*

Introduction

The common denominator in all acts of organized crime and the most serious crime is the desire to obtain unlawful financial and material profits, what motivates organized groups to be concerned with masking, disguising, concealing, recycling, or investing the profits obtained from crime, all these operations give rise to a legal appearance of illegal income.[1]

In other words, the income derived from criminal activity, in order to be reinvested in other businesses by criminals, must be "cleansed", "washed" so that it cannot be distinguished from the legitimate income.

It is fundamental in understanding the definition of money laundering the definition of money. Thus, money is any value that can be easily transferred from person to person and that it is accepted by most people as payment for goods, services, debts, etc.

Money, a present concept in the phrase money laundering may be: cash, precious metals and stones, credit cards, money orders, cards, etc., any amount deemed to be subject to a transaction. In order to properly define money laundering it must be taken into consideration that, firstly, money laundering is a complex and dynamic process, conducted in three stages, being the subject to some considerable changes[2].

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[1] Georgeta Valeria Sabău, *Traficul şi consumul ilicit de droguri şi precursori. Combaterea traficului şi consumului ilicit de droguri şi precursori prin mijloace de drept penal, (*Bucharest , Universul Juridic Publishing House, 2010), p. 342.

[2] Mary – Jo Kranacher, Richard Riley and Joseph T. Wells, *Forensic Accounting and Fraud Examination*, , (USA, RDC Publishing Group, 2010), p. 94.

The Definition Of Money Laundering

Before clarifying the correct name of the crime we will make a foray into the specialized literature both in Romania and other countries of Europe, in the European Union regulations, the United Nations and of international bodies competent in this matter - group of Financial Action (FAFT / FATF), International Monetary Fund, Interpol, the World Bank, the International Organization of Securities Commissions (IOSCO).

United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances,[3] adopted on 19 December 1988 in Vienna, although they do not use terms of *money laundering*, they define this process as: the intention of concealing the origin, nature, disposal, movement or owner of the funds derived from illicit traffic in narcotic drugs, including the movement or conversion by electronic transmission methods, in order to give the appearance that these funds are derived from legal activities.[4]

The provisions of this document, money laundering is, per se, limited to criminal activity involving proceeds of crimes related to drugs.

Article 6 of the ***Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the proceeds from crime***[5], defines money laundering as:

- Processing and transfer of property of which the one who used it knew that they are proceeds of crime, in order to conceal or disguise the illicit origin of goods or for helping any person involved in committing the major crime to escape the legal consequences of his action;

- Concealment and disguise of the nature, origin, location, disposition, movement or real ownership of property or the rights thereof, which the owner knew that the products are proceeds of crime;

- Purchasing, procurement and use of goods, which the person who acquired them, hold or use knew, at the moment of receiving products, that are proceeds of crime;

- Participation in one of the offenses set out previously or any other form of association, attempt, or complicity by providing assistance or advice in order to commit the crime.

UN Convention against transnational organized crime[6], uses both terms laundering of proceeds of crime and money laundering. Thus, article 6 of the Convention called the ***criminalization of laundering of proceeds of crime,*** calls on states to adopt the fundamental principles of its domestic law, such legislative and other measures necessary to establish the offense, when the act was committed intentionally:

a) (i) change or transfer of property to one who knows they are from crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person involved in committing the offense to evade from the legal consequences of his acts;

(ii) The concealment or disguise the true nature, source, location, disposition, movement or ownership of property or other related rights, whose perpetrator knows that they are proceeds of crime;

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[3] Opened for signature on 20 December 1988 in the framework of the Sixth Plenary Session of the UN Conference in Vienna on Psychotropic Substances. Romania acceded to the Convention by Law no. 118 of 15 December 1992, published in Official Monitor Romania, Part I, no. 341 of December 30, 1992.

[4] Article 3 letter b), c).

[5] Ratified by Romania by Law no. 263/2002, published in the Official Monitor of Romania no. 353 of May 28, 2002.

[6] Ratified by Romania by Law no. 565 / 2002 and published in Official Monitor of Romania no. 813/8.11.2002. Romania has signed on 14 December 2000 in Palermo, the United Nations Convention against Transnational Organized Crime and its two protocols adopted in New York, 15 November 2000.

- Protocol on preventing, suppressing and punishing trafficking of persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime;

- Protocol against the smuggling of migrants by land, sea and air, supplementing the United Nations Convention against Transnational Organized Crime.

b) and subject to the basic concepts of its legal system:

(i) the acquisition, possession or use of property which the one who purchases, possesses or uses them, knows, at the moment of the receive, that they are proceeds of crime;

(ii) participation in one of the offenses provided for under this article or any other association, understanding, attempt or complicity by assistance, help or advice in order to commit it.

Article 7 of the ***UNO Convention against transnational organized crime*** uses also terms of money laundering, this article is entitled ***Measures to combat money laundering***.

Regarding the different terminology used in this Convention, for the same crime, ***the General Assembly of the United Nation*** equates the expressions *money laundering* and *laundering proceeds of crime* **(A/55/383/Add.1, para. 10)**.[7]

According to the FATF recommendations, money laundering is *defined as processing the proceeds of crime in order to conceal their illegal origin*.[8]

Corpus Juris,[9] incriminates in article 3 money laundering and abetting regarding the offenses under this document. Article 3, al 1 defines money laundering as: *the conversion or transfer of property from a subject crime or a criminal act of participating to such an offense, with the purpose of concealing or disguising the illicit origin of property or of helping any person involved in this activity to avoid legal consequences of his actions.*

We note that, in Corpus Juris, it is used the phrase laundering revenue or profits resulted from fraud offenses described in Corpus Juris, crimes that affect the financial interests of the European Union (art. 1, 2, 4 and 8).

In the definition of the **World Bank** and **International Monetary Fund**, money laundering is *the process whereby the assets acquired or generated by criminal activities are moved or disguised in order to conceal their relation to crime.*[10]

Interpol General Assembly in 1995 adopted the following definition of money laundering as: *any act or attempt to conceal or disguise the origin of illegally obtained money so that it creates an appearance of legality to their origin*.[11]

French Criminal Code in ***article 324-1*** defines money laundering by the following terms: *the act of facilitating, by any means possible, the false justification for the origin of goods from the perpetrator in order to achieve a profit directly or indirectly. It also represents money laundering the participation of a placement operation, concealment or conversion of direct or indirect proceeds of an offense or crimes*.

Article 301 of ***the Spanish Penal Code*** provides that any person is guilty of money laundering if he receives, transforms or transmits property, knowing that they come from a serious crime, or makes any other act to conceal the illicit origin of goods or he helps the person who participated in the offense or crime to evade the consequences of his act (article 301, al. 1).

Also, according to Spanish criminal stipulations money laundering is also the concealment or disguising the true nature, origins, locations, destinations, movements, or property rights over their

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[7] Nations Unies, *Guides Législatifs pour l'Application de la Convention des Nations Unies: Contre la Criminalité Transnationale Organisée et des Protocoles s'y Rapportant*, Nationes Unies, 2005, p. 47.

[8] The 40 Recommendations of the Financial Action Group, www.onpcsb.ro.

[9] Concerned with the criminal protection of EU financial interests and the harmonization of criminal law especially regarding community fraud and corruption, a group of experts from the European Council drew up and published in 1997, a document that rules 8 offenses affecting the European Union's financial interests, as follows: article 1 – fraud; article 2 - fraud in the matter of concluding transactions; article 3 - money laundering and abetting offenses relating to the Corpus Juris; article 4 - association in order to commit crimes; article 5 – corruption; article 6 – embezzlement; article 7 - abuse of office; article 8 – disclosing service secrets.

[10] Donato Masciandaro, Elod Takats and Brigitte Unger, *Black Finance: the economics of money laundering, (*London , Edward Elgar Publishing, 2007), p. 109.

[11] Bruce Zagaris, *International White Collar Crime: Cases and Materials*,(New York, Cambridge University Press, 2010), p. 508.

assets, knowing that the goods come from committing any acts set forth above or from an act of participation. (article 301, al. 3).[12]

In the Italian Penal Code, **article 648 bis** it is incriminated the act of the person who replaces or transfers money, goods or other utilities that come from crime, or he connects with these operations that prevent the identification of the illegal origin.[13]

Article 648 ter. of Italian Penal Code rules the use of money, property or other utilities of illicit origin.

The German Criminal Code in **Section 261** defines money laundering as: the deed of a person who *hides* an object that comes from committing one of the criminal acts under the law (all crimes and certain offenses), *obscuring* the origin or provenance *thwarts or jeopardize* finding, tracing, seizing such asset and also the one who *has* for himself or another or *holds* or *uses* for himself or for another property knowing, at the time of acquisition, that they come from crime.[14]

In foreign specialized literature, money laundering has been defined as the process of integration of crime proceeds in commercial and financial law channel by disguising their illicit origin[15]; disguising the existence, nature, source, owner, location and / or provision of goods from the criminal activity or as a simple formulation, the process by which dirty money is cleaned[16]; the process by which criminals attempt to conceal the origin and ownership of crime proceeds in order to maintain control over them and to "cover" the illicit income.[17] Money laundering is the name given to the process by which money is moved through various transactions so that funds are separated from their criminal source.[18]

Money laundering has been defined as being a wide range of activities and processes intended to obscure the source of illegally obtained money and creating an appearance of legality of the origin of this money.[19]

According to the Romanian doctrine, money laundering has been defined as: a complex economic and fraudulent financial transactions, having as main objective to create conditions for the use and increase, on legal ways, the profits from illicit activities of large transnational organized groups;[20] any action of concealment, camouflage, acquisition, possession, use, investment, movement, storage or transfer of property which the law expressly confers the status of crime in connection with illegal acts and crimes specified in such law and which relate to earnings from other crimes;[21] a criminal action method such as drug trafficking, illegal arms trafficking and terrorism, trafficking in credit card, hide the origin of illegally acquired funds in order to avoid their detection and risk prosecution when they are placed on the market;[22] the process of trying to conceal the origin

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[12] Juan Miquel del Cid Gomez, *Blanqueo internacional de capitales: como detectarlo y prevenirlo, (*Barcelona Ed. Deusto , 2007), p. 137.

[13] Pasquale Fava, *Analisi sistematica della giurisprudenza penale – Delliti contra la Publlica Administrazione ed il patrimonio,* (Santarcangelo di Romagna, Maggioli Editore Publishing House, 2009), p. 407.

[14] Camelia Bogdan, *Infracțiunea de spălare a banilor în legea franceză şi germană,* Revista de Drept Penal 4 (2006): 128.

[15] Ismail A. Odeh, *Anti – Money Laundering and Combating Terrorism Financing for Financial Institutions, (*Pittsburg, Pennsylvania, Dorrance Publishing, 2010), p. 1.

[16] Mary – Jo Kranacher, Richard Riley and Joseph T.Well , *Forensic*, p. 94.

[17] Doug Hapton, *Money Laundering. A Concise Guide for All Business,* Second Edition,(England, Gower Publishing Limited , 2009), p. 1.

[18] Colin Barrow, *The Global Property Investor's Toolkit: A Sourcebook for Successful Decision Making,* Capstone Publishing Ltd., USA, 2008, p. 156.

[19] IOSCO, Technical Committee, 1992, *Report on Money Laundering*, October No. 25, Ibidem, p. 109.

[20] Georgeta Valeria Sabău, *Traficul*, p. 343.

[21] Ștefan Popa and Adrian Cucu, *Economia subterană şi spălarea banilor, (Bucharest,* Expert Publishing House, 2000), p. 60.

[22] Geo Stroe, *Dreptul penal al afacerilor pe înțelesul tuturor sau cum să conduci afaceri fără să-ți pierzi libertatea sau averea, ,* (Bucharest,Dacoromână Publishing House, 2004), p. 305.

and the real possession of income come from criminal activities;[23] giving a financial product look legitimate or legal of the financial product (money and property) resulting from certain categories of crimes committed by criminals using sophisticated methods and techniques which involve the banking system or other specific entities of the market economy (capital market, insurance companies, casinos).[24]

From the analysis of the above definitions, it results that there is money laundering offense when there are committed with intent of changing or transferring some goods in order to hide or disguise their illicit origin, knowing that they are products of crime; to hide or conceal the real nature of the goods in terms of provenance, ownership, location, movement and rights relating to such property; the acquisition, possession or use of property, knowing that they originate from a criminal action and from any act of participation or support in any form to the actions described above.

In Romania,[25] the **Law no. 656 / 2002** for the prevention and punishment of money laundering, and instituting some measures to prevent and combat financing acts of terrorism[26], regulates in article 23 the crime of money laundering, as follows: (1) The crime of money laundering is punished with imprisonment from 3-12 years:

a) *change or transfer of property, knowing that they come from committing crimes, with the purpose of concealing or disguising the illicit origin of property or in order to help the person who committed the offense from which the goods come from, to evade prosecution, trial or execution of sentence;*

b) the concealment or disguise of the true nature, source, location, disposition, movement or ownership or rights over their property, knowing that the goods come from committing crimes;

c) the acquisition, possession or use of property, knowing that they come from crime. "

Critical Analysis Of The Phrase "Money Laundering"

In Romania, on the law governing the designation of the crime, given the controversial opinions that exist in literature, there is required a series of discussions.

Thus, there were **critical opinions** to calling on Law of "preventing and combating money laundering", supporting the fact that the term *money laundering* now reflected in the title of the law and in the name of the crime provided for in article 23 does not match the content of Law no 656 / 2002 nor the crime defined by article 23, al. 1.

In the support of this opinion there were the provisions of article 1 of Law no. 656/2002 according to which "*this Law establishes measures to prevent and combat money laundering*." It was emphasized that strictly grammatically, *money laundering and laundering of proceeds of crime* are not synonymous, the latter including not only money but also other goods, values, rights, etc. Supporting the same idea it was also mentioned that the material object of this crime, as defined in article 2 al. 1 of Law no. 656/2002 consists of tangible or intangible goods, movable or immovable, and legal documents or instruments that evidence that this title or relating rights, bringing out a much broader scope than just "money".

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[23] Dumitru Matis, Cristina Palfi, Răzvan Mustață, *Importanța cunoașterii clientelei în prevenirea și combaterea spălării banilor,* Tribuna Economică 51-52, (2004): 75.

[24] Costică Voicu, et al., *Drept penal al afacerilor,* Publishing House, Bucharest, 2002, p. 203.

[25] Prevention and punishment of money laundering were initially regulated by Law no. 21/1999 on preventing and sanctioning money laundering, published in Official Monitor of Romania, Part I, no. 18 of January 21, 1999, repealed according to article 31 of Law no. 656 / 2002.

[26] Published in the Official Monitor of Romania no. 204 of December 12, 2002, as amended and supplemented by GEO no 53/2008 regarding the amendment of Law no. 656/2002 on preventing and sanctioning money laundering and instituting measures to prevent and combat terrorism financing, published in Official Monitor of Romania, Part I, no. 333 of April 30, 2008, and GEO no 26/2010 for amending and supplementing GEO no 99/2006 on credit institutions, capital adequacy and other norms, published in Official Monitor of Romania no. 208 of April 1, 2010.

The arguments in favor of these criticisms were also from the **historical perspective** on the phase of prevention and combat money laundering, phase exceeded by the current reality, which requires extending the crime of conviction of any proceed which is washed, and those related to the fact that using the words *money laundering* it is affected the preventive law side because it leaves room for interpretation and confusion on the subject of crime and in executing its obligations established by the law in question.[27]

A "*regrettable gap*" between the provisions of Law no. 656/2002 and international and European law in money laundering domain – the European Convention on Laundering, Search, Seizure and Confiscation of crime and the Convention against transnational organized crime of the United Nations, has been reported by other authors as well who have views that the two phrases "money laundering ", used by the Romanian legislator and "laundering of proceeds of crime ", used by the above mentioned Conventions and that include any other property or values thus money[28], are not synonymous.

There are separate opinions[29] that the Warsaw Convention by ratifying the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of crime and terrorist financing, although the Romanian legislator has not defined in the Law no. 656 / 2002 the proceeds expression, by the provisions of article 23 of the law it refers to goods coming from committing any crimes. It was also claimed that the Romanian state is not required to replace the incumbent term of laundering proceeds of crime with money laundering because the Strasbourg Convention is ratified by Romania by Law no. 263 / 2002, does not provide this obligation for states, nor the obligation to include references to the material object of the crime in the name of its marginal denomination, given that money laundering is the term used in several laws and the Conventions that contain the obligation to incriminate money laundering establishes the term of "money laundering offense."[30]

Regarding the terminology used in naming the Law no. 656 / 2002 to prevent and combat *money laundering* and establishing measures to combat and prevent terrorist financing, it was claimed that the Romanian legislator has given a broad interpretation of money laundering phrase when he incriminated these facts, given both money and property and other rights on them, the legislator incriminated the act of money laundering that come from the illicit proceeds or of money laundering illegally obtained in other securities or cash.[31]

Conclusions

As we mentioned before, money is any value that can be easily transferred from person to person and that it is accepted by most people as payment for goods, services, debts, etc. Money, a present concept in the phrase money laundering may be: cash, precious metals and stones, credit cards, money orders, cards, etc., any amount deemed to be subject to a transaction.[32]

Looking from this perspective, we believe that using the phrase *money laundering* to define the offense according to article 23 of Law no. 656 / 2002, is itself improper as a money laundering operation does not actually involve money, there is money laundering every time there is an activity (transaction) that involves any property value, assets, income, that is the product of a crime.

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[27] Valerică Dabu and Sorin Cătinean, *Noua lege pentru prevenirea şi sancţionarea spălării banilor (Legea nr. 656/ 2002) şi Convenţia Naţiunilor Unite împotriva Criminalităţii Transnaţionale Organizate,* Revista Dreptul, XIVth Year, IIIrd Series 6 (2003): 24.

[28] Georgeta Valeria Sabău, *op. cit*., p. 344.

[29] Camelia, Bogdan, *Infracţiunea de spălare a banilor şi infracţiunea de tăinuire,* in Revista de Drept Penal, no 4/ 2009,(Bucharest, R.A. Official Monitor, 2009), p. 99.

[30] Camelia Bogdan, *Infractiunea,* p. 99.

[31] Ioan Lascu, *Spălarea banilor. Actualitate. Realitate socială şi incriminare,* Revista Dreptul, XIVth Year, IIIrd Series, 6 (2003), p. 7.

[32] Mary – Jo Kranacher, Richard Riley, Joseph T. Wells, *Forensic.,* p. 94.

However, based on international documents in matters of money laundering ratified by Romania (the Vienna Convention, the Strasbourg Convention, the Palermo Convention and the Warsaw Convention) which does not require to states the use of a certain terminology to define the crime of money laundering and the interpretation of article 23 of Law no. 656/2002 from where it clearly results that the Romanian legislator not only limits the incrimination of money laundering, but refers to laundering any good or any tangible or intangible, movable or immovable property derived from any crime, therefore we are not convinced of the necessity to replace money laundering with the phrase laundering of proceeds of crime.

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THEORETICAL AND PRACTICAL CONCERNS REGARDING THE CONCEPT OF COMPLEMENTARY PUNISHMENTS APPLICABLE TO NATURAL PEOPLE COMPLIANT TO THE REGULATIONS OF THE NEW CRIMINAL LAW

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Abstract

By this study we proposed to analyze the concept of complementary punishments applicable to natural people compliant to the regulations of the New Criminal Law, motivated by the numerous significant amendments brought in by the above mentioned writ, such as: deduction of the peak limits of the punishments from 10 to 5 years, increase of the number of the rights part of punishments' content, significant increase of punishments' field of incidence by introducing some of the safety orders into complementary punishments' category (prohibition of entering certain cities, foreigners' deporting, prohibition of returning to family's residence for a certain period), the facility to advertise natural person's Court Final Decision of sentencing, as well as many other news we intend to present in the present article.

Keywords: *complementary punishments, new regulations, natural people, military degradation, sentence publication.*

Introduction

New elements, regarding the complementary punishment, can be identified in the new Penal Code, starting from the setting of this punishment place in Article 55 Penal Code, respectively after accessory punishment, as a following to a natural punishment reordering, reported to the moment of their application and execution.

Expanding the scope of complementary punishment from 5 to 15 variants of complementary punishments demonstrates the penal policy orientation towards an accentuated individualization of punishment by adding to the main punishment certain appropriate complementary punishments according to the penalty level, the gravity of the offense, the specific circumstances when the criminal act was performed, and the offender with his/her level of responsibility, understanding, education and training, prior criminal experience, or membership in another legal culture of another country.

Furthermore, part of the sanctions representing safety measures in the previous legislation respectively „prohibition to be in certain localities", „foreigners' deporting" and „prohibition to return to the family residence for a certain period" were introduced in the complementary punishment content, considering that these measures have and increased restrictive character for the freedom of movement. However by applying these measures, the prevention of committing new crimes is realized, by indirectly removing the danger state, by removing the offender from the criminal field.

The applicability scope broadening in comparison to the old criminal law is given by the possibility of the measure disposing both regarding the imprisonment, regardless of duration, but also to the penalty fine.

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Eliminating the provision on the punishment of at least 2 years to implement a complementary punishment, made the current criminal law more flexible and adaptable, so the detailed assessment of the nature, gravity, offense circumstances and offender becomes possible.

Changes regarding the beginning of the complementary punishments execution were made, following the introduction of penalty fines, and criminal punishments which can be executed with suspension, to which one can apply a complementary punishment. Thus, if the previous Penal Code conditioned the existence of an imprisonment sentence of at least two years to apply the complementary punishment, in case of fine or suspension of sentence under supervision, the complementary punishment of prohibiting the exercise of rights **begins from a final conviction decision.**

In the current regulation the complementary punishments are particularly development in content, and also as number by introducing "the sentence publication" as complementary punishment.

Publication of the final sentence, as new complementary punishment, develops the court's capacity to draw the public and offender's attention with a clear message of justice, as well as satisfying the injured party regarding the moral readjustment due to him from effects of carrying the offense.

As historic element we can show that publication of the sentence recurs in our country, following to this measure the reassessment in the Penal Code of 1936 (Articles 61 - 62) when it applies only to the legal person.

Furthermore, regarding the military degradation we consider that many problems in jurisprudence should be solved, at some of them a unitary solution not being applied for the moment.

Since the complementary punishment for rights prohibition requires an extensive, thorough, detailed analysis, we will limit our analysis only upon complementary punishment of military degradation and the new complementary punishment, respectively the publication of the sentence in case of individuals.

1. Military Degradation

1.1. Definition and Punishment Content

In accordance with art. 69 in the new Penal Code, the complementary punishment for the military degradation consists in the loss of military degree and the right to wear uniform from the moment the sentence becomes final.

The military degradation is compulsory applied to military prisoners in active military service, reserve or retired, if the main penalty imposed is imprisonment exceeding 10 years or life in prison.

The military degradation can be applied to military prisoners in active military service, reserve or retired for crimes committed with intent, if the main penalty imposed is imprisonment for at least 5 years and not more than 10 years.

The military degradation is a complementary punishment that applies in case of committing criminal acts of extreme gravity.

In the first paragraph of the commented text, the legislator identifies the subject of legal compulsion for the application of this complementary punishment.

The gravity of this punishment provided that over time, in some cases, was regulated even as the main punishment. According to art. 253 in the Military Justice Code in 1873 (in force until 1937) the punishment was ... "by military degradation.. fraudulent stamps and seals usage, etc ... harmful to the state or military rights or interests".

Since by Decree no. 212 dated June 17, 1960, Art. 481 in the Code of Military Justice in 1937 was repealed, Articles 62 item 1 and Article 62 item 2 were introduced in the 1968 Penal Code, by

which the military degradation punishment was applied; in the first article the military categories of all grades and crimes were enumerated. For which, in case of conviction, the military degradation was imposed, and in the second the military degradation[1] effects were presented.

The 1968 Penal Code brings modifications to simplify and clarify its rules, stipulating by art. 67 para. 1 the content and effects of military degradation. It also establishes for the first time the mandatory and voluntary nature of military degradation.

Must be seen the fact that, firstly, there was a resignation of the system for the crime determination to which the military degradation can be applied by the enouncement of their juridical qualification, adopting the punishment value criterion.

Second, the unfair legal treatment was removed, preserving in our criminal law, the provision under which the complementary punishment of military degradation will apply to reservists as well. It was taken into account the fact that it was not just that for the same criminal act a military should be punished, besides the main imprisonment, also the military degradation, and the reservists to perform only imprisonment, maintaining their level of military under reserve. In the application of the military degradation the reservists were assimilated with active military personnel, because the gravity of the acts committed imposes in their case as well the application of the complementary punishment in debate[2]. In the 1936 Penal Code, the military degradation, as it was regulated in art. 62 item 1 and 62 item 2, was applied only to military reservists.

The result is that the military degradation effect – alienation from the army and the loss of military degree for the active military, as well as for the one in reserve, was regulated for the first time in the 1969 Penal Code.

In doctrine, till the enforcement of the 2009 Penal Code, there were numerous discussion according to which there is another regulation, besides the provisions in art 62/1 and 62/2, more precise the military categories to whom this complementary punishment can be applied, that needed certain explanations due to the evident legislative incompliance.

Practically, it is related to the provision comprised in art. 69 Law no. 80/1995 regarding the military statute[3], revised and completed, which holds the basis for the application of the military degradation in accordance to the conditions foreseen in the penal law to active military, in reserve or retired personnel, condemned by court order to the complementary punishment of military degradation.

According to the mentioned text, there are 3 categories of military personnel to whom this punishment can be applied, that is: active military, military in reserve, and retired military personnel.

Unlike the provisions of art. 67 paragraph 2 and 3 Penal Code results that together with the enforcement of Law no. 80/1995, the military degradation was also applicable to the retired military personnel.

The term "retired military" is explained in art. 42 Law no. 80/1995, including, first of all, the active officers and in reserve, as well as the warrant officers and reserve officer that exceeded the degree age limit for third class in reserve, foreseen in art. 92 and 93, and second, the officers, warrant officers and active officers or in reserve, rated by the medical-military expertise commissions as "unfit for military service, with changes in the military statute".

A first problem that needed to be solved is if by such law the regime of a certain punishment already foreseen in the Penal Code could be regulated.

The doctrine opinion was affirmative; in the meaning that article 72 paragraph 3 letter f in the Constitution foresees that punishments are regulated through organic law. Nevertheless, Law no. 80/1995 is an organic law, because according to art. 117 paragraph 2 in the Constitution, the statute

[1] VASILIU T. şi colab. - The Penal Code of Socialist Republic of Romania, commented and completed. General Part – Stiintific Publishing House, Bucharest, 1972.

[2] BULAI C.- Romanian Penal Law. General Part, volume II, - Sansa Publishing House, Bucharest, 1992.

[3] Law no.80/1995 was published in the Of. G. no. 155/1995.

of military personnel is established by such a law and the regulation of certain aspect related to the complementary punishment of military degradation is in accordance to art. 72 paragraph 3 letter f in the Constitution.

On the other hand it should be noted that the law on the military personnel statute is a non-criminal law, but nothing prevents such law to include provisions of criminal nature as long as it is an organic law, since the Constitution does not contain any provisions by which punishments are to be regulated only through organic laws of totally criminal nature.

In the previous expressed opinions, the correlation would regard, first, the adding of a retired military personnel as a third category to which the complementary punishment of military degradation can be applied, together with military personnel and reservists.

Moreover, it was considered that the expression "military and reservists convicts" comprised in art. 67 in Penal Code should be replaced with "active military personnel" and with "military personnel in reserve", which are widely explained in Law no.80/1995. This change was considered necessary since the term "military" has a wide meaning, if we consider that it refers to all military personnel[4] in general.

It appears that the legislator of the 2009 Penal Code took into account all these unconformities and introduced for the first time in the legal standard the provision according to which "military degradation is compulsory applied to active, in reserve or retired military convicts".

Military degradation is a complementary punishment which consists in the loss of the military degree and the right to wear the uniform.

This punishment has a limited application regarding the offender, the law naturally limiting this punishment application to military personnel and reservists.

The application of the complementary punishment of military degradation is done in case of committing criminal acts with high degree of gravity.

The military degradation punishment is a deprivation of rights punishment, which means the loss of the mentioned rights, unlike the complementary punishment of prohibiting certain rights, which is a restrictive punishment, consisting in a suspension, reducing the applicability of certain rights for a certain period of time (from 1 to 5 years), but not their loss. Thus, the convict is forbidden certain rights expressly foreseen by the law.

The military degradation punishment, under its execution, has a negative content, the execution of this punishment leading to a passive attitude imposed by law to the convict. He is not constrained in doing something; on the contrary, he is forbidden certain rights[5].

From the nature and content point of view, the military degradation is a determined punishment, in the meaning that the law expressly foresees the object upon which the juridical constraint is realized. The text of art. 67 paragraph 1 in Penal Code clearly mentions which rights are lost, thus limiting this punishment.

With deprivation of specific civic rights, this punishment can be applied only to people who own these rights upon conviction[6], namely employed military officers or in reserve. By explicit establishing of the lost rights as a following to the military degradation, the offenders to whom it becomes applicable are determined, namely active or in reserve military, meaning those who usually are granted the right to wear military degree and uniform. Regarding the reservists, we consider that this complementary punishment can sometimes affect only the loss of the military degree, the loss of the right to wear uniform or not being granted or not by the retirement Order. In this respect, we consider that if the retirement order does not confer the right to wear the uniform, the applicability of the complementary punishment of military degradation will only consist in the loss of the military

[4] BUTIUC C. –Military Degradation. Un-correlations – in RDP no. 4/1998, page 37-39.

[5] DONGOROZ V. si colab. –Theoretical explanations of the Romanian Penal Code. General Part – volume II, second edition, Academia Romana Publishing House, Bucharest, 2003.

[6] Appeal Court Bucharest, penal decision no. 55/2000, in T. Toader, Penal Law. General Part, page 116.

degree. We consider that the situation is not conferred by the Order of the movement in the right to wear the uniform; the complementary penalty of military degradation will only consist in the loss of the military rank.

The complementary punishment of military degradation consisting in the loss of military degree and the right to wear a uniform, consists in the loss of any military degree, including the soldier one, because this is a military degree and it assumes the right to wear the uniform[7].

If this quality got lost during the activity, by changing the police or penitentiary personnel statute, this complementary punishment can only be applied for the reserve or retired[8] periods. The loss of the military degree amounts some material effects regarding its financial value to be paid till the moment of the rights loss, rights granted for life to the owner. The financial value consists in salary/pension for the military, but also additional income due to military degree. The Penal Code does not contain any mention regarding the loss to the pension right, this problem being fixed by the regulations regarding the pension, where it is clearly foreseen that the right for pension is lost by the one convicted for military degradation[9]. The loss of the right to wear a uniform is referring only to retired or reserve military to whom was granted this right as recognition of personal merits during service. Furthermore the right to wear **only** the military uniform of the service where the military personnel served is regarding its use to special ceremonies and during national holidays, wearing the uniform in different environments being prohibited.

The punishment of military degradation, even if applicable beginning with the decretory conviction **has an absolute privative character,** the punishment of military degradation being taken for undetermined period. By Law 80/1995 art. 71-72 the possibility to overrule the complementary punishment of military degradation by another court decision containing the acquittal or this punishment no longer applies is foreseen; in this case the possibility to re-grant the military degree and change of the military status exists. From here we can see that the effect of the military degradation and the loss of the right to wear uniform are applied for life.

Different opinions were expressed in specialty literature regarding the perpetual and definitive character of military degradation. In this sense, some authors affirmed that complementary punishment of military degradation is definitive and has **perpetual character,** because is valid forever, even after rehabilitation[10].

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[7] Appeal Court Bucharest, section I penal, decision no.42/A/1997.

[8] **Military Court Timişoara, s.p. 125 dated 20.10.2004,** declined his competency for the cause settlement complaint against N.U.P. resolution in favor of Arad Judicature, and this by civil sentence no. 2561 dated 17.12.2004 declined the competency in favor of Military Court Timisoara with the motivation that the provisions of article 40 Penal Procedure Code are applicable, with the motivation that the military capacity loss previous to the crime performance does not change the court competency, the military court remaining competent, if the deed is related to offender's job description, as in the case presented.

For the competence negative conflict settlement was taken into account the fact that after 90 days from October 3, 2004, when Law 293 dated 30.09.2004 was enforced, the entire military personnel (where the offender was incorporated) form the Penitentiary General Division and the units respondent to it were demilitarized, being granted the public servant statute in the system of the Penitentiaries National Administration.

Î.C.C.J., d.p. 1052 dated 14.02.2005, established the competence in favor of District 2 Judicature, because if some crimes committed by the military personnel maintained in the military instances competence, after the enforcement of Law no. 293/2004 the active law would denaturize, as well as the juridical regulations that follow the adoption of national legislation to the European Commission Legislation.

The provisions of art.40 para. 1 letter a) Penal Procedure Code are not applicable, because they assume the loss of a capacity owned at the date of the crime performance to be liable to other reasons than the legislator will.

[9] OANCEAI. –Penal Law. General Part – Didactica si Pedagogica Publishing House, Bucharest, 1971.

[10] DOBRINOIU V., BRANZA W. - Penal Law. General Part – Lumina Lex Publishing House, Bucharest, 2003, page 429; BASARAB M. and co.,- Penal Code commented. General Part, - Hamangiu Publishing House, volume I, Bucharest, 2007, page 379; BASARAB M.- Penal Law. General Part, Discourse – Lumina Lex Publishing House, volume I, Bucharest, 2005, page 288; VASILIU T. and co. - Penal Code of Socialist Republic of Romania, commented and completed. General Part – Stiintific Publishing House, Bucharest, 1972; BULAI C., BULAI B. –Penal Law

Opinions were mentioned about the nature and its content, the military degradation is a determined punishment, and under its duration is a perpetual punishment, in the meaning that the law does not foresee the limit of its duration, the convicted being expelled from the army in a definitive way and losing his military degree[11]. It was considered that the effects of military degradation continue to exist even after the convicted rehabilitation, because, as the law foresees, the rehabilitation is not followed by the obligation to be reinstated in the position held prior to conviction or to be called in the army permanent existent personnel, or to be granted the lost military degree[12].

We approve the opinions according to which the complementary punishment of military degradation **does not have a definitive and perpetual character,** because by rehabilitation, the convicted to this punishment regains the right to accede to the military position by following the steps required by the law[13]. Thus, we consider that after rehabilitation the convicted becomes up for accession to the military position.

Considering the fact that the court cannot cleave the punishment content when it application is performed, the military degradation has a punishment character with irreducible content, the rights foreseen in the text forming an impartible complex of rights.

2.2. Applicability conditions

The military degradation has a compulsory or discretionary character.

According to art.69 para. (2) in the new Penal Code, the military degradation is **compulsory** applied in the case this complementary punishment is applied together with the main punishment, that is imprisonment for more than 10 years or imprisonment for life[14].

The **discretionary** application, art. 69 (3) in the new Penal Code, can be decided by the court, in the case of military convicts that committed the crime with **intent**, the main punishment being of at least 5 years and not more than 10 years. The discretionary character of this application is *ex lege*, stipulating that military degradation "can be applied".

It must be noted that, unlike compulsory military degradation, which is conditioned only by the crime quality and the amount or the nature of the established main punishment, the discretionary degradation is conditioned by the subject quality, the crime type and the amount of the main custodial sentence set by judge. In this respect, imperative conditions are required, namely: application of a custodial sentence established by the court and its execution to the form of guilt.

The complementary punishment of military degradation is applied regardless the existence of a certain relation between crime and military position and independent to the case where the offender was or was not in a military position at the date of the crime committal, important being for the subject to have a military position at the time of the conviction. There were many opposite solutions, unfortunately, in jurisprudence, this punishment being automatically applied together with imprisonment for more than 10 years, regardless if the defendant had or not the active or reservist military position[15].

Manual. General Part – Universul Juridic Publishing House, Bucharest, 2007, page 319; BOROI A., NISTOREANU GHE.- Penal Law. General Part according to the new Penal Code, fourth edition, All Beck Publishing House, 2004; PASCU I. –Penal Law. General Part – second edition, Hamangiu Publishing House, 2009, page 371.

[11] ILIESCU N., in DONGOROZ, - Theoretical explanations of the Romanian Penal Code – volume II, second edition, page 90; The Supreme Court of Justice, penal section, decision no. 366 dated February 13, 1998.

[12] BULAI C., BULAI B. – Penal Law Manual. General Part – Universul Juridic Publishing House, Bucharest, 2007. page 320; BULAI C.- Romanian Penal Law. General Part, volume II – Sansa Publishing House, Bucharest, 1992.

[13] HOTCA Mihai Adrian –Penal Law. General Part – C.H. Beck Publishing House, Bucharest 2007, page 583; BASARAB M.- Penal Law. General Part. Discourse – volume I, Lumina Lex Publishing House, Bucharest, 2005, page 288.

[14] Appeal Court Bucharest, Section II penal, decision no. 13/2004, Practica judiciara penala 2006, pag.86;

[15] Penal Section, no. 114/2009, not published; Appeal Court Ploiesti, penal decision no. 185/A/1998, commented in CRISU S and CRISU E. –Penal Code completed with judicial practice 1989-1999, Argessis Print Publishing House, 1999, page 204.

Being conditioned not by the main punishment foreseen by law, but by the main punishment established by the court, the military degradation was not registered in the incrimination special standards, as the prohibition of certain rights[16] has been registered.

The complementary punishment of military degradation can be established by the military courts and by the civil courts (when they are trialing crimes performed by the offender before having obtained the military position).

Being conditioned by the amount of the main punishment to which it is added, the legislator did not foresee the military degradation for the different crimes attracting the application of this punishment.

What must be remembered is the fact that the military degradation, as well as the prohibition of certain rights complements the main punishment when the court appreciates as necessary the replenishment of direct repression and is functioning together with the main punishment, sometimes for the same crime being applied more complementary punishments (for instance, in case of real crimes, different complementary punishments or even the same type of complementary punishments but with different content, are applied together with the custodial punishment to be executed by the convict). Ultimately, the complementary punishments regarding the penal sanctions as main punishments, answers to the general prevention and special prevention functions, in a greater extent for the latter, the convict executing the complementary punishment being put, in certain cases, in the situation of not committing another crime.

Execution of military degradation takes place immediately after issuing a final conviction sentence, the loss of military degree and the right to wear a uniform, becoming valid from the moment in which the conviction decision becomes *res judicata*, a situation presented as a rule exception case, according to which the complementary punishments start after completing the main custodial punishment to which is added[17].

2. Sentence Publication

In accordance to the provisions of art. 70 in the new Penal Code the publication of a final sentence can be issued at any time, considering the nature and gravity of the crime, the circumstances and the convict, the court considers the publication will also help to prevent the perpetration of other crimes.

The sentence decision is published in an excerpt, in a regional or national newspaper, once. The final conviction sentence is done on the convict's expense, without disclosing the identity of others.

2.1. Concept and Punishment Content

For the first time in our penal legislation the possibility of publishing the definitive penal decision in case of natural people is institutionalized, not having a correspondent in any of the precedent regulations. This complementary punishment, in the previous Penal Code, was foreseen, in a specific frame, only for legal people.

By the establishment of these complementary punishments the increase of the justice's message efficiency was expected, but also to provide moral readjustment to the injured person[18].

However, the Penal Code aims to provide the judge a wide range of measure that, by flexibility and diversity, can allow a better judicial individualization. Thus the incidence of complementary punishments, the number of rights contained in the punishment were significantly

[16] UNGUREANU A. - Romanian Penal Law. General Part – Lumina Lex Publishing House, Bucharest, 1995.

[17] GIURGIU N. –Liability and Penal Law sanctions – Neuron Publishing House, Focsani, 1995, page 114; VOLONCIU N., MOROSANU R., Penal Procedure Code commented – Hamangiu Publishing House, 2007, page 47.

[18] HOTCA M.A. –The new Penal Code and the previous Penal Code. Different aspects and transitory situations – Hamangiu Publishing House, 2009, page 74.

extended, and a new type of punishment was introduced, respectively the publication of the definitive conviction sentence[19].

The conviction sentence is **established by the court** taking into account the nature and gravity of the crime, the circumstances and the convict, in relation to its effectiveness to prevent the perpetration of such crimes, but also to provide moral readjustment to the injured person.

We consider that this punishment must be applied for the crimes with high gravity, which attract public disapproval, without making use of its implementation together with crimes of lower gravity. The basic argument of this reasoning lies in the fact that applying this punishment including crimes with lower gravity has as consequence a harder reintegration in the society of the convict, despite the positive effects in term of punishment goal.

Publication of the sentence is a great **moral punishment** with powerful intimidating effect if the offender is notorious in the respective region; the criminal deeds produced a major impact at public opinion level or in the case where the nature and gravity of crime presented high interest to the community. In such situations, the sentence publication has a greater effect regarding the convict, but by the power of example the case can contribute to the prevention of such crimes.

The complementary punishment of the sentence publication is a penalty involving loss of civil rights, the convict being disapproved by the public. Such sanction can have a strong discouraging effect, forming a real denigration made on personal expense, meant to warn the public opinion about the convict's criminal activity.

In this respect, the complementary publication of the conviction sentence is a punishment with positive effects in terms of punishment goal, altering the image of the convicted person. It is a punishment that provides a strong general prevention, taking into account the prevention of committing new such crimes.

2.2. Application Conditions

Punishment is applicable for intended crimes and for crimes on guilt and it regards all natural people with penal liability, and there are no individuals excepted from this punishment. The sanction has discretionary character for the court, its application being debated from case to case, according to the crime nature or gravity, the circumstances it occurred in and the potential impact of the negative publicity made in this way[20].

The court may decide to publish the sentence in excerpt, in a form in which the content is clear and understandable to the public, in a very visible form of exposure and impact (on the first page, with a certain print format, pre-established letters size or table), within the pages of a regional or national newspaper. Regarding the display, it is obvious the legislator refers to the way the natural person is obliged to ensure the sentence decision display, respectively the announcement format, the dimensions must be established as to allow the announcement observation and reading by the people reading the regional or national newspaper. In order to achieve the sanction finality, the publication should include a brief presentation of the facts, as it was apprehended by the court, as well as the elements of the decision.

Unlike the complementary punishment of the displaying or publishing the conviction decision in case of legal persons which are made on a period of one to three months, in case of a natural person it will be published once. This way, the legislator characterizes this complementary punishment as determined punishment, although it appears to be an undetermined punishment.

Publication of the conviction final decision is made on the convict's expense.

Publication of conviction sentence must not prejudice the injured subjective rights, reasons for which by the sentence publication cannot be revealed the injured people identity, except the cases where the agreement of the injured or his/her legal representative agreement exists. The law also

[19] Reasons report of the new Penal Code, published on the Representative Chamber site – http://www.cdep ro/proiect/2009/300/00/4/em304.pdf.

[20] ANTONIU G. and co.- The new Penal Code – volume III, C.H.Beck Publishing House, 2008, page 189.

regulated the situation when in the circumstances more people are involved, being also protected regarding their right to a personal life, their identity not being revealed.

This complementary punishment for natural people is new, so the courts are about to develop their practices in the situations where such penalty can be applied together with the main punishment. The efficiency of such complementary punishments for legal people, represented by natural people, led to the conclusion of the measure application straight to the responsibility of the natural people.

The conviction sentence publication is enforced by sending the extract in the form established by court, to a regional newspaper appearing in the district court that pronounced the sentence, or to a national newspaper for publication, on the convict's expense.

Considering the provisions of the Penal Code foresee the application of complementary punishments in the situation where the main punishment is imprisonment and in the situation where the main punishment is a fine, we consider as necessary the introduction of the regulation regarding the prohibition of exceeding by publication costs the value of the fine applied to the natural person for the committed deed (source of inspiration could be the provisions in art. 131-35 French Penal Code).

In case of malevolent punishment failure, the judged assigned with its execution can consider fulfilled the constitutive elements of the penal sanctions non-performance crime foreseen and punished by art.288 para. (1) Penal Code, crime punished with imprisonment from 3 months to 2 years or with fine. According to the provisions of art.554 Penal Procedure Code he may approach the court that will proceed according to the provisions of art. 595 and art.596 Penal Procedure Code.

Conclusions

The new Penal Code aims to provide the judge a wide range of measures that, through flexibility and diversity, can allow a better judicial individualization. In this respect, the incidence was significantly extended for the complementary punishments and the number of rights under the punishment content, and a new type of punishment was introduced, respectively the publication of the conviction final sentence.

This complementary punishment for the natural people is new, so the courts are about to develop their practices in the situations where such penalty can be applied together with the main punishment. The efficiency of such complementary punishments for legal people, represented by natural people, led to the conclusion of the measure application straight to the responsibility of the natural people.

We consider that the regulations enforced by the new Penal Code regarding the complementary punishments are meant to ensure a better punishments' individualization, so as to avoid as far as possible the non-unitary solutions of jurisprudence.

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CRIMINAL ACTS PREPARATORY TREATAMENT IN COMPARATIVE LAW

OANA ROXANA IFRIM[*]

Abstract
Acts preparatory treatment shows a very high importance. Romanian Penal Code adopted system unpunished preparatory acts, but there are times when preparatory acts are similar attempt or offense consumed when they present a danger to society mare. Legal regulation preparatory acts is preventive in relation to more serious offenses and multiple would be committed. Author aims to make a foray into time on the treatment of criminal preparatory acts.

Keywords: *legal treatment, preparatory acts, preparatory acts punishing*

Introduction

Preparatory acts usually are not charged other than possibly as an independent crime (which is the solution to Romanian law), consideration of this issue is of great scientific and practical interest.

It's known that old French law did not distinguish between the act Junior and enforcement act serious offenses (atrocious) such as crimes against the monarchy, parricide, poisoning. Jousse shows that if the monarch is punishable, acts committed against criminal thoughts and proved by witnesses or the offender's recognition.

For less serious offenses (simple) distinguish between proximus and conatus conatus remotus and acts more gentle closer than offense punishable consumed and not punishing the most remote at all. In France, doctrine and jurisprudence, in a spirit of schools punishing criminal acts preparatory class tend to interpret doubtful cases in favor of the delinquents sometimes, for example, qualify as acts committed by these preparatory acts, even if the acts were actually performed.

Donnedieu de Vabres, in Traité de droit criminel[1], noted in turn that there are two tendencies in the interpretation of the document preparation, an objective trend that justifies criminalizing preparatory act only within the state of the external manifestation was creating a threat to social values and the second was a subjective tendency considers the outward manifestation as a symptom of criminal personality, in this vision does not interest but determining the degree of social unrest was manifested in early danger of executing the offender, it must be punished as severely as would be consumed offense

Pradel[2] also emphasize the objective weight of distinguishing, in some cases, if we face a preparatory act or an act of execution. For instance, the thief caught in the door when you call the victim's home to check whether it is home or not, commits an act of preparation (scot) or executing an act of the theft (punishable)? Salvage, p.35, the author argues that the central problem is to determine how the external manifestation is necessary to attract criminal liability. Soyer, in the same news shows that the key problem is to determine the minimum beyond which crime crackdown should intervene.

In one case (Sconfield) the offender was convicted of attempted arson because he brought a candle and matches in his own house with the intention of fire, the court discussed this opportunity

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[1] Donnedieu de Vabres, in *Traité de droit criminel*, Edit. Sirey, Paris, 1947, p.128-129.

[2] Jean Pradel, Droit penal general,Cujas, Paris, 1991, p.121.

where you can go to punish past acts consumption, not to give a general solution to this issue. In a design inspired by the German doctrine of the last century is considered that only the actual consumption of the act would involve a disorder of the rule of law and justifies the criminal liability of the perpetrator. This vision is part of an expected limitation of extreme liberal view of state intervention in the relations with citizens only to situations where such intervention would be rendered absolutely necessary by fundamental social values that were actually harmed or jeopardized.

Such a solution was not accepted by any modern legislation but sustaining that past experience and requirements that a claim of rational criminal policy sanctioning the acts of execution interrupted early or did not produce any effect, because these acts can include the germ of the result. He reasoned that it would be dangerous for the criminal law to punish only the consummated crime unprotected citizens leaving the threat of serious and imminent danger, but even such a definition excludes the criminalization and punishment of preparatory acts. Criminal law should intervene even before consumption when there is a concrete danger that time of the act to achieve the result that the legislature wants to prevent (Saleilles).

In such a view is considered necessary that social values should be protected not only after they have been made a touch and to avoid repetition of such attacks, but even before the consummation of the offense, when it profiled only possibility of such hazardous results (damage potential) and to avoid turning this possibility into reality. Such facts lead to a social alarm and disorder as high as fait (Kohler). From another perspective it was argued that the modern state must punish not only immoral act reflecting an offense will result caused a relevant criminal violation of the precept that the actual act but did not reach the drinking scene, because in this case but otherwise the rule violated the precept was made. If, for instance, the precept of the rule relating to the fait accompli of murder is "not kill" if the act preparatory to murder rule violated the precept is "not trying to kill."

Subjective theories (especially the positivist school) have proposed mandatory punishment of preparatory acts and all crimes as acts preparatory revealing the intent to commit criminal offense also makes clear the dangerous person regardless of offense (unlimited criminalization of acts preparatory solution) This position was developed by the Italian positivist school (Ferri, Garofallo). In any event outside its design faces an offense dangerous revealing the author (action was considered a symptom of individual hazards) would be justified to make any distinction between those acts and committing the offense. Moreover, the risk of the individual relevant issues of fact are identical with itself and insusceptible of graduations and quantitative assessments would not legitimize the existence of different limits of punishment for past acts of crime consumed relative to consumption. This solution was justified and other arguments, supporting it, the cell, the mere manifestation directed towards producing results include in it a threat to reach the goal of the act or the willingness to consume in such acts pose a threat already evident in such a time representing a rebellion against the collective will of the individual.

Such a design feature of the willingness of the criminal law (as opposed to the outcome of the criminal law) was rightly criticized because it undermines individual liberties and guarantees attempting therefore legal security of citizens. Although subjective theories were advocated unlimited criminalization of preparatory acts, in fact most authors have located the positions of these theories have acknowledged that criminalization could not be extended to crimes and light (so unlimited criminalization sentence and turned to accept the solution here limited criminalization of preparatory acts). On the way to punish preparatory acts, subjective theories parificării penalty system occurred on the ground that it presents the danger that the perpetrator is the same person whether it just be prepared or executed offense that led to the production performance results.

Criminalization of acts preparatory thesis argues the need to criminalize these acts taking into account the social danger they posed. Preparatory acts, it is argued in this opinion, creates conditions conducive to the perpetration ¬ laid down by the criminal law and thus should be included causal

history of socially dangerous resultment, although this result did not occur, creating a state of danger to the social value against which the act was to move ready. Criminalization and punishment of preparatory acts are therefore necessary, in the same design, just to prevent the perpetration and prepared to defend the social threat. In the criminalization thesis took shape, however, two views: one that supports the need to criminalize preparatory acts limitless, whatever the offense is ready, and another partisan of the idea of limited incrimination. According to this latter opinion, while recognizing that the preparatory acts therefore presents a danger and that in principle could be criminalized, it is considered however that such criminalization is required only for serious crimes because such crimes only harmful acts shall prepared[3] characteristic of the seriousness of the offense.

The legislature could consider that any manifestation directed towards producing an outcome of illicit acts by enrolling in all contributory to the results present the same danger as the result itself and as such production would always be criminalized even if not completed, but was interrupted or not and had its effect. Another solution would be that of the external manifestations of the perpetrator directed to the consummation of the infringement to be distinguished from those which are only preparing those committing the action is the actual execution of the crime. On the way to punish preparatory acts (if unlimited or limited shall sentence criminalization of preparatory acts) to be the solution proposed parificării prosecute acts of punishment that is prepared in the same range of punishment as a penalty offense diversification solution that is consumed or prosecute acts of preparation in lower limits of punishment for the crime than those consumed.

Authors were ranked objective theories have not considered it necessary to punish acts of training while not posing a danger to society is too far removed from the time of consumption, on the other hand, they do not enroll any causal history of crime consumed (non-accusing solution acts of preparation). Exceptionally was admitted even by those authors, that documents may be sanctioned training especially for extremely serious crimes like being treason, piracy and other overhead.

It is also accepted idea that the preparatory acts would be punishable as a crime in itself. Romanian legislature ranked objective theory, considering that you would not be justified criminalization of acts preparatory to the crime. This solution was motivated by the argument that the acts of preparedness, objective, produce no social unrest, it does not violate the law are usually equivocal, there is no doubt that the author will continue to persevere in operation offense, it is in society's interest perpetrator to leave open the path of recovery and abandonment of criminal decision, on the other hand, preparatory acts are far from time consummation.

Unpunishment thesis argues, conversely, that the preparatory acts must not be criminalized because they remain outside the act and does not form the actual causal history of criminal outcome. The main argument of the thesis that the criminalization of preparatory acts is not indicated, however, is that they generally ambiguous character in the sense that it shows clearly what the author wants them, so that it could be argued that he quit at any time to commit the crime. Finally, it was alleged that the preparatory acts not only produce an actual injury, but the state does not create any danger for the social office to which they are moving, so if you would criminalize such acts were reach and thus reduced unnecessary penalties. In theory, even if one accepts objectives exceptionally punishment in some cases, preparatory acts, limits are always lower than the penalty for the consummated crime system (diversification).

Some limited criminal codes criminalize preparatory acts, eg the Bulgarian Criminal Code, the Hungarian Criminal Code, and other countries criminalize them indefinitely. Russian Criminal Code provides in art. 30 preparatory acts that fall under criminal law only when used to commit a serious or particularly serious crimes and only if the execution was not carried through the fault of the offender. Non-accusing rule is enshrined in the preparation of acts of criminal law, but she knows some mitigation, as in our law, like most European systems devote two situations in which these acts come to be criminalized[4].

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[3] Giusepeppe Bettiol,Diritto penale, parte generale, Padova, 1973, p.322.
[4] George Antoniu , Attempt, Pub. Daco-Română, 1997, p.186.

The two situations where we encounter preparatory act is treated as attempted, and the second assumption is that preparatory acts are treated as independent offenses. According to the provision of art. 173 par. 2 Penal Code., It is considered tentative and production or acquisition of means or instruments and take measures to commit very serious crimes against state security, and according to the first paragraph of that provision attempt to these crimes are punished. Exceptionally Romanian penal law to be upheld the criminalization of preparatory acts as autonomous crimes (eg possession of weapons and ammunition, explosive substances, possession of instruments for counterfeiting securities, possession of tools for fishing) by expanding the concept of act of execution and the acts which by their nature are acts of preparation (procurement, production means or instruments and take measures to commit a crime) when committed in connection with serious crimes, treason by helping the enemy, treason transmission of intelligence, espionage, fascist propaganda, illegal deprivation of liberty (173 par.2 Penal Code., art.189 al. Penal latter.) as well as some crimes specified in the code (Air art.1072 ff) or civil navigation Decree (D 443/1972), Art. Al.ult 123. .

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FEW PRACTICAL ASPECTS AND PROBLEMS REGARDING LAW NR. 202/2010

ALEXANDRA CRISTINA JIPA*

Abstract
We have analyzed the impact the introduction of art. 74¹ penal C. over a certain category of infractions, respectively over the economical nature infractions. Harmonization of such recent norms with the already existent legislative framework rises a series of questions and possible practical problems. Also, we have considered interesting to appreciate if such changes are sufficient or there is not a conflict between the punishments set forth by regulators for each of such infractions. Should the answer be yes, there should be considered the possible conciliation methods.

Keywords: *sanction, replacement, individualization, penal liability, prejudice.*

Introduction

Occurrence of law 202 gave rise to a series of legislative changes; from my point of view, the provisions keeping the attention and regarding an institution of great interest, are those provided in art. 74¹ penal C., as well as those in art. 320¹ penal. proc. C.

They both concern new methods for individualization of punishments, cases of punishment reduction or of replacement of the penal sanction with an administrative one. The first article (74¹ Penal Code[1]) does not benefit from a marginal denomination, yet it might be „cases of imprisonment punishment reduction or of application of another sanction".

A first element worth being analyzed is the legal nature of these two new institutions introduced by the regulator by Law 202/2010. We may not remember that art. 74¹ in Penal Code would have introduced a new attenuated circumstance, as they "define circumstances, qualities, states or situations accompanying the fact, contributing to the determination of the associated danger level, of the gravity and its qualification, or which relate to the personal situation of the doer, determining this one's associated danger, the kind of his fault and the incidence of the penal liability"[2].

To which extent could we talk about a replacement method for penal liability in case of art. 74¹ Penal Code? We know that the replacement of the penal liability may be unconditional when an

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[1]Article 74¹ Penal Code:

Paragraph 1- In case of committing fraudulent management infractions, scam, dilapidation, abuse in service for personal interests, abuse in service against public interests, abuse in service as also qualified as negligence in service, provided in the present code, or of economic infractions provided by special laws, by which a loss was generated, if during the penal pursuit or during trial, until settlement of the case in first instance, the defendant or faulty part integrally covers the caused prejudice, limits of the punishment provided by law for the committed crime being reduced to half.

Paragraph 2- In case the prejudice caused and recovered under the same conditions is up to euro 100,000, in the national currency equivalent, the fine punishment may be applied. If the prejudice caused and recovered under the same conditions is up to euro 50,000, in the national currency equivalent, an administrative sanction applies, which is recorded in the criminal record.

Paragraph 3- Provisions of paragraphs 1 and 2 do not apply if the doer had committed another similar crime, provided in the present code, within a 5 years interval from crime committing, for which it benefited from the provisions of paragraphs 1 and 2.

[2] Vintilă Dongoroz and colab., Theoretical explanations of the Romanian penal code, vol. II, p. 129, Editura Academiei Române, Bucharest, 2003.

infraction is non-incriminated and the nature of liability changes se or may be conditioned, in which case the replacement only operates if certain conditions are met; such form of conditioned replacement may compulsory operate by simply meeting the conditions required by law, or may be at the free choice of the court instance[3].

In the present case, I think we may say that paragraph 1 in art. 74¹ Penal Code represents a cause for punishment reduction, paragraph 2 thesis I constitutes a form of conditioned liability replacement and which only operates if the court considers so (it may not be replaced by a non-penal liability, yet the court may choose a fine in case of prejudice recovery), and regarding paragraph 2 thesis II, I believe it is possible to retain a non-equivoque for of penal liability replacement with an administrative liability form, replacement only operating as the intervention of the court being no longer necessary for the observation of such situation.

By the content of art. 74¹ Penal Code a series of infractions are set forth to which the present provisions are applicable, the doer's criterion being economic: to be more exact, it refers to those result infractions, provided in the penal code within title III (against the patrimony) and title V (against the authority) and which have caused a prejudice, a loss, on one hand, as well as to economic infractions provided in economic laws and which also caused a loss.

The cause for the reduction of the punishment limits to half, becomes functional for the above mentioned infractions only in case before the end of the trial stage in instance, the defendant or plaintiff covers the entire prejudice produced. On this case I believe that including the defendant in such provisions is excessive and that the regulator should have exclusively refer to the defendant, as it does not provide for the possibility of a solution at the end of the penal pursuit to consider art. 74¹ penal C.. I say this as art. 74¹ is part of Section II – Attenuating and aggravating circumstances and from the content of **art. 80 penal C.** it results that they may only be held by the court: „any circumstance kept as attenuating circumstance or as aggravating circumstance should be shown in the **decision**." The things are just the way they are as the legal individualization work is exclusively attributed to the court instance, and positioning such article recently introduced in Chapter V. Individualization of punishments from general side of the Penal code confirms such thing.

Paragraph 2 in art. 74¹ in penal C., comes with additional specifications setting forth the quantum of the produced prejudice, what punishment and sanction may be applied. Therefore, of the prejudice was up to Euro 100,000 in national currency equivalent, than in case the fine punishment **may apply**. Two observations should be made here: first of all the possibility and not the obligation of setting forth the fine punishment, as well as the fact that it is for the first time when the regulator sets forth a quantum into another currency than the national one in the content of the Penal Code. Practically, a recommendation for clemency is made in case of economic infractions that produced a prejudice covered by the end of the trial (reduction by ½ of the punishment limits) and which does not exceed the amount of euro 100,000. Case in which minimum one paradox is obvious: if the punishment limits are reduced by half, this refers to imprisonment punishments, as for this type of infractions there is not yet provided the fine punishment as alternative. But the regulator sets forth by the present article the possibility of applying the fine sanction, which alters from the legal point of view the provisions on the sanctions from each of the articles incriminating din such infractions, either from the Penal Code special part or from special laws. Practically, a change of the sanctions occurs, which is not provided in the legal content of the mentioned infractions. Nevertheless, mentions of the regulator are not exclusive, but exemplificative – „ (...) for some economic infractions as provided in the special laws".

The second thesis of paragraph 2 regards the situation when the caused prejudice does not exceed the amount of Euro 50,000 in the national currency equivalent, in which case an administrative sanction **applies**, recorded into the criminal record. This time not like in the previous thesis that „may apply".

[3] V. Dongoroz-op. cit., p. 192.

Moreover, in paragraph 3 a negative condition is provided, more exact the provision of art. 74¹ paragraphs 1 and 2 Penal Code do not apply if the doer benefited from these provisions within a prior five years interval before committing the present penal action. We have as elements: **a negative condition** circumscribed by **previously committing a similar infraction** within a **given term** and **for which the doer benefited from such institution.** In other words, art. 74¹ penal Code may apply in case it had not been applied for the same personal action for the same person for a similar act in the past 5 years.

The thing that remains unclear in this case is the interaction between this institution and other substantial penal law institutions, like the general individualization criteria: punishment limits from the special side, the social hazard of the action performed, the doer person and the circumstances attenuating or aggravating the penal liability (the situations of infractions, recidivism, aggravating circumstances and attenuating circumstances).

If in case of paragraph 1 it seem to yet retain from the court notifying with the case instance, with the same regime as a cause for punishment reduction by half, in case of paragraph 2 thesis II the other institutions that might be present in the case are automatically eliminated.

In situation of paragraph 1 it is clear that there will be started from such reduced limits of the punishment and the incidence of other norms of punishment individualization will be normally analyzed.

Regarding paragraph 2 thesis II, the faculty of applying a fine punishment is left for the court's choice which and in this case shall be able to make an analysis of all cases that might concur to the establishment of the punishment, such as to correctly individualize the punishment. For example, if there is observed that the defendant has penal antecedents (even if not for the same type of action) and/or in case there are aggravating incidents and circumstances from the general part, the court may pronounce an imprisonment punishment, which, should the defendant is also retained the attenuating circumstances and had covered a prejudice of up to Euro 100,000, may be subject to supervision.

Problems yet occur from the analysis of thesis II of art. 74¹, paragraph 2 penal Code: the regulator pronounces in the meaning that if the prejudice is less than Euro 50,000 and covered/recovered under conditions in the previous paragraph, then the court shall apply an administrative sanction. Practically, the court may no longer analyze any other incidental institution , is not interested if we have also aggravating circumstances retained and if, let's say, the defendant is recidivist. Regardless the situation, such a sanction to be further recorded in the criminal record will apply. It is clearly an arbitrary norm attacking the legality of the penal suit by cancellation of the legal individualization in such a case. If we also consider the fact that probably most of the economic infractions frame into this thesis, we will observe that therefore the regulator found it necessary to solve the problem of the celerity of the penal trial, impairing on the other hand its legality.

O also observe the fact that an obvious pecuniary discrimination produces: defendants affording to pay the prejudice shall benefit from this institution that becomes a real shield for a potential imprisonment punishment, and those not affording it, who could not find a job after the beginning of the penal pursuit or who had no possibility of obtaining a credit for covering the prejudice or who have no assets to sell in this regard, shall receive a liberty privation punishment as such infractions are not provided with the alternative fine punishment.

By the same law 202/2010 art. 320¹ in penal proc. Code was also introduced, called „Trial in case of guilt recognition"[4]. By the present article a distinctive procedure is regulated, applicable in

[4] Article 320¹ penal proc. Code.

Paragraph 1- Until beginning of judgment investigation, the defendant may personally state or by authentic writ that it recognizes the acts retained on the court notification deed and that it requests the judgment to take place based on the evidences administered during the penal pursuit stage.

case the defendant recognizes committing the acts recorded on the prosecution deed and requires for the judgment to be made based on the probation in the penal pursuit. This thing presumes the exclusivity of the already administered probation in the previous, the new evidences only possibly consisting in deeds of circumstantiation. In this case, the trial shall be solved with celerity – practical, upon the first judgment term, if there are no reasons to postpone - , and in case the settlement of the civil side involves administration of evidences, the case will be disjoint on this side. As effects, the court is held that under such conditions to pronounce the conviction of the defendant to a punishment of which limits will be reduced by 1/3 in case of imprisonment punishment and by ¼ in case of fine punishment.

There is spoken of a single type of court notification, namely by indictment, but I assume that such provision also apply in case the court kept the case for judgment in case of admitting a claim based on art. 278¹ penal proc. Code, giving another consideration to the probation in the penal pursuit stage, for example.

We have several conditions circumscribing this institution:

First of all, the moment until it might become applicable is clearly set forth by the regulator - „until the beginning of the judgment investigation". Any further moment brings the impossibility of invoking the incidence of art. 320¹ penal proc. Code in question.

Second of all, recognition should be complete, without reservation, aiming exactly the facts retained in the defendant's task and exactly as they were retained by indictment. Also, the defendant states that it does not intend to administrate other, from such rule exception being made for deeds in circumstantiation; yet the later ones may not be submitted unless upon the same moment, the postponement excluded for their submission, therefore as it results from the law's text.

Based on paragraph 3 of this article there is practically coming back to the rules for judgment investigation carrying on, the defendant is interrogated, after which the floor is given to the prosecutor and to the other parties on the case. A lack from the regulator is that it doesn't provide the institution available for the court in case the probation is considered as insufficient? There is a suggestion in paragraph 4 where it is said that „the court settles the penal side when, from the administered evidences results that the actions of the defendant are established and there are enough information regarding its person to allow the establishment of a punishment". Otherwise, I consider that the court may dispose, according to art. 332 penal proc. Code, the return of the case for remaking the penal pursuit.

Paragraph 2 – Judgment may only take place based on the evidences administered during the penal pursuit stage, only when the defendant states that it totally recognizes the acts retained on the court notification deed and that it does not request administration of evidences, except for the writs in circumstantiation it is able to administer upon this judgment term.

Paragraph 3- Upon judgment term, the court asks the defendant if it requests the judgment to take place based on the evidences administered during the penal pursuit stage, which it knows and acknowledges, proceeds to its hearing and then it gives the floor to the other parties.

Paragraph 4- The court instance settles the penal side when, from the evidences administered, it results that the actions of the defendant are established and there are sufficient information regarding its person to allow the establishment of a punishment.

Paragraph 5 – Should for settlement of the civil action administration of evidences be necessary before the court, its disjoint will be ordered.

Paragraph 6 - In of case settlement by application of paragraph 1, the provisions of art. 334 and 340—344 correspondingly apply.

Paragraph 7 - The court instance shall pronounce the defendant's conviction, who benefits from a reduction by 1/3 of the limits of punishment provided by law, in case of imprisonment punishment, and from a reduction by ¼ of the limits of punishment provided by law, in case of fine punishment. Provisions of paragraphs 1—6 do not apply in case the penal action aims an infraction punished by life detention.

Paragraph 8 - In case of petition rejection, the court instance continues to judge the cause according to the common law procedure.

In case there is necessary to administrate evidences regarding the civil side of the case, disjoint shall be disposed, such as the settlement of the penal trial to be not delayed by the settlement of the civil action.

In the paragraph before the last one the limits of reduction for punishments is mentioned in case of guilt recognition; what amazes is that the regulator uses a strict tone for the possibilities: to be more exact, it only refers to the possibility of conviction, not considering the situation of replacement of the penal liability or defendant's acquittal based on art. 11, point 2 compared to art. 10 letter b^1 penal proc. code, for example. In any case, it is established that the imprisonment punishment will be reduced by 1/3, and the fine by ¼.

These provisions are not applicable when for the infraction the court had been notified with the life detention is provided. What is not very clearly said is if this thing is also valid in case of infractions with life detention alternative punishment provided and that of imprisonment, bur from a first interpretation it would result that including in such situations, the provisions of art. 320^1 penal proc. Code may not apply.

When such a request belongs to the defendant and it is rejected by the court, judgment shall be carried out according to common law procedure, as mentioned within paragraph 8. Practically, only this way the restitution of the case to the prosecutor would be possible for remaking the penal pursuit, as the special procedure regulated by this article does not provide for such possibility.

Conclusions

There are several observations possibly brought to this new institution, but we shall concentrate, first of all, on the issues generated by its „crossing" with the penal law institution substantially presented in the first part of the study, respectively the one in art. 74^1 in Penal Code.

Practically, two different cases of reduction are established: one in the general part of the Penal Code by which the limits of the punishment are reduced by half, respectively a fine or an administrative sanction applies, and the one in the penal proc. Code by which the limits of the punishment are reduced by 1/3 in case of imprisonment, respectively by ¼ in case of fine.

There is no reason such cases wouldn't be cumulative; therefore there will be reached a series of situations when such reductions will cumulate in the same case, but what happens if they disappear from the penal Code. They shall be bringing the application of a fine instead of imprisonment punishment, the ones in the penal procedure code are decreasing such fine by ¼, but the infraction in question is only provided with imprisonment punishment, as in case of fraudulent management, for example?

The legal nature of the case provided in art. 74^1 penal Code is bivalent: on one hand it works as a special case of punishment reduction, and on the other hand it has a nature of penal sanction replacement with another, obviously more favorable (imprisonment is transformed in fine or an administrative sanction).

Starting from those above analyzed there can be said that such new institutions introduced by the regulator by Law 202/2010, activates on several ways:

On one hand, it favors the recovery of the prejudice in case of economic nature infractions, the same time acting in favor of the penal trial celerity; it reduces the punishment limits or even another punishment is chosen, like the fine or an administrative sanction applies.

No the other hand, a positive discrimination is made concerning the defendants; those who committed economic infractions, with prejudice recovered until the end of judgment, benefit from such institutions, unlike the other defendants regarding another type of infractions who may only benefit from the provisions of art. 320^1 penal proc. Code.

In conclusion, there may be said that such institutions seem to follow a penal vanguard's policy and tend to apply less severe sanctions for certain categories of defendants. There is an evident distinction made between this type of economic infractions and, practically, an evident attenuation of

the social abstract danger in such cases is intended. It is true that the provisions of art. 320^1 may apply regardless the nature of infraction (therefore not only to economic infractions), but also its effects are more reduced that in cases retained in art. 74^1 Penal Code.

Yet there cannot be denied that such provisions positively contribute to the celerity of the penal suit settlement and helps to achieve a lower volume of files recorded on the case of one instance.

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SANCTIONS WHICH OCCUR AS A CONSEQUENCE OF NON-COMPLIANCE WITH THE PRINCIPLE OF LEGALITY IN THE PENAL TRIAL

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Abstract
The legality principle represents a frame principle since its interaction with the other principles exceeds the simple connection with those. The legality represents the frame within and with the compliance with which all the other fundamental principles of the penal trial are realized. No other principle can be placed outside the legality, in same way in which any principle, no matter how important it may be, does not occur in any other way than according to the forms stipulated by law.Taking into consideration that the enforcement of the law is mandatory in criminal law procedures, as well as the obvious significance of the penal trial's principle of legality, it was absolutely necessary for the compliance with this principle to be doubled by numerous guarantees which, in the situations in which this fundamental rule has been violated, would become genuine sanctions referring not only to the procedural acts achieved with the law's violation, but also to the people who have not complied with the law as far as the procedural penal activities' unfolding is concerned.

Keywords: *the legality principle; procedural, disciplinary, penal and civil sanctions*

Introduction

In order to achieve its aims, the procedural activity may be regulated in such a way as to be in accordance with some leading ideas and rules. By principles (basic rules) of the penal trial we should understand those leading and fundamental ideas according to which the procedural system is organized and the entire criminal procedural activity unfolds.[1]

By means of the fundamental principles, which are at the basis of the penal trial in Romania, the same rules with general character on the grounds of which the entire unfolding of the penal trial is regulated are taken into consideration. The notion of fundamental principle can be understood only as a rule which lies at the basis of the entire procedural activities, therefore those rules which apply only to some phases of the penal trial cannot be considered as fundamental principles.[2]

Within the framework of the Romanian penal trial's system of fundamental principles, an important position is occupied by the legality principle (*nulla justitia sine lege*), exposed by the legislators in the provisions of article 2 line 1 of the Criminal Procedure Code: "The penal trial unfolds not only during the criminal prosecution, but also during the act of judging, according to the provisions stipulated by the law." Therefore, the penal trial's legality principle can be applied not only to the judicial authorities, but also to the parties, all the trial participants being obliged to respect the law during their activity.

Being a transposition on the private level of the general principle of legality acknowledged in article 1 line 5 of Romania's Constitution ("In Romania, the conformation to the Constitution, to its supremacy and to the laws is mandatory.") and having a true correspondent within the basic principles specific to the substantial criminal law (*nullum crimen sine lege, nulla poena sine lege*[3]), it is necessary to state that out of the basic rules of the Romanian penal trial its legality principle is the most significant. Even the placement chosen by the legislator – the legality of the penal trial being

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[1] N. Volonciu, *Criminal Procedure,* the Didactic and Pedagogical Publishing House, Bucharest – 1972, p.44.
[2] I. Neagu, *Criminal Procedure Treaty– General Part,* the Judicial Universe, Bucharest – 2010, p.69.
[3] C. Beccaria, *Dei delitti e delle pene* – 1764.

the first principle stated among the provisions of the Criminal Procedure Code – assures us once again of the importance of this fundamental rule.

In reasoning the statement expressed in the previous line, at the same time we refer to the Decision no. 783/12.05.2009 of the Constitutional Court. This instance has understood the importance of the penal trial's legality principle, declaring unconstitutional the provisions of article I point 185 of Law no. 356/2006 for the modification and completion of the Criminal Procedure Code, by means of which point 17^1 of line 385^9 of the Criminal Procedure Code has been abolished ("The decisions are prone to invalidation … when the decision is contrary to the law or when by the decision a wrongful implementation of the law has been made."). In this way, the motivation of the pronounced decision, "The court establishes that the abolition of point 17^1 of article 385^9 line 1 of the Criminal Procedure Code, by eliminating the possibility to criticize by means of the decree's second appeal on the grounds that it is contrary to the law or that a wrongful application of the law has been made, prevents the interested party from effectively valorizing the violated right. Actually, whenever the criminal law has been infringed upon, it must grant the interested party the possibility of demanding and obtaining the legality's re-establishment by means of the illegal decision's invalidation."

In the same time, the European Convention on Human Rights states that nobody can be deprived of one's freedom, with the exception of some cases and according to the legal ways. At the same time, according to article 6 line 1, as far as the penal charges made against one are concerned, "every person has the right to a just public trial in a reasonable term for its cause, judged by an independent and impartial court established by law." Equally important are the provisions of article 8 – the right of respecting the private and family life – which proves that "A public authority's interference in this right's exercise is not accepted unless it is stipulated by law."

The doctrine has highlighted that the legality is much more than an explicit principle of the penal trial, its extent actually covering the entire judicial activity included in the procedure norms. In this manner, the compliance with this principle is systematically verified by the judicial authorities that participate at the resolution of a penal cause, there being the possibility of invalidating the issued documents with the infringement of the legal disposition or with the restoration of the cause to the competent authorities for the respective documents' re-establishment. (e.g.: article 220, article 232, article 265, article 268, article 300 or article 332 Criminal Procedure Code)

From a certain point of view, the legality implies the foundation by means of law of courts of law, prosecutor's offices and criminal investigation authorities, as well as their activities' unfolding as far as the structure and the limits of the competence conferred by law are concerned. The norms which regulate these authorities' structure and limits are compulsory and any infringement upon these norms is to be punished.[4]

In this context, not only the Criminal Procedure Code, but also the special laws which equally represent judicial sources of the Criminal Procedural Law, consist of a series of dispositions which call for the necessity and compulsoriness of the compliance with law in the activity of justice's achieving, being in consensus with the principle *nulla justitia sine lege*, stated in article 124 line 1 of Romania's Constitution ("Justice is to be achieved in the name of law").

Therefore, Law no. 304/2004 concerning the judicial organization, in the norms comprised in article 2 line 1 demonstrates that "Justice is to be achieved in the name of law, it is unique, impartial and equal for everyone", restating the enunciation existent in Romania's Constitution.

A similar example can be observed in the contents of article 62 (the Public Ministry's Competences) of the same law where, in the second line, the following formulation can be found: "The prosecutors unfold their activity according to the principles of legality, impartiality and hierarchic control, under the Ministry of Justice's authority, *according to the law*", in this way the regulation presented by Romania's fundamental law within the framework of the stipulations of

[4] M. Damaschin, *Criminal Procedure*, Wolters Kluwer Publishing House, Bucharest – 2010, p.50.

article 132 being entirely restated ("The prosecutors unfold their activity according to the principles of legality, impartiality and hierarchic control, under the Ministry of Justice's authority"). It can easily be observed that the legislator, by intending to highlight the importance of the prosecutors' compliance with the law with respect to the specific activities' unfolding, has operated a slight completion of the stipulation recaptured by the fundamental law, by means of adding at the end the collocation "*according to the law*".

Furthermore, Law no. 303/2004 concerning the judges' and prosecutors' statute in article 2 line 3 stipulates that "The judges are independent, are to submit only to the law and they must be impartial", taking over the stipulations of article 124 line 3 of Romania's Constitution according to which "The judges are independent and are to submit only to the law." To an equal extent, according to article 3 line 1 of the same law "The prosecutors appointed by the President of Romania enjoy stability and are independent, according to the law.", this idea being reiterated also in the stipulations of art 64 line 2 of Law no. 304/2004: "In the solutions disposed, the prosecutor is independent, according to the conditions stipulated by law. The prosecutor can make an appeal at the Superior Council of Magistracy, within the framework of the verification procedure of the judges' and prosecutors' conduct, against the hierarchic superior prosecutor's intervention, in any form, as far as the penal pursuit's achievement or the solution's taking-up are concerned."

The principle of legality is also recaptured within the probation, a basic institution of the penal trial. Thus, the legislator has stipulated, in article 64 line 2 of the Criminal Procedure Code, that "The means of evidence illegally obtained cannot be used in the penal trial."

Not lastly, we also refer to the stipulations concerning the individual freedom established by Romania's Constitution where, in article 23 line 12, it is shown that "no punishment can be established or applied otherwise than under the law's conditions and on its grounds", and article 7 of the European Convention on Human Rights establishes that "nobody can be convicted for an action or an omission which, at the moment it had happened, had not been considered as a crime, according to the national or international right."

In this way, from a functional point of view, it is necessary that all the procedural documents, measures and activities to unfold according to the conditions stipulated by law, as guarantees of the accomplishment of the function for which they have been instituted. Their role and importance is overwhelming, because, by omitting to carry into effect some constitutive procedural acts or by carrying those into effect in other conditions than those stipulated by law, the just and through resolution of the cause can be negatively influenced.[5]

Taking into account the arguments exposed in the previous paragraphs, as well as the obvious importance of the penal trial's principle of legality, it was absolutely necessary for the compliance with this principle to be doubled by numerous guarantees which, in the situations in which this fundamental rule has been violated, would become genuine sanctions referring not only to the procedural acts achieved with the law's violation, but also to the people who have not complied with the law as far as the procedural penal activities' unfolding is concerned.

Procedural sanctions

Within the system of the special judicial guarantees, with the purpose of ensuring the penal trial's legality, the procedural sanctions are those which attract the invalidity of the procedural acts carried into effect with the law's violation and, sometimes, even the coercion of those who have violated the law to remake them according to the legality conditions. This type of sanctions really appear to be necessary during a just trial, within the conditions in which the application of the penal, civil or disciplinary sanctions does not produce direct and immediate consequences upon the validity

[5] B. tefănescu, *Judicial Gurantees of the Compliance with the Criminal Procedure Law as far as the Act of Judgment is Concerned*, Hamangiu Publishing House, 2007, p.112.

of the acts carried into effect with the law's violation in bad faith or by means of law abuse. The procedural sanctions represent actual procedural remedies which are meant to eliminate or to thwart the production of the judicial consequences if the law has been violated while the procedural activity has been fulfilled. [6]

By means of its multiple purpose, the procedural penal sanction constitutes an extremely important guarantee by means of which it ensures the functioning of the penal trial's legality in all its phases, due to the fact that it prevents the law's violation, sanctions it when it happens and continues to ensure the compliance with law throughout the penal trial's unfolding. Likewise, the procedural penal sanction also constitutes itself as an important guarantee as far as the purpose of finding the truth is concerned, due to the fact that the procedural acts carried into effect with the law's violation generate doubt on the truthfulness of the evidence administered abusively or arbitrarily and, as a consequence, on the correctness of the solution taken up in regard to the provisions of the penal or civil law.[7]

Contrary to the judicial sanctions of disciplinary, civil or penal nature, which are direct against the people who have violated the law with respect to the penal causes' resolution, the procedural sanctions refer to acts fulfilled with the law's violation. The means by which the procedural acts illegally fulfilled become invalid are: inexistence, incapacity, inadmissibility and invalidities.

*The **inexistence*** represents a category which is used to operate especially within the science of the criminal procedural law, the notion not being expressly regulated in the procedural penal norms. However, it is unanimously accepted that this law institution must get into action anytime the procedural acts have been elaborated by means of violating the essential conditions required by law for their existence or when they have been done by a subject who, legally, did not have the necessary competence. To that effect, it can be considered as being inexistent an ordinance of the penal action's setting in motion fulfilled by a judicial police authority or a court order fulfilled by a prosecutor.

As far as inexistence is concerned, due to the manner in which it had been formulated *ab initio*, the procedural act represents only a *de facto* reality and not a judicial one. The inexistent acts, presenting only the appearance of a judicial existence, will not be taken into account by any judicial authority and will not be able to produce judicial effects.

In this way, the inexistent procedural acts must not be rendered void nor must they become subject to any form of declaring them unavailable, the authority in front of which they produce setting them aside, as if they had never produced, considering them simply inexistent.[8]

*The **incapacity*** is a procedural sanction which interferes whenever a procedural act is not carried out within the peremptory term stipulated by law. The settlement of some imperative terms within the penal trial's unfolding ensuring the necessary actions' efficiency as far as the just resolution of the penal causes is concerned, foreshadowing in this way the achievement of the penal trial's aim.

In the Criminal Procedure Code, the incapacity is expressly regulated in article 185 where it is shown that, in the situation in which for the exercise of a procedural right the law stipulates a certain term, the non-compliance with it determines incapacity from the exercise of right and the invalidity of the act performed after its term.

The incapacity institution operates, as a procedural sanction, for example, when the complaint against the resolution of non-initiation of the penal prosecution or ordinance or, as the case may be, of the classification resolution, suspension or cease of the prosecution, has been stated after the expiration of the 20-day term after communicating to the interested people a copy of the ordinance or

[6] V. Dongoroz, *Criminal Procedure Course*, 2nd edition, 1942, p.167.

[7] N. Giurgiu, *Nullity Causes During the Penal Trial*, the Scientific and Encyclopaedic Publishing House, Bucharest – 1974, p.78.

[8] N. Volonciu, *Criminal Procedure*, the Didactic and Pedagogical Publishing House, Bucharest – 1972, p.224.

of the resolution (according to article 228 line 6, article 246 line 1 and article 249 line 2 of the Criminal Procedure Code). Moreover, according to article 278^1 line 8 letter a) of the Criminal Procedure Code, the court of law will reject as being tardy the complaint against the resolution of non-initiation of the penal prosecution or ordinance or, as the case may be, of the classification resolution, suspension or cease of the prosecution, given by the prosecutor, if the interested person has addressed to the competent court of law after the expiration of the 20-day term since the communication date of the rebutment solution ruled by the prosecutor, as a consequence of the previously made complaint's resolution, according to articles 275-278 of the Criminal Procedure Code.

In what concerns the crimes for which the law stipulates that a previous complaint is necessary, according to article 284 of the Criminal Procedure Code, the injured person or the person entitled to claim must introduce the complaint in term of 2 months since the day he/she has known who the perpetrator is. Non-compliance with the previously shown term will determine the application of the provisions of article 10, line 1, letter f) of the Criminal Procedure Code, the previously formulated complaint after the expiration of the 2-month term being tardily introduced.

Similar situations are also to be found in the case of the overdue appeal or recourse. In this way, according to article 363 line 1 and article 385^3 line 1 of the Criminal Procedure Code, the appeal's pronouncement term, respectively that of the recourse is of 10 days, if the law does not rule otherwise. In consequence, whenever the court will observe that these means of attack have been exercised after the expiration of the term established by law, the solution of the appeal's rebutment, respectively that of the recourse, as being tardy will be pronounced.

Nevertheless, in order to defend the procedural subjects' rights, by means of the term's reinstatement, the law has foreseen the possibility of suspending the passing of the term of exercising the appeal or recourse right when the interested party proves that the attack means' non-exercising has been caused by the existence of a solid impeding cause, and that the request has been made in at most 10 days since the beginning of the punishment's execution or of the civil reimbursements.

The overdue appeal and recourse institutions function with the same purpose. Thus, the party which was absent for all the trial terms, as well as for the pronouncement, can declare appeal, respectively recourse, even after the expiration of the term, but not latter than 10 days since the beginning of the punishment's execution – for the defendant – or since the beginning of the civil reimbursements – for the civil part and for the responsible party in the civil lawsuit.

Taking into consideration the conditions imposed by the legislator in such a way as the term's reinstatement and the overdue appeal, respectively recourse, to be able to be exercised by the interested parties, we can draw the conclusion that these institutions of criminal procedural law do not represent exceptions as regards the procedural sanction of the incapacity, but are real guarantees that those penal trial's participants, who found themselves in special situations of impeding or who could not defend themselves due to the fact that they had not participated to the cause's trial, will be able to take advantage of their procedural rights either in appeal or in recourse.

The incapacity distinguishes itself from invalidity for the simple reason that the invalidity refers to procedural acts, whereas the incapacity refers to procedural rights; the invalidity refers to a fulfilled act, whereas the incapacity regards an act that can no longer come into being because the term stipulated by law had expired.[9] Furthermore, the incapacity operates on the basis of law, whereas the invalidity must always be declared by a judge.

*The **inadmissibility*** is another procedural sanction which sometimes has an autonomous manifestation, however, in most cases being a consequence of the incapacity or of the invalidity.[10]

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[9] D. Pavel, The Aknowledgement of the Invalidity of the Actions Carried into Effect with the Legal Provisions' Violation during the Penal Trial, Romanian Magazine of Law no.9/1971, p.28.

[10] N. Volonciu, *Criminal Procedure*, the Didactic and Pedagogical Publishing House, Bucharest – 1972, p.225.

As well as in the situation of the inexistence, the inadmissibility institution is not specifically regulated in the Criminal Procedure Code, there being, however, numerous legal texts which use the notion and which refer to this sanction. In this way, with the title of example, we will mention he following cases: article 52 line 5^1 shows that it is inadmissible to challenge the judge who was to decide upon the challenge; article 278 line 2^1 stipulates that the complaint formulated against the rebutment solution ruled by the hierarchic superior prosecutor is inadmissible; as a consequence of the complaint's settlement against the prosecutor's resolutions or ordinances of non-arraignment, the court, according to the provisions article 278^1 line 8 letter b), will dismiss the complaint as inadmissible, maintaining the resolution or the ordinance; article 379 line 1 letter a) stipulates that the court dismisses the appeal if it is tardy or inadmissible, the same solution existing also for the recourse, according to article 385^{15} line 1 letter a); article 403 line 3^1 shows that the subsequent reviewing requests are inadmissible if there exist identity of person, legal grounds, motives and defenses.

As procedural sanction, the inadmissibility interferes whenever acts which are not stipulated by law or which are excluded by it are fulfilled, as well as in situations when procedural rights which had been exhausted by other procedural or non-procedural ways are being fulfilled.

Therefore, the appeal declared by the injured party with regards to the civil side of the cause is affected by inadmissibility, article 362 line 1 letter c) of the Criminal Procedure Code not stipulating this means of attack. Moreover, according to article 60 line 6 of the Criminal Procedure Code, any means of attack exercised against the decision according to which the Supreme Court of Justice rules referring to the change of venue will be inadmissible, and the dispositions of article 61 of the Criminal Procedure Code shows that a cause's new request for the change of venue is inadmissible, if it is grounded on the same circumstances which were set forth at the resolution of the previous request. To the same effect, article 42 line 4 of the Criminal Procedure Code stipulates that the court of law's decision of declining the competence is subjected neither to appeal nor to recourse.

In the light of the new modifications concerning the Criminal Procedure Code, regulated by Law 202/2010, the court will dismiss as inadmissible the appeal declared against the decisions pronounced by the county courts or military courts of law, in this way this means of attack starting to be able to be exercised only against the decisions pronounced by the territorial county courts and military county courts (article 361 of the Criminal Procedure Code).

In the same time, we believe that the procedural acts fulfilled by people who do not have a procedural tile in regards to the respective penal cause will be considered as being inadmissible. In this way, as far as the appeal's or recourse's institution is concerned, the court will have to dismiss as inadmissible the means of attack exercised by the people who do not find themselves in the situations expressly stipulated by law, according to the provisions of article 362 of the Criminal Procedure Code. A similar solution will also be ruled in the case regulated by article 278^1 of the Criminal Procedure Code, whenever the complaint addressed to the court of law had not been formulated by an injured person or by a person whose lawful interests had been prejudiced by the solution ruled by the prosecutor. In addition, the Supreme Court of Justice will dismiss a inadmissible the recourse in the law's interest which had not been promoted by the general prosecutor of the Prosecutor's Office of the Supreme Court of Justice, the conduct colleges of the supreme courts of law and of the courts of appeal, or by the People's Lawyer. Not lastly, as far as the challenge's institution is concerned (article 51 of the Criminal Procedure Code), the Court in front of which the challenge had been formulated will dismiss as inadmissible the challenge request which had not been formulated by any of the parties, as well as the challenge request which refers to other judges than those who are part of the law court. The challenge request directed against the same person for the same incompatibility case and for actual grounds presented to the court of law with respect to a previous request's formulation will also be inadmissible.

It can be said that the inadmissibility is similar to the incapacity, because both of them are sanctions stipulated by the law for the same situations when the fulfilled act is without right, the

difference being made by their happening times. Thus, in the case of the inadmissibility, the lack of right is *ab initio*, whereas in the incapacity case, the lack of right is a consequence of the non-compliance with the term. In the same time, inadmissibility, in contrast to the incapacity, will always determine the invalidity of the fulfilled act with the law's violation which, if it is declared inadmissible, cannot be remade.

The invalidities, considered as being the most important procedural sanctions, interfere whenever a procedural act, or a procedural activity has been realized without the strict compliance with law. As procedural sanctions, the invalidities affect the existent procedural acts, which had come into being by means of non-compliance with the legal provisions, by omitting or violating the forms stipulated by law.[11]

The invalidity, as a procedural guarantee, prevents the infringement of the provisions which regulate the penal trial's unfolding. Hence, it fulfills the role of ensuring the penal trial's legality because, without the recording of the invalidity sanction, the procedural norms would have an optional character.

As a procedural sanction, the invalidity can be directed against the procedural acts of any kind. In this way, the grounds for instituting such a procedural sanction is that which states that the fulfillment of a procedural penal act with the violation of the provisions which regulate the penal trial's unfolding can not come into effect, due to the fact that by overruling the content and form stipulated by law it could lead to wrongful settlement of the cause, one that would not encapsulate the truth.

Therefore, the invalidity operates in the case of the violation of the provisions which regulate the procedural acts' fulfillment, as well as in that of the violation of the provisions according to which the procedural acts' fulfillment is conducted. Generally, the invalidity of an in-court procedural act also determines the invalidity of a procedural act; for example, the judging of a cause by a court of law whose structure is contrary to the law, also determines the pronounced decision's invalidity.[12]

By comparing it with the other procedural sanctions, it can be observed that, while the inexistence, the inadmissibility and the incapacity determine the act's invalidity with the effect of impeding its subsequent resume in the penal trial, their action being especially destructive, the invalidity by constituting not only a sanction, but also a procedural remedy, normally implies, the possibility of repairing – sometimes even the remaking compulsoriness – of the corrupted act.[13]

The fact that, in the Romanian Criminal Procedure, the invalidities' existence as procedural sanctions is closely related to the existence of a procedural damage, damage which must have been produced by fulfilling an act in illegal conditions, must be highlighted.[14] Moreover, the damage notion does not refer only to injury of the parties' legitimate rights and interest, but it also extends to the just settlement of the penal cause.

For that purpose, in article 197 line 1 of the Criminal Procedure Law, it is shown that the violations of the legal provisions which regulate the penal trial's unfolding determine the act's invalidity only when a damage had been produced, a damage which cannot be eliminated in any other way other than by that act's annulment.

Therefore, besides the existence of a procedural damage, it must be observed that it had been caused by a violation of the legal norms which regulate the penal trial's unfolding; the damage which can concern the parties' rights in the procedural trial, as well as the manner in which the penal trial's unfolding is actually realized. Equally, an act's invalidity will be called for only when it would be

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[11] I. Ionescu-Dolj, *Romanian Criminal Procedure Course*, Bucharest – 1937, p.190.
[12] M. Damaschin, *Criminal Procedure*, Wolters Kluwer Publishing House, Bucharest – 2010, p.312.
[13] N. Giurgiu, *Nullity Causes During the Penal Trial*, the Scientific Publishing House, Bucharest – 1974, p.31.
[14] I. Neagu, *Criminal Procedure Treaty – General Part*, the Judicial Universe, Bucharest – 2010, p.669.

impossible to eliminate the produced damage in any other way other than by eliminating the act fulfilled with the law's violation.

According to the procedural penal norms which are in effect and taking into consideration the manner of expression in the judicial norm, the invalidities can be deliberate and virtual. Moreover, depending on the application mode and the effects that they can produce, a classification of relative invalidities and absolute ones can be established.

The absolute invalidities interfere in the cases expressly stipulated by law and can be called for at any time during the penal trial's course and by any trial participant, being possible to be taken into consideration *ex officio*.

In the present regulation of the Criminal Procedure Code, the absolute invalidities are considered, in the same time, express invalidities, stipulated in article 197 line 2 of the Criminal Procedure Code, and interfere when some legal provisions that are particularly important in the penal trial's unfolding are violated.

Thus, according to article 197 line 2 of the Criminal Procedure Code the provisions which concern the competence according to the subject matter and according to the person's quality (referring to the law courts' competence as well as to the competence of the penal prosecution's authorities), at the court's notification, at its structure and at the judgment session's publicity, are stipulated under the absolute invalidity sanction. Moreover, the absolute invalidity sanction also stipulates the provisions which refer to the prosecutor's participation, the presence of the accused or of the defendant and their assistance by the defender, when they are compulsory, according to law, as well as the execution of the evaluation proceeding in the causes with underaged law breakers.

We observe that the legislator had chosen a limitative enumeration of the legal provisions whose non-compliance with determines absolute invalidity. However, we believe that there are numerous other procedural penal provisions whose overlooking would undoubtedly determine the interference of the absolute invalidity sanction, without the need to prove the existence of a damage that cannot be eliminated in any other way than by annulling the respective acts. Therefore, we can mention that it is compulsory to hear the accused or the defendant when taking a preventing or safety measure (article 143 line 1, article 150 line 1, article 162 line 1^1 of the Criminal Procedure Code), the arraignment without the penal pursuit authorities' implication in the penal pursuit file's presentation (article 250 – article 262 of the Criminal Procedure Code), the penal trial's unfolding without ensuring the presence of an interpreter when necessary, according to article 8 and article 128 of the Criminal Procedure Code, or whenever there is a flagrant violation of the penal trial's fundamental principles, such as the granting of a person's freedom, the compliance with the human dignity or the granting of the defense right.

In the case of the absolute invalidities, the procedural damage is presumed *juris et de jure*, in such a way as the person who calls for the invalidity does not need to prove the existence of the damage, the proof of the judicial norm's violation stipulated under the sanction of the absolute invalidity being enough. In the same time, the provisions of article 197 line 3 of the Criminal Procedure Code shows that the absolute invalidities cannot be eliminated in any way.

In what concerns *the relative invalidities*, their features result from the principle provisions stipulated by article 2 and article 197 line 1 and 4 of the Criminal Procedure Code, according to which the violation of any legal provision which regulates the penal trial's unfolding, other than those stipulated under the absolute invalidity sanction, determine the act's invalidity only when a damage, which cannot be eliminated in any other way than by annulling that act and only if they had been called for during its fulfillment, when the party is present, or at the first court term with complete procedure, when the party has not been present at the act's fulfillment, has been produced.

In this way, we can conclude that the relative invalidities are taken into consideration only if they had been called for by the person who had suffered a damage of his/her procedural rights, due to the fact that they do not operate *ex officio* but in exceptional situations. The person who calls for the invalidity caused by the law's infringement as a result of the procedural act's fulfillment is obliged to

prove the existence of the produced damage, which can consists in the injury caused to a procedural right or interest or which can be a material damage.[15]

In the same time, when, by some provisions' violation which refers to a penal trial's unfolding, the truth's finding and the cause's just resolution is affected, general order interests being involved, the relative invalidity can be taken into consideration *ex officio*, in any trial phase.[16]

In contrast with the absolute invalidities which cannot be eliminated in any way, in what concerns the relative invalidities the damage produced by means of the law's infringement can be paid for by the parties' will, having as consequence the validity of the procedural acts which had been fulfilled with the law's infringement. Furthermore, the relative invalidity must be called for only at a certain time, stipulated according to the presence or absence of the interested party at the act's fulfillment. Failing to do so determines the invalidity exception's delay and the act's execution.

Moreover, in what concerns the relative invalidities, when the voidable act's remaking can be done in front of the court of law which, by means of the closure, had observed the legal provisions' violation, the court will assign a short term for the act's immediate remaking.

Not only the relative, but also the absolute invalidity, are appealed to by means of the invalidity's exception or by the attack means, and the authority in front of which the act's annulment is requested must detect the invalidity and if the provisions stipulated by law are fulfilled, it must rule the annulment of the act fulfilled with the law's violation. The act's remaking is usually realized by the same judicial authority which had fulfilled it with the law's violation and it is rarely remade by another authority.

After the invalidity has been detected and proclaimed according to the provisions of law, its direct effect is the act's inefficiency, its lack of judicial value representing the lack of the effects it should have determined if it had been valid. Therefore, the act is considered as being void of judicial effects, from the moments of its fulfillment (*ex tunc*), and not from the moment the invalidity is detected (*ex nunc*).

The specialized literature addresses the invalidity's indirect or extensive effect, considering that the invalidity produces effects in relation to the validity of the previous, simultaneous and subsequent acts, which are related to the annulled act. We consider that it cannot be the case of an automatic spread of the invalidity, the judicial authorities having the obligation to evaluate, for each actual case, if the provisions stipulated in article 197 of the Criminal Procedure Code are applicable.

In the same time, due to the fact that in the Criminal Procedure Code there are no express stipulations as far as the invalidity's extensive effect is concerned, we believe in the applicability of the judicial norms stipulated in article 106 line 1 of the Code of Civil Procedure where it is shown that a procedural act's annulment determines only the subsequent acts' invalidity, to the extent that they cannot have an independent existence.

Disciplinary sanctions

These sanctions have a special character, because by means of their organization the legislator had established as being in the judicial authorities' competence the imperative obligation of exercising the function they had been invested with, in good-faith and without abusing of it. Thus, we can reach the conclusion that the judicial authorities' subjective rights have value of obligation for these authorities.[17]

The disciplinary sanctions interfere whenever the judicial authorities, when exercising the functions and attributions conferred to them, commit, whether by bad-faith, or by negligence or

[15] I. Neagu, *Criminal procedure Treaty – General part,* the Judicial Universe, Bucharest – 2010, p.673.

[16] Gr. Theodoru, L. Moldovan, *Criminal Procedure,* the Didactic and Pedagogical Publishing House, Bucharest – 1979, p.184.

[17] S. Kahane, *Criminal Procedure,* the Didactic and Pedagogical Publishing House, Bucharest – 1963, p.16.

ignorance, abuses or omissions referring to the basic rules which ensure the compliance with the legality principle during the penal trial.

Therefore, in Law no. 303/2004 concerning the judges' and prosecutors' statute it is shown that the judges and prosecutors are disciplinary responsible for the breach of their jobs' duties, as well as for the actions which affect the justice's reputation. Additionally, the provisions of article 99 of the same law shows that disciplinary deviations, as a consequence of the penal trial's overlooking of the legality principle, will be formed: the violation of the legal provisions which refer to the incompatibilities and interdictions concerning the judges and prosecutors (according to article 50 of the Criminal Procedure Code, the incompatible person is obliged to declare that he/she refrains from participating in the penal trial as soon as he/she is aware of the incompatibility case's existence); the interferences for some causes' settlement, the claim and the acceptance to settle personal interests or the family members' or any other people's interests, in a different way than within the limit regulated by law for all the citizens, as well as the interference in another judge's or prosecutor's activity; the non-compliance with the secret of the deliberation or with the confidentiality of the works that should be confidential (according to article 307 of the Criminal Procedure Code only the members of the Court in front of which the debate happened are allowed to take part in the recess, they being obliged to secretly deliberate); the delayed fulfillment of the works, as well as the repeated non-compliance and for imputable reasons of the legal provisions which concern the causes' settlement with celerity; the unjustified refusal of receiving to the file the requests, conclusions, memoirs or documents handed in by the trial's parties; the function's exercising, including the non-compliance with the procedural norms, by bad-faith or by severe negligence, if the action does not represent a crime; the unworthy attitude towards the colleagues, attorneys, experts, witnesses or litigants while exercising the job's responsibilities; the non-compliance with the provisions concerning the randomized distribution of the causes, as it had been regulated by article 313 line 1 and line 2 of the Criminal Procedure Law.

To the same effect, the Internal Regulations of the Judicial Courts (approved by the Decision no. 387/2005 of the Superior Council of Magistracy) shows – at article 10 – that "the lack of taking the necessary measures for the application of the norms concerning the randomized criterion of causes' distribution or the violation of these norms determine the guilty people's disciplinary responsibilities, under the law's conditions".

According to the provisions of article 97 line 1 of Law no. 303/2004 any person can notify the Superior Council of Magistracy, directly or by means of the leaders of the courts of law or prosecutors' offices, about the judges' or the prosecutors' inadequate activity or behavior, the violation of the professional obligations within the relations with the litigators or some disciplinary deviations' fulfillment by them.

To this extent, Law no. 317/2004 concerning the Superior Council of Magistracy regulates the procedure that must be followed as well as the council's competences as far as the domain of the magistrates' disciplinary responsibility is concerned. Thus, the Superior Council of Magistracy fulfills, by means of its departments, the role of court of law in the judges' and prosecutors' disciplinary responsibility domain, for the actions stipulated by Law 303/2004, republished. The disciplinary action is exercised by the Superior Council of Magistracy's disciplinary commissions, composed by a member from the Department of Judges and 2 inspectors from the Service of the Judges' Judicial Inspection and, respectively, a member from the Department Prosecutors and 2 inspectors from the Service of the Prosecutors' Judicial Inspection.

As a consequence of the disciplinary deviation's acknowledgement, the departments of the Superior Council of Magistracy can apply to the judges and to the prosecutors, according to the deviations' severity, the following sanctions: notification; the reduction of their monthly gross pay with up to 15% for a period starting from a month and up to 3 months; the disciplinary move for a period starting from a month and up to 3 months to a court of law or to a prosecutor's office, which is

under the jurisdiction of the same Court of Appeal or under the jurisdiction of the same Prosecutor's Office of this court; the dismissal from the function and the exclusion from the magistracy.

Furthermore, according to the provisions of article 51 line 2 of Law no. 303/2004 concerning the judges' and prosecutors' statute, the Superior Council of Magistracy, *ex officio* or at the general assembly's proposal or at the proposal of the court of law's president, can rule in favor of the dismissal of the judges from the leadership function, in the case of one of the disciplinary sanction's application.

Representing a genuine source of law with regards to the norms of the criminal procedure law and having direct implications in the penal trial's unfolding, Law no. 304/2004 concerning the judicial organization acknowledges the existence of the disciplinary sanctions' institution by means of the interfering consequences' expression.

Therefore, it is shown that the prosecutors appointed within the Terrorism and Organized Crime Investigation Department can be dismissed by means of the order given by the General Prosecutor of the Prosecutor's Office of the Supreme Court of Justice, with the Superior Council of Magistracy's notice, in the case of a disciplinary sanction's application.

Moreover, the law previously mentioned prescribes that the prosecutors appointed within the National Anti-Corruption Directorate can be dismissed by means of the order given by the Chief Prosecutor of the National Anti-Corruption Directorate, with the Superior Council of Magistracy's notice, in the case of the inadequate exercise of the function's specific responsibilities or in the case of a disciplinary sanction's application.

We can also encounter disciplinary sanctions in the case of the activities unfolded by the officers and specialized agents of the judicial police. In this way, in article 7 line 1 of Law no. 364/2004 concerning the organization and functioning of the judicial police, it is shown that the actions of indiscipline performed by the penal inquiry authorities of the judicial police, the General Prosecutor of the Prosecutor's Office of the Supreme Court of Justice can request the Administration and Interns minister to begin the preliminary inquiry for the deployment of the disciplinary responsibility.

We also consider that the disciplinary responsibility of the judicial police's penal inquiry authorities can be drawn in by the situation regulated by article 219 line 3 of the Criminal Procedure Code. In this way, in the case of the nonfulfillment or the deficient fulfillment, by the authority of penal inquiry, of the provisions given by the prosecutor, the prosecutor will inform the leader of the authority of penal inquiry, which has the obligation to communicate, in term of 3 days since the notification date, to the prosecutor the ruled measures. In this situation, we should bear in mind that, as a consequence of the corroboration of the norms comprised by article 219 line 2 of the Criminal Procedure Code with those comprised by article 66 line 1 of Law no.304/2004, it means that the authorities of the judicial police unfold the penal inquiry activity, directly, under the prosecutor's leadership and supervision, being obliged to fulfill his/her directives.

The specialized literature even discusses about the existence of a type of trial which directly concerns the disciplinary sanctions. Therefore, professor Grigore Theodoru mentions that the disciplinary trial comes into being in the case when, as a consequence of a disciplinary deviation, the activity of the disciplinary jurisdiction authorities unfolds, for the application of a disciplinary sanction to the person guilty for the deviation. The disciplinary sanction's application takes the form of a trial when, by law, disciplinary commissions are instituted, whose judgment activity unfolds after a specific procedure, as in the case of the disciplinary commissions of the magistrates, attorneys, teaching staff, etc. To that effect, we mention the provisions of article 24 of Law no. 304/2004; article 87 and article 101 of Law no. 303/2004; articles 44 – 49 of Law no. 317/2004 (republished) concerning the Superior Council of Magistracy; article 50, article 53, article 58 and articles 70 – 74 of Law no. 51/1995 for the organization and exercise of the profession of attorney. The disciplinary trial is similar to the penal trial due to the application of the principle of the disciplinary authorities'

ex officio interference and to the unfolding of an inquiry prior to the judgment, but the judgment usually follows the civil trial's norms.

In direct connection with the disciplinary sanctions, the legislator had also established the institution of the ***judiciary fine***. Therefore, within the framework of the penal trial, certain deviations which can be performed by the people chosen to cooperate at the judicial activity's unfolding are sanctioned with judicial fine.

Frequently, these deviations consist of: the nonfulfillment or wrongful fulfillment of the citation or procedural acts' communication works; the unjustified lack of the defender, witness, expert or interpreter; the expert's delay of fulfilling the given duties; the non-compliance with the measures taken by the court of justice's president regarding the order and solemnity of the judgment session by the parties, their defenders, witnesses, experts, interpreters or any other person, as well as their irreverent manifestations towards the judge or the prosecutor.

The judiciary fine is applicable for the deviations expressly stipulated by article 198 of the Criminal Procedure Code, which imply the non-fulfillment of the procedural obligations or their fulfillment with the non-compliance of the legal requirement. The judiciary fine's application can be cumulated with a disciplinary sanction; in the same way, according to the provisions of article 198 of the Criminal Procedure Code, the judiciary fine's application does not eliminate the penal responsibility, in case the action represents a crime.

The specialized literature shows that the judiciary fine is a procedural sanction which can be considered a typical, imperfect fine.[18]

According to article 199 of the Criminal Procedure Code, the competence of applying judicial fine belongs to the judicial authorities in front of which the cause is presented, and the establishment of its quantum is made according to the deviance's nature and severity, the commission conditions and the perpetrator's procedural position. In this way, the fine is applied by the penal inquiry authority, by means of ordinance, and by the court of law, by means of closure.

The person who received the fine can ask for a relaxation or the fine's reduction, in term of 10 days since the date of communication of the ordinance or of the resolution of the fine, justifying in his/her request the reason for which he/she could not have fulfilled his/her legal obligation. The request will be analyzed by the same judicial authority which had given the fine.

Penal sanctions

The compliance with the legality principle during the penal trial is also granted by the existence of some penal sanctions which can be applied to the people who do not fulfill or who violate the legal obligation concerning the penal trial's unfolding.

The people who unfold a judicial activity do it in compliance with the law, in the same time being obliged to fulfill their responsibilities by means of the pronouncement of legal and through settlements in relation to the legally administered evidence. To that effect, we should bear in mind the provisions stipulated by article 64 and article 68 of the Criminal Procedure Code, where it is shown that the means of evidence obtained illegally cannot be used during the penal trial, the utilization of violent threats or any other means of constraint, promises or incentives, with the purpose of obtaining evidence, also being outside the law. Moreover, article 68 line 2 of the Criminal Procedure Code shows that persuading a person to commit or to continue to commit a penal action, with the purpose of obtaining evidence, is not allowed.

Taking into account the previously mentioned points, as well as the imperative condition which implies the compliance with law throughout the penal trial, we can declare that whenever,

[18] V.Dongoroz et alii, *Theoretical Explanations of the Romanian Criminal Procedural Code*, general part, *vol.I*, the Academic Publishing House, Bucharest – 1975, p.414

during the specific activities of the penal trial's unfolding, the law's violation takes serious forms, the guilty people will be held penally responsible for their actions.

To that effect, we should remember that in the Penal Code, the Special Part, Title VI, Chapter II, the legislator had established the crimes which impede the fulfillment of justice, and some of them can be committed only during the penal trial's unfolding. Therefore, we should consider: illegal arrest and abusive inquiry (art 266 of the Criminal Procedure Code), subjugation to ill treatments (article 267 of the Criminal Procedure Code), torture (article 267^1 of the Criminal Procedure Code), unjust repression (268 of the Criminal Procedure Code). The special judicial object of these crimes is constituted by the social relations concerning the achievement of the penal justice which implies the compliance with all the legal stipulations and which also exclude any violent actions, pressures and sufferings.

We observe that the crimes previously mentioned are typical for the penal trial's unfolding, being possible to be committed only by the actively qualified subjects. Thus, as far as the crime of the illegal arrest and abusive inquiry is concerned, the active subject cannot be anything else than a functionary (magistrate, penal inquiry authority, etc.) who has responsibilities as far as the application of the detention or preventive arrest, or referring to the punishment's execution or who unfolds judicial activities. The active subject of the crime of subjugation to ill treatments cannot be anything else than a functionary who has among his/her responsibilities the surveillance of a detained or arrested person, or a person against who safety or educative measures have been taken. Moreover, although the law does not expressly refers to it, as far as torture is concerned, the doctrine[19] stipulates that the active subject of the crime, cannot be anything else than a functionary – authorities' agent or any other person who operates under an official title or when provoked by or with the express and implicit consent of these kind of people, regardless of the fact that the judicial procedure had been started or not. In the case of the unjust repression crime, the active subject will be the judicial authority that has the ability of setting into motion the penal action (prosecutor or, in exceptional cases, judge), of ruling in favor of the arrest (judge), of sending to trial (prosecutor) or of convicting a person (judge), knowing that that person is not guilty.

Besides the previously mentioned crimes, the Romanian Penal Code also refers to a series of crimes which are not typical for the penal trial, but which are frequently encountered during the activity of unfolding of the justice's administration. To that effect, we observe that without dealing with a classification of the active subjects, the violation of the penal trial's principle of legality can be sanctioned with the following crimes: abuse while on duty against the private interests (article 246 of the Criminal Procedure Code), abuse while on duty by means of limiting some rights (article 247 of the Criminal Procedure Code), aggravated abuse while on duty (article 248^1 of the Criminal Procedure Code), negligence while on duty (article 249 of the Criminal Procedure Code), abusive behavior (article 250 of the Criminal Procedure Code), conflict of interests (article 253^1 of the Criminal Procedure Code), bribery (article 254 of the Criminal Procedure Code), reception of illegal benefits (article 256 of the Criminal Procedure Code), etc.

Furthermore, we should observe the circumstance according to which the fundamental principle of the penal trial's legality can be overlooked by the judicial authorities appointed in conformity with their competences to participate in the settlement of a penal cause, as well as by the other penal trial's participants or even by the people who are not directly involved in the trial's unfolding. Therefore, within the Penal Code's special provisions the legislator had established a series of crimes among which, with the title of example, we care to mention the following: corrupt payment (article 255 of the Criminal Procedure Code), influence peddling (article 257 of the Criminal Procedure Code), defamatory denunciation (article 259 of the Criminal Procedure Code), perjury (article 260 of the Criminal Procedure Code), abetment in crime (article 264 of the Criminal

[19] M. Hotca, *Penal Code, Comments and Explanations,* C.H. Beck Publishing House, Bucharest – 2007, p.1301.

Procedure Code), the omission to inform the judicial authorities (article 265 of the Criminal Procedure Code), the judicial authorities' contempt (article 272^1 of the Criminal Procedure Code), etc.

Civil sanctions

Under certain conditions, the official subjects that had violated the law during the penal trial's unfolding can be held civilly responsible. According to the provisions of article 94 of Law no. 303/2004 the judges and the prosecutors are civilly responsible, under the law's conditions.

Therefore, we mention that the provisions of article 52 line 3 of Romania's Constitution stipulate that the State is held responsible from a patrimonial point of view for the prejudices caused by means of judicial errors. Moreover, the state's responsibility is established under the law's conditions and does no eliminate the responsibility of the magistrates who had exercised the function in bad-faith or severe negligence.

Fully reconsidering the regulation comprised in Romania's fundamental law, presented in the previous section, Law no. 303/2004 concerning the judges' and prosecutors' statute shows, in article 96 line 1-3, that "The state is held responsible from a patrimonial point of view for the prejudices caused by means of judicial errors. The state's responsibility is established under the law's conditions and, does not eliminate the responsibility of the judges and prosecutors who had exercised the function in bad-faith or severe negligence. The cases in which the injured person has the right to fix the prejudices caused by means of judicial errors which were fulfilled during the penal trials are established by the Criminal Procedure Code".

To that effect, according to article 504 of the Criminal Procedure Code, the person which was convicted definitively has the right to fix the suffered damage, if as a consequence of the cause's rejudging a definitive decision of acquittal had been ruled. Moreover, the person who, during the penal trial, had been illegally deprived of freedom or whose freedom had been limited has the right to demand the prejudices repair. Not lastly, according to line 4 of the same article, the person who had been deprived of freedom after the occurrence of the action's prescription, amnesty or non-incrimination, has the right to repair the suffered damage. By means of this enumeration of cases in which the prejudiced person has the right to repair the damage, the legislator has also managed to offer a definition to the notion of "judicial error during the penal trial".

We should also mention the provisions stipulated in the Additional Protocol no. 7 at the European Convention on Human Rights which, in article 3, states the following: "When a definitive penal conviction is subsequently cancelled or when a judicial pardon is offered, due to the fact that a newly or recently discovered action proves that a judicial error had occurred, the person who had been affected because of this conviction is reimbursed according to the law or practice in effect in the respective state, except for the case when by not discovering in time the unknown act is entirely or partly imputable to that person."

For obtaining the damage's repair, according to the provisions comprised in the internal legislation, specifically article 506 corroborated with article 504 of the Criminal Procedure Code, the person entitled may address to the court in whose circumscription he/she resides, by suing the state by means of a civil trial, which is cited by the Ministry of Public Finances. According to article 96 line 6 of Law no. 303/2004 the injured person can take action *only* against the state, represented by the Ministry of Public Finances. The grounds of the state's patrimonial responsibility are based on the fact that the State is the one that organizes the justice's activity and is the magistrates' trainer, reason for which the deficiencies of any other nature are imputable to it.

The magistrates' civil responsibility has a *subsidiary* character and is determined only when the state had paid the prejudice which had been generated by the judicial error. In this way, after the damage's repair according to article 506 of the Criminal Procedure Code, as well as in the situation in which the Romanian state had been convicted by an international court, the legal remedy against

the person who, by bad-faith or by severe negligence, had produced a damage generating situation is mandatory. Moreover, in article 96 line 7 of Law no. 303/2004 the following is mentioned: "After the prejudice had been paid by the state on the basis of the irrevocable decision ruled according to the provisions of line (6), the state can reclaim the prejudices from the judge or the prosecutor who, by bad-faith or severe negligence, had performed the judicial error which had caused prejudices."

e can observe that the legal remedy is mandatory not only for the situations which generate prejudices mentioned in article 504 – 506 of the Criminal Procedure Code, but also as far as the circumstances of the Romanian state's conviction by international courts are concerned.

To that effect, we mention the provisions of article 12 of the Government Emergency Ordinance no. 94/1999 concerning Romania's participation at the procedures presented to the European Court of Human Rights according to which the State has legal remedy against the people who, by means of their activity, guilty as charged, had determined its obligation to pay the sums established by means of the Court's decision. Moreover, it is shown that the magistrates' civil responsibility is established according to the conditions that will be regulated by means of the judicial organization law.

Additionally, considering this institution, we insist on mentioning the legislator's constant concern with the purpose of creating a coherent and efficient judicial framework as far as the application of the judges' and prosecutors' material responsibility is concerned. Thus, by means of the law project concerning the modification and completion of Law no. 303/2004 and of the Criminal Procedure Code, the legislator considers implementing an obligation in the judges' and prosecutors' duty of signing civil liability insurance for the judicial errors fulfilled due to severe negligence. Furthermore, the law project previously mentioned defines the notions of bad-faith ("there is bad-faith when the judge or the prosecutor violates, with knowledge, the material or procedural law's norms, desiring or accepting some people's injury") and severe negligence ("there is severe negligence when the judge or the prosecutor guiltily overlooks, and in a severe and unpardonable manner, the material or procedural law's norms").

In order to reinforce the penal trial's legality principle, besides the procedural sanctions, the civil or penal disciplinary sanctions, which find their applicability according to the severity of the law's violation, numerous possibilities of systematic and efficient control by means of which the illegal procedural and in-court procedural acts can be discovered and eliminated are regulated.[20] On these lines, the Criminal Procedure Code has organized the surveillance of the activity of the penal inquiry authorities by the prosecutor (articles 216 – 220), the judicial control of the penal inquiry activity (article 278^1, article 300, article 332, article 380 and article 385^{16} line 2) or the control of the court of law by declaring and judging the attack means. In this way, not only the prevention of law's violation is ensured but also the discovery and elimination of the already fulfilled ones.[21]

The legality principle represents a frame principle since its interaction with the other principles exceeds the simple connection with those. The legality represents the frame within and with the compliance with which all the other fundamental principles of the penal trial are realized. No other principle can be placed outside the legality, in same way in which any principle, no matter how important it may be, does not occur in any other way than according to the forms stipulated by law.[22]

Therefore, considering at the same time the aspects exposed in the present paper, we conclude by saying that the compliance with the fundamental principle of legality in the penal trial is guaranteed by numerous sanctions which, by means of their importance and severity, undoubtedly express the fact that the activity of justice's fulfillment must unfold within the law's supremacy

[20] I. Neagu, *Criminal procedure Treaty – General part,* the Judicial Universe, Bucharest – 2010, p.76.

[21] Gr. Theodoru, L. Moldovan, *Criminal Procedure,* the Didactic and Pedagogical Publishing House, Bucharest – 1979, p.35.

[22] N. Volonciu, *Criminal Procedure,* the Didactic and Pedagogical Publishing House, Bucharest – 1972, p.73.

spirit, ensuring in the same time the right to a just trial. Regardless of the level at which they operate – constitutional, organic law or special law, these sanctions have a single purpose, which is the guarantee of the provisions which regulate the penal trial's unfolding according to the law.

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VARIOUS TECHNIQUES OF INDIVIDUALISING PUNISHMENTS IN THE NEW CRIMINAL LAW

ION IFRIM*

Abstract
The author analyzes the new criminal code provisions in relation to criminal law in force, the new Penal Code has dropped explicit mention, as criteria of individualization of punishment, the general provisions of Part penalty and limits set out in the Special Part of Penal Code, as and causes that aggravate or mitigate criminal liability. Also, the new Penal Code was established several general criteria of individualization of punishment on which the judge can make a clearer assessment of the social significance of the individual offense and offender.

Keywords*: new criteria of individuation, penalty, mitigate or aggravate cases.*

Introduction

In order to understand the significance, the role and the place of punishment individualization in the system of the means of applying Penal Politics, it has to be viewed from the perspective of the purpose and from the light of the fundamental principles of Penal Politic, in comparison with the purpose of the Penal Law and the punishment in the Penal Code system, and most importantly, the harmonizing of material the Penal Code with the systems of other European Union countries.

The specific of Penal Politic, that regards the purpose[1], is the fact that it practically aims to gradually eliminate the crime phenomena from society. To this supreme purpose are consecrated the preventive[2] action as well as the reaction against crimes committed, reaction that also aims the causes of the same phenomena – the individual causes from the criminal's conscience. Or the repressive actions' efficiency to succeeding in this task depends, as it has been shown earlier, on the extent to which the means of this reaction and especially the punishment are adequate, on the extent to which the penal reaction is individualized.

In Penal Politics[3] and in the Romanian Criminal Law, individualizing the penalty isn't a mere principle of solid establishment of the penalty, but a condition *sine qua non* of the efficiency of the above mentioned hence of fulfilling the Law and Penal Politic's goal.

That is why, in Penal Politic and in the Criminal Law system *individualizing the penalty* has been elevated to the status of general principle and have found in this state an explicit consecration in all the European states' Criminal Laws[4]. Therefore the German Criminal Law regulates the principle of establishing the penalty[5]. In the 1st paragraph of art 46 of the Criminal Law it is mentioned that the accused blame is represents the very foundation of establishing the penalty, however when evaluating it, the effects on the future life of the doer must be considered. The French Criminal Law

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[1] George Antoniu, *Contribuţii la studiul esenţei, scopului şi funcţiilor pedepsei*, R.D.P., nr. 2/1998, Buucureşti, Edit. Monitorul Oficial, p. 9.

[2] Ibidem, p. 19-20.

[3] Costică Bulai, Bogdan N.Bulai, *Manual de drept penal, Partea generală*, Edit. Universul Juridic, Bucureşti, 2007, p. 56 și urm.

[4] See Pen. C. of Iugoslavia art. 38 și urm.; Pen. C. Of Hungary, art. 64 and next.; Pen. C. of Bulgary, art. 54 and next.; Pen. C. of Germany, p. 61 and next.; Pen. C. of Poland, art. 50–59.

[5] Hans Jescheck, *Lehbruch des Strafrechts,* Alemeiner Teil, Duncher und Humbolt, Berlin, 1988, p. 769; *Codul penal german* (Strafgesetzbuch, StGB) available on http://www.iuscomp.org/gla/statutes/StGH htm.

establishes in article 132-24 the general individualization criteria[6], mentioning that "in the limits imposed by the Law, the Court pronounces punishments and sets their conditions depending on the circumstances of the crime and on the author of the crime[7]. The Spanish Criminal Law[8] does not mention which are the general criteria for individualizing the penalty, but holds a very vast legal framework of penalties, in which the judge can establish the defined penalty in concordance with some characteristics.

This value of general principle that is owned by the individualization of the penalty is unanimously recognized in the Romanian juridical literature. [9]

Individualization of the penalty is consecrated and works, in the Criminal Law system, in perfect harmony with the basic principles of Politics and penal law.

In regulating the application of individualizing penalty in the Criminal Law system it is indeed assured that the fundamental principles of penal politics are respected. Therefore unity and the primary purpose of Criminal politics, for whose accomplishment works together the punisher as well as the judge summoned to apply the law, the juridical conscience that guides the judge's activity, all of these guarantee the harmonious accomplishment of the fundamental principles of Penal Politics in managing the making of penalty individualization .

Among the general principles enshrined in our criminal law a leading role for *the principle of individualization* of repressive reaction is reserved[10].

Indeed even in the New Criminal Law[11] the principle of individualization has been explicitly enshrined by the position in art. 74. Cr. L from Section 1 entitled "General Dispositions", chapter V entitled "*Individualizing Penalties"* , Title III of the General Part which constricts the court to individualize the penalty, turning to some criteria.

In the disposition from paragraph 1 of art. 74 of the New Criminal Law it is provided that when establishing the length or quantum of the penalty it *is done* in accordance with some general individualization criteria, which means that the principle of individualization is consecrated through a mandatory disposition.

Under the new Criminal Law[12] the criteria applied to the individual also applies to the legal person. However, in the case of both individuals and businesses, among general criteria other special criteria becomes incident in some cases.

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[6] R. Saleilles, L´*individualisation de la peine,* Paris, Felix Alcan Editeur, 1909, p. 10-11;

[7] F. Desportes, F.Le Gunehec, *Le nouveau Droit penal,* Tome, I, Droit penal general, Septieme editition, Edit., Economica, Paris, 2000, p.820. A se vedea *Code pénal*, 2008, Dalloz, 105 édition, coordonată de Y. Mayaud, E.Allain, C.Gayet; www. legi-france fr.

[8] *Codigo penal.* Ley organica 10/1995, de 23 de novembre, edicion preparada por Enrique Gimbernat Ordeig con la colaboracion de Esteban Mestre Delgado, decimoquinta edicion, Tecnos., Madrid, 2009.

[9] Vintilă Dongoroz, *Sinteze asupra noului Cod penal al României*, Studii şi Cercetări Juridice, 1969, nr. 1, p. 7–35; Şt. Daneş, V. Papadopol, *Individualizarea judiciară a pedepselor,* ediția a II-a, Ed. Juridică, Bucureşti, 2003, p. 67, p. 91-150, p. 29-321; O. Brezeanu, *De la individualizarea la personalizarea sancțiunilor,* în R.D.P. nr. 1/2000. J. Grigoraş, *Individualizarea pedepsei*, Edit. Ştiințifică, Bucureşti, 1969, p. 91 – 110; Gh. Ivan, Individualizarea pedepsei, Edit. C.H. Beck, Bucureşti 2007, p. 105 – 167; J.Igor Andrejew, Lenouveau Code pénal polonais, *Revue de Science criminelle et de droit pénal comparé*, 1970, nr. 2, p. 309–317; Stefan Freier, *Les principes de l'infliction des peines aux termes du Code pénal tchécoslovaque* de 1961, Bulletin de droit tchécoslovaque, 1962, nr. 1–2, p. 31–35 etc.

[10] G.Antoniu – coordonator – *Noul Cod penal*, vol.II, Ed.C.H.Beck, Bucureşti, 2008, p.191-201.

[11] The New Criminal Law adopted trough the Law 286/2009 with assuming responsibility by the Government has permitted the lawmaker to be superior to the new criminal law adopted by the Law 301/2004 (subsequently repealed), as well as the current Criminal Law.

[12] Art.74. *General criteria for individualizing the penalty* (1) Establishing the duration or the amount of penalty is commensurate with the gravity of the crime committed and the dangerousness of the offender, which is assessed on the following criteria: a) Circumstances and manner of committing the crime and the means used; b) the state of peril created for the protected value; c) the nature and gravity of the result produced or of other consequences of the crime; d) reason and purpose of the crime; e) nature and prevalence of crime which constitute antecedents of the offender for which he is convicted; f) conduct after committing the crime and during trial; g) education level, age, health, family and

Regarding the general specific criteria of individualization it has been questioned whether they should be evaluated together or separately in a certain sequence.

In juridical literature the opinion that "the deed of the doer and all the circumstances in which the crime has been committed – regardless of the fact that through their weight they have the role of aggravating or minimizing circumstances – they must be thoroughly analyzed, as they condition each other and, therefore, increase or decrease the level of social peril" has been expressed. That is why the problem of putting first place investigating the person or the deed cannot be considered.

In another opinion it has been highlighted that the fact that at individualizing the punishment is undeniable the fact that all criteria must be considered and the sanction applied must represent the result of a multilateral examination.

Finally, other authors share the opinion that in accomplishing "the operation of legal individualization of the penalty the starting point is represented by the penal deed in comparison with the data complex that indicates its level of social peril (gravity, frequency, prevention possibility, means of committing, consequences) and as final point the personal situation of the criminal regarding the social peril represented by itself (the role he/she had in committing the crime, the guilt's form and gravity, psycho – physical state, previous history, etc)". This order might have its legal basis in the provisions in art. 74, enumerating the individualization criteria, indicating primarily aspects regarding the severity of the deed and afterwards the personality of the doer.

Punishment individualization, on behalf of its proper determination, isn't a mere recommendation which the lawmaker brings forward to the court but an obligation from which he cannot abscond.

Regarding individualizing punishments, the New Penal Code, even if it maintains many of the previous dispositions, introduces new ones as well, highly important, such as renouncing on applying the penalty and delaying it[13] (chapter V, section III and section IV)

Waiver of penalty consist in the court's recognized right of judgment to forgive permanently the establishment and application of a penalty for a person who is guilty of committing a crime, for the fulfilling of which, taking into count the committed crime (art.80 paragraph 1 letter a.); of the personality of the criminal and he's behavior that he has had before and after committing the deed, would be sufficient applying a warning, while establishing, applying and executing a penalty would risk producing more harm than to help the recovery of the accused. (art. 80 paragraph 1. letter b.)

In art. 80 paragraph 1. letter b. from the New Criminal Law are mentioned the conditions for waiver of penalty. In paragraph 2 of the text mentioned above are showed the conditions in which the court cannot dispose waiver of penalty[14]. Waiver of penalty in case of infringements of competition (art. 80 para. 3) may be ordered if concurrent conditions for each offense are set out in paragraphs. 1 and 2 of the article cited. Waiver of penalty law is regulated in other countries as well (Germany, France, Switzerland, Italy etc.).

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social situation. (2) When the law provides alternative penalties for the crime committed, the criteria set out in para. (A) are taken into account and choosing one of them.

[13] Versavia Brutaru, *About some new modalities of individualiyation of the punishments according with the new Code penal*, Studii si Cercetari Juridice, vol.II, Drept Public, Timisoara, Conferința internațională a doctoranzilor în drept, 2010, p. 90-97.

[14] Article 80 para. 2 of the new Criminal Code so provides, that it may not be given waive of penalty if:

a) The offender has previously suffered a conviction, except as provided in subparagraph 42.let. a) and b) or that has been rehabilitation or rehabilitation period has been fulfilled;

b) against the same offender was more willing to waive the penalty in the last two years preceding the date of the offense for which trial;

c) the offender has evaded prosecution of law or truth or attempted thwarting the identification of his whereabouts and his charging or criminal liability or the participants'.

d) penalty provided by law for the offense is imprisonment for more than three years.

It was also envisaged the postponement of the sentence in Article 83 of the new penal code for crimes for which the law provides established punishment, including in the event of multiple offenses, is a fine or imprisonment not exceeding two years; if the defendant had no criminal record, except as provided in Article 42 letter a and b) or for which has been reached term rehabilitation or to rehabilitation, and after committing the crime has given solid evidence that may point the defendant had a good attitude court may not apply to any punishment and if he had an improper conduct may be to postpone them again, for the same period of surveillance (surveillance period is 2 years in Article 84), penalty, or penalty provided by law within.

The Romanian criminal law the principle of individualization of punishment was the first time explicitly enshrined in the Criminal Code of 1936, in the provision of art. 21, stated that "punishment applied by a judge applies the statutory limits, taking into account the reasons and seriousness of the offender and the degree of perversity."

In the literature this provision has been interpreted as meaning that it contained "a recommendation and a criterion for judicial individualization of punishment"[15]. The structural changes in social and political ordering of our country, led to a reformulation of the provision of art. 21 Penal Code. which should correspond better promoted criminal policy of consistently increasing in our state.

Thus, by Decree no. 187 of 30 April 1949 to amend the Criminal Code provision in art. 21 was modified in the sense that the court "shall" take into account when determining the sentence of the Criminal Code general dispositions, the special limits of punishment for each crime, the seriousness that it shows the offender and the circumstances of the offense and the offense was committed. Through this change not only have been scientifically formulated general criteria of individuation, in a manner very close to that of the provision in art. 72 of the Criminal Code was given a very explicit mandatory provision, stating that the court must determine the actual sentence based on criteria listed in the text.

From what was stated above results that this language is no longer used in the new penal code as "must take into account" but as the phrase "take account". This wording is correct because the standard regards the operation of individuation, and not the court. As for the mandatory nature of the provision in force, it can not be, we believe, to doubt.

This norm with amount of general principle will be applied in relation to all special part of criminal law rules, whether contained in the Penal Code or in special laws for non-criminal. Enshrining the principle of individualization explicit highlights its position in relation to other principles of our penal policy and criminal law. If in the scope of application and its content is derived from the principle of determining the penalty policy and the fundamental principles of our criminal law (principles of legality, humanism and democracy)[16] and is subordinate to these principles, it is nevertheless true that the fundamental principles can not be met without observance of the principle of individualization of punishment. It is a consistent position which lies both the theory[17] and our judicial practice[18].

Consecration default principle is important in determining the penalty from a bent perspective.

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[15] V. Dongoroz, în C. Rătescu, I. Ionescu-Dolj, I. Gr. Periețeanu, Vintilă Dongoroz şi alții, *Codul penal adnotat, vol. I, Partea generală*, Comentarii la art. 21, p. 68.

[16] Vintilă Dongoroz, *Drept penal*, (Tratat),1939, p.82.

[17] In our literature of criminal law the principle of determining the penalty has particular importance and is widely recognized and affirmed.

[18] In the legal practice is sufficient, we believe, to refer to the decision of the Plenum of the Supreme Court no guidance. 12 of 10 November 1966 on the *individualization of punishment*. George Antoniu, Vasile Papadopol, Mihai Popovici, Bogdan Ştefănescu. *Îndrumările date de Plenul Tribunalului Suprem şi noua legislație penală*, Edit. Ştiințifică, Bucureşti, 1971, p. 72 and following.

Firstly, this consecration actually increases the explicit consecration's authority on the one hand because it proves that the lawmaker has complied with this principle, he himself making an it a work of individualization, as far as he could and on the other hand because it ensures the implementation of the individualization principle via the conditions created for this purpose. Determining the legal frame for punishment individualization for each crime and providing the court with the means to apply individualization, the laws explicit provision of the individualization principle not to remain a formal proclamation, but to be actually achieved.

Second, enshrining the principle of individualization implicit control law ensures the work of individuation because individualization made in concrete determining of the sentence or during execution must take place within the framework established by law, this legal framework is itself implicit expression of the principle of individualization of consecration. The provision of art. 72 Penal Code., which enshrines the principle of individualization, refers to the individualization of punishment, namely on the occasion of its concrete determination by the court. This direct reference to the punishment could be explained if we consider that the sentence is typical of criminal sanction, the main sanction without which the system of criminal law could be conceived; is the main instrument of achieving the policy and criminal law and therefore applied the principle of individualization have reported primarily on the sentence. But punishment is not the only criminal sanction.

Alongside it in the system of enforcement of our criminal law, it measures to provide safety and educational measures that are also criminal sanctions, means of reaction to committing an offense under the criminal law, although other measures are taken on other grounds and pursue other immediate purposes. These criminal penalties can not perform any other functions (removal of a state of danger from which a person who has committed an offense under the criminal law, is exposed again to commit such an act, if not safety measures, education and juvenile offender rehabilitation, if not educational measures) if they are not individualized and do not correspond to the state of real danger and prevention needed of the facts provided by the criminal law in each case.

In other words, safety measures and educational measures are subject, as well, like any other criminal penalties, to the general principle of individualization[19], in that it must correspond to the seriousness of the crime committed, that the danger that prevents state and the individual offender, this adaptation of the penalty depending on its functional efficiency.

It is reminded that the principle of individualization of criminal sanctions not only operate at their specific determination by the courts but its presence and influence is still known at the time of the criminal law as regards the limits of punishment for each crime and the conditions under which these limits can be overcome and the regime of imprisonment during the execution.

Of course individualization principle finds its full application in the penalty execution phase, in the process of continuous adjustment of these sanctions to the actual needs of the convict rehabilitation referral and using effective means of individualizing made available to law enforcement bodies responsible for overseeing prison sentence.

One may conclude that the principle of individualization by means of criminal law is organically integrated in our criminal law system and has a general application.

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[19] Vintilă Dongoroz, in *Explicaţii teoretice ale codului penal român*, vol. II, Bucureşti, Edit. Academiei Române, 1970, p. 243.

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OPINIONS REGARDING A NEW ACCUSATION-COMPROMISING THE INTERESTS OF JUSTICE

MARIA OPREA*

Abstract
The criminal offence of compromising the interests of justice, according to the new regulation, refers in particular to the respect and authority that needs to be attached to the performance of the act of justice, and such performance is protected by criminal law in two manners: both as regard the criminal offences committed by persons from outside the judicial system in the capacity of unqualified active subject , also against the abuses commited by the persons called to perform the act of justice.

Keywords*: compromising the interests of justice, divulge, disclosure, predictability and functionality of the criminal rule.*

The New Romanian Criminal Code[1] provides in 4-th Title of Special Part a separate chapter, Second Chapter, established for Crimes against justice's administration, art no 266-288.

In the explanatory memorandum of the New Criminal Code was shown that the name ,,Crimes which impede the course of justice,, was replaced by ,,Crimes against justice administration,, ,because through this infractions achievement of justice it is not always impeded,but producing just a state of danger for achieving the act of justice.

The changes brought to the Criminal Code regarding this infractions have been justified by the legislator by the need of ensuring legality, independence, impartiality and firmness in the process of carrying out justice by punishing criminal acts likely to affect seriously, ignore or undermine the authority of justice.

Thus, have been introduced new incriminations , such as ,,Obstructing justice,, , ,,Revenge for helping justice,, , ,,Pressure on the judiciary,, , ,,Compromising the interests of justice,, , Violation hearing solemnity,, , ,, Unfair assistance and representation,, .

Have also been redesigned other criminal acts that were already incriminated, such as, ,,not-telling,, , ,, favoring the perpetrator,, , ,,influencing statements,, , ,,perjury,, , concealment,, .

By introducing a new incrimination, that of compromising the interests of justice, provided for in art. 277, the legislature followed to achieve several objectives.In this way, was wanted to be increased the requirement to officials working in the administration of justice in connection with the management of data and information they obtain during a criminal trial, which can significantly influence the truth or the right to a fair trial of the person investigated or accused.

In the same time to strengthen the guarantees of the right to a fair trial, and in particular the presumption of innocence, enshrined in art. 6 of the Convention for the Protection of Human Rights and Fundamental liberties had been incriminated as an alternative way of offense, the act of disclosure without law, evidence or official documents in a criminal case before it has a solution not to proceed to trial or final settlement of the case by an official who has knowledge of them by virtue of office.

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[1] Adopted through no 286/2009 Law,published in „The Official Monitor of Romania",part I,no 510 from 24 of July 2009

Since, under the Convention, signatory states have, besides negative obligation to refrain from any violation of the rights outside the permitted limits, and a positive obligation to take necessary measures to ensure these rights provided against their violation by any other person, violation of the presumption of innocence if disregarded state responsibility on those obligations.

It was also noted in the explanatory memorandum to the new Criminal Code, that through this legislation is intended to prevent public officials to present evidence (witnesses statements, surveys, video recordings hear) from an ongoing criminal proceedings in order not make the presumption of innocence into a presumption of guilt provisional pending the outcome of the case.It was also envisaged that the assessment of evidence, whatever its content, can often lead to erroneous conclusions as long as there shall be assessed against all the evidence taken, to determine its legality, relevance and probative force.For example, testimony which is later proven to be false or any other apparently incriminating evidence will inevitably induce the idea of guilt, and sometimes it can not be changed even by presenting the official verdict of innocence found by judicial authorities.

Another objective is the need to preserve the secrecy of the administration evidence in a criminal investigation phase which is secret.

1. Legal content

Article nr. 277 of the Penal Code provides that the crime of compromising the interests of justice may be committed in the following alternative arrangements:

(1) Disclosuring without law, confidential information concerning the date, time, place, manner or means by which evidence is to be administered by a magistrate or other public official who has knowledge of them by virtue of office if this can be hindered or prevented the prosecution. The penalty is imprisonment from 3 months to 2 years or a fine.

(2) Disclosuring without law, evidences or official documents in a criminal case before a solution has not proceeding to trial or final settlement of the case by a civil servant who became aware of them under function. In this way, the penalty is imprisonment from 1 month to 1 year or a fine.

(3) Disclosure, without right of information in a criminal case by a witness, expert or interpreter, when the ban is imposed by the law of criminal procedure, shall be punished with imprisonment from 1 month to 1 year or a fine.

The legislator has provided also in paragraph (4) of the same article and a justifiying cause:,, deed is not a crime if trough itself are disclosed or revealed clearly illegal acts or activities committed by the authorities in a criminal case,,.

Criminal Code of 1936 divided the ,,Offences against the administration of justice" located in Title IV of Special Part in ,, Crimes against judicial activity" (art. 269-294), ,,Crimes against court ruling authority" (art 295-300) and ,,The Duel" (art.301-307)[2]

Criminal Code of 1936 provided a similar indictment in art. 293 entitled ,,Crime of disclosing acts of secret procedure".

This offense which was punishable by correctional imprisonment from 1 month to 6 months and a fine of 2,000 to 5,000 RON could be commited in the following ways:

" 1.That who, contrary to the provisions of the Code of Criminal Procedure, made public in any way, in whole or in part, indictments or other proceedings in criminal or correctional before the instruction to be completed and before these acts to be public hearing was read in court, and acts of research or instruction of a closed business;

[2] Criminal Code Carol The Second,annotated by Constantin G. Rătescu, I.Ionescu Dolj, I.Gr. Perieţeanu, Vintilă Dongoroz, H. Aznavorian, Traian Pop, Mihail Papadopulu, N. Pavelescu, second Volume,Special Part,Publishing of SOCEC & Co S.A Library, Bucharest, 1937.

2.The one who publishes a report on the proceedings of a trial, that the Court has forbidden publication or has declared secret;

3.The one who publishes the names of judges, indicating their individual votes which are awarded in verdicts or judgments, or assessments made on solutions based judgments likely a current or on the facts and background of people in process;

4.Whoever publishes the report on the hearing which is being discussed as a crime committed by a minor, or portrait of a minor sought or any other illustration related to it or on its criminal acts of;

5. The one who publishes a complete account of libel,in which the sample material to the truth is not allowed.

The provisions of paragraphs 2 and 3, the second part, and at 4 and 5 shall not apply to studies, scientific comments and notes, in no case can be made on behalf of the parties to the claim.

The comment made regarding the punishment of the offense of ,,Disclosure of the secret pleadings" is showed that this crime is not only sanctioning the ban on publication of court documents expressly referred to in terms of art. 110 and 111 of criminal procedure Carol The Second,but also in the special provisions related to proceedings of the same code of crimes against minors and honor (art. 296 and 608 penal procedure)[3].

Similar incriminations are found also in the legislation of some European countries,like in the Italian Crminal Code (art.379 bis),Spanish Crimal Code(art. 466),French Criminal Code(art. 434-7-2 şi art. 226-13),Portuguese Crminal Code(art 371),Swiss Criminal Code (art.293), Swedish criminal code(Chapter 20).

Thus, the Italian Criminal Code incriminates in art. 379 bis,,disclosure of secrets required to a criminal procedure" as follows:

,,Unless the act constitutes a more serious offense who would illegally disclose the secret information on criminal proceedings,found by him because he participated or witnessed an action of this procedure, is punished with imprisonment up to one year.Same punishment applies also to the person who, after giving statements during the preliminary investigations,he doesn't respect the interdiction imposed by prosecution on the strength of art. 391 alin.5 Code of Criminal Procedure".This article was introduced by art. 21 of Law no. 397 of 7 December 2000.

Spanish Criminal Code criminalises the art. 466 par. (1) that the lawyer or the prosecutor who disclose declared secret procedural actions by the judicial authority.[4]This offense is punishable by a fine of 12 to 24 months and the special lapse item,from the civil service, profession or occupation for a period of 1-4 years.

Alin. (2) of the same article incriminates disclosure of actions declared secret taken by a judge or a member of the Court, representing the Public Prosecutor, Registrar or any official in the department of Administration of Justice, in which case the punishment laid down in article 417 applies in their half higher.

The French Criminal Code[5] also provides in art 434-7-2modificat through the nr 2005-1549 Law from 12 december 2005,the following incrimination:

,,Without prejudicing the rights of defense, the act of any person who by reason of his duties, becomes aware, in accordance with the provisions of the Criminal Procedure Code,by information relating to an investigation or pending criminal prosecution on a felony or a crime knowingly disclose such information to persons likely to be involved as perpetrators, co-authors, accomplices or adopters in committing these crimes,when disclosure is made in order to obstruct the investigation or finding the truth,it is punished by two years imprisonment and 30,000 euros fine.

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[3] Criminal Code Carol The Second,op.,cit., pages 222-223.

[4] Hose Luis Manzanares Samaniego, Codigo penal (Adaptado a la Ley Organica 5/2010, de 22 de junio), Comentarios y jurisprudencia, II, Parte Esepcial (articulos 138 a 639, Granada, 2010, p. 1263-1265

[5] Available on http://www.legifrance.gouv fr/

When investigation or prosecution regards a felony or a misdemeanor, punishable by imprisonment up to ten years,as they are revealed by the provisions of article 706-73 of the Code of Criminal Procedure,the penalties will increase to five years in prison and 75 000 euro fine."

Thus, the Italian Penal Code incriminates in the art. 379 bis of ,,Secrets disclosure required in criminal proceedings" as follows:

,,Unless the act constitutes a more serious offense who illegally disclose the intelligence information on criminal proceedings, available to him because he participated or witnessed the action of this procedure, is punished with imprisonment up to one year. The same punishment applies to a person who, after he made statements during the preliminary investigations, the prosecution does not comply with the prohibition under Art. 391alin.5 Code of Criminal Procedure.

This article was introduced by art. 21 of Law no. 397 of December 7, 2000.

2. Preexsting conditions

A. Object of the crime

The doctrine distinguishes between legal subject and material object of the crime. It was argued that ,,the rules of criminal law, like any other legal requirements, are designed so they can be carried through and reunite on legal social order". Thus, in the concept of criminal law rules we find, always, the idea of protection of interest (primary idea or order), face to face with the idea of limiting the actions which could hit or threaten the interest protected (adjacent idea or disorder idea).

In establishing incriminating provisions, it is always considered the interest that is protected and the evil against which the protection is created; based on these two concepts is built the incriminating rule. That's why, in each incriminating provision , we find a combination of both concepts (the primary idea and the adjacent idea), combination which reflects synthetic the idea of right"[6].

In foreign doctrine was argued that the legal subject is an abstract value, immaterial, which does not identifies with a determined good, tangible or intangible[7].

Our doctrine has defined the legal object of the crime (or criminal object of protection) as ,,the interest that the criminal rule protects". In this way, ,,in all crimes we will find: an interest specially protected, that the incriminating rule was concerned directly and an interest protected generally, that that the incriminating rule was concerned indirectly"[8].

In which concerns the legal object, is also distinguished in the legal literature, between the general legal object, the legal generic object and the special legal object.

Regarding this classification some reservations were expressed in the doctrine of our country. Thus, it was argued that ,, the general legal concept of object is a category without any practical importance, and in addition, far too vague to be accepted. If we accept the idea that any crime affects the law order, we must accept that other forms of illegality have the same meaning. Therefore, the law order is not only affected by crimes, but also by contraventions"[9].

Related to the general legal object was noticed that the conditions under which this has special importance in the systematic special part of the Criminal Code can't be ignored the fact that there is a ,,plurality" of such objects when there are more groups andundergroups of crimes in the same title,being given as exemples the crimes against person[10].

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[6] Vintilă Dongoroz, *Criminal Right* , (republication of 1939 edition), Romanian Association of Criminal Sciences, Bucharest, 2000, pages 163-164

[7] I. B. Gomez de la Torre, ş.a., *Curso de dercho penal. Parte generale*, Ed. Experiencia, Barcelona, 2004, page 204, quoted by Florin Streteanu,*Treaty of criminal right.General Part* , Vol. I, page 345.

[8] Vintilă Dongoroz, *Criminal Right* , (republication of 1939 edition), Romanian Association of Criminal Sciences, Bucharest, 2000, page 164.

[9] Florin Streteanu, *Treaty of Criminal Right*, Vol. I, C. H. Beck Publishing, Bucharesti, 2008, page 346.

[10] Florin Streteanu,op. cit., page 347

Depending on the legal structure of the object, Italian doctrine distinguishes between monooffensive and pluriofensive crimes. It was considered therefore that if in monooffensive crime, the crime is sufficient for the existence of a single violation of a social value, while plurioffensive crimes must involve necessarily undermine more social values. There is a plurioffensive crime only when its typicity is conditioned in abstract by damaging or jeopardizing more social values.

a) The special legal object of the crime lie in those social values and social relations that grow on them, whose existence is ensured by the maintenance work of justice against acts to hinder or frustrate the truth by the judicial organs.

b) The secondary legal object(adjacent) is represented by the freedom or dignity of the person and sometimes his patrimony also when sometimes by disclosuring , without law, evidence or confidential information bring some damage.

Since according to the structure of the crime's object analyzed may also be harmed the interests of justice, and rights belong to individuals, such as dignity, freedom, or its patrimony, we believe that this incrimination is part of plurioffensive crimes.

c) Material object can be, as is clear from the damning, the official documents, the evidence (witness statements, minutes of transcription of interceptions). In legal literature it is argued that the material object of the crime is ,,the good against which the action or inaction goes directly, and in its entirety can be harmed or endangered by this action"[11].

B. Crime's subjects

a) The active subject of crime is a qualified one (circumstantial):magistrate, a public servant, witness, expert or interpreter.

Participation is possible in the form of instigation and complicity, these participants were not directly required quality of the active subject. The coauthors is believed not to be possible because the obligation not to disclose confidential informations or not disclose confidential evidence, documents or information in a criminal case is a personal one.The doctrine was pronounced in the same way regarding the activ subject of the crime of disclosure of professional secrecy[12].If more persons are having the special quality required by law,based on an agreement, divulge or disclose, without law, confidential information, evidence, official documents or information they have acquired by virtue of office or the disclosure of which has been prohibited by the Criminal Procedure Act, each person commits a distinct offence of compromising the interests of justice, as author.

b) The mainly pasive subject is the state because the justice is its atribute. Along with the state natural or legal person whose rights or interests are harmed by the offense, is **secondary pasiv subject or adjacent.**

3. Constituent content

Premise situation. The premise situation is represented by the existence,prior committing the crime, of a ,,criminal cause" with the meaning of a pending cause of the judicial organs.

A. Objective side

a) Material element

The material element includes a description of the event which can be achieved by two alternative actions: ,,divulgence" or ,,disclosure". Since the law does not require that these ways to take place simultaneously, the content of the offense remains a simple one.

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[11] Florin Streteanu, Criminal Law.General Part, volI. page 351

[12] Victor Roşca,*Crimes against person's liberty(Disclosure of professional secreacy), in* „Theoretical explanations over The Criminal Code", by V. Dongoroz and others., vol. III, Second Edition, Romania Academy Publishing,All Beck Publishing , Bucharest, 2003, page 321; Vasile Dobrinoiu, Norel Neagu, *Criminal Law, Special Part,Theory and judicial practice,*Wolters Kluwer Publishing , Bucharest, 2008, pages 191-192.

„The legislator describes the fact that he intends to prohibit (vetitum) or to impose (jussum) not from imagination or caprice, but by giving expression to the social needs, the need to protect, by means of criminal law (which is last ratio) the fundamental social values . The description from the incrimination rule is a generalization of the specific traits of the facts assessed by the legislator in pre-legislative period, is his conclusion about the need to combat this facts through the intercession of law''[13].Regarding the description of the illegal act of the incrimination rule, the doctrine was argued that it „it must be, if possible, exhaustive, the legislator has the obligation not to omit anything that would characterize the act on which it seeks to repress.But sometimes is possible that the incrimination rule not to contain all the conditions of incrimination. The doctrine recognizes the possibility of a penal offense **open content**, when the legislator does not list all the ways it comes obtaining the results.Other times the legislator establishes **closed incrimination contents**, specifying, limited, the means to achieve the result to produce. Open content indictment refers to ways of committing crime can be totally omitted (as in murder), or be listed as examples, then use the formula „and other similars" or another closed formula".[14]

Divulging is to expose, to reveal, to make a secret to be known to many people.[15]From the text formulation results that he t action must be intended to disclose confidential information about a sample, ie the date, time, place, manner or means of administration.

To reveal is to uncover, make known (by words, writing, images) to show, to disclose. Disclosure must take place without law, what is an illegal condition or special antijuridicity , which was said to represent one of the elements of conviction.[16]

In the manner of disclosure, without law, evidence or official documents in a criminal case before a solution has not proceeding to trial or final settlement of the case, it may prejudice the right to a fair trial and particularly the presumption of innocence, as guaranteed by art. 6 of the Convention.

In the case of the crime committed by a witness, expert or interpreter, typical behavior is realisedtrough disclosure rightless,of information from a criminal case when this interdiction it is imposed by the law of criminal procedure.For the incrimination to respond to requirements of predictability and functionality ,relative to be understood by recipients of the criminal rule and to be applied by the judiciary organs,the law of crimianl procedure must expressly provide those situations when it is forbidden for witnesses,experts and interpreters to communicate or disclosure information.

According to article 285 paragraph 2 of the new Criminal Procedure Code[17]:the procedure during the prosecution is not public.Also,art.352 from the same code which provides as a general rule-the publicity of the trial-,provides and the possibility of declaring the trial secret,situation when the trial's file is not public.

Paragraph 8 of the mentioned article is imposing to the presiding judge the duty to inform the persons who participates to the secrettrial,obligation of keeping the confidentiality of the information got during the trial.

Violation of this obligation may be punished with judicial fine from 1000 to 10000 RON,excepting the situation when this divulging is not an infraction.

Besides these provisions were not identified in the procedural law other bans imposed to the witness or other active subjects of the crime that could be committed in the manner prescribed by the paragraph. (3) of art. 277 by which to determine specifically what information must not be disclosed.

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[13] George Antoniu, *The material element from the incrimination rule*, Criminal Law Magazine, nr. 2/1999, page 12.

[14] George Antoniu,Ibidem, page 12.

[15] Romanian Explicative Dictionary, Second edition, Universul Enciclopedic Publishing, Bucharest, 1998, page 321

[16] Vintilă Dongoroz,Criminal right (reeditated edition from the 1939 one), precit. page 163.

[17] The New Criminal Procedure Code,adopted through Law nr.125/2010,published in Romanian Official Monitor nr.486 from 15 of July 2010.

We consider that, at least in the manner prescribed by the paragraph. (3),the incrimination that we are analyzing can't pass the test of predictability and functionality that the objectivity of legality principle requires for any incimination.

b) Immediate consequence is endangering the social value protected. In legal literature it was argued, regarding crime's comission in modality of disclosure, without right, of confidential information as par.(1) of art. 277 provides -disclosure ,,must have as consequence hindering or preventing prosecution".[18]

We believe that this is not the meaning which the legislator has given through the wording of the law since it is alleged that the disclosure of confidential information as a requirement to complete the objective side to occur and the result also, is only sufficient to create a state of danger.Legislator has embodied this circumstance in the formulation in: ,,if through this prosecution can be hindered or prevented". By using this expression to delimit the concept of confidential information, their importance and especially the administration of some important evidence for criminal prosecution.We appreciate that for achieving the content of the crime in the the manner provided by .par. (1) is not actually necessary that the prosecution to be hindered or blocked, being sufficient just endangering the normal activity of the criminal investigation.

Towards the specific content from the incrimination rule, we believe that this crime is one of concrete danger.Considering the crimes of concrete danger was endorsed in legal literature[19] that ,,they are characterized through the provision in the incrimination rule of the demand that the fact must create a state of danger for the protected value.Therefore, the fact would be a crime only if it is proved that in concreto, it has generated such a danger.Like in the case of result crimes the existence of physical changes in the external world must be proved ,in hypothesis of crimes of concrete danger must be proved creating a state of danger for the social value protected by criminal law provisions."

c) Causality report. To complete the objective side of the offense it must be a causal link between the action (inaction) that the material element of the deed was done and the immediate consequence, endangering the social relations regarding administration of justice.

B. Subjective side.The form of guilty necessary to achieve the subjective side of the offense is intention direct or indirect.

4. Forms.Variants.Sanction

From the text's formulation results that the preparatory acts are not incriminated and the attempt is not punishable. The offense is consumed differently. In the type variant provided by alin.(1)it is necessary to must proved the actual state of danger, namely the way could be hampered or prevented the prosecution.

The legislor has provided two versions of incrimination in two legal ways and a justificative cause

Sanctions are provided alternative, namely imprisonment from one month to one year or fine and imprisonment from three months to two years or a fine.

5. Procedural issues. Criminal proceedings shall be initiated automatically

In conclusion, we are considering that the new incrimination regarding compromising the interests of justice can contribute to the prevention and punishment of those facts through which can be seek disclosure or divulging of elements, confidential information, evidence in a criminal case, issues that could hinder the proper conduct of the trial or would affect the presumption of innocence.

[18] Petre Dungan, *A new incrimination-compromising justice's interests,* in "Dreptul", nr. 8/2010, page 80.
[19] Florin Streteanu, op. cit., page 407-408.

De lege ferenda, we propose, for ensuring the predictability and functionality of the criminal rule, that the legislator to provide,in the law of criminal procedure, specifically or in ways that determine which are the information that a witness, expert or interpreter must not disclose in a criminal case. Otherwise, this task would be left to the judicial organs who could create the danger of an incrimination by analogy.

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THE APPROPRIATION OF A FOUND GOOD

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Abstract
The appropriation of a found good is an offense, as stipulated by Art. 216 of the Criminal Code in two normative modalities. According to the first one, the offense consists in the fact of not handing over of a lost and found good to the authorities or to the person who lost it thereof or in the fact of disposing of the respective good as of an own good. The "found" good is a good that has been lost, forgotten or wandered by another person. The lost good (wandered) can only be a movable good. Immovable goods cannot be wandered and therefore cannot be found. Furthermore, the authors are discussing, besides the juridical and material object, the subjects of the offence, the subjective aspects and the applicable sanctions, the theoretical analysis being complemented with comments on the jurisprudence.

Keywords*: appropriating, good, active subject, the moment of consuming, forms, sanctions.*

1. Concept

The appropriation of a found good is an offense, as stipulated by Art. 216 of the Criminal Code in two normative modalities.

According to the first one, the offense consists in the fact of not handing over of a lost and found good to the authorities or to the person who lost it thereof or in the fact of disposing of the respective good as of an own good.

According to the second modality, the same offense consists in the unlawful appropriation of a movable good that belongs to another person, but has reached the perpetrator's possession by mislead.

The text of Art. 216 in the Romanian Criminal Code reaches its correspondent in Art. 647 of the Italian Criminal Code.

Within the new Criminal Code, the offense is stipulated in the Special Part, Title II, Chapter III, Art. 243 under the denomination "The Appropriation of the Lost Good or of the Good That Reached by Mislead the Perpetrator's Possession".

2. Preexisting conditions

A. The object

a) The Special Juridical Object coincides with the general one, consisting in the social relations that assure protection to the person's patrimony.

b) The Material Object of the offense is given by the good found by the perpetrator (paragraph 1) or by the good that has reached the perpetrator's possession by mislead (paragraph 2).

The "found" good is a good that has been lost, forgotten or wandered by another person.

The lost good (wandered) can only be a movable good. Immovable goods cannot be wandered and therefore cannot be found.

Doctrine1 often underlines the fact that, in order to become the material object of this offense, the good shall be part of a person's patrimony, hence not to be "abandoned". The evidence of this

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fact is necessary because the abandoned goods (res derelictae) cannot constitute the material object of a patrimony related offense.

The question related to specifying when a good can be considered as "abandoned" yet arises. Of course, the issue is not related to goods that were left in private spaces (as taking a good from a private space constitutes, without any doubt, theft), but only to the situation when a good is found unattended in a public space. In this latter case, one cannot establish if the possessor's intention was to abandon the good or if the possessor left it there for other reasons (for instance, because he/she considered that no one will touch his/her good). Therefore, for avoiding risks, one should exclude the hypothesis of the respective good being abandoned and to consider the respective good as belonging to a person's patrimony, being eventually "lost" by the owner. In any case, the possessor's intention of abandoning the good cannot be presumed, but it must result from circumstances that reflect an undoubted intention in this respect – like, for instance, the circumstance that the possessor left the good in a place where waste or residues are normally deposited.

From here, a movable good left unattended in a public space has to be considered always as a "found good" and the offense stipulated by Art 216 of the Criminal Code subsists every time a person appropriates such a good.

Consequently, it has been wrongfully decided that the appropriation of a good temporarily left unattended or forgotten by the owner in a certain place, where he/she knows about the good, constitutes the offense of theft and not appropriation of a found good2.

Regarding the good that reached by mislead the perpetrator's possession, it has to be underlined that this one can be either a good handed over to the perpetrator , based on the error of the person who handed it over, either a good that the perpetrator has appropriated by him/herself, believing that the respective good is his/hers.

In case the mislead of the person who handed over the good has been provoked by the perpetrator, the fact shall constitute the offense of fraud.

B. Subjects

a) Active immediate subject of the offense can be any person, apt for criminal liability, as the text does not require any special quality on the part of the author.

Based on the dominant position of the doctrine3, the criminal participation is possible under all its forms for this offense. As far as we are concerned, we deem that this fact, as incriminated by Art. 216 paragraph 1 in the Criminal Code, cannot be committed by co-authors, since it is an omissive offense, with an unique author (the obligation of handing over a lost good is a personal obligation).

b) Passive subject is the natural or legal person who had lost a good or to whom the good that reached by error to the perpetrator belongs to.

3. Constitutive Content

A. Objective Aspects

a) The Material Element

Within the first normative modality (Art. 216 para. 1), the material element consists either of the fact of "not handing over" a found good, either of the fact of "disposing" of the found good.

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[1] D. Lucinescu, *Codul penal comentat şi adnotat, Partea specială*, vol.I, (The Criminal Code Commented and Amended). Special Part), Ed. Ştiinţifică şi Enciclopedică (Scientific and Encyclopedic Publishing House), Bucharest, 1975, p.328.

[2] T. S., dec.pen nr.184/1974, (Supreme Court Criminal Decision) in RRD nr.7, 1974, p.62; T. S., dec.pen.1571/1972, in *Repertoire I*, p.74 ş.a.

[3] D. Lucinescu, op.cit., p.328.

"Not handing over" implies the omission of delivering the found good to the authorities or to the person who had lost it (when the perpetrator knows this person). The text does not claim that the good to be handed over to a certain authority, hence the doctrine deemed that it can be handed over to any authority4 In fact, the good has to be handed over under evidence, which imposes that its delivery to be made to the specialized state services, organized and functioning according to law. The omission of handing over gets a criminal relevance only if 10 days have passed since the finding of the respective good. The expiry of this term leads to the legal presumption of appropriation related to that good.

The offense can be consumed even before the expiry of this 10 days term, if the perpetrator disposes of the good as of his/her own property. In this latter case, "to dispose" of the found good does not only mean legal acts enforcement towards the good (selling, renting etc.), but also the use, consumption or transformation of the good.

Under the legal practice, it has been decided that the same offense is being committed if a person, after finding such a good, denies towards the good owner the finding and the detention/ possession of the respective good. In motivating this solution, it has been evidenced that the 10 days term is granted only to the good faith finder; if the finder manifests the intention towards the good appropriation before the expiry of the term, the offense is deemed as consumed or terminated5.

However, this perspective has not been unanimously recognized. On the contrary, certain authors have criticized the solution, observing that the simple denial regarding a good found does not accomplish the material element of the offense, in none of its normative versions. As long as the term did not expire and the founder did not dispose of the found good as it was his/hers, one cannot apply Art. 216 of the Criminal Code. The contrary solution tends to sanction the simple appropriation intention, without considering that the text grants to the founder a time for reflexion and, before the expiry of the 10 days, he has the possibility to reevaluate his/her decision in appropriating the good and therefore in committing the offense.

This offense cannot be committed by the employee of a "lost and found" service, because in this case the appropriation of a good handed to him for conservation constitutes the offense of dilapidation.

In the second normative modality, the material element consists of the unlawful appropriation of a good belonging to another person, that has reached by mislead the perpetrator's possession.

Within the field literature, a proposal for amending Art. 216 para. 2 has been submitted and consisted of the establishment of a delivery term, just like in the case of Art. 216 para. 1 of the Criminal Code6, taking into account that there can be situations when the perpetrator immediately realizes who is the owner and keeps the good, but without endeavoring any disposition acts towards the latter one; or, in such a situation, there is an incertitude regarding the moment when the offense should be deemed as consumed.

As per our opinion, we consider as disputable the necessity of such an incrimination, in its both factual modalities.

On the one side, if the perpetrator takes, by mistake, a movable good belonging to another person (of course, without the owner's consent) the problem that arises is wether the theft felony has been committed or not and, for defending him/herself, the perpetrator has to make evidence that the purpose of the unlawful appropriation is missing, respectively that he/she took the object by mistake because of the similarities between his/her own good and victim's good.

On the other side, if the perpetrator appropriates a movable good belonging to another person and this person handed the good by mistake, the fact could constitute, without difficulty, the offense

[4] D. Lucinescu, op. cit., p.329.
[5] T.j. Braşov, dec.pen. nr.325/1970, în RRD nr.10, 1970, p.165.
[6] G. Antoniu, C. Bulai, op.cit., p.142.

in 216 Criminal Code, taking into account that by "found good" one can understand also a good that reached by mislead the perpetrator's possession.

In any case, the incrimination in para. 2 has an identical protection purpose with the incrimination in para. 1 of Art. 216 Criminal Code, namely assuring the accomplishment of the handing over obligation, hence its existence is not justified. In this case, the perpetrator, realizing the good does not belong to him/her, again omits to hand it over to the authorities or to the one from whom he/she has received it. Or, given the facts, the renunciation over the incrimination in para. 2 of Art. 216 would be imposed and eventually, the first paragraph would be completed, with the mention that the fact can have as its material object even a good that reached by mistake the perpetrator's intention.

b) Immediate consequence

The majority of authors assert that, for this offense, the result consists in a new situation, according to which "the good is unlawfully under the ownership sphere of the perpetrator"7.

On our perspective, such an assertion equals to the fact that the offense presents itself as a formal one, more exactly as a pure omission type of offense.

c) Causality Link result ex re, from the itself omission of handing over the good.

B. Subjective Aspects.

Subjective Element. This offense can only be committed by intention, despite the fact that, according to Art. 19 para. 3 of the Criminal Code, the fact consisting of an inaction is an offense no matter if it has been committed by intention or only by guilt, excepting the case when law sanctions its intention based accomplishment only.

This exception type solution has been explained by the fact that the denomination of this offense itself would exclude, in an implicit manner, the possibility of its accomplishment by guilt only. But, in reality, the text of Art. 19 para. 3, same as the text of Art. 19 para. 2 of the Criminal Code, assigns a falsehood – because there are no offenses, actions or omissions, committed "by guilt"; action is always a physically intentioned manifestation, oriented by a purpose.

The Mobile or Scope are not constitutive elements of the offense.

4. Forms. Sanctions

Preparatory Acts and Tentative are not being sanctioned.

The moment of the offense termination differs in relation with the modality in which the offense is being committed.

In principle, the offense is being consumed by the expiry of the 10 days term, calculated from the date of the good being found. When the expiry is a day on which the authorities have their services suspended, the handing over within the next day will be considered within the legal term. Within the 10 days period, the perpetrator can at all times hand over the good, without being held responsible of committing the offense.

An anticipate termination of the offense is limited to the situation when cert evidence is being given that, within the 10 days term, the perpetrator has disposed of the good as of its own. In other terms, when the material element consists of disposing of a good, the termination takes place together with the accomplishment of the material element.

This offense is sanctioned with detention from one month to three months or with penalty.

The court can dispose, according to Art. 90 of the Criminal Code, the replacement of the criminal liability.

[7] Dumitru Lucinescu, *op. cit.*, vol.I (1975), p.330.

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CONSIDERATIONS REGARDING THE CRIMINAL LIABILITY OF CORPORATIONS – THE ROMANIAN WAY

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Abstract
Announced by the legal literature, recommended through an important number of international instruments, already provided for in the majority of European Criminal Codes, the criminal liability of corporations (re)gained its place in the Romanian legislation, through Law no. 278/2006 for the amendment of the Criminal Code and other laws. The purpose of the paper is to present the main regulations governing the criminal liability of corporations, as existing in the Criminal Code, as well as they are provided in Law no. 286/2009 (the new Criminal Code). Although the criminal liability of corporations is now consecrated in Romanian for almost five years, there is however some reticence in engaging the liability of such person which is not "in the flesh", but only, according to some opinions, an abstract entity which lives only in the universe of jurists. As a consequence, up to present there is little case law in this field. Nonetheless, in the past year, it can be noticed an emergence of the files where the problem of the criminal liability of corporations is raised. Therefore, the objectives pursued by the present study are to provide an approach on the court decisions where criminal charges against corporations were carried out and to see how the relevant legal provisions were applied in these cases.

Keywords: *criminal liability, corporations, sanctions, precautionary measures, safety measures*

Introduction

Criminal liability of corporations has become one of the most debated topics of the 20th and 21st centuries. The debate became especially significant following the 1990s, when all countries have faced an alarming number of environmental, antitrust, fraud, food and drug, false statements, worker death, bribery, obstruction of justice, and financial crimes involving corporations[1].

In Romania, the criminal liability of corporation was announced by the doctrine[2] and recommended through an important number of applicable international documents[3]. Also, the criminal liability of corporation had been already recognized through many European Criminal Codes[4]. As a consequence of all this factors and of the great number of crimes related to corporations, their criminal liability (re)gained its place in the Romanian legislation in 2006, when

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[1] Anca Iulia Pop, „Criminal Liability of Corporations - Comparative Jurisprudence", (King Scholar Program, Michigan State University College of Law, 2006): 2.

[2] Please see in this respect the debates of the Second Congress of the International Criminal Law Association which took place in Bucharest in 1929 and further debates in Rome (1953), Bucharest (1978), Cairo (1983). Please also see George Antoniu, "Criminal Liability of Corporation", *1 Criminal Law Review* (1996): 9-15; Dan Adrian Brudariu, "Criminal Liability of Corporation", *9 Commercial Law Review* (1996): 145-148; Florin Streteanu, "Criminal Liability of Corporations in the Legislation and Doctrine. Comparative Law Presentation", *3 Commercial Law Review* (1997): 64-86; Anca Jurma, "Crimina Liability of Corporation", *1 Criminal Law Review* (2003): 99-118; Adrian Fanu-Moca, "Criminal Liability of Corporation", *1-2 Romanian Law Studies* (2004): 217-222.

[3] Council of Europe Recommendation (88) 18 concerning Liability of Enterprises Having Legal Personality for Offences Committed in the Exercise of their Activities; Second Council Protocol of 19 June 1997 to the Convention on the protection of the European Communities' financial interests; Convention on the Protection of the Environment through Criminal Law (Strasbourg, November 4, 1998); Criminal Law Convention on Corruption (Strasbourg, January 27, 1999) etc.

[4] Please see art. 51 of the Dutch Criminal Code of 1976, art. 121-2 of the French Criminal Code of 1994, art. 5 of the Belgian Criminal Code of 1999 etc.

Law no. 278/2006 for the modification of the Criminal Code and of other laws[5] was adopted. Therefore, this paper covers the problem of criminal liability of corporations in Romania, as regulated by the Criminal Code into force.

The criminal liability of corporations lives its first years of life in the Romanian legislation. It is thus understandable that this topic raises numerous problems. The first court decisions against corporations were given in 2009 and the jurists do not seem totally convinced by the utility of this institution, continuously named "recent". The press periodically offers examples related to criminal prosecutions against the administrators of corporations for crimes such as counterfeit, corruption, environmental crimes, tax dodging etc. although it is obvious that criminal liability of the said corporations should (also) be examined. This situation is generated by both the lack of ignorance of the conditions of the criminal liability of corporations and the fear in front of a new institution. Moreover, the few cases when the criminal liability of corporation was raised ended with questionable solutions. Last, the new Criminal Code adopted in 2009 brings some changes in this field. This is why a detailed presentation of the legal provisions related to this issue is particularly important.

In order to answer this matter, this paper shall cover, in a first phase, the conditions required by the law in order to engage the criminal liability of corporations, also taking into account the foreign regulations which inspired them, if case. Of course, the beginning of a criminal trial against a corporation creates both criminal and criminal procedural consequences, which shall be studied in the second part of the paper.

As resulting from the abovementioned statements, the criminal liability of corporations is still a new institution in the Romanian legislation. Hence, there is little literature on this topic. This paper is not meant to be a synthesis of the existent specialized literature nor does it represent a critic to this doctrine, aiming to offer another perspective on the criminal liability of corporations.

I. THE CONDITIONS REQUIRED BY THE LAW FOR THE CRIMINAL LIABILITY OF CORPORATIONS

The criminal liability of corporations is regulated in art. 19^1 of the Romanian Criminal Code, named „*The Conditions of the Criminal Liability of Corporations*"), being found in Chapter I („*General Provisions*") of Title II ("*Crime"*) of the General Part of the Code, immediately after the provisions related to the general characteristics of the crime. According to this article, the corporations[6], excepting the State, the public authorities and the public institutions which develop activities which cannot form the object of the private field are criminally liable for the crimes committed when performing the object of activity, to their benefit or on their behalf. The Code also states that the criminal liability of corporations does not exclude the criminal liability of the natural person who contributed, in any manner, to the perpetration of the same offence.

Other provisions related to the criminal liability of corporations are contained in the articles related to the attempt [art. 21 par. (2) of the Criminal Code], the concurrence of crimes (art. 40^1 of the Criminal Code), the recurrence (art. 40^2 of the Criminal Code), the intermediate plurality (art. 40 of the Criminal Code), in Title III of the General Part regarding the sanctions, as well as in the provisions related to the status of limitation of the criminal liability (art. 122 last par. of the Criminal Code) and of the execution of the sanction [art. 126 par. (2), (3) of the Criminal Code], rehabilitation [art. 123 par. (2) of the Criminal Code]. Some relevant provisions are also contained in the Special

[5] Published in the Official Journal no. 601 of July 2006. The provisions regarding the criminal liability of corporations entered into force 90 days after this date.

[6] For the purpose of this paper, we used the term "corporation" in order to define the collective entities which are liable under the Romanian Criminal Code. As explained below, only the legal persons (which acquired legal personality) can be held responsible, with the exceptions provided by the law.

Part of the Criminal Code [art. 271 par. (5) regarding the non-observance of court decisions and art. 285^1 regarding the sanctioning of the corporations for forgery crimes]. Last, as it is normal, the procedural provisions regarding the criminal liability of corporations can be found in the Criminal Procedure Code (Chapter I^1 of Title IV – *„Special Procedures"*- of the Special Part).

All these provisions create the legal framework of the criminal liability of corporations. In order to determine the conditions of the criminal liability of such persons, there are three questions which need to be answered: who (which corporation) can be criminally liable? (1), for what crimes ? (2) and how can we relate those two – the corporation potentially liable and the crimes which can be perpetrated by such entities? (3).

In order to answer these questions, we need to analyze the aspects related to the application field of the criminal liability of corporations, from both material and personal perspective (**1**), as well as the ones related to the lien between the crime committed and the corporation (**2**).

1. The domain of the criminal liability of corporations

The first issue raised by the criminal liability of corporations is related to its domain. The doctrine, either Romanian or foreign (from the states which inspired the Romanian legislator) affirms that the criminal liability of such entities is general[7]. This means that it is applicable to all legal persons and to all crimes, provided by the Criminal Code or by special laws. Some explanations must however be made in both cases. Therefore, the domain of the criminal liability of corporations include its analysis from both personal perspective, through the examination of the legal persons which can be subjects of the criminal liability, and material one, through the delimitation of the crimes which can be perpetrated by a legal person.

Regarding the legal persons subject to criminal liability, art. 19^1 of the Romanian Criminal Code clearly states that the corporations, excepting the State, the public authorities and the public institutions which develop activities which cannot form the object of the private field are criminally liable. This rule requires however various discussions regarding, on one side, the private legal persons and, on the other side, the public legal persons.

With respect to the private legal persons, as a principle, all such entities can be liable under the Romanian Criminal Code, including the commercial companies[8]. This category of legal persons is mainly concerned by art. 19^1 of the Romanian Criminal Code, taking into account that they are frequently met in the economic landscape and the most capable of perpetrating crimes through their activities. The text also concerns syndicates, economic interests groups, European economic interest groups, owners associations, political parties, associations, foundations etc. Regarding the latter two legal persons, it must be mentioned that, according to art. 1 point 2 of the Government Ordinance no. 26/2000 regarding the associations and the foundations[9], they are private legal persons without patrimonial scope. The doctrine showed that these categories cannot be included in the one of the persons excepted of the criminal liability, provided by art. 19^1 of the Criminal Code as they cannot be assimilated with the State, the public authorities and the public institutions which develop activities which cannot form the object of the private field, because they have other juridical nature, they function based on other laws and they have other functions than the associations and the foundations. Neither their recognition, through Government Decision, as being of public utility does not exclude them from the criminal liability because, on one side, the legislator does not exclude them from the winding-up when their scope or activity became illicit or contrary to the public order and, therefore, even more they are not excluded from this sanction when they committed criminal offences, and on

[7] Francis Le Gunehec and Frédéric Desportes, *General Criminal Law*, (Paris: Economica, 2006), 573.

[8] For instance, in France, in the projects of the Criminal Code of 1978 and 1983, only private legal persons were concerned by the provisions which regulated the criminal liability of corporations.

[9] Published in the Official Journal no. 39 of January 31st, 2000.

the other side, the associations and foundations are not provided in any legal text as being expressly excluded from the criminal liability[10].

Therefore, the Criminal Code concerns the lucrative legal persons, as well as the ones without lucrative purpose. Of course, the logical interpretation of the provisions regarding the criminal liability of corporations leads to the conclusion that this institution was mainly created for the lucrative legal persons[11]. It is beyond doubt, taking into account their scope (to obtain turnover), those kinds of persons are the most exposed to criminal liability. From the analysis of the first three decisions against legal persons, it can be noticed that only limited liability companies were sentenced.

Some other issues are raised with respect to the determination of the exact concept of "legal persons". We must therefore analyze the chronological limits of the criminal liability of corporations[12], meaning the determination of the criminal liability of the entities lacking legal personality, the entities which are being created, transformed or dissolved.

Regarding the first issue, it must be noticed that, according to the Criminal Code into force, only the legal persons are liable. *Per a contrario,* the entities which lack legal personality do not fall under the provisions of the criminal law. This solution is grounded on the idea that a person who does not have identity or legal existence cannot be sentenced and that, anyway, such sentencing would not have any interest, because the said entity does not have rights or a patrimony[13]. Moreover, the doctrine showed that the limitation of the criminal liability of corporations to the entities having legal personality represents a source of legal security, which would be damaged if such entities would be criminally liable[14]. Thus, it would be difficult to establish who could represent such entities in a criminal trial and the enforcement of sanctions would be hard to conceive with respect to the principle of the personal character of the criminal liability[15].

A second problem which was raised regarding the criminal liability of private corporations is related to the moment when such liability can be held against them, knowing that there is always an amount of time between the moment when the by-laws of the company are signed and until the date when the person is registered according to the law. In the absence of any case law in this field, the doctrine stated that no criminal liability of such entities could be admitted. Such idea would raise various problems, especially regarding the sanctions applicable to these entities. Moreover, it must not be forgotten that the principle of legality must always be observed: as long as the Criminal Code clearly states that only the legal persons are liable, no collective entity could be responsible before that moment.

What is the solution with respect to the criminal liability of a corporation when such person is being transformed, taking into account the fact that, in such situation, the loss of legal personality normally becomes an obstacle to the liability[16]?

According to the Romania law, the transformation of corporations can be made through merger or demerger. Those two modalities are described in art. 41 of the Decree no. 31/1954

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[10] See Valerica Dabu and Remus Borza „Some Considerations regarding the Criminal Liability of Corporation. Constitutionality", *1-2 Romanian Legal Studies* (2007): 167.

[11] See Le Gunehec and Desportes, *General Criminal Law*, 573. In France, out of 97 decisions against corporations, given in the first four years after the consecration of their criminal liability, 60 were given against commercial companies (limited liability companies or stock companies). See Claude Ducouloux-Favard, "Four Years of Criminal Sanctions against Corporations", *Recueil Dalloz* (1998): 395.

[12] See Isabelle Urbain-Parleani, "The Chronological Limits of the Engagement of the Criminal liability of Corporations", *Companies Review* (1993): 239.

[13] See Le Gunehec and Desportes, *General Criminal Law*, 586.

[14] See Frédéric Desportes, "Criminal Liability of Corporations, art. 121-2", *Juris-classeur penal* (2001): 63.

[15] See Florin Streteanu and Radu Chiriță, *Criminal Liability of Corporations* (Bucharest: C.H. Beck, 2007), 100.

[16] See Marc Segonds, „Frauding article 121-2 of the Criminal Code", *9 Criminal Law,* (2009): 18.

regarding the natural and legal persons, according to which the merger is made through the acquisition of a legal person from another legal person or through the consolidation of more legal persons in order to create a new legal person, while the demerger is made by the split of the entire patrimony of a legal person between other existent legal persons or who are thus being created.

The Romanian Criminal Code does not state on this issue, but the doctrine generally accepts the possibility of engaging the criminal liability of corporations for offences perpetrated before the transformation, based on the continuity of the legal person[17]. This solution is expressly provided by the new Criminal Code adopted through Law no. 286/2009[18]. Thus, according to art. 151 par. (1) of the new Code, named "*The effects of the merger and the demerger of the legal person*", in case of the loss of the legal personality through consolidation, acquisition or demerger, after the perpetration of the crime, the criminal liability and its consequences shall be suffered by the legal person created through consolidation, the person which acquired the initial one or the persons created through demerging.

The foundation of this solution is related to the effects of the transformation of the legal persons, which suppose the transmission of the patrimony. This idea allows the practical enforcement of the sanctions against the entity which acquired the patrimony of the person which committed the crime. Of course, one could state on the breach of the personal character of the criminal liability. Also, some problems related to equity or opportunity can be raised: it is justifiable to dissolve a newly created person for crimes committed before this moment? The case law shall respond to these problems.

The "death" of a corporation raises as much problems as its birth and life. It is known that the disappearance of a legal person determines a liquidation period, when the legal person keeps its civil capacity, meaning also its legal personality. Although the Criminal Code is silent in this matter, it is generally accepted that the corporation is criminally liable during this time, taking into account the fact that it does not lack legal personality.

While it can be observed that there is no exception to the criminal liability of private legal persons, the situation is different with respect to public legal persons. The Romanian Code provides for two absolute exceptions, concerning the State and the public authorities, and an exception which requires various discussions, regarding the public institutions which develop activities which cannot form the object of the private field.

The criminal liability of the State is expressly excluded by art. 19^1 par. (1) of the Criminal Code. The same exception exists in all the laws or projects of criminal codes which accepted the criminal liability of corporations. The reasons of this exception are related to the principle of sovereignty and of the separation of powers[19]. Another argument links the State to its role regarding the criminal sanctions: the State has the monopoly of the right to punish; as a consequence, the State cannot punish itself[20]. The same arguments are used in order to justify the exclusion of the public authorities from the criminal liability.

With respect to the public institutions, their criminal liability is excluded only if they develop an activity which cannot form the object of the private field. Such solution is yet criticizable. Normally, in the legislations of the States which provide the same exception, only the legal persons which committed the crime while performing an activity which cannot form the object of the public domain are excluded. The contrary solution, existing in the Romanian Criminal Code, allows the

[17] See Streteanu and Chiriță, *Criminal Liability*, 191.

[18] Published in the Official Journal no. 510 of July 24, 2009. The date of the entering into force shall be provided through the Law for the application of the Code.

[19] See Etienne Picard, "Criminal Liability of Public Legal Persons: Foundation and Domain", *Companies Review* (1993), 261.

[20] See Cosmin Balaban, "The Corporation, Subject of Crime", *2 Criminal Law Review* (2002): 80; Costica Bulai, Avram Filipas and Constantin Mitrache, *Criminal Law Institutions. Selective Course for the Bachelor of Law Degree 2008-2009*, (Bucharest: Trei, 2009), 80.

immunity of a public institution whenever it performs at least one prerogative which cannot form the object of the private field. Or, the majority of public institutions are in this situation. This conclusion leads to problems with respect to the constitutional principle of equality. Hence, the Romanian National Bank cannot be held liable for a criminal offence, but any other commercial bank shall see its criminal liability engaged for the same crime. The new Criminal Code correctly settles this matter, excepting from criminal liability only the legal persons which committed the crime while performing an activity which cannot form the object of the public domain.

The domain of the criminal liability of corporations also includes the determination of the crimes which can be committed by moral persons. The Criminal Code into force, unlike Law no. 301/2004[21], provides for a general liability, meaning that corporations can be held liable for all crimes provided by the Criminal Code or by special laws.

The justification of the special liability, provided by Law no. 301/2004 and other foreign laws is related on the crimes which could be attributed to corporations. It was mentioned that such entity cannot commit crimes such as rape, incest, bigamy, desertion etc. However, it must be noticed that all these crime can be perpetrated by corporations, as instigator or accomplice. It is therefore almost impossible to identify a crime which can totally exclude the implication of a legal person from its perpetration[22]. A corporation can be thus sentenced for being accomplice to rape when it allows natural persons to enter its headquarters on this purpose or for helping natural persons committing bigamy, by furnishing forged papers[23].

The criminal decisions against corporations given so far engaged their liability for crimes related to copyright[24], accidental injuries and breaches of the labor law[25].

2. The lien between the corporation and the crime committed

The answer of the third question requires the research of the lien between the corporations criminally liable and the crime committed. In order to answer this question, we must first determine which are the natural persons who can engage the criminal liability of corporation, as it is widely accepted that the criminal liability of corporations cannot be conceived in the absence of the intervention of a natural person. Second, the constitutive content of the crime committed by a legal person must be analyzed, through the examination of the material element and of the subjective element.

Law no. 301/2004 which was meant to introduce for the first time the criminal liability of corporations in the Romanian law provided that corporations are liable for crimes committed by their organs or representatives. We can found here the indirect model of criminal liability of corporations. The model of this provision was art. 121-2 of the French Criminal Code. The notion of "representative" was wider than that of "organ," and includes other persons such as the temporary administrators, liquidators, and special agents. Therefore, the acts of other members or subordinate

[21] Law no. 278/2006 is not the first law on the criminal liability of the legal person. Some precationnary measures against corporations were provided by the Criminal Code in 1937. Also, Law no. 299/2004 on criminal liability of legal persons for crimes of forgery of currency or other values (published in the Official Journal no. 593 of July 1, 2004) came into force in 2004, but could not be applied in the absence of appropriate procedural provisions. Also Law no. 301/2004 on the Criminal Code (published in the Official Journal no.575/2004) provided for the criminal liability of corporations, but it never came into force and was repealed by Law no. 286/2009.

[22] See Andra-Roxana Ilie, "Between the Principle of Specialty and the General Criminal Liability of Legal Persons. View on the New Criminal Code", *4 Curierul Judiciar* (2009): 234.

[23] See Streteanu and Chirită, *Criminal Liability*, 397.

[24] See Sibiu Tribunal, criminal decision no. 105/2009, in Anca Jurma, *The Legal Person – Subject of the Criminal Liability* (Bucharest: C.H. Beck, 2010), 246-248; Sibiu Tribunal, criminal decision no. 126/2009, unpublished.

[25] See Iasi District court, criminal decision of March 31st, 2010, commentary by Andra-Roxana Ilie, *5 Legal Currier* (2010): 280-282.

employees cannot engage the criminal liability of corporations even when the acts are committed in the benefit of the corporations.

Law no. 278/2006 did not keep this rule, providing for a direct criminal liability of corporation. This means that the liability can be engaged by any natural person who is sufficiently related to the legal person (administrator, executive director, accountant, employee, representative etc.).

The criminal liability of corporations cannot be however engaged by any person related to these entities, as the law requires for other conditions. Thus, there are three criteria pursuant to which a legal person may be charged with an offence, namely the perpetration of the offence when performing the object of activity, the perpetration of the offence to the benefit of the legal person or the perpetration of the offence on behalf of the legal person.

The perpetration of the offence when performing the object of activity means that the offence must closely connected to the performance of the object of activity of the legal person. Such offences are related to the general policy of the company or to the activities it performs (offences related to the work safety, competition, environment protection).

The perpetration of the offence to the benefit of the legal person refers to those offences that fall outside the activities related to the performance o the object of activity, but considered to result in a benefit for the legal person. The benefit may take the form of a profit or of the avoidance of a loss.

The perpetration of the offence on behalf of the legal person refers to those crimes perpetrated within the process of organizing the activity and operation of the legal person without directly connected to its object of activity[26].

It must also be stated that, according to the Criminal Code, the criminal liability of the legal person does not exonerate the criminal liability of the natural person who contributed, in any manner, to the perpetration of the same offence.

One of the arguments which discouraged the criminal liability of corporations was related to their deed, their specific *mens rea*; it was shown that the corporations do not have their own will. However, it must be admitted that, although we cannot find the psychical processes specific to natural persons, the legal persons have their own will, expressed through their capacity to assume contractual obligations or through their tort or contraventional liability.

In the Romanian law, the criminal liability of a legal person represents a direct liability; which means that the infringement must be researched from the part of the company. In this respect, the Romanian Criminal Code expressly provides that a legal person may be held liable under the criminal law where the deed has been perpetrated by means of the infringement provided by the criminal law". Therefore, the offence may be the consequence of either a decision made deliberately by the legal person or of the negligence from its part, negligence which may consist of a faulty organization, insufficient safety measures of unreasonable budgetary restrictions that provided the circumstances for the perpetration of the offence. In respect of the offences perpetrated by an agent or by an attorney in fact, it is required that the company had been aware of his/her intention to perpetrate such offences or had encouraged such actions[27].

II. THE CONSEQUENCES OF A CRIMINAL TRIAL AGAINST CORPORATIONS

Once a criminal trial begins against a corporation, there are two sorts of consequences which could be triggered. The first category refers to the criminal consequences and determines the analysis of the criminal sanctions applicable to corporations. The Romanian Criminal Code provides three

[26] See Streteanu and Chirită, *Criminal Liability*, 230.

[27] See Lex Mundi, *Business Crimes and Compliance Criminal Liability of Companies Survey* (2008), 276-288, accessed February 19, 2011. www.lexmundi.com.

types of sanctions that may be inflicted on a corporation: a main penalty, some complementary penalties and safety measures (**1**).

The second category of consequences which a criminal trial determines relates to the provisions of the Criminal Procedure Code. When the criminal liability of corporations was set forth in the Romanian Criminal Code, the legislator also modified the Criminal Procedure Code, by introducing a special chapter in this respect (**2**).

1. The criminal sanctions applicable to corporations

As a preliminary statement, it must be mentioned that the term "sanction" includes both penalties (criminal sanctions pronounced as a consequence of the sentencing of the corporation) and safety measures (such measures can be inflicted against any person which committed illicit acts provided by the criminal law, and not crimes, in order to avoid an emergency condition and to prevent other illicit acts).

With respect to the penalties which can be applied to corporations, it must be mentioned that there are only two categories of such sanctions: a main penalty and complementary penalties.

The single main sentence which may be inflicted on the commercial companies is the fine. The criminal fine which may be inflicted on the commercial companies is between the common limits RON 2,500 and RON 2,000,000 (approximately euros 580 – euros 465.000). The fine is calculated taking into account the penalty provided by the law for the natural person. Thus, in the cases in which, for an offence perpetrated by a natural person, the law provides a maximum penalty of 10 years' imprisonment or a fine, the special minimum of the fine inflicted on a legal person is of RON 5,000 and the special maximum of the fine is of RON 600,000. In the cases in which, for an offence perpetrated by a natural person, the law provides the life imprisonment or the penalty of more than 10 years' imprisonment, the special minimum of the fine for a legal person is of RON 10,000 and the special maximum of the fine is of RON 900,000.

It can be noticed that those limits are lower than the common ones (RON 2,500 – RON 2,000,000). Those common limits can be touched however by means of the mitigating or aggravating circumstances (such as concurrence of crimes or recurrence).

The complementary penalties can be applied together with the fine, whenever the judge consider necessary. They are however mandatory whenever the law provides as such (for example, in case of forgery). The service of the complementary penalties shall commence to run from the date on which the conviction sentence remains final.

The complementary penalties are as follows: the legal person's winding-up; the suspension of the legal person's activity for a period of 3 months to one year or the suspension of one of the activities performed by the legal person, in respect of which the offence was perpetrated, for a period of 3 months to 3 years; the closing down of certain working points of the legal person for a period of 3 months to 3 years; the prohibition to take part in any tender procedure for a period of 1 to 3 years; the posting or dissemination of the conviction decision[28].

In this context, it must be mentioned that the new Criminal Code adopted by Law no. 286/2009 introduces a new complementary penalty which can be imposed on a legal person: the placement under judicial surveillance. This penalty determines the appointment of an administrator or a representative who shall supervise, for a period of 1 to 3 years, the performance of the activity that triggered the perpetration of the crime[29].

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[28] See Andra Roxana Ilie, „Criminal Penalties Applicable to Legal Persons. Comparative Study regarding France and Romania" (Dissertation for the Master 2, Fundamental Criminal Law, Montpellier 2008); Ioan Lascu, „Penalties Applicable to the Legal Persons in case of Criminal Offences", *3 Law* (2007): 123.

[29] See Anca Jurma, „Sanctions Applicable against Legal Persons", *I Univeristy of Bucharest Annals* (2010): 101.

The Criminal Code provides for various safety measures which can be taken whenever an illicit act has been perpetrated. However, there is only one safety measure which can be applied to corporations: the seizure of the assets.

In order to apply this measure, the seized goods shall meet one of the following conditions: (a) such goods are obtained by means of the perpetration of a deed provided by the criminal law; (b) such goods have been used, in any manner, for the perpetration of an offence, in case they belong to the perpetrator, or, in case they belong to another person, such person was aware of the purpose for which they have been used. This measure may not be ordered in respect of the offences perpetrated by means of the press; (c) such goods have been produced and adjusted with a view to perpetrating an offence, if they have been used for the said perpetration and if they belong to the perpetrator. In case such goods belong to another person, the seizure is ordered provided that their production and adjustment has been performed by the owner himself/herself or by the perpetrator and with the full awareness of the owner; (d) such goods have been offered with a view to cause the perpetration of an offence or to reward the perpetrator; (e) such goods have been acquired by perpetrating a deed provided by the criminal law, if they are not returned to the aggrieved person and if they do not serve as a remedy for such person; (f) it is prohibited by the law to own such goods.

2. The procedural provisions relevant to criminal trials against corporations

The Criminal Procedure Code, in art. 479^1, states that its provisions are also applicable to offences perpetrated by legal persons, being amended by the special provisions contained in the Chapter referred to the enforcement of the criminal liability of corporations.

A first problem related to a criminal trial against a corporation is related to the person who can represent the legal person, especially that mostly the representative of the corporation is also the person who perpetrated the offence. The Criminal Procedure Code distinguishes between two situations. First, if solely the legal person is held liable, it shall be represented for the fulfillment of the procedural steps by its legal representatives. Second, if for the same deed or related deeds, the criminal proceedings have been initiated against the legal representative of the legal person as well, the latter shall appoint an attorney-in-fact to represent it. In the event that the legal person fails to appoint an attorney-in-fact, such appointment shall be made by the body conducting the criminal proceedings or by the court, from among the legal practitioners in the field of insolvency procedures.

Another important mention concerns the interim measures which can be applied to corporations. In this respect, the Criminal Procedure Code provides that during the criminal trial, either the judge or the court may order, for grounded reasons in order to ensure the good and proper development of the criminal trial, one or more of the following measures: the suspension of the legal person's winding-up or liquidation procedure; the suspension of the legal person's merger, division or reduction of the share capital; the prohibition of any specific patrimonial operations that may entail the significant reduction of the patrimonial assets or the legal person's insolvency; the prohibition to execute certain legal instruments, established by the legal body; the prohibition to perform activities of the same nature as those underway or as those that occurred when the offence was perpetrated[30].

The Criminal Procedure Code also provides for the possibility to take precautionary measures against a corporation (the distraint and the garnishment). These precautionary measures may be undertaken with a view to ensuring the special seizure, the remedy of the damage caused by the offence, as well for securing the service of the sentence represented by a fine.

There is not much case law on the criminal procedural provisions regarding corporations. It is however important to mention that, in one court decision given in 2010, it was established that, based on art. 200 and 202 par. (1) of the Criminal Procedure Code, whenever the prosecutor is informed

[30] See Dorina-Maria Costin, *Criminal Liability of the Legal Person in the Romanian Law* (Bucharest: Universul Juridic, 2010): 529-535.

through a criminal complaint on the perpetration of offences by a natural person who is also a representative of a legal person, the prosecutor must decide with respect to both persons. On the contrary, the prosecutor's decision is subject to suppression, the prosecutor being compelled to also perform investigations on the corporation[31].

Conclusions

From the analysis of all these aspects, we can determine the main issues regarding the criminal liability of corporations in Romania. Thus, the Criminal Code provides for the criminal liability of all corporations, either public or private, excepting the State, the public authorities and the public institutions which develop activities which cannot form the object of the private field. Such corporations are liable for any type of crime provided by the Criminal Code or by special laws, as authors, instigators or accomplices. In order to engage the criminal liability of a corporation, the offence must have been committed when performing the object of activity, to their benefit or on their behalf. The Code also states that the criminal liability of corporations does not exclude the criminal liability of the natural person who contributed, in any manner, to the perpetration of the same offence. Following a criminal trial, a corporation can be sentenced to a main penalty (the fine), together with complementary penalties. There is also a safety measure (the seizure of the corporation's assets) which can be taken against a corporation, as well as interim measures and precautionary measures.

The implications of these outcomes can be already seen in the few court decisions which raised the problem of the criminal liability of corporations. Thus, the criminal decisions against corporations given so far concerned only limited liability companies and engaged their liability for crimes related to copyright, accidental injuries and breaches of the labor law. The companies were convicted together with their administrator and the only penalty inflicted was the fine.

All these aspects show that there is still a long way until this institution shall be fully understood and applied. Other than the issues raised by this study, there are many other topics for discussion, such as the consideration of the turnover as a criterion for the individualization of the sanctions applicable to corporations[32], the criminal liability of foreign corporations or the introduction of new criminal penalties.

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UNIVERSAL JURISDICTION AND THE PRINCIPLE OF NE BIS IN IDEM

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Abstract
Universal jurisdiction was defined as "the assertion of jurisdiction to prescribe in the absence of any other accepted jurisdictional nexus at the time of the relevant conduct." Professor Randall, in his seminal work on universal jurisdiction, opined that the theory of universality "provides every state with jurisdiction over a limited category of offenses generally recognized as of universal concern, regardless of the situs of the offence and the nationalities of the offender and the offended."Universal jurisdiction is considered a tool for promoting greater justice, but the rights of the accused must be protected. One of the most important guarantees is the principle of ne bis in idem, which protected persons against multiple prosecutions for the same crime. The main legal consequence of the application of ne bis in idem in most systems is the prohibition and inadmissibility of subsequent prosecutions on the same facts blocking effect).The national ne bis in idem principle is established as an individual right in international human rights legal instruments, such as the International Covenant on Civil and Political Rights of 19 December 1966, in Article 14(7). At the regional level, Article 8(4) of the American Convention of Human Rights (1969) and Article 4 (I) of the Seventh Protocol of the European Convention of Human Rights merit mention. In Europe, the ne bis in idem principle is enshrined in Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985, which prohibits the initiation of a second trial for the same offence when final judgment has been imposed upon a person by a court of a contracting party.

Keywords*: "universal jurisdiction", "the principle neb is in idem", "domestic recognition", "double jeopardy".*

Universal jurisdiction was defined as "the assertion of jurisdiction to prescribe in the absence of any other accepted jurisdictional nexus at the time of the relevant conduct.[1]" Professor Randall, in his seminal work on universal jurisdiction, opined that the theory of universality "provides every state with jurisdiction over a limited category of offenses generally recognized as of universal concern, regardless of the situs of the offence and the nationalities of the offender and the offended."[2]

Universal jurisdiction is considered a tool for promoting greater justice, but the rights of the accused must be protected. One of the most important guarantees is the principle of ne bis in idem, which protected persons against multiple prosecutions for the same crime. The main legal consequence of the application of ne bis in idem in most systems is the prohibition and inadmissibility of subsequent prosecutions on the same facts blocking effect).[3]

The national ne bis in idem principle is established as an individual right in international human rights legal instruments, such as the International Covenant on Civil and Political Rights of 19 December 1966, in Article 14(7). At the regional level, Article 8(4) of the American Convention of Human Rights (1969) and Article 4 (I) of the Seventh Protocol of the European Convention of Human Rights merit mention.

In Europe, the ne bis in idem principle is enshrined in Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985, which prohibits the initiation of a second

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[1] Roger O'Keefe, Universal Jurisdiction Clarifying the Basic Concept, 2 Journal of International Criminal Justice 735, 734 (2003).

[2] Kenneth C. Randall, Universal Jurisdiction Under International Law, 66 Texas Law Review 785, 788 (1988).

[3] De La Cuesta, José Luis, General Report, Concurrent National and International Criminal Jurisdiction and the Principle "ne bis in idem", International Review of Penal Law, 2002, 3e/4e trimesters, 707-736.

trial for the same offence when final judgment has been imposed upon a person by a court of a contracting party.

A. On the constitutional level, the Fifth Amendment to the United States Constitution contains the principle of ne bis in idem expressly. Article 39 of the Japanese Constitution clearly establishes that no person "shall be placed in double jeopardy" and, according to the general interpretation, this includes double jeopardy both in procedural law and in substantive law.

The German Constitution, in article 103(3), clearly states that no persons may be punished for the same act more than once. In Spain, although the 1978 Constitution does not explicitly proclaims the principle ne bis in idem, the Constitutional Tribunal has declared since 1981, that it is a direct consequence of the legality principle of Criminal Law (Article 25). In Croatia, in article 31 paragraph 2 of the Constitution of the Republic of Croatia establishes that "no one may be tried anew nor punished in criminal proceedings for an act for which he has already been acquitted or sentenced by a final court judgment made in accordance with the law."

In fact, all countries consider the ne bis in idem principle as a principle that is recognized at the domestic level. This basic right is directly applicable only with respect to judgments of domestic courts. The most frequent legal basis for the domestic recognition of the principle ne bis in idem, is simple statutory law, on a customary basis in Finland or in the Penal Code such in France, the Netherlands, Sweden. In Belgium, France, Germany, Romania, Italy, Hungary, Spain, Croatia Turkey it is recognition in the Code of Penal Procedure and in Spain, in other legal texts.

B. Recognition of the ne bis in idem effect of foreign res judicata at the national level is not very frequent. Except the relevant treaty expresses a prohibition, countries do not recognize a ne bis in idem blocking effect to foreign decisions, such in Germany in case of judgment of a court outside the European Union and admit a double prosecution and punishment.

In Germany, there is a distinction between foreign judgment of a Court inside and outside the European Union. Concerning foreign judgments of courts outside the European Union, if the convicted person has been punished abroad for the same act, the foreign punishment shall only be credited towards the new one to the extent it has been executed. This is the principle of accounting or deduction, mitigation or remission recognized in Japan, too. However, the public prosecutor's office may dispense with prosecuting an offence committed on foreign territory if the defendant has a sentence for the offence was already executed abroad and the sentence which is to bee expected in Germany would be negligible after taking the foreign sentence into account.

In Finland, it is recognize the ne bis in idem effect of all foreign res judicata without regard for the state of origin. In other countries, the law provides criminal proceedings after a final judgment has been rendered by a foreign court, entailing an acquittal, dismissal of the charges or conviction, if punishment has been imposed, followed by complete enforcement, pardon and in Belgium also amnesty or lapse of time, such in the Netherlands. In Croatia, although the ne bis in idem principle is recognized as obligatory only at the national level, with regard to the prosecution of criminal offenses committed abroad pursuant to the universality principle, criminal proceedings will not be initiated if the perpetrator has served the full sentence imposed on him in a foreign state or if he has been acquitted by a final judgment or pardoned in a foreign state; similary, if the statutory limitation has expired under the law of the state where the crime was committed. The perpetrator may be prosecuted for the second time in Croatia if he was sentenced by a final judgment in a foreign state, but did not serve the full sentence. In this situation, the perpetrator is not punished twice as the time previously spent in detention or prison will be included in the sentence pronounced by the domestic court for the same criminal offense.

In the United Nations ad-hoc tribunals, Article 10 of the International Tribunal for the former Yugoslavia Statute and the Article 9 of the International Criminal Tribunal for Rwanda Statute must be respected as concerns the principle of ne bis in idem.

C. In the Netherlands, the recognition of foreign res judicata is entirely independent from the prospective basis of criminal jurisdiction. In general, such in Germany, the principle of ne bis in idem

applies regardless of the principle according to which a domestic or a foreign court or authority exercises its jurisdiction. The ne bis in idem blocking effect of a foreign judgment is entirely the same, whether it derives from the state loci delicti or from a state which has exercised universal jurisdiction.

But in the Netherlands this egalitarian approach is open to criticism. One could imagine that a state might wish to shield a person, by starting criminal proceedings in his absence and next, due to lack of evidence, acquit him. The Statutes of the ad-hoc tribunals for Rwanda and the former Yugoslavia, the International Criminal Court provide for exceptions to the ne bis in idem rule in case of sham trials.

In Croatia, concerning crimes against international law foreseen in the Criminal. Code, the ne bis in idem principle has been disregarded entirely because of the incorporation of the universality principle within a provision regulating the protective principle. Croatian legal doctrine has criticized this approach and has considered it as erroneous. About the international crimes, the ne bis in idem principle limits the exercise of universal jurisdiction. In Finland the Penal Code makes it possible to exercise universal jurisdiction even in cases for which a prior foreign judgment has been handed down.

D. The principle ne bis in idem guarantees apply to a same person that risks being prosecuted or punished again for the same fact. For the application of the blocking effect of ne bis in idem in international context, the conditions are:

1) The European Court of Justice recognized in several cases, that is really difficult to asses the congruity of facts for the purpose of ne bis in idem within the transnational context. In the Van Esbroeck case[4], the issue of what amounts to the same facts was raised for the first time. In this case the accused had been convicted in one state for importing drugs and was subsequently prosecuted in another state for exporting the same amount of drugs. The Court held that in doing so, the ne bis in idem principle was violated:

a) "the relevant criterion for the purposes of the application of that article of the Convention implementing the Schengen Agreement is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected;

b) punishable acts consisting of exporting and of importing the same narcotic drugs and which are prosecuted in different Contracting States to the Convention implementing the Schengen Agreement are, in principle, to be regarded as "the same acts" for the purposes of Article 54 of the Convention, the definitive assessment in that respect being the task of the competent national courts."

In the Van Esbroeck case, the Court of Justice continued this road.[5] In the criminal proceedings against Kraaijenbrink, the problem was whether the accused could be convicted in Belgium of laundering money coming from drug transactions after she had been convicted in the Netherlands of receiving and handling of money deriving from illegal drug transactions.[6] According to Advocate General Sharpston, the different legal qualifications do not prevent regarding this as falling within the same set of facts.[7]

In Germany, the prohibition of a second trial for the same acts is not limited to the same provision of substantive criminal law, but encompasses all the historical circumstances during the commission of the crime (prozessualer Tatbegriff).

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[4] European Court of Justice, 9 March 2006, C – 469/2003, criminal proceedings against van Esbroeck.

[5] European Court of Justice, 28 September 2006, C – 150/2005, Van Straaten against the Netherlands and Italy.

[6] European Court of Justice, 5 December 2006, C – 367/05 criminal proceedings against Kraaijenbrink, Opinion of Advocate General Sharpston.

[7] De La Cuesta, José Luis, "Concurrent National and International Criminal Jurisdiction and the Principle ne bis in idem", International Review of Penal Law 2002 3e/4e trimester, 707-736.

2) Penal orders (Strafbefehle) prohibit in Germany the initiation of a second trial once the order has entered into force, if no objections have been lodged in time.

As to the character of the decisions that may bar a new penal proceeding in general, there is an absolute prohibition of a second trial after a final acquittal or a final conviction. Only decisions adopted as a definitive termination of proceedings or a final answer on the merits of the case qualify.

Another question is that of determining if judgments determining the end of proceedings due to a procedural impediment, and the termination of proceedings by the public prosecutor, even when a court consents, have or do not have a ne bis in idem effect. The European Court of Justice decided that: "The ne bis in idem principle laid down in Article 54 of the Convention implementing the Schengen Agreement also applies to procedures whereby further prosecution is barred, such as the procedures at issue in the main actions, by which the public prosecutor of a member state discontinues criminal proceedings brought in that state, without the involvement of a court, once the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the Public Prosecutor."[8]

In the Miraglia case, the European Court of Justice has established that Article 54 does not apply when the Public Prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been started in another member state of European Union against the same defendant and for the same acts, without any determination whatsoever as to the merits of the case.[9] The European Court of Justice in the Miraglia case, has established that Article 54 does not apply when the Public Prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been started in another European Union state against the same defendant and for the same acts, without any determination whatsoever as to the merits of the case.[10]

Another question is whether the sentence has been enforced. In Kretzinger the issue came up whether a suspended sentence must be regarded as enforced, or is actually in the process of being enforced, as meant in Article 54. The Court stated that "In that respect, it must be noted that, in so far as a suspended custodial sentence penalises the unlawful conduct of a convicted person, it constitutes a penalty within the meaning of Article 54 of the Convention implementing the Schengen Agreement. That penalty must be regarded as "actually in the process of being enforced" as soon as the sentence has become enforceable and during the probation period. Subsequently, once the probation period has come to an end, the penalty must be regarded as 'having been enforced' within the meaning of that provision."

In case of final judgment rendered by a foreign court entailing conviction, if punishment has been imposed, the sentence must have been enforced completely for the application of the ne bis in idem effect. In cases of only partial execution, the principle of deduction enters in force, allowing a further prosecution and a new punishment. In the context of the European Union, article 58 of the Schengen Convention enjoins the courts to deduct any period of deprivation of liberty served on the territory of another party from a sentence handed down in respect of the same offence.

E. One of the most important exception to the ne bis in idem principle is in the case of sham trials. One can imagine cases of abuse of criminal proceedings in foreign states, for example a state might wish to shield a person, by starting criminal proceedings with the sole purpose of shielding the perpetrators (sham prosecution). In Croatia an exception to the ne bis in idem principle has been envisaged, namely, for exercising universal jurisdiction over gross human rights violations. When proceedings in another state have been conducted contrary to internationally recognized standards of a fair trial, criminal proceedings may be initiated in Croatia against the same perpetrator and for the same crime with the approval of the Chief State Prosecutor. This is not possible with regard to the

[8] European Court of Justice, criminal proceedings against Gözütok and Brügge, Judgment of 11 February 2003 (C – 187/01; C – 385/01).

[9] European Court of Justice, C – 469/03, criminal proceedings against Miraglia.

[10] European Court of Justice, 10 March 2005, C – 469/03, criminal proceedings against Miraglia.

International Criminal Court. In Hungary there is no special regulation for preventing sham trials, but due to the fact that the foreign judgment must submitted to a process of recognition of equivalence by the Metropolitan Court, this court must examine if foreign proceedings are consistent with the principles of due process of law.

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THE APPLICATION OF THE SPECIALTY PRINCIPLE, CONCERNING THE SPECIAL SEIZURE IN ROMANIAN CRIMINAL LAW

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Abstract
This paper aims to be a comparative analysis of the special seizure as a safety measure, as it is regulated in Romanian special criminal legislation, and also a way to highlight certain discrepancies between the general and special criminal legislation. Special seizure, as a safety measure, may be disposed under Criminal Code regulations, as a general norm, but also under some stipulations included in special Criminal laws. Moreover, when there are such special stipulations, they have under the rules of specialty principle, priority in implementing to the general norm. In our opinion, in these cases, special seizure is also disposed under the Criminal Code provisions, as general norm, because the general terms nondescript by others field of incidence, are the ones who set by the Criminal law. In fact, in such cases, the special seizure is ordered under both Criminal provisions. In analysis of the paper, is made reference to the applicability of special seizure measure in matter of corruption offences, in customs, money laundering, illicit trafficking of drugs and fisheries and fish farming, and as a result of their presentation, we concluded that although is in question the specialty principle, mainly would find application the general norm in comparison with special norm. Moreover, corroborating the actually general norm with the provisions of the New Criminal Code, we believe the special seizure, should operate exclusively under the general law, or the provisions of the special norm, should be modified.

***Keywords**: special seizure, corruption, drugs, fishing, money laundering*

Introduction

The Criminal reform of the Romanian judicial legislation and our country's accession to the European Union, are two reasons for a thorough reflection on the institutions of Criminal law and the role of the contemporary judicial system. One of these Criminal law settlement is ***special seizure.*** Initially, showed as a safety measure and traditional regulated by the Romanian criminal law, the special seizure increasingly raises several problems both in internal law and in international regulations.

After analysis of different countries legislation, emerges that special seizure is regulated differently, being considered both a safety measure, or a criminal sanction (punishment or complementary penalty). In some states, the special seizure has a mixed judicial nature, depending on the pursued purpose, being considered either as a safety measure or a punishment. These differences are important and interfere on the judicial status of these Criminal law settlements, having different consequences, and as appropriate, either a preventive character or repressive one, made by coercion. It should be noted from the outset, that in Romanian legislation, the true judicial nature of special seizure is a *criminal sanction,* not that a *sanction of Criminal law,* enrolling better in complimentary punishment category, than in category of safety measures.

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Usually, through the norms included in particular non-criminal laws, but that including penal provisions, has not been established a new category of goods liable for confiscation, other than those provided by article 118 of the Criminal Code, the provisions of these special laws are not only, just applications of the art. 118 of the Criminal Code in domain covered by special law.

These are *general provisions* on special seizure by equivalent, introduced at a time when this type of seizure was not provided in the general section of the Criminal Code, while being required by international judicial instruments, to which Romania is party. In case of incidence of special seizure, it will be applied under these provisions, and the provisions of art. 118 of the Criminal Code came to supplement them.

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It can be observed, that these provisions, innovative and derogatory to the general status of the special seizure since them introduction date, after changing the general status of special seizure by Law no.278/2006, has reached a coverage sphere more limited than the general provisions. Or, this was not the legislature's intention when introducing these provisions. Being particular offenses, that usually generate large profits for offenders, the legislature has intended to close any possibility that may remain with the proceeds of crime from their illegal activities. Or, actually, this purpose can be better achieved, based on the provisions *of the general part* of Criminal Code. However, there is the principle *specialibus generalia derogant*, which express the relationship between general and special law, in accordance with the special law derogates from the general one.

Also, some voids of law regulations, reflected in the inability to confiscation some certain assets, which served immediately after the committed offence, to ensure the offender escape or the retain of the obtained product, have resulted in legal practice, the controversial solutions, some of them, are unwarranted expansion of existing legislation and creating fictions to enable the confiscation of such goods, and others unable to confiscation. This controversy could be eliminated by regulating this assumption of special seizure stipulated in internal law.

Also, it should be noted the special seizure approach in Anglo-Saxon legislation. The traditional approach of serious offences means the offender capture, followed by the criminal trial intended to him, the conviction and reclusion. Recently, the offenders enriching, provide by of economic crimes or *drug trafficking*, has permitted to led to adding a new element, namely, the confiscation of crime products.

The special seizure in matters of corruption offences

In matters of corruption offences, it can be found special disposals as regards to the special seizure, as a safety measure, both included provisions in the Special Part of Criminal Code, and in special legislation. Para. 3 of art. 254 of the Criminal Code, provides that money, values or any other goods that have been the object of bribery, shall be confiscated, and if they could not be found, the convict is obliged to pay their equivalent in money.

By provisions of para. 4 by art. 255 of Criminal Code, the regulations previously indicated, relating to the confiscation is extended on bribery even if the offer was not followed by acceptance. In the situation of connection the bribery with special causes to remove the criminal nature of the crime, or unpunished, regulations provided by para. 2 and 3 by art. 255 of the Criminal Code, the money, values or other assets are returned to the person who gave them.

Also, in terms of receiving undue benefits, para. 2 of art. 256 of Criminal Code, provides that money, values or any other received assets shall be confiscated, and if they are not be found, the convict is obliged to pay their equivalent in money.

The special law with incidence on preventing and combating the corruption offences, namely, the Law no. 78/2000, are found explicit references on special seizure. Thus, in case of buying influence offence (regulated by Art. 6^1 of Law) it provides that money, values or other assets that have been object of crime, shall be confiscated, and if they are not found, the convicted must pay their equivalent in money (Pocora 2010). The money, values or any other assets are returned to the person who gave them in case of the perpetrator is not punished for the reason that he denounce the offense to the authority before the criminal authorities has been took notice for that offense. As a general provision, Art. 19 of Law no. 78/2000 provides that in case of committed offences against the European Communities' financial interests, the money, values or any other assets which were gave to determine offense committing (if they are not returned to the injured party and they could not served to them damages), should be confiscated. In case of unfounded assets, the convicted is obliged to pay their equivalent in money.

In case of corruption offences, the special seizure will be applicable under provisions of Special law, but also with observing the general regulations under Art. 118 of Criminal Code.

The Special seizure in matters of custom house

The settlement framework on custom house is provided by the Romanian Customs Code, Law no. 86/2006. To these, is added a reference to the special seizure by equivalent made through the art. 277 of Custom Code: when goods or other assets which made the object of the offense were not found, the offender is required to pay their equivalent in money. This regulation must be interpreted by reference to the art. 118 of Criminal Code, since Law no. 86/2006 has adopted. This is because is necessary to avoid controversy appeared at the time of confiscation by equivalent, and was preferred to refer explicitly to this in the special law (Boroi, Al., Voicu, C. 2007).

As regards the way how it make the reference to the regulations in matters of special seizure, we believe that when the measure is taken by nature, must be based on art. 118 of Criminal Code, but, if the seizure is made by equivalent, it must be reported to the provisions of art. 277 of Law no. 86/2006, because has a special norm character in relation to the provisions of the Criminal Code.

Referring to the special seizure as a method of fighting customs debt can create confusion about the judicial nature of this measure has. We believe that the nature is in this case, one which lies on the administrative law domain, and not the Criminal law. This is because the purpose for which the special seizure is took differently from that provided by the measure described above.

The Special seizure in matters of money laundering

Actually, In Romania, the money laundering domain is governed by Law no. 656/2002 on preventing and sanctioning money laundering and instituting some measures to prevent and combat terrorism acts. Reflecting to the exigencies manifested on special seizure through the international judicial instruments in this matter, art. 25 of the internal law, refers to the provisions of art. 118 of Criminal Code, on confiscation: "in case of money laundering offences and financing the terrorist acts, are applicable the provisions of art. 118 of the Criminal Code on special seizure".

Furthermore, as regards the provisions of art. 25, para. (2)-(6) of Law no. 656/2002 are specified as follows:

- Para. (2) - if the assets that are subject on special seizure are not found, shall be confiscated their equivalent in money or other assets acquired in lieu thereof;
- Para. (3) – the incomes or other financial benefits derived from goods referred by para. 2 shall be confiscated;
- Para. (4) –if the assets that are subject on special seizure could not be individualized to the assets acquired legally, shall be confiscated other assets ratable to the value of assets - subject to special seizure;

- Para. (5) - the provisions of Para (4) shall apply in accordance of other financial benefits and others incomes derived from assets - subject to special seizure, which could not be individualized to the assets acquired legally;

- Para. (6) – to ensure the enforcement of special seizure assets, is mandatory to take precautionary measures provided by the Criminal Procedure Code".

In case of committed crime by the legal entity, art. 23, para. 4 of Law no. 656/2002 it provides that in addition to the fine penalty shall apply, as appropriate, one or more of the complimentary penalties provided for in art. 53^1 let. 3 of the Criminal Code. Also, art. 22 para. $3^1$of Law no. 656/2002, it provides that that in case of a legal entity commits any kind of offense defined in the same law, in addition to the main penalty the legal entity may be subject to the complimentary sanction of assets confiscation, fated, used or produced by the offense. It is likely the legal provisions, about a sanction with different legal nature and base. If in case of special seizure we are dealing with a criminal penalty, in case of this sanction we are in a liability contravention field which is based on committing an antisocial fact less serious (Lascu 2005).

As can be observed, the special law with incidence to prevent and combat money laundering and financing the terrorism acts, is regulated in close terms to those of art. 118 of Criminal Code on matters of special seizure.

Moreover, the special seizure on money laundering is also regulated by international legal instruments, such as ***The Framework – Decision of Council, no. 2001/500/JAI,*** whose main objective was to ensure harmonization of laws as regard to incrimination money laundering and assets confiscation regulations, stating that coverage sphere of subject - offenses should be sufficiently broad in all Member States. Analyzing the provisions of this Framework - Decision, we can state that the EU does not act on different levels on general standards terms of cooperation established by legal instruments which emanating from other legal authorities. Rather, the assessed standards are considered as a benefit already won, and the role of the Decision being to advance on the line of cooperation especially in the field of interest.

Thus, the stated purpose of the Framework - Decision it seems to ensure that all Member States have effective rules on confiscation of crime related assets, among others, as regarding the obligation of proof on the source of assets held by a convicted person for a crime related to organized crime. It is interesting that, to indicate the aimed offenses, is not using their name, but the technique to indicate the Community legal instrument relating them.

The Special seizure for illicit drug trafficking

The regulation in this matter is ensured by the Law no. 143/2000, to combat illegal drug trafficking and consumption.

Under provisions of art. 18 of Law no. 143/2000, the restrained drugs as regards the confiscation are destroyed, the counter-keeping is mandatory. However, there are, exempted from destruction: a) employable medication, which were sent to pharmacies or hospitals, after prior approval of the Directorate of the Ministry of Health Pharmaceutical b) employable plants and substances in pharmaceutical industry or other industry, relating to their nature, which were submitted to a public or private economic agent, authorized to use or export them, c) some appropriate amounts that will be preserved for teaching and research institutions or who have received by institutions with dogs and other animals to detect drugs, for training and maintenance practice, in according with legal provisions (Nistoreanu 2008).

In the same matter, G.O no. 121/2006 on the legal status of drugs precursors, defines in art. 22 and 23 some crimes on this regime. In art. 24 of G.O no.121/2006, it provides that in case of defined offenses, it can be order the confiscation of substances classified under the law. When substances have been classified offenses are not found, the offender is liable to pay their equivalent in money. As regards drugs, art. 26 of G.O no. 121/2006, it provides destruction of confiscated classified substances or handed in custody after the activity cessation and which could not be turn account.

The Special seizure in matters of fishing and fish farming

The legal act which provides the special rules in fishing and fish farming is G.O no. 23/2008.

In connection with these facts, art. 66, para. 1 of G.O no. 23/2008 it stipulates that "are able to confiscation the fishing tackle and fishing boats, animals, vehicles, firearms and any other goods that have been used to commit crimes". In the same article, but in different paragraph were included the provisions on confiscation as a criminal law sanction, but also as a contravention: "the assets derived of committed crimes and contraventions, consisting of fish, spawn, other living being and aquatic products will be confiscated" . In this situation, depending on the specific type of behavior which is specifically identified in the case, the applicable rules will be those in the Criminal law or Administrative law.

It is very interesting the technique used by the legislature, especially for poaching fish that can be both an offence, but also contravention. In cases of assets confiscation, under this legal act, it can be seems that the authorities have power of capitalization under the law, their money equivalent completing the state budget. In this way, even in matters of special seizure, it appears that we could not talking about the recovery assets, even in case if they are seized from a person who has acquired through illegal acts – for example, the authorized fishing tools are stolen, that are owned by a legitimate administrator of a fishing fund and are used for illegal fishing. We consider, however, that such a solution is not correct in terms of fulfilling the purpose of safety measures. This is because the danger that has to be combat is only by considering a person who committed a certain type of behavior. In a situation even more clearly, a person can steal a fishing boat owned by the fishing fund manager and using it to commit an unauthorized fishing. Under the special provisions contained in G.O no. 23/2008, this boat must be seized, valuable and the equivalent must be recovered for the state budget, this is clearly an unjust solution. For this reason, we consider is very important that the special rules that we are talking about it has to be in accordance with the framework rule of the Criminal Code.

Conclusions

This paper is not aimed to present all the rules which are contained in special legislation, and having regard measures of special seizure as a safety measure, but only to illustrate some of the ways in which they were shown and to highlight some non concordances that exist between the general and specific rules, relevant for this investigation.

In special legislation there are numerous references to the safety measure of special seizure. *For example,* as is easy to understand, such provisions are contained in legal acts which guarantee the legal regimes regulating as regards the possession and using of dangerous substances. Specifically, art. 19 para. 2 of Law no. 111/1996 on the safety, regulation, licensing and controlling nuclear activities: "the nuclear fuel illegally held will be seized, will become a public property of the state and will be handed to a custodian, specially named for that purpose". Seizure itself is done accordance with the provisions of art. 118 Criminal Code. All this, because as following disposals of special legal act: „the nuclear and radioactive equipments, them components, the nuclear fuel, radioactive products, including radioactive waste, the nuclear explosive devices or their components, which were subject of special seizure by a court order, in accordance with art. 118 of Criminal Code, provided by the guilty party, must be retained with the former owner expenses, in a safety place, under the seal of public authorities, in compliance with nuclear safety requirements, so as be safety for population life or health and for environment or property until the courts order regarding to them.

In our point of view, is necessary that all these have to be expressly repealed, because as we highlight during our analysis, some of them are just warnings on the general legal text of art. 118 of Criminal Code. In previously example, the special seizure has binding performed under art. 118 para. 1 lit. 1 let. f of Criminal Code, even if special legislation has not contained any reference to this text.

According to the specialty principle, corresponding to which the special rule have priority in relation to the general rule, we propose that the special legislation have to contain some rules with considering the measures of special seizure of assets, **to indicate more clearly which is the judicial nature of this confiscation.** Otherwise, there are very high risk of confusion between the special seizure as a Criminal law sanction and special seizure as a contravention sanction.

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ADMITTING GUILT IN COURT CASE IN ACCORDANCE WITH NEW LEGISLATIVE CHANGES

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Abstract
Entry into force of the law no.202/2010 regarding some measures to speed up the trial processes already raises some problems of interpretation especially concerning cases that are pending. Such a situation was inevitable since the transitional provisions could not cover all situations arising in practice, and the law mentioned above create some completely new institutions in our criminal law. But I believe that for the new institution of admitting guilt in court case, would be required to adopt transitional rules necessary to eliminate the controverses that arise and will arise in practice. As any new institution, admitting guilt in court case will require a certain period of time untill crystallize an unitary practice field, even more because the text contains some vague expressions. Unfortunately, the courts have no benefit yet of a fast and efficient mechanism for unifying the jurisprudence, and this fact will probably affect also the solutions that will be taken by the courts in this matter.

Keywords : *guilt, offence, court,unfair, controverses.*

Introduction

Under the statement of reasons in the Law no. 202/2010, regarding some measures for speeding up the cases settlement it has been illustrated that: *"the introduction in the Code of Criminal Procedure of a new institution, such as the institution of trial in case of pleading guilty, satisfies the need of efficacy of the judgment, contributing to the annulment of some time consuming procedures and often useless for establishing the legal truth, subsuming to the qualitative requirements of the act of justice".*

However, the entry into force of the Law no. 202/2010, stirred up numerous discussions amid the practitioners and it has already generated a series of interpretation problems in the judicial practice, especially regarding the application of this law to the pending cases, under process of settlement, as long as the above-mentioned law has introduced some completely new institutions in our criminal law, and the provisional measures could not cover all the possible situations occurred into practice.

Under the marginal title *"The judgement in case of pleading guilty"*, the new art. 320^1 of the Criminal procedure code provides that *"until the initiation of the court investigation, the accused can declare either personally of by means of an authentic document that he / she acknowledges to have been committed the incriminated actions recorded in the court notification instrument and asks for the judgement to be settled based on the evidence submitted to the file in the stage of criminal investigation"* (art. 320^1 paragraph 1 Code of criminal proc.). In the case of applying this procedure *"the court shall decide on the conviction of the accused, who benefits of the remission by one third of the limits of the sentence provided by the law, in the case of sentence to imprisonment, and a remission by one fourth of the limits of the sentence provided by the law, in the case of punishment by administrative fine"* (art. 320^1 paragraph 7 C. criminal proc.).

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Paper content

Regarding the application of the new art. 320^1 of the Code of crim. proc., regulating the trial procedure in case of pleading guilty, as far as concerning the cases pending at the effective date of this text of law, these provisions are susceptible of being interpreted differently in the judicial practice, as there are possible several solutions, depending on the procedural stage of the case, on the accused position as to that moment, on the criminal plurality registered in the case and on the legal frame of the action.

Thus, one of the problems that have occurred was the one of the moment up to which the accused can plead guilty and what consequence causes the fact that the request of being judged based on the evidence gathered during the criminal prosecution is submitted after the initiation of the court investigation.

In the cases where the court investigation has not been initiated yet, and before the procedural moment up to which pleading guilty can become incidental (the initiation of the court investigation), the accused can use, beyond any discussion, of the provisions of the art. 320^1 Code of criminal procedure, operating the rule of immediate application of the norms of criminal procedure law (*tempus regit actum*).

In the cases where the court investigation has begun or such procedural stage has not been reached, and the accused did not admit his guilt, it is not yet a matter of pleading guilty.

However, a thorough analysis of the legal provisions called forth presupposes both the hypothesis where, in the cases pending with the courts of law, where the court investigation has begun, the accused admitted to have committed the deed ever since the criminal prosecution stage, stating this position also in front of the court, as well as the case when, the accused has not pleaded guilty during the criminal prosecution stage, but, after the initiation of the court investigation, he understands to reconsider the procedural position in the sense of admitting his / her guilt, thus as, although, as procedural stage, there has been exceeded the moment of initiating the court investigation, the accused requires to be applied the new procedure.

According to the opinion of theoreticians of law as well as to the practice of the courts, there is a first trend that considers that the accused is not automatically granted the right to benefit of the provisions of the art. 320^1 Code of criminal procedure, from the very moment of the enforcement of this text, regardless of the considered hypothesis, resulting from the above-illustrated facts.

In supporting this opinion and the solutions passed by the courts in this sense, there is, firstly, the argument, according to which, one must consider the fact that the criminal trial has exceeded the procedural moment up to which the accused could plead guilty and could admit committing the crimes and when he could ask for the judgement to be done based on the evidence submitted to the file in the criminal prosecution stage (initiation of the court investigation).

The deadline established by the legislator that is until the initiation of the court investigation, is equal to the expiration of a time-limit. This presupposes that any statement formulated after the initiation of the court investigation must be dismissed as belated.

This is because the criminal trial must carry out operatively, without interruptions and reinstatements to the prior stages, and a reinstatement to a previous stage or procedural phase is likely solely in the cases in which the law expressly stipulates such action (i.e. in the case of cassation for re-judgement or in the case of reopening the criminal investigation).

However, the accused whose decision has been quashed or cancelled in one of the remedies at law, and the case has been sent to be re-judged by the court of first instance, he/she can make use or not make use of this procedure depending on the limits, in which the decision is cancelled and of the last valid procedural instrument, from which point on the criminal trial must be recessed.

Another argument of those supporting the above-opinion is that, the rule of immediate enforcement of the procedural criminal law cannot be ignored and cannot have a retroactive character unless expressly provided as such by its text. In the doctrine there has been even ascertained that the

retroactivity of the new procedural criminal law cannot be accepted under any circumstances, as it is not allowed by the art. 15 paragraph 2 of the Constitution, providing the possibility of retroactivity only for the criminal law but nor for the procedural criminal law.

It is appreciated that, in the case of a succession of procedure laws the discrimination cannot be called forth, as the procedure law applies immediately to all the persons in the same procedural stage, without any discrimination. However, the accused whose court investigation has proceeded face a different situation than those not yet in that procedural stage, and the possibility to ask for the judgement solely based on the evidence submitted during the criminal prosecution granted only to the later ones, does not represent a discriminatory act. Thus, it would mean that the new procedure law would apply to all the persons facing the same situation, including those that have been definitively convicted, which is deemed to be absurd.

Besides, if there would be adopted the contrary solution it would mean that the judgement procedure for the case of pleading guilty would be applicable, including in the case of the files under the appeal or recourse stage, such a point of view being less likely to be generally accepted.

In analysing the incidence of the art. 320^1 paragraph 7 Code of crim. pr. in the case of the files already under investigation with the court at the date of entering into force of such Code, one cannot simply ignore the fact that this norm is not one effective on its own, without entailing any condition, but a norm whose incidence is conditioned by the performance of a certain procedural action of the accused, that is the acknowledgement of the facts by the accused and his/her request, *made prior to the initiation of the court investigation*, that the judgement shall be done based on the evidence submitted during the criminal prosecution stage.

However, it is considered that, in the cases where the court investigation started before the effective date of this new art. 320^1 Code of crim. pr. this condition is not complied with and it can no longer be complied with. If the courts would only apply the art. 320^1 paragraph 7 Code of crim. pr., without considering the fact that the conditions under the paragraph 1/6 of the same article are not complied with, the result would be that the provisions of the new law and the old law would combine, thus giving birth to a new law (*lex tertia*), which is not admissible.

Thus, the surpassing of the procedural moment up to which the perpetration expression of will can intervene, entails the inapplicability of that cause providing the lack of sentence or the remission, and any likely changes in the accused plead, occurred subsequent to that moment, are ineffective, therefore, if the court investigation proceeded and if any evidence have been served to the court, the judgement cannot no longer be grounded on the evidence submitted during the criminal prosecution stage.

There is however a new approach of some courts who have admitted that both the accused acknowledging their actions since the criminal prosecution stage can benefit of the provisions of the art. 320^1 Code of crim. proc., maintain this position in front of the court, even if, by reference to the effective date of the new legal provisions, the starting date of the court investigation had passed, as well as the accused who, although have not pleaded guilty during the criminal prosecution stage, have changed their procedural position understanding to acknowledge their action and asking for the judgement to be carried out according to the new regulated procedure.

Practically speaking, as we talk about a law containing also provisions of substantial criminal law – as it provides a ground for remission by one third of the limits of the sentence provided by the law, in the case of sentence to imprisonment, and a remission by one fourth of the limits of the sentence provided by the law, in the case of punishment by administrative fine – it can apply retroactively, as this is a more favourable law.

Regarding the criteria for differentiating between the norms of substantial criminal law and the ones of criminal procedure, in the doctrine, we have a unanimous opinion according to which the placement of such norms in the Criminal Code or Criminal Procedure Code does not represent a criterion for differentiating such norms, hence, the fact that the relevant text appears in the Criminal

procedure code does not represent an impediment for its assessment as a norm of substantial criminal law, susceptible of being, thus, retroactively applied, if it is more favourable.

Even if the constitutional provisions contained in the art. 15 paragraph 2 stipulate that the *„law orders only for the future, except for the more favourable criminal law (...)"*, we consider that the reasoning of the legislator upon the drafting of such norm was to provide the possibility to retroactively apply any criminal law or procedural criminal law, containing more favourable provisions.

An extensive interpretation of the constitutional law provisions is required, in the sense that, even if the text does not expressly stipulate that the criminal procedural law can also retro-activate, we must accept that, if we talk about the remission of the sentence limits, any law, whether criminal or procedural criminal law, is subject to retroactivity.

The legislator did not refer to the constitutional law provisions of the art.15 paragraph2 and to the criminal procedural law, as the remission of the sentence limits, fall under the matter of criminal law, the provisions of the art. 320^1 Code of crim. proc. being the first procedural provisions containing norms of criminal substantial law.

We deemed as compulsory the interpretation of the art. 320^1 paragraph 7 Code of crim. proc., as it is a norm concerning the quantum of the sentence applicable to certain offences or crimes, to be further framed beyond any doubt in the category of the criminal substantial law, and not in the category of the criminal procedural norms category.

Besides, the finality of norms edicting by the legislator is represented by the granting of a right, being excluded the fact that the above-mentioned legal provision regulates any formalities, the actual result to which the application of this legal provision leads to targeting the criminal liability that can be decreased.

Thus, as far as a norm, by its actual application on the case referred to judgement, regardless of the law section it belongs to, introduces a change in the incrimination conditions, in the conditions of charging the criminal liability or in the sanctions, shall fall under the incidence of the more favourable law (mitior lex).

We also consider that, in the case of some accused that caused criminal offenses at the same date, it would be deemed as discriminating if the judgments passed by the courts to be different, in the sense of considering as incidental or not the provisions of the art.320^1 Code of crim. proc., depending on the expedience of a criminal investigation authority in more effectively run through the procedural stages and phases of research and /or execution of the criminal prosecution.

Even more discriminating would be considered the different judgments in a trial in process of settlement, if the accused had committed a criminal offense for which he/she is judged by the court, while another accused that has committed a criminal offence long before the previously-referred to accused, either a similar offence, or a different offence, but due to a more complex criminal participation, or due to the fact that the crime has been committed in a series of criminal offences, circumstances which, due to the case complexity, resulted in a longer criminal investigation.

We consider that, in the given situation, such a treatment would be a discriminating one, as long as the causes generating it are as objective as it gets, being obviously not imputable to the accused. Thus, we get to the situation in which the accused that committed a single criminal offence, related to which the evidence service did not require a long period of time, hence the file has been referred for settlement by the competent court, will not benefit of the new simplified procedure, while other accused that have committed the criminal offence long before the other accused, will benefit of the simplified procedure of pleading guilty.

For this purpose, we called forth the Decision no. 86/27.02.2003 of the Constitutional Court, establishing that the provisions of the art. 8 of the Law no. 543/2002 regarding the pardoning for certain sanctions and the removal of some measures and sanctions that are unconstitutional, because they limit the application of the law for sanctions established by means of final court decisions, unchallenged by the date of entry into force of the law, excluding the sanctions applied subsequently

for actions committed before such date. In grounding the decision the Constitutional Court showed that the situations of certain categories of persons should basically differ for justifying the difference in the legal treatment and such difference should be based on an objective and rational criterion.

Another issue of interpretation and application is the one regarding the disjunction and incompatibility, and it concerns the case where in the same case there are two or more accused with different pleadings: one or several acknowledging to have committed the criminal offence described in the indictment and requesting the case settlement based on the evidence submitted to the file during the criminal prosecution and another one or ones not recognising to have committed the criminal offence or not requesting the application of the art. 320^1 paragraphs 1-6 Code of crim. proc.

From the text analysis, it results that the legislator did not expressly provide the coercitiveness to disjoint the case in such a situation, as provided under paragraph 5 of the art. 320^1 of the Code of crim. proc. for the case where evidence are required for the settlement of the civil action.

Although we do not deal with an imperative provision that would establish the coercitiveness of the case disjunction, in the case where any of the criminal participation forms is held and the procedural position of the participants to the offence is different, the court can decide the disjunction, only when possible. In such case, the court shall proceed according to the rules of simplified procedure for those that comply with the conditions, ordering by its decision the case disjunction for the other accused parties.

The accused sentenced on the grounds of *"pleading guilty"* can be heard as witnesses in the disjoint case, in relation to the other accused parties.

The judge passing the sentence for convicting the accused, according to the simplified procedure, can find himself/herself incompatible to judge the case of the other participant to committing the criminal offence.

Based on this interpretation of the text of law, included in a study published by the Superior Council of Magistracy, some courts facing such a situation declared themselves incompatible to judge the accused towards whom they ordered the case disjunction.

Considering the rule established by the art. 32 Code of crim. pr., text providing that, the case disjunction would not represent the best solution, in case of indivisibility or joint cases, the first instance judges all the cases, if the court settles all the criminal offences and all the accused.

Even if the art. 38 Code of crim. pr. allows the disjunction in the cases of incompatibility provided under art. 33 let. a) and in all the joint cases, one should not forget the basic rule, that is, in such situations the cases it operates and prevails the case joining, and the disjunction is merely the exception.

The only case that might be taken into account is the one regulated by the art. 47 paragraph 2 of the same code, which provides the fact that the judge who has pre-empted on the judgement that might be reached in the case can no longer participate to the case settlement.

According to the legal provision quoted above, the judge that, prior to the case settlement, pre-empts on the merits of the case is incompatible for judging the case. It is of no importance if the pre-emption occurred before the appointment or during the trial, if it has happened during first instance or in during the redress procedures, if it happened in an official environment or in an occasional case.

By using the word "settlement", the legislator referred to the situation in which the judge determined on the existence of the criminal action and on the guilt of the accused, and not to other situations such as the change of juridical framing of the offence, the extension of the criminal judgement on other material actions, on other deeds or on other persons. In fact, in both the doctrine and the practice, the opinion according to which the judge that has previously settled the criminal law part of the trial is not incompatible for settling also the disjoint civil part is the majority opinion.

By relating to the provisions of the art. 33 let. a) and art. 34 Code of crim. pr., if we take into account the situation in which there was a criminal participation when the criminal offence was committed, all the persons have been sent to judgment, and, prior to the commencement of the court

investigation three of the accused have requested to be judged based on the simplified procedure, while the other accused have not pleaded guilty, if the case is disjoint, the court must order the conviction of the three persons, applying the provisions of the art.320^1 and the disjunction related to the other two accused, that will be judged by a different panel of judges.

If, in this case, there exists a prejudice, the means of settling the civil action shall be an extremely difficult one, in the context in which the three accused, that have chosen to benefit of the new procedure implied by pleading guilty, do not challenge the prejudice, precisely because the modality established in the indictment is a convenient one for them, considering the rule of solidarity operating between the debtors.

In such a case, will the court jointly convict solely the three accused that have opted for calling forth the new legal procedure in their favour, further the solidarity being established on the occasion of convicting the other two accused, or will it disjoint, regarding the three accused, the civil matter settling it together with the criminal matter that concerns the other two accused, as well?

Moreover, we have to consider the issue of what happens in the case where, on the occasion of judging the two accused, shall there be ascertained that the entire prejudice has been caused by the three accused that have benefited of the procedure of pleading guilty, and, in relation to them, has the criminal court decision, establishing the fault or the contribution to the prejudice, remained final?

We consider that the answer to the two above-posed questions is represented by the fact that, in a case like the above-illustrated one, the disjunction is not the best solution, therefore, in such a case, when the legal conditions are complied with, for the accused choosing the simplified procedure the court shall have to limit to admitting the judgement based on the evidence serviced during the criminal prosecution stage, and the judgement for these accused shall be passed concurrently to the one of the accused judged according to the ordinary procedure.

There is, however, the case when, due to different reasons, the case disjunction could not be possible. In this hypothesis, a pertinent question would be can the court dismiss the request of an accused to apply the simplified procedure, only because the other one does not agree?

Practically, in case there is a criminal offence committed by several authors and one of the accused intends to benefit of the simplified procedure, acknowledging the committing of such offence based on the evidence serviced during the criminal prosecution and the other accused opts for the ordinary procedure of settling his case, and, thus, we have a case in which the disjunction is impossible, if the case reaches the stage of court investigation and the evidence is submitted to the file pending with the court, can it still be supported the compliance with the premise for applying the remission of the sanctions limits, according to the art. 320^1 paragraph 7, if the case has not been settled solely based on the evidence serviced during the criminal prosecution?

In this case, considering the argument related to the indivisible nature of the norm provided under art. 320^1 Code of crim. pr. and to the impossibility of applying the paragraph 7 of the same article in case of concurrent non-application of the paragraphs 1-6, we consider that the accused pleading guilty should neither benefit of the remission of the sanction.

Nevertheless, in this case, the difference of legal treatment between the two accused is to be carried out, like before the effective date of the new art. 320^1 Code of crim. pr., by applying the sanction particularization criteria or by holding the mitigating circumstances for the accused pleading guilty of committing the actions indicated in the indictment.

However, we ask ourselves if it is equitable and non-discriminating that the accused who intended to benefit of the simplified procedure should receive a conviction the only mitigating factor applicable to his case being the mitigating circumstances for his honest attitude and for acknowledging his/her deed. It is obvious that, although this accused agrees that the judgement shall only be carried out based on the evidence serviced during the criminal prosecution, finds himself/herself in the impossibility of making use of the simplified procedure due to causes independent of his/her will, as long as the second accused (co-author to committing the criminal offence) understands to adopt a procedural position of pleading not guilty and the cause cannot disjoint.

On one hand, due to the occurrence of a cause independent of his/her will, the accused should be able to benefit of the new procedure. On the other hand, as long as the other accused does not acknowledge the guilt of committing the criminal offence, thus, the criminal trial must follow its course in front of the court, the file enters the stage of court investigation and other evidence is implicitly serviced during the criminal trial, thus that the first accused could no longer call forth the provisions of the simplified procedure. It is a situation that the judiciary practice must solve by adopting a majority solution in this sense.

It is true that the doctrine and jurisprudence have accepted the possibility of combining more favourable provisions stipulated under different laws, when such provisions concern institutions that are susceptible of being applied autonomously, such as, for example, the case of multiple criminal offences, where there shall be selected the more favourable law for each offence separately, and further there shall be selected that sanctioning treatment for multiple criminal offences, provided by successive laws, which is more favourable. Is, however, the institution of guilt acknowledgement, regulated by the art. 320^1 paragraphs 1-6 Code of crim. pr. one susceptible of being applied autonomously of the institution of the cause of sanction remission, provided under paragraph 7 of the same article? Does the norm provided under art. 320^1 Code of crim. pr. have a divisible nature, allowing a separate application of the paragraph 7 of this article, independent of the special procedure of pleading guilty, regulated under the paragraphs 1-6 of the same article? We believe that the answer to such questions can only be a negative one, as, according to all the criteria proposed by the doctrine, the norm provided under the art. 320^1 has indivisible nature, and the application of the sanction remission cause, provided under paragraph 7 of this article to be conditioned by the application of the separate procedure of acknowledging the guilt, regulated by the paragraphs 1-6 of this article.

Thus, in the foreign doctrine, there has been ascertained that *"the milder provisions of the new law are a sort of a counterparty to the more severe provisions the two series of provisions are trying to balance, therefore the two series of provisions cannot be applied independently one of another"*. However, it is obvious the legislator's intention to grant a "*compensation*" consisting in the remission of sanction only to that accused that pleaded guilty and facilitated a more efficient settlement of the criminal trial by the request of settling the case based on the evidence serviced during the criminal prosecution.

We deduce this also from the fact that the simple acknowledgement of guilt, without the judgement carried out based on the evidence gathered during the criminal prosecution (due to various reasons, including the dismissal of the request by the court, according to art. 320^1 paragraph 8 Code of crim. pr.), does not lead to the remission of the quantum of the sanctions applicable to the accused.

Another problem in applying the provisions of the art. 320^1 Code of crim. pr. is the significance of the verb*"to hear"*.

There are opinions according to which the hearing is carried out after the court has previously informed the accused on all the consequences deriving from opting for the simplified procedure, followed by the reading of the intimation.

It has been considered that this hearing focuses on admitting the actions described in the indictment and on accepting the evidence serviced during the criminal prosecution and that is does not have the legal nature of an evidence (not being applicable the provisions of the art. 69-74 Code of crim. pr.), representing but a mandatory procedural activity required for establishing the procedural frame, being placed at the time of prior matters, before admitting the claim for judgement, according to the procedure provided under art. 320^1 Code of crim. pr.

The mandatory nature of this procedural activity is correlated with the accused right to opt for the simplified procedure. The supporters of this opinion have accepted the fact that this simplified procedure can carry out by default, in the absence of the accused, if the legal requirements are complied, in the hypothesis in which the acknowledgement has been made by means of an authentic deed.

However, this opinion, presents some drawbacks, that we shall further detail:

Placing the action of hearing the accused at the time of prior matters not correct. From the art. 44 Code of crim. pr., marginally called *"prior matters"*, it results that: *" The criminal court has the competence to try any prior matter on which the resolution of the case depends, even if, by its nature, that matter falls under the competence of another court. The prior matter is tried by the criminal court according to the rules and probative means regarding the field to which the matter belongs. The final decision of the civil court on a circumstance that represents prior matter in the criminal trial has authority of res iudicata in front of the civil court."*.

The text of the art. 44 Code of crim. pr., illustrates the fact that, there is no provision on the procedural moment when the accused can call forth this matter and that this moment can occur whenever during the criminal trial, both in the prosecution stage (see art. 45 Code of crim. pr.), as well as in the judgment stage (both before and after the court investigation initiation).

The hearing of the accused, provided under art. 320^1 Code of crim. pr., even if, apparently, has the value of a simple statement of acknowledgement, it cannot be reduced to it. It cannot be carried out by omitting the fact that the judgment stage is governed by certain rules. These rules require an active role to both the judge and prosecutor, and provide the right of the other parties to ask questions.

As a matter of fact, the hearing of the accused must be placed in the context established by the Code of criminal procedure. After analysing the order of the legal texts it results that, in a criminal trial, the order of the activities shall be the following:

- according to the art. 320 C. cr. pr., the chairman shall explain to the damaged person that he/she can have the capacity of party in a civil trial or it can participate as damaged person in the criminal trial;

- according to the art. 320^1 paragraph 3 Code of crim. pr., the chairman shall ask the accused if he/she requires for the judgement to be carried out based on the evidence serviced during the criminal prosecution stage, evidence he/she acknowledges, or, based on the ordinary procedure and shall take note of the expressed position;

- according to the art. 320 paragraph 2 Code of crim. pr., the chairman shall ask the prosecutor and the parties if they have formulated pleas, applications or if they propose new evidence; in case of a negative answer, the court declares the court investigation initiated, and such investigation shall be carried out according to the provisions of the art. 321 Code of crim. pr.

- according to the art. 322 Code of crim. pr., the chairman shall order that the clerk to read or to make a summary of the court intimation deed.

- according to the art. 323 Code of crim. pr., the court shall proceed to hearing the accused; if there are several accused, the hearing of each of them shall take place in the presence of the others.

Practically, after hearing the accused, according to art. 323, art. 324 Code of crim. pr., the court shall be able to determine on the request of the accused to be judged based on the evidence serviced during the criminal prosecution, fully aware of the case details.

Regardless of the means of action of the court, the disjunction regarding the other accused and the continuation of the trial, the statement of the accused opting for the simplified procedure shall have the value of evidence.

After a careful reading of the provisions of the art. 320^1 Code of crim. pr., it can be noticed that under this aspect, the legislator points out two moments: the one in which the accused states that he/she opts for being judged based on the evidence serviced during the criminal prosecution, prior to commencing the court investigation and the one of hearing the accused that can only be realized as above-indicated.

Of course, it would be possible for the accused that has submitted to the file the authentic statement, but is not present, to be brought in front of the court, if the court considers his/her present necessary.

What differentiates the two procedures is the fact that in the case of simplified procedure, the evidence gathered in the criminal prosecution no longer have to be services by the court, according to oralitaty, contradictoriality and publicity conditions, as provided for the regular procedure.

As a matter of fact, we should not forget the reason of introducing such procedure that was grounded on some actual realities, the fact that the courts had to re-service the evidence during the criminal prosecution, even if the accused was admitting the actions for which he was undergoing trial.

Another interpretation issue generated by the simplified procedure of the judgement in case of acknowledging the guilt results from the ambiguous content of the paragraph7 of the art. 320^1, also mentioned by the provisions of the art. 320^1 paragraphs 1-6 Code of crim. pr., the chairman does not apply in case the criminal action targets an offence sanctioned with life imprisonment, leaving unregulated another situation much more often met in the practice, that is the one in which the law provides the sanction of life imprisonment, alternatively with the imprisonment sanction for the committed offence.

If we take into account the fact that, upon the procedural moment when the legal provisions, regarding the guilt acknowledgement, can be applied (prior to the court investigation), the court cannot assess if the judgement to be passed is the sanction of life imprisonment or the imprisonment sanction, one might consider that the provisions of the art. 320^1 Code of crim. pr. are not applicable either if the criminal action targets an offense sanctionable with life imprisonment alternatively with the imprisonment sanction.

However, if we take into account the fact that the legal provision above mentioned is of strict interpretation and application, the conclusion to be drawn is that the legislator, by the plea it has created, had in mind only the offences that are exclusively sanctioned with life imprisonment.

In an interpretation *per a contrario*, in the case of committing the criminal offences for which the law provides the sanction of life imprisonment alternatively to the imprisonment sanction, the accused can benefit of the simplified procedure, if, based on the list of evidence serviced in the case, the court shall reach the conclusion that the life imprisonment is to apply, the guiding principle being that, if the evidentiary material provides data based on which the court considers that the life imprisonment sanction should apply, even if it used the simplified procedure, the accused cannot benefit of it.

Moreover, it is difficult for the court to accurately interpret and assess the possibility of an accused to benefit of the simplified procedure in the case of committing a series of criminal offences in which we have one offence punishable only by life imprisonment and another sanctionable only by imprisonment.

In such a case, we consider that it is mandatory for the court to assess that the provisions of the art. 320^1 Code of crim. pr. are not applicable.

However, we ask ourselves what would be the solution adopted in the practice in the above-mentioned hypothesis when the accused acknowledges this/her guilt by reference to the criminal offence for which the law provides solely the imprisonment sanction, and during the trial the evidence leads to the inexistence of the accused guilt by reference to the offence sanctioned by life imprisonment, thus, in relation to such offence the court shall order the acquittal of the accused. Can the court still relate retroactively to the fact that the accused initially pleaded guilty for the offence sanctionable by imprisonment, thus as for the accused to benefit of the remission of his sanction limits, according to the simplified procedure? Because we could encounter such judicial errors that are not covered by our legal framework and for which the legislator and the judicial practice must clear such aspects.

Another aspect that needs to be brought into discussion is the one regarding the means of applying the text of the art. 320^1 paragraph 3 Code of crim. pr., which provides that at the hearing *"the court asks the accused if he/she requires the judgement to be made based on the evidence serviced during the criminal prosecution stage, evidence that he/she acknowledges and accepts, and*

in such case it proceeds to hearing the accused and then it grants the permission to speak to the prosecutor and to the other parties".

First of all, it does not clearly result what the hearing of the accused refers to, that is if it only concerns the aspect related to the judgment made based on the evidence services during the criminal prosecution stage or the hearing should also concern aspects related to the offence subjected to trial?

From the text of the paragraph 1 of the art.320^1 C. crim. pro. that provides the fact that the accused can declare also by means of an authentic deed that he/she admits to have committed the offence held in the intimation, we could deduce that the hearing of the accused concerns solely the first aspect, related to the formal statement of admitting to have committed the offence and to the request for the judgement to be made based on the evidence serviced during the criminal prosecution stage.

The same interpretation would be also required by the fact that in this case it is not about a hearing carried out during the court investigation, as the text does not make any reference to reading the intimation, or to the commencement of the court investigation, but, on the contrary, from the paragraph 1 of the art. 320^1 Code of crim. pr. we deduce the fact that the entire procedure takes place *"prior to the initiation of the court investigation"*.

Moreover, the entire reasoning of the text, of simplification and expedition of the procedure for judging the cases in which the accused acknowledges the offences described in the indictment, might lead to the same conclusion, that the hearing only refers to the formal statement of admitting to have committed the offences described in the indictment and to the express request of the accused for the judgment to be carried out based on the evidence serviced during the criminal prosecution, which, of course, can include a detailed statement of the accused regarding the offence referred for settlement, to be considered upon judging the case.

If we take into account the *cases Colozza vs. Italy, Ilisescu and Chiforec vs. Romania,* we can only conclude that the above-illustrated interpretation does not contravene to the ECHR case law in the matter, as the accused has expressly waived his/her right to be heard and to ask the hearing of witnesses in front of the court, in which case the right to a fair trial is not infringed.

Secondly, the text does not clearly explain what it means to grant the permission to speak to the prosecutor and to the other parties: is the permission to speak is granted based on their statement on the case merits or only on the accused request, of settling the case based on the evidence serviced during the criminal prosecution?

Based on the fact that the paragraph 6 of the art. 320^1 Code of crim. pr. expressly provides that in case of settlement of the file by means of this procedure, there shall be applied the provisions of the art. 340-344 Code of crim. pr. (referring to, among others, to granting the permission to speak during the debates and the last hearing being granted to the accused), we may implicitly conclude that the permission to speak granted to the prosecutor and to the other parties, after hearing the accused, concerns only his/her request of case judgment by means of the special procedure of pleading guilty.

Further, after the court approved this request of the accused, the court would grant the permission to speak both during the debates on the case merits and the last intervention would be granted to the same.

Another interpretation issue raised in the discussion is the one concerning the judgement to be ordered by the court in the case of applying the provisions of the art. 320^1 paragraph 7 Code of crim. pr..

By using the categorical formula of the legislator *"the court shall determine the accused conviction"* we might deduce that another solution than the conviction is not possible, even if there are grounds for acquittal, as provided by the art.10 C.of crim. proc., and, implicitly the accused acquittal based on the art. 10 let. b^1 Code of crim. pr., when the offence does not present the social danger of a crime, would not be possible.

It is hard to believe that the legislator would have consider that the procedure of pleading guilty is incompatible to any other solution, other than the accused conviction, although the text leaves no room for interpretation.

It might be ascertained that, for the case in which it intends to pass an acquittal, the court might dismiss the accused request to be judged based on the evidence serviced during the criminal prosecution stage and to carry on with the court investigation.

In this case, if it intends to order the acquittal of the accused based on the art. 10 let. b^1 Code of crim. pr., it would be pretty difficult for the court to reason the dismissal of the accused request to apply the procedure under the art. 320^1 Code of crim. pr., without pre-empting on the judgment to be passed in the case.

Moreover, the judiciary practice is to establish what happens in case a person, due to various considerations, takes over himself / herself the liability of a crime, that he/she did not actually committed, requests for the judgement to be made based on the simplified procedure, the court orders conviction, within the remission limits, and after a while the true author of the crime is discovered?

Shall it be considered that the criminal prosecution authorities have committed a serious judiciary error that led to the considering that person as author of the criminal offence? Shall it be considered that the statement of the accused of pleading guilty represented major evidence, and thus the state authorities shall be exonerated of any liability by reference to the existing judiciary error, as long as the accused took over him/her the crime he / she hadn't committed?

Or, in case a person, that is not guilty, still pleads guilty, due to the lack of confidence in the impartiality and objectiveness of the court, the procedural conduct of pleading guilty only for eliminating the possibility to receive a higher sanction, and later on, during the court investigation, it proves to be innocent, can there be considered the accused supporting statement, according to which he / she pleaded guilty, even if not guilty, because he/she was afraid of getting a higher sanction, for assessing the existence of a judiciary error? We will find an answer to this question again from the judiciary practice, the answer being imposed by the majority opinion.

Another problem occurred in the practice is represented by the statement of guilt acknowledgement of the accused. In relation to such statement, it has been said that the accused must not acknowledge also the legal framing of the offence, such as held in the intimation, being able to ask for the legal framing of the same, according to art. 334 Code of crim. pr.

Moreover, it has been stated that, considering the capacity of guarantor for the compliance with the right to a fair trial, the court may order the exclusion of the illegally or unfairly gathered evidence, even if the accused requested to be judged based on all the evidence gathered during the criminal prosecution stage.

This opinion is questionable in the light of the aspect referring to the court opportunity to exclude, in this simplified procedure, certain evidence as illegally or unfairly gathered. Practically, a condition for the request admissibility is that the accused must not challenge such evidence, and the court must ascertained that the same was legally gathered. If the court shall ascertain the contrary, it must dismiss the request of the accused and must settle the case according to the ordinary procedure.

As resulting from the content of the art. 320^1 Code of crim. pr., the only evidence to be serviced in this procedure are those in favour of the accused proving his/her bona fide conduct prior to such offence.

The last paragraph of the article in discussion is also susceptible of leading to non-unitary interpretation by the fact that it does not enumerate, not even as an example, the causes for which the court might dismiss the accused request for applying the procedure of the judgment in case of pleading guilty.

We could deduce from the paragraph 4 of the art. 320^1 Code of crim. pr. that such a request can be dismissed in case the evidence gathered during the criminal prosecution shows that the actions of the accused are not determined or when there are not enough evidence regarding the accused, for determining a sanction.

In lack of express provisions we consider that the request shall be analyzed by reference to the provisions of the art. 320 paragraph 4 Code of crim. pr., providing that the "*trail court settles the criminal matter when, from the serviced evidence, it results that the accused actions are determined and there are sufficient data regarding his/her person for enabling the court to reach a verdict*".

Therefore, when the accused actions are not determined and there are not sufficient evidence regarding his/her person for enabling the court to reach a verdict, the court will be able to dismiss the request. Considering that all the citizens are equal in front of the law, as provided under the art. 16 of the Constitution, it can be considered that this provision is unconstitutional as it establishes different treatments between the accused whose request is allowed and the ones whose request is dismissed, the first ones benefiting of a substantial remission while the others do not, just because their actions are not determined and there are not sufficient evidence regarding their person for enabling the court to reach a verdict.

However, considering the deficiencies occurred during the criminal prosecution cannot be imputable to the accused, there is no reasoning that would lead to the conclusion of his / her ,,sanctioning'' by dismissing the request for applying such procedure, as it would implicitly render his / her impossibility to benefit of the remission of the sanction limits as provided by the law.

It seems that a great deal of interpretation is left with the courts, when settling the accused request to be judged based on the evidence gathered during the criminal prosecution.

This circumstance has a double nuance, consisting in both a positive aspect, if we refer to the attempt of eliminating the possibility that, due to different reasoning, the accused will acknowledge offences he did not commit, but also in a negative aspect if we take into account that, if, after the court investigation, the court reaches the conclusion that the accused really committed the offence, as described in the indictment, it can no longer apply the sanction within the limits of the remission, according to the art. 320^1 par. 7 Code of crim. pr..

Even if the text of law does not provide such a possibility, we deemed as correct the opinion according to which the accused must benefit of the legal cause for remission according to art. 320 paragraph 7 Code of crim. pr., moreover, this happening in the situation in which, although he/she opted for the simplified procedure, the court dismissed the request and applied the common law rules regarding the judgement, and, on the occasion of deliberation on the case, after analysing the evidentiary material, has ascertained that the facts described in the indictment and acknowledged by the accused are proved beyond any doubt.

A major aspect is the corroboration between the art. 320^1 Code of crim. proc. and the provisions of the art.18 of the Law no. 508/2004 on the set up, organization and functioning within the Public Ministry of the Directorate for Investigating Organized Crime and Terrorism.

Thus, according to the art.18 of the Law no. 508/2004: "the person committing one of the provided by the law under the jurisdiction of the Directorate for Investigating Organized Crime and Terrorism, and during the criminal prosecution denounces and facilitates the identification and the holding criminally responsible other participants to the criminal offence benefit of the remission to half of the sanction provided by the law''.

Considering the fact that the art. 320^1 paragraph 7 C. crim. proc. provides the remission by one third of the sanctions provided by the law in the case of imprisonment sanction, there is one question to pose: how will the court act in case a person that committed a criminal offence provided by the Law no. 508/2004, has adopted a procedural attitude by which he/she has contributed, during the criminal prosecution, to the identification and to holding criminally responsible other perpetrators, thus, becoming incidental the provisions of the art. 18 of the special law, and before the court, prior to initiating the court investigation, he/she maintains the same honest attitude and understands to use the simplified procedure of pleading guilty?

We consider that in the above-illustrated example, the court will have to pass a decision by which to order the application of the art. 320^1 paragraph 7 C. crim. proc. in relation to the accused and to order the remission by one third of the imprisonment sanction, but relating to the sanction

already reduced to half, according to the art.18 of the special law. Practically, in such a situation, the court should reduce the imprisonment sanction, to be applied to the accused, by two thirds.

Conclusions

These are only some of the issues raised by the application of the new text of the art. 320[1] Code of crim. pr., the discussions that can occur and the interpretations to be given, being definitely more than those above-mentioned. As any new institution, the judgment in the case of pleading guilty shall require a certain period of adjustment until the unitary practice in this matter shall be reached, especially that the text contains some inexact formulations, meant to create multiple interpretations. Unfortunately, the courts do not yet benefit of a quick and effective mechanism for unifying the judiciary practice, fact that has affected and shall probably continue to affect the solutions adopted in this matter.

We consider that for the new institution of judgment by pleading guilty, the adoption of some transitory norms would have been required, as being necessary for eliminating the controversies occurred and still to occur in the practice, as the possible interpretations to be given to the texts related to this institution can no longer refer to the prior Romanian case law and doctrine, and the consulting of the judgments from the comparative law is still a desideratum out of the reach of most of the interested ones.

Although apparently simple, the means of settling the issue causes numerous consequences in the practice, consequences we deem solvable solely through the promotion and admission of recourse actions for judicial review that would render impossible to pass contrary judgments in similar cases, thus ensuring unitary judgments in the judiciary practice, for eliminating the discriminating verdicts, in which the same text of law is applied differently, although the situations are identical.

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THE RIGHT TO AN INDEPENDENT COURT OF LAW. THEORETICAL ASPECTS. THE EUROPEAN COURT OF HUMAN RIGHTS CASE-LAW

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Abstract

International specialized literature approaches the concept of court of law from two perspectives: on the one hand, this concept refers to the court of law, regarded as a key linking element within the unitary judicial system, and, on the other hand, to the panel of judges, regarded as the main subject of the criminal procedure, i.e. the judges who take part in trying a criminal case. In a criminal case, the court of law plays the most important role and its main attribute is the function of jurisdiction, which represents the sum of powers granted to a magistrate for the administration of justice[1]*. The court of law plays a significant role in the rule of law state; thus, both at national and international level, attempts are made in order to set up a legal framework consisting of norms issued by national lawmakers or by official international institutions or by some magistrate associations or NGOs. All these efforts are meant to underline the significant role that the judiciary plays in a rule of law democratic society. In this study we shall try to analyse the concept of "independent court of law", as this is presented in the national system of law, in its specific norms that are provided by international normative acts and in the principles deriving from the ECHR case-law.*

Keywords*: the right to a fair trial; the right to an independent court of justice; criminal case; the European Court of Human Rights (ECtHR); unification of case-law.*

Introduction

The concept of **independence of the court of justice** implies two aspects: the court's independence from the other state authorities and the court's independence from the parties involved in the trial.

The judge's independence from the other state authorities – particularly, from the executive power – depends upon the appointment procedure and the length of the term of office, the judge's protection from external pressure and the judges' appearance of independence.

The judge's independence means that litigations are settled in the absence of any interference from any state body or from any other person[2]. At the same time, the judge's main obligation is to *independently* and impartially interpret, clarify and protect the rule of law state[3].

Thus, almost all the UNO member states have adopted national constitutions and international agreements that have gradually extended the judges' power in most of the states and in international relations. The separation of powers – which is provided by the Constitution – is meant, among other things, to represent a strong judicial guarantee for the judges' independence.

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[1] V. Cădere, *Tratat de procedură civilă*, 3rd Edition, Cultura Națională Publishing House, Bucharest, 1928, p. 44, *apud* I. Leș *Instituții judiciare contemporane*, C.H. Beck Publishing House, Bucharest, 2007, p. 2.

[2] I. Leș, *Organizarea sistemului judiciar românesc. Noile reglementări*, C.H. Beck Publishing House, Bucharest, 2004, p. 38.

[3] Ernst-Ulrich Petersmann, *Do Judges Meet their Constitutional Obligation to Settle Disputes in Conformity with Principles of Justice and International Law*, in European Journal of Legal Studies, vol. I, nr. 2/2007, according to http://www.ejls.eu/index.php?id=2.

Regional and international conventions on human rights, as well as other international juridical instruments, provide the right to "a public and fair trial within a reasonable term by an independend and impartial court of justice that is set up by the law." In addition to this, more and more international treaties continue to extend such individual rights of access to independent courts of law that should guarantee the fair implementation of the judicial procedures.

In this study we are going to approach the independence of the court of law principle from the Romanian legal system perspective, while taking into account international regulations and the standards imposed by the ECHR Convention and case-law.

1. Standards regarding the independence of the court of justice that are established by the Romanian system of law

National internal regulations on the independence of the judiciary are basically provided by the fundamental law of the state and they are also set forth by the laws on the organization of the judiciary.

Thus, according to Article 124 § 3 of the republished Romanian Constitution, "judges shall be independent and subject only to the law."

The judges' independence is ensured by other constitutional guarantees. We refer to the provisions of the Constitution that define the most important role played by the Superior Council of Magistracy, i.e. the guarantee of justice independence (Article 133 § 1 of the Romanian Constitution). In this respect, the Constitution also indicates the powers of the Superior Council of Magistracy, which are exercised in order to accomplish the most important role played by this council, i.e. the role of being the guarantor of justice independence[4].

Article 2 § 3 of the republished Law no. 303/2004 on the judges and prosecutors statute sets forth that "judges shall be subject only to the law and impartial."

Article 2 § 4 of the republished Law 303/2004 sets forth that "any person, organization, authority or institution shall abide by the independence of judges". At the same time, "the continuous professional training of judges and prosecutors shall guarantee their independence and impartiality in exercising their powers (Article 35 § 1)."

As to the judges' independence, Article 73 of Law 303/2004 provides that the judges' rights … shall be set forth in conformity with the place and role played by justice in the rule of law state, with the responsibility and complexity implied by the position of a judge…, with the restrictions and inconsistencies provided by the law as to these positions; the judges' independence is meant to *guarantee independence and impartiality*. ... The judges' and prosecutors' Statute also sets forth the role played by the Superior Council of Magistracy in "protecting judges…against any action that might affect their independence or impartiality or that might raise suspicion as to their independence and impartiality." "The judges or prosecutors who consider that their independence or impartiality is affected in any way by interference actions in their professional activity may address to the Superior Council of Magistracy for the necessary measures to be adopted according to the law."

Law 304/2004 on the organization of the judiciary also provides legal guarantees for the independence of judges. Thus, Article 10 sets forth that "all the persons shall enjoy the right to a fair trial and a solution to their cases within a reasonable term by an impartial and independent court, set up by the law." Article 46 § 2 provides that "The investigations made by presidents or vicepresidents personally or by especially appointed judges shall comply with the principle of independence of judges and they shall abide by the judges' subjection only to the law, as well as by the authority of the res judicata."

At the end of this subparagraph we underline the importance of magistrates' professional associations from Romania, which, without exception, have as an object of activity the obligation to

[4] Similar provisions can be found in Law no. 317/1.07.2004 on the Superior Council of Magistracy – the law was republished in the Official Gazette of Romania, no. 827/13.09.2005.

ensure and reinforce the independence of the judiciary. We refer to the Romanian National Union of Judges, SoJust-Society for Justice, the Romanian Magistrates' Association and the Association of Romanian Judges.

Thus, at the end of 2008, the Romanian National Union of Judges elaborated a document entitled "Principles for consolidating and promoting the independence and impartiality of justice"[5], which includes a minimum set of norms that should guarantee the efficiency of these desiderata for justice (and for the whole society, at the same time):

a) the firm assumption by the lawmaker and executive power of a coherent legislation in all domains of social and economic life, so that the application of the legislative norms should no longer encounter difficulties which sometimes could not be dealt with by the judiciary; the public assumption – provided in the governing program that the new Parliament votes after the future executive is invested – that the judiciary will not be constrained by any action or omission;

b) the conscious assumption by the judiciary of its own independence and impartiality, especially by assuming its own responsibility for the magistrates' actions and deeds in exercising their constitutional powers;

c) the assumption by the political class of the necessity to revise Romanian Constitution, which is an insurance instrument and a safeguard of justice independence;

d) enhancing efficiency, responsibility and adaptability of the Superior Council of Magistracy to the constitutional role it plays;

e) excessive bureaucratization of the Superior Council of Magistracy and the Ministry of Justice;

f) underlining the role of lawmaker played by the Parliament from two perspectives:

1) adopting - as soon as possible and after adequate public debates attended by specialists in law both theorists and practitioners - the civil code, the code of civil procedure, the criminal code and the code of criminal procedure. It is necessary for the new realities that are pointed out by these codes to eliminate the constant modifications of these fundamental laws, a situation that was specific for the last 18 years. Judicial stability and security can not exist if legislation is permanently instable and incoherent; 2) annihilating the executive power's tendency to annex the legislature powers by excessively adopting emergency ordinances meant to amend or modify organic laws.

A problem for the Romanian criminal procedure system – which is linked to the independence of the judiciary – is represented by the system of military tribunals. In this respect, there existed cases in which Romania was accused of having broken the right to a fair trial when judging civilians for criminal matters by military courts.

Thus, judicial military criminal bodies play a well-defined role in the Romanian criminal judiciary system. This category includes: military tribunals, the public prosecutor's offices attached to these tribunals and special criminal investigation bodies, whose functioning is regulated in Article 208 a) – c), the Criminal Procedure Code; more precisely this category includes: the commanders of headquarters and officers that are especially appointed by their commanders, the heads of commandants' offices and the officers that are especially appointed by their superiors, commanders of military centres, as well as the officers appointed by their commanders. The competence of military tribunals was regulated while taking into account the quality of the offender and also the nature of the crime. In this respect, the powers of the military courts were exercised in accordance with the offences committed by the military staff and the offences committed by civilians (no matter if they are employed by military institutions or not); these offences were committed in connection to these employees' service duties or they were directed against the military bodies patrimony. All these offences were prosecuted in conformity with the procedure applied by the special criminal investigation bodies, military prosecutors and military tribunals.

[5] According to http://www.unjr ro/comunicate/principii-de-intarire-si-promovare-a-independentei-si-impartialitatii-justitiei html.

As to the competences provided by the law in the special literature, opinions have been expressed according to which military criminal judicial bodies, even if they are special[6] bodies, are not granted a special form of competence[7]. In other words, special competence must not be mistaken for the competence of the special[8] bodies.

Thus, the inclusion of military tribunals in the category of judicial bodies that have special competence has been contested. Special competence is specific to judicial bodies that belong to a distinct judicial system and this aspect does not refer to the place occupied by military bodies within the national judicial system, which is unitarily regulated. In this way, for the military tribunals to be granted special competence, they should have been placed outside the system of courts and this hypothesis is not valid for military[9] tribunals.

This thesis is supported by another opinion according to which military tribunals do not have special competence because they also judge criminal cases that involve crimes which aggrieve various social relationships; consequently, these tribunals do not have special competence for a certain sector of social[10] activity.

However, military criminal bodies are specialized bodies whose existence is required by the particularities specific to military life. Over the last years, as to the Romanian criminal policy, there has been noticed a tencency to reduce the number military criminal judicial bodies and limit their powers. In this respect, we mention the fact that the Military Division of the High Court of Cassation and Justice was cancelled, its powers being taken over by the Criminal Division of the High Court. At the same time, the legal framework regulating the material and personnel competence of the ordinary military tribunals has been confined through many modifications that have been brought to the criminal procedure laws.

Thus, Law no. 281/2003 provides that crimes committed by civilians against the assets owned or administered or used by the Ministry of National Defence, the Ministry of Administration and Interior, the Ministry of Justice – the General Directorate of Prisons, Romanian Intelligence Service, Foreign Intelligence Service, Special Telecommunication Service and Protection and Guard Service, which have a military role or are linked through their nature to the defence capacity and security of the state – are no longer in the competence of military tribunals.[11]

In the same way, offences committed by the civil employees of military institutions and related to their service duties are no longer brought before military tribunals. Article I § 5 from Law no. 356/2006[12] provides that offences committed by civilians against the defence capacity of the

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[6] In this respect, e.g., military tribunals are considered to be courts with special jurisdiction (V. Dongoroz, in V. Dongoroz, S. Kahane, G. Antoniu, C. Bulai, N. Iliescu, R. Stănoiu, *Explicații teoretice ale Codului penal român. Partea generală, vol. II*, the 2nd Edition, the Romanian Academy Publishing House and the All Beck Publishing House, Bucharest, 2003, p. 101).

[7] V. Rămureanu, *Competența penală a organelor judiciare*, the Scientific and Encyclopaedic Publishing House, Bucharest, 1980, p. 43.

[8] N. Volonciu, *Drept procesual penal*, the Didactic and Pedagogical Publishing House, Bucharest, 1972, p. 131.

[9] For example, the criminal procedure regulations prior to the present Criminal Procedure Code provided a large range of specialized judicial bodies (tribunals for the railways, maritime or fluvial tribunals), among which military tribunals occupied a distinct position. They held a special position in the judiciary system because they belonged to a separate judicial system, which implied the existence of a military supreme court.

[10] I. Neagu, *Tratat de procedură penală. Partea generală*, Universul Juridic Publishing House, Bucharest, 2010, pp. 360-361 (at present, however, as a consequence of the significant modifications brought to the norms regarding military competence, one can notice a more specific character of the cases judged by the military criminal bodies).

[11] Prior to Law no. 281/2003, the material competence for offences committed by civilians against the assets owned by military institutions underwent another confinement, i.e. the provision that these assets must have a military destination or refer to the defence or security capacity of the state.

[12] Law no. 356/2006 on modifying and amending the Criminal Procedure Code, as well as on modifying other laws, was published in the Official Gazette of Romania no. 677/7.08.2006.

state, according to the provisions of the Articles 348-354 of the Romanian Criminal Code, shall be brought before civil courts, as a consequence of abrogating Article 26 § 1 § b of the Criminal Procedure Code. Last but not least, it is of great significance, when mentioning the criminal policy principles that are applied in Romania, to point out the fact that offences committed by the military staff shall be judged by the military criminal bodies only if they are perpetrated in relation to their service duties (Article 26 and Article 28, the Criminal Procedure Code). The requirement to establish a connection between the illicit act that was committed by the military and the military's service duties is also provided in Article 28^2 of the Criminal Procedure Code. Thus, in the first instance, the Military Tribunal judges offences committed by the military staff against the security of the state and the offences against peace and mankind. The norm we are discussing about does not refer to the military's service attributions, but, obviously, these crimes usually imply the breach of the service attributions.

As an exception, according to Article 28^2 § 1 (c) of the Criminal Procedure Code, the Military Court of Appeal judges in first instance the crimes committed by military magistrates; this article does not provide as a condition the identification of a connection between the illicit act and the offender's service attributions. In this situation, however, the offender's quality of a magistrate is of major importance for establishing the competence of the Military Court of Appeal; the result is that a legal framework – similar to the one concerning offences committed by civil magistrates employed in courts of first instance, tribunals, courts of appeal, respectively public prosecutor's offices attached to these courts – is created.

We appreciate that the limits imposed on the jurisdiction of Romanian military tribunals are in line with the ECHR case-law, according to which criminal cases that involved civilians and were judged by the military courts were, in fact, mistrials.

2. Standards concerning the independence of the judiciary that are set forth by different international instruments

At international level, an impressive body of laws are issued by different world or regional organizations for protecting human rights, ranging from magistrates' international professional organizations to NGOs set up for this purpose, all of which militate for the independence of justice.

The ennumeration of the important international judicial instruments must start with a referrence to **the Universal Declaration of Human Rights** which, in Article 10, entitles any person the right to be judged by an *independent* court of law.

In 1985, at the 7th United Nations Congress on Prevention of Crimes and the Treatment of Offenders, a set of fundamental principles regarding the independence of the judiciary[13] were adopted. Thus, this document provides that the independence of the judiciary shall be guaranteed by each state and set forth in the National Constitutions. The judiciary systems shall be entitled to deliver judgements in the cases that are being tried, on the basis of the facts and in conformity with the law, without any direct or indirect restrictions, inappropriate influence, incentives, pressure, threat or interference coming from any party or for any reason. At the same time, the judicial systems shall have jurisdiction for all the legal matters and shall have exclusive authority to decide whether any potential case is within their competence, as the law sets forth.

The document also refers to the inconsistencies existing between the requirements imposed by a rule of law state and the courts of law that do not enforce the procedures that are provided by the law. At the same time, the document refers to those aspects that are adjacent to the independence of the judiciary and that are closely linked to non-determination. Thus, the following aspects are taken into account: the freedom of speech and assembly of the members of the judiciary, the selection and training process of magistrates, the conditions provided for magistrates as to the performing of their

[13] Milano, 26.08-6.09.1985. The principles were validated by the Resolution 40/32 (29.11.1985) and the Resolution 40/146 (December 1985) by the United Nations General Assembly.

offices, as well as the length of their term of office, professional secret, immunity, respectively norms referring to magistrates' judicial liability.

In this respect, as far as freedom of speech is concerned, the document states that – according to the Universal Declaration of Human Rights – the members of the judiciary are entitled to freedom of speech, faith, association and assembly, as all the other citizens are; this means that when exercising these rights the judges will have to behave in a manner that implies the preservation of their dignity and impartiality and the independence of the judicial system. Judges will be free to form or join judges associations or other associations which represent their interests, promote their professional training and protect their judicial independence.

In order to be recruited as personnel for the offices available in the judicial system, these persons should enjoy a good moral reputation and should also have a high professional training. Their selection must be independent of any potential forms of discrimination, on grounds of race, colour, sex, religion, political orientation or any other opinion, property, birth or statute. However, the requirement that a candidate to a judicial office should be a citizen of that state is also regulated and it is not regarded as a discriminatory one.

The exercise of judicial powers implies the ensurance of those conditions that are necessary for creating a proper legal framework in order to make the performed activity more efficient. Judges (no matter if they are elected or appointed) have life tenure and the age limit is regulated in the national legislations. The promotion of judges shall rely on objective factors, such as professional training, moral integrity and experience.

The independence of the judiciary also implies the preservation of the professional secret.

Finally, the independence of the judiciary exists only on condition that judicial liability is strictly regulated with reference to the judges.

Recommendation no. 94 (12) issued by the Committee of Ministers of the Council of Europe to the member state regarding the independence, efficiency and the role of judges[14] was adopted in order to comply with the provisions of Article 6 of the Convention and also with the previously presented document

This regional document primarily refers to the concrete measures that are necessary to be adopted for the independence of justice to be guaranteed: the independence of judges shall be guaranteed by observing the provisions of the Convention and the constitutional principles; the national systems will comprise the following rules: 1) the judges' decisions shall not be subject to any revision except for the legal means of appeal; 2) the term of office and the remuneration of judges shall be guaranteed by law; 3) no other bodies except for the courts of law shall decide upon the specific competences of the judge, as provided by the law; 4) except for the decisions regarding amnesty or pardon, the government or public administration are not entitled to decide upon the retroactive invalidation of the delivered judgements.

A magistrates' decision forum is necessary to exist and it is regarded as a judicial authority (as the Superior Council of Magistracy is in Romania) that shall have the competence to select and train magistrates and to organize their career. It is very important for this authority to enjoy, in its turn, complete independence.

Norms that guarantee the independence of the judiciary are included, such as: regulating the sanctions for those who try to influence the judges' decisions in any possible way; the aleatory

[14] Recommendation no. 94 (12) was adopted by the Committee of Ministers on the 13th of October 1994, at the 516th meeting of the state secretaries. The texts of the Recommendation project and the explanatory Memorandum were drawn up by a work group as regards the independence of civil justice. After these documents were examined by the European Committee for International Cooperation, they were sent to the Committee of Minister from the Council of Europe. The Committee of Ministers adopted the text of the recommended project and approved the publication of the explanatory memorandum.

distribution of the cases; the minute regulation of the hypotheses according to which a case can be removed; inamovibility.

According to **Recommendation 94 (12)**, the meaning of the phrase "independence of judges" does not exclusively refer to judges but it covers the whole judiciary. The independence of judges is bound to be guaranteed according to the provisions of the Convention and in conformity with the constitutional principles of every national system. As to the measures adopted for implementing this principle, one should take into account several aspects, depending on the legal traditions of every state. The law should provide norms that regulate the situations which can be classified as appeals against the delivered judgements. The revision of the delivered judgements by the government or the administration outside this legal framework will obviously be inadmissible. Similarly, the judges' term of office and their remuneration should be guaranteed by law. As to the judges' term of office, Recommendation **94 (12)** comprises specific rules regarding the cases that classify the judges' suspention or removal from office as possible. Moreover, a specific recommendation is made for the judges' remuneration. Courts of law should also be entitled to decide upon their own competence, as the law provides it, and administration or government should not be entitled to make decisions that lead to the annulment of the delivered judgement, except for some special cases, such as: amnesty, pardon, clemency or other similar situations.

The judges' independence is first of all and mainly linked to the maintenance of the separation of powers in the state. The executive and legislative bodies have the duty to ensure that judges are independent. Some of the measures taken by these bodies might directly or indirectly interfere or might modify the way the judicial power is exercised. Consequently, executive and legislative bodies have to restrain from adopting any measures that could undermine the judges' independence. Moreover, pressure groups or other interest groups should not be allowed to undermine this independence.

The independence of judges must be guaranteed when judges are recruited and also during their whole professional career, without any discrimination. All the decisions regarding the judges' professional life should rely on objective criteria and even if every member state has its own method of recruiting, electing or appointing, the selection of candidates for the judiciary and the judges' career must be based on merit. Such decisions are important to be made only on the basis of objective criteria especially when the decision for appointing judges is made by bodies that are not independent from the government or from administration or, for example, from the Parliament or the Head of the State.

The independence of the judiciary must be observed not only when a judge is appointed but also during his entire professional career. For example, the decision of promoting a judge to another position might be, in fact, a disguised sanction of an "uncomfortable judge". Such a decision is clearly incompatible with the terms of **the Recommendation 94 (12)**.

An important aspect for ensuring the fact that the most appropriate persons are appointed to the office of judge is represented by the lawyers' training. Persons who build a career as a judge must enjoy an adequate judicial training. Furthermore, professional training contributes to the independence of the judiciary. If judges have appropriate theoretical and practical knowledge, as well as other abilities, it means that they could act more independently from the administrative and, if they intend to do so, they could change their professional orientation without being obliged to continue to work as judges.

Similarly with the **Fundamental Principles regarding the Independence of the Judiciary**, in the Contents of the **Recommendation 94 (12) on the independence, efficiency and role of judges**, dispositions regarding the judges' authority, the conditions of performing the assigned job tasks, the right to association, the applicable judicial regime can be found in this document.

Thus, we shall make reference to the way in which the rules regarding the judges' responsibility are set forth. In this respect, in order to protect the rights and obligations of all persons, the responsibilities of a judge are: a. To act outside any influence and in an independent way when

judging all cases; b. To solve all cases in an impartial way and in conformity with the collected evidence and in accordance with the law, to ensure that each party is fairly heard during the trial and that the procedural rights of the parties are observed according to the provisions of the Convention; c. To dismiss a case or to decline competence whenever there are valid grounds that he must do so in conformity with the exhaustive provisions of the law (e.g. in case of health problems, conflict of interests etc.);

d. whenever necessary, to explain in an impartial manner judicial matters for the parties; e. whenever necessary, to encourage the parties to reach an agreement; f. To motivate his decision, using a plain language, except for the cases when the law or customs provide it differently; g. to undergo any training that is necessary for him to accomplish his tasks in an efficient way.

If these responsibilities are not fulfilled or they are fulfilled in a wrong way or with delay, measures are to be taken according to the judicial profile of the profession. E.g., the following measures are taken: a. the withdrawal of the case from the judge; b. the transfer of the judge; c. the judge is sanctioned with a salary cut; d. the judge's suspension[15].

The European Chart on the Statute for Judges was adopted with the same purpose[16].

Thus, this document reiterates a series of rules which have the value of principles and of which we point out those aspects that refer to the judges' inamovibility. The **Chart** sets forth the principle of the judges' inamovibility, according to which the removal of a judge is possible only if the judge agrees to be removed from office[17]. This principle is not applied if the judge's removal is provided as a disciplinary sanction in case modifications of the judicial organization occur and this implies the disappearance of a court of law or in case the judge is called to support a court that undergoes a difficult situation.

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[15] According to Article 100 of the republished Law no. 303/2004 on the Statute of Judges and Prosecutors, the disciplinary sanctions applied to judges and prosecutors - depending on the seriousness of their misconduct - are: a) warning; b) cut of the monthly salary with up to 15% for a period of up to 3 months; c) disciplinary removal for a period of 3 months to another court of law or a public prosecutor's office in the constituency of the same court of appeal or in the constituency of the same public prosecutor's office attached to one of these courts; d) exclusion from magistracy. As one can notice in the national system, the hypothesis of ordering for a case to be withdrawn from a certain judge is not regulated. These sanctions can be imposed by the Superior Council of Magistracy if a judge is accused of misconduct for: a) breach of the legal provisions regarding the statement of assets, the statement of interests, the incompatibilities and interdictions imposed on judges and prosecutors; b) intervening to satisfy certain requests, demanding and accepting to settle one's own personal interests or the family members' interests or other persons' interests otherwise than the legal framework provides for all the citizens, as well as interfering in another judge's or prosecutor's activity; c) performing public activities that have a political character or expressing one's own political orientation when exercising the service duties; d) disclosing the secret of deliberation and the confidential nature of the performed works; e) repetitive and guilty breach of the legal disposals regarding the obligation to solve the cases within a reasonable time; f) the groundless refusal to accept applications, conclusions, reports or other documents from one of the parties in the trial; g) the groundless refusal to accomplish a service duty; h) exercising the office and breaking the procedure norms in bad faith or out of gross negligence if the deed is not an offence; i) delaying the performance of the works on imputable grounds; j) unmotivated and repeated absence from work; k) adopting a reproachable attitude during the exercise of the servive duties to the colleagues, lawyers, experts, witnesses or lawmakers; l) non-accomplishment of the obligation to transfer the basic norm to the court of law or the public prosecutor's office where the judge is employed; m) breaking the disposals regarding the aleatory distribution of cases; n) directly taking part or through the agency of other people in gambling activities or investment systems that avoid the transparency of the funds as the law stipulates.

[16] The preliminary project of **the European Chart on the Statute for Judges** was adopted in the spring of 1998 on the second multilateral reunion on the statute of judges from Strasbourg (8-10 iulie 1998).

[17] Regulations have a correspondent in Romanian national legislation. Thus, Article 2 § 1 and § 2 of the republished Law no. 303/2004 on the stature of judges and prosecutors provides that "The judges appointed by the President of Romania shall be irremovable according to the law. The irremovable judges can be removed by transfer, delegation, relocation or promotion only if they agree with this and they can be suspended or removed from office according to the provisions of the present law. "

The temporary appointment stipulated in the last ennumerated case must have a limited duration which is defined in the statute. However, taking into consideration the delicate situation of transfering a judge when the latter did not express his consent, we must underline the fact that they have the right to an appeal before an independent court that has the obligation to check if the transfer was legitimate.

In the Romanian national system, according to the republished Law no. 303/2004 on the statute of judges and prosecutors, if a court of first instance, a tribunal or a specialized court of law can not function properly because of a temporary absence of certain judges or because of a vancacy or other similar causes, the President of the Court of Appeal, at the proposal of the court of law within that appellate court's constituency, can appoint judges from another court of law within the same constituency *on the basis of a written agreement signed by those judges.* The delegation of judges from courts of first instance, tribunals and specialized courts of law to another constituency can be decided on the basis of the written agreement of those courts, with the approval of the Superior Council of Magistracy, and if the President of the Court of Appeal requires this in the constituency where the delegation is necessary and with the approval of the President of the Court of Appeal within the constituency where these judges work. The temporary appointment of appellate judges in control positions is decided ***on the basis of the written agreement thereof***, at the request of the Superior Council of Magistracy and of the President of the Court of Appeal until that position is occupied by appointment according to the present law. The appointment in control positions of judges at the High Court of Cassation and Justice is decided by the Superior Council of Magistracy ***on the basis of the written agreement thereof***, at the proposal of the President of the High Court of Cassation and Justice. The delegation of judges can be provided for a period of 90 days the most per year and it can be prolonged for other 90 days ***with the written agreement thereof.***

According to the same normative act, in Romania the removal or transfer of judges can not be accomplished without ***the written agreement*** of the judge.

At the end of this subparagraph we are going to mention a series of provisions stipulated in **the Bangalore Principles of Judicial Conduct**. Thus, the independence of justice is the premise for the rule of law state and it represents the fundamental guarantee of a fair trial. The judge, consequently, must support and be an example for the independence of the judiciary and also from an individual and institutional point of view.

The fair enforcement of this principle requires the observance of the following rules: a) the judge shall exercise his judicial office independently, on the basis of his own approach of the facts, on the basis of a faithul interpretation of the law, without being influenced or persuaded, forced, threatened or without allowing any direct or indirect intrusion that might come from the part of certain circles, no matter what the reason for such an interference; b) the judge shall be independent in society, in general, and in relationship with the parties involved in the litigation that he has to settle; c) the judge shall not only avoid any improper relationship but he shall also be beyond any influence that might come from the executive or legislative powers, and he must be perceived as such by any outside observer; d) when exercising his juridical office, the judge shall be independent from his magistrate colleagues as to those decisions that he must make independently;

e) the judge shall encourage and support all those measures that lead to the accomplishment of the judicial obligations in order to maintain and reinforce the independent functioning of justice; f) the judge shall manifest and make proof of a judicial attitude of good quality in order to consolidate the public trust in justice, without which the independence of the judiciary cannot be maintained.

Last but not least, we mention the documents elaborated by the Consultative Council of European Judges at the Council of Europe.

3. Standards for the independence of the court of law set forth by the ECtHR case-law:

The European Court of Human Rights set forth that the independence of a court of law depends on the following aspects:

a) the appointment of judges;

b) the length of the judges' term of office;

c) the existence of a legal framework that offers judges protection against potential external pressures;

d) the possibility to check the judges' appearance of independence[18].

Thus, it has been established that the exigencies of independece are met by the Parole Board (a common law advisory body that can express opinion on the way in which the penalty must be executed by the convicts and that enforces a procedure which implies a set of major guarantees[19]), the Jury Court in Belgium (the Belgium legislation provides many guarantees that are meant to protect the Jury Court magistrates from external pressures, while the appointment of jurors is subject to certain very strict rules) [20], the Prison Visiting Committee (jurisdictional institution that is specific to the UK prisons and that has contentious powers and whose members are independent) [21]. The Bar Council of Antwerp was also considered an independent body on the basis of its administrative, disciplinary, contentious or advisory powers. At the same time, the independence of the Council members is undoubtable since they are subject to their own counsciousness[22] alone.

The ECHR appreciated that the Royal Air Force Court Martial meets the independence standards because this court is comprised of members who have superior juridical competence and are presided over by a highly qualified civilian who is appointed by the Minister of Justice and who is entitled to give directions as to the administration of evidence and the settlement of the legal problems according to public mandatory procedure he is subject to[23].

If these conditions are not met, the procedure set forth by the Crown (the Queen of the Netherlands and the Public Health Minister) does not meet the requirements regarding the exigencies for the independence of the court of law. In this respect, the royal decree - by which the Crown statuated the challenge - has the force of an administrative procedure act issued by a Minister who is responsible before the Parliament. This royal decree could not be subject to the control of a judicial body[24].

In the same way, the Austrian National Council for Persons with Disabilities or the Lausanne[25] Police Commission can not be considered independent bodies. As to the latter example, it has been pointed out the fact that the unique member of this commission is a high official from the police and thus he is likely to be required to accomplish other tasks, too. In this context, the lawmakers will tend to see him as a member of the police who is part of a hierarchical system and who is solidarious to the police forces.

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[18] N. Mole, C. Harby, *Le droit à un procès équitable*, Conseil de l'Europe, Strasbourg, 2007, p. 33. See also, ECtHR, Decision adopted on 16.12.2003 in the case *Cooper vs. the UK* , according to HUDOC; ECtHR, Decision adopted on 16.12.2003 in the case *Greaves vs. the UK* , according to HUDOC; ECtHR, Decision adopted on 22.06.1989 in the case *Langborger vs. Sweden*, according to HUDOC; ECtHR, Decision adopted on 22.11.1995 in the case *Bryan vs. the UK*, according to HUDOC; ECtHR, Decision adopted on 2.06.2005 in the case *Zolotas vs. Greece*, according to HUDOC; ECtHR, Decision adopted on 21.09.2006 in the case *Maszni vs. Romania*, published in M. Of. nr. 585/24.08.2007.

[19] ECtHR, Decision adopted on 2.03.1987 in the case *Weeks vs. the UK*, in V. Berger, *Jurisprudența Curții Europene a Drepturilor Omului*, 4th Romanian Edition, Romanian Institute for Human Rights, Bucahrest, 2003, p. 138.

[20] ECtHR, Decision adopted on 1.10.1982 in the case *Piersack vs. Belgia*, in V. Berger, *op. cit.*, p. 204.

[21] ECtHR, Decision adopted on 28.06.1984 in the case *Campbell and Fell vs. the UK*, în V. Berger, *op. cit.*, pp. 217-219.

[22] ECtHR, Decision adopted on 30.11.1981 in the case *H. vs. Belgia*, în V. Berger, *op. cit.*, pp. 226-228.

[23] ECtHR, Decision adopted on 16.12.2003 in the case *Coper vs. the UK*, according to HUDOC.

[24] ECtHR, Decision adopted on 23.10.1985 in the case *Benthem vs. the Netherlands*, in V. Berger, *op. cit.*, pp. 161-163.

[25] ECtHR, Decision adopted on 29.04.1988 in the case *Belilos vs. Switzerland*, in V. Berger, *op. cit.*, pp. 181-183.

In another case, the problem whether a court of law (The Turkish State Security Court) which is composed of two civil judges and a military judge meets the requirements of an independent court of justice. In this respect, the independence of the two civil judges can not be doubted, but the ECHR analysed the statute of the military judge who is a part of this court of law. Thus, although the military judges undergo the same training program as the civil judges and are protected from external pressure, they are, nevertheless, part of the army, an institution which is subordinated to the executive power. At the same time, military judges are subject to a disciplinary regime and are assessed within the military system they belong to. At the same time, military judges are appointed by the administrative system and the army. Taking into consideration these aspects, the ECHR held that this court of law does not offer guarantees of independence[26].

The court's lack of independence has also been pointed out as to the circumstances in which the members of the court were appointed and could be removed by the executive[27].

As to Romania's case, the issue regarding the independence of the court of law has been repeatedly analysed; in the following lines we are going to analyse some of these cases.

Thus, the judges' obligation to comply with a case-law that was set forth by the joint divisions of a country's Supreme Court did not contravene the independence of a court of law because the reunion of the divisions of a high jurisdiction is meant to confer special authority to certain decisions adopted in important areas of the judiciary; this does not imply that the lower courts' rights and duties to independently examine the cases brought before them are aggrieved[28].

In the case Vasilescu vs. Romania[29], the ECHR held – according to Article 6 §1 of the Convention – that the Romanian prosecutors, as representatives of the Public Ministry, are first of all subject to the General Public Prosecutor, and then to the Minister of Justice, and thus, that they are not independent but subject to the executive.

In the case Maszni vs. Romania[30], the ECHR analysed whether the military tribunal – which tried an offence inflicted on a civilian – was an independent court of justice. Thus, basically, the ECHR held that military tribunals have competence to deliver judgements for the crimes directed against the military personnel on condition that the guarantees of independence and impartiality provided by Article 6 §1 of the Convention are met. However, a different hypothesis was formulated with reference to the situations in which national legislatures entitle military tribunals to judge civilians in criminal matters.

Thus, according to the text of the Convention, the competence of military tribunals to judge cases against civilians is not absolutely excluded on condition that the exigence implied by this competence should be minutely examined.

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[26] ECtHR, Decision adopted on 9.06.1998 in the case *Incal vs. Turkey*, in C 1, pp. 213-216; see also: ECHR, Decision adopted on 28.10.1998 in the case *Ciraklar vs. Turkey,* in M. Udroiu, O. Predescu, *Protecția europeană a drepturilor omului și procesul penal român. Tratat*, C.H. Beck Publishing House, Bucharest, 2008, p. 574; ECtHR, Decision adopted on 8.07.1999 in the case *Surek vs. Turkey*, *ibidem*.; ECtHR, Decision adopted on 10.02.2004 in the case *Önen vs. Turcia,* according to HUDOC. See also: A. Mowbray, *Military Judges and The Right to a Fair Trial*, in Human Right Law Review, vol. 6, nr. 1/2006, pp. 176-183.

[27] ECtHR, Decision adopted on 3.03.2005 in the case *Brudnicka vs. Poland*, according to HUDOC.

[28] ECtHR, Decision adopted on 16.07.2002 in the case *Ciobanu vs. Romania,* in C. Bîrsan, *op. cit.*, p. 493.

[29] ECtHR, Decision adopted on 22.05.1998 in the case *Vasilescu vs. Romania,* published in the Official Gazette of Romania no. 637/27.12.1999. For the same solution, regarding the lack of guarantees for the independence of Romanian prosecutors, see ECtHR, Decision adopted on 3.06.2003, in the case *Pantea vs. Romania,* published in the Official Gazette of Romania no. 1150/6.12.2004; ECtHR, Decision adopted on 26.04.2007, in the case *Popescu (1) vs. Romania,* according to HUDOC; ECtHR, Decision adopted on 26.04.2007, in the case *Popescu (2) vs. Romania,* published in the Official Gazette of Romania no. 830/5.12.2007.

[30] ECtHR, Decision adopted on 21.09.2006 in the case *Maszni vs. Romania,* published in the Official Gazette of Romania no. 585/24.08.2007.

The ECHR underlined the fact that it analyses with utmost care the circumstances in which the military tribunal is exclusively comprised of career military magistrates; in this case, the compliance with Article 6 §1 of the Convention is possible only under exceptional circumstances.

Without denying the special role played by the army in the constitutional organization of democratic states (this role is limited as far as national security is concernced because the exercise of the judiciary lies with the civil institutes), the ECHR held that military tribunals should basically not have the competence to judge civilians. Thus, the state should oversee that the civilians accused of committing an offence, no matter what this may be, will be judged by civil courts. At the same time, the power of the military criminal justice should not encroach upon civilians unless there are solid grounds for justifying such a situation and only in conformity with the clear provisions set forth by the law. These grounds should be proved in every particular case *in concreto*. The *in abstracto* inclusion of certain categories of offences within the competence of military tribunals might not be sufficient. Such an inclusion might place civilians in a position which is different from that of the citizens who are judged by ordinary courts of law and this could lead to inequality before the law, a fact which should be avoided in criminal matters.

Referring to the enforcement of these principles, the European Court of Human Rights noticed that the Romanian lawmaker – without being loyal or subject to the army – was, however, quoted before the military court for common offences.

Analysing the statute of military judges in Romania, the European Court of Human Rights noticed that certain independence and impartiality guarantees are provided by our legislation. Thus, the military judges undergo the same professional training as their civil counterparts do and benefit of constitutional guarantees which are identical to those of the civil judges - they are appointed by the President of the State at the proposal of the Superior Council of Magistracy, are irremovable and enjoy professional stability. On the other hand, other characteristics of the military judges' statute can cast doubt upon the judges' independence and impartiality. Articles 29 and 30 of the Law no. 54/1993[32] provide that military judges are career officers, are paid by the National Ministry of Defence, are subject to military discipline and their promotion is regulated by the internal military[31] norms.

Under these conditions, the European Court of Human Rights established that the right to a fair trial is aggrieved if the military tribunal - which judged a criminal case involving an offender accused of committing common crimes - did not observe the independence exigency. Thus, it was held that the offender's doubt as to the independence and impartiality of the military tribunals can be considered as objectively grounded.

The lawmaker's right to a fair trial obliges the state to ensure the fair application of the judicial procedures, while ensuring the equality of the parties before an independent and impartial system of justice which is set up in accordance with the law. This obligation is permanent because, otherwise, the right to a fair trial is aggrieved by the national jurisdictions.

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[31] We notice that, although Law no. 54/1993 was abrogated, the regulations were taken from Law no. 303/2004 on the statute of judges and prosecutors. Thus, according to Article 30^1 "A person who meets the requirement provided by the law for becoming a magistrate can be appointed in the position of a military judge or prosecutor after this person became an officer within the National Ministry for Defence". According to Article 73 § (4) § (5) and (6) "(4) Military judges and prosecutors are active military officers who have all the rights and duties that this position implies. (5) The remuneration and the other rights that military judges and prosecutor have are ensured by the National Ministry for Defence, in conformity with the legislative provisions regarding salaries and the other rights that are specific to the judiciary personnel and in conformity with the regulations regarding the payment rights that are specific to the quality of a military, and to the quality of a civil employee for this Ministry. (6) Military ranks and promotion of military judges and prosecutors shall be made in accordance with the norms that are applied for the full-time employees within the National Ministry for Defence."

Conclusions

In Romania, in criminal trials, the court of law is defined as the most important processual subject and it is included in the specialized literature in the category of the official processual subjects. The lawmaker's right to a fair trial determines the state to ensure the fair enforcement of the judicial proceedings, as well as the equality of the parties involved in the trial in accordance with the legal provisions. This regulation has a permanent character and, otherwise, the right to a fair trial is aggrieved by the national jurisdictions.

The present Romanian legal framework meets the requirements imposed by the organization and functioning of an independent system of justice. A number of guarantees that support these essential requirements for the judiciary and the fairness of the judicial procedure are also regulated. Subsequent to the ECtHR decisions, important modifications have been brought to legislation in matters of criminal procedure. Thus, e.g., we mention the limitation of the military judicial bodies competence only as to the offences committed by the military personnel (declining military tribunals any competence to judge the offences committed by civilians, no matter what these may be) or exclusively placing the remanding in custody measure with the judge, thus reducing the prosecutor's competence.

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CONSIDERATIONS ABOUT OVERLAPPING CRIMINAL AND ADMINISTRATIVE LIABILITY FOR THE SAME OFFENSE

MIRELA GORUNESCU[*]

Abstract
The ne bis in idem principle is one of the fundamental principles of a criminal trial in a state of law. This paper focuses on the question whether a possible overlapping between criminal and administrative liability for the same offense is or not a violation of this principle. Both the national and the European Court of Human Rights jurisprudence were investigated. By reporting to the European case we concluded that such a situation represents a case of bis in idem.

Keywords*: criminal liability, administrative liability, overlapping two kind of legal liability, non bis in idem, res judicata*

Introduction

1. This paper focuses on the problem of frequent overlapping from the Romanian jurisprudence of criminal liability and administrative liability for the same antisocial fact. It is a common situation in the jurisprudence, in some particular situations being considered as mandatory. Specifically, we refer to the *crimes by habit* whose essential condition can be practically proved only by reports concerning minimum three contraventions of the same nature. But there are other situations, generally accepted, which involve the overlapping of criminal liability over the administrative liability, without being perceived as a *bis in idem*.

2. From our point of view it is very important that these situations be studied, because their reporting to the European Court of Human Rights (ECHR) jurisprudence have the ability to be considered violations of the *ne bis in idem* principle. Moreover, the European Court stated that the meaning of "criminal responsibility" is different from the one we find in our national law doctrine and jurisprudence. The perpetuation of the overlapping practice of criminal liability over the administrative liability for the same illicit act may cause further convictions of Romania in the cases brought in front of the European judicial body.

3. In our study we show, from a national point of view, what is the relationship between crime and contravention and which are the penalties that are applicable to each of them. Equally, we will reveal the Romanian doctrine statements on the matter of overlapping criminal liability over contravention liability for the same antisocial act.

In counterweight, we will investigate the ECHR decisions on cases of overlapping of the two forms of legal liability. Comparing the two systems will result that there is no identity between them, and the internal reality requires a mandatory reconsideration.

4. In terms of the Romanian doctrine in the field of interest, the present study has a different position regarding the qualification as a *bis in idem* situation the overlaps of the criminal and administrative liability for the same fact. This happens because traditionally, in the Romanian doctrine the possibility of overlapping the two types of legal liability was admitted. Reconsideration of these opinions should be made now in the light of ECHR decisions.

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***Res Judicata* and *Non Bis in Idem* in Romanian Criminal Law**

In the Romanian criminal procedural law, one of the reasons which justify the use of the extraordinary appeal against a court ruling is the violation of *res judicata* rule by the fact that two final judgments for the same criminal offense[1] were delivered against the same person. Such a situation is possible when the perpetrator did not know about the existence of the first decision, because otherwise there would be invoked on the occasion of the second trial, or when the perpetrator did not know about the second trial and he could not invoke *res judicata*. For the appeal to be admitted it is sufficient to prove the existence of two final[2] decisions, regardless the reason that caused this *bis in idem*. The condition is considered fulfilled even if for the same offense two courts have given a different legal qualification (eg one considered it a fraud and the other one embezzlement).

Also in Romanian doctrine it is shown that *non bis in idem* rule requires three conditions to be fulfilled: a) to have a final conviction, acquittal or termination of criminal proceedings decision[3], b) the same person, c) the same object (the fact itself is important and not its legal qualification, because giving a different legal classification would make it possible to circumvent the rule[4]).

An express indication of the *non bis in idem* principle in Romanian legislation is more recent and is found in the field of international judicial cooperation in criminal matters. Under this name, the principle was introduced in 2006[5] in Article 10 of the Law no. 302/2004 on international judicial cooperation in criminal matters[6]. According to the paragraph (1) of this legal text, whose *nomen juris* is *non bis in idem*, the international judicial cooperation is not admissible if in Romania or in any other state has been held a criminal trial for the same offense and if: a) by a definitive decision was ordered the acquittal or the cessation of the trial, b) the penalty imposed in the case by issuing a final decision was executed or was the subject of a total or partial amnesty. However, these exemptions do not operate where the judicial assistance is requested to review a final decision in an extraordinary appeal for any reason under the Romanian Criminal Procedural Code. The text does not apply if an international treaty to which Romania is a contracting party contains provisions more favorable concerning the principle *non bis in idem*.

THE *NON BIS IN IDEM* PRINCIPLE AT EUROPEAN LEVEL

At European level, the consecration of the *non bis in idem* rule is found in both the legal instruments adopted under the aegis of the European Union and those written under the auspices of the Council of Europe.

For example, from the European Union instruments, article 50 of the Charter of Fundamental Rights concerns a fundamental right of EU citizens: "the right not to be tried twice for the same offense". Based on this text, "nobody can be tried or convicted for an offense that has already been acquitted or convicted within the Union by final judicial decision in accordance with law."

In the same way, the Council of Europe, in the 7th Protocol of European Convention of Human Rights, in article 4, defines the *"right not to be tried or punished twice"*, so nobody can be prosecuted or punished by the criminal jurisdiction of the same state for an offense for which has already been acquitted or convicted by a final decision under the criminal law and criminal jurisdiction of that state. However, these provisions do not prevent the reopening of the trial,

[1] V. Dongoroz, S. Kahane, G. Antoniu, C. Bulai, N. Iliescu, R. Stănoiu, Theoretical Explanations of Romanian Penal Code, Special Part, vol. II, Academiei Române Publishing House, Bucharest, 1978, p. 249

[2] N. Volonciu, Criminal Procedural Law, Paideia Publishing House, Bucharest, 1994, p. 328

[3] E Unless the decision to terminate criminal proceedings on the basis of art. 10 par. f of the Romanian Criminal Procedural Code.

[4] Gr. Theodoru, Criminal Procedural Law, Hamangiu Publishing House, Bucharest, 2008, p. 830.

[5] The Law no. 224 / 2006, published in the Romanian Official Journal, Part I, no. 534 of 21 June 2006.

[6] Published in The Romanian Official Journal, I[st] Part, no. 594/2004. It was successively amended, including by Law no. 222/2008.

according to the law and penal procedure of that state, whether new or newly discovered facts appear or a fundamental flaw is discovered in the previous proceedings which might affect the solution. The importance of this rule is revealed once more by the fact that under the article 4 paragraph 3 of the same bill any exception to the rule is allowed. This principle has been included in other legal instruments adopted also by the Council of Europe and which impact in the field of cooperation in cases of certain segments of specialized crime. For example, the European Convention on Extradition adopted in 1957, in article 9 stipulates that extradition will not be granted when the person has been definitively judged by the competent authorities of the requested party for the offense or offenses for which the extradition is requested. Similarly, the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990, in article 18 paragraph 1 item 3 indicate among the situations in which cooperation may be refused the one when "the requested Party considers that the measure sought would be contrary to the principle of *ne bis in idem*".

THE *NON BIS IN IDEM* RULE IN ROMANIAN DOCTRINE

Generally accepted, Romanian doctrine states that *res judicata* does not operate where there is identity of material facts, but the fact is described differently in terms of legal nature: once as the contravention and then as a crime[7]. This is because, under trial as a contravention it has not pursued a criminal action which seeks criminal liability of those who committed a crime and, consequently, no criminal action could be extinguished. Because the criminal action was not ended, a definitive judgment of an administrative court in which for the same act it was applied to the offender a contraventional sanction would not operate as a barrier to starting the penal trial[8]. Such a statement should be reconsidered because of the European Court of Human Rights jurisprudence.

ABOUT THE CUMULATION OF CRIMINAL AND CONTRAVENTIONAL LIABILITY IN ECHR JURISPRUDENCE

The ECHR, in a particular case[9], had to answer to this particular question. In this instance, the case started from a citizen's complaint, who after being contraventionally fined in a conflict in which he broke a neighbor's door then struck him, he was convicted for the same act by the criminal court for trespassing and battery or other violent acts. In this context, in front of the European Court, the plaintiff claimed violations of Articles 6 of the European Convention on Human Rights and article 4 of the Protocol no.7 to the Convention (which guarantees the right not to be tried or convicted twice for the same acts - *non bis in idem*).

The Court, in its Judgment delivered on 14 January 2010, found violations of both articles. About the article 4 of Protocol 7 to the Convention, the Court stated that: the contraventional sanctions applied for the committed acts can be considered as having a criminal nature in the autonomic sense that the Court gave to this concept, considering that on the one hand, the prohibition imposed by the violated legal text has an *erga omnes* opposability and that, on the other hand, the purpose of the applicable sanction is to punish and to prevent the future commission of similar acts.

In addition, it was stated that there is identity of facts that were considered contravention and those which have generated the criminal proceeding against the applicant, regardless of the legal definition that domestic law gives to the contravention and the to crimes. In this context, it was found that there was an overlapping of legal proceedings against the plaintiff, given that criminal proceedings were preceded by the payment of an administrative fine for the same fact.

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[7] I. Neagu, Treaty of Criminal Procedure Law, Special Part, Gobal Lex Publishing House, Bucharest, 2008, p. 347.

[8] I. Poenaru, Aspects of the relationship between criminal responsibility and liability offenses, the DRR no. 6 / 1973, p. 82.

[9] Tsonyo vs Tsonev vs Bulgaria 2376/03, 14 January 2010, www.echr.coe.int

The solution took into account the provision of art. 4 of Protocol 7 which refers only to „the law and the criminal procedure of a state", but the Court frequently gave a different content to the term "penal" compared to the national law. To identify this term sense there were considered some alternative criteria: the legal qualification of criminal issue in the national law, the kind of penalty, the severity of the penalty applicable[10].

Even when an act is not qualified considering the first criterion as penal (it is an administrative illicit fact) it must be reported also to the other criteria. In particular, it is important to observe the kind of penalty, especially who exactly is addressed to the legal rule in question: to a small group especially characterized or on the contrary, is a general disposition[11].

The third criterion, (the severity of the penalty applicable) has a low importance in the decisions on which the European Court has sentenced on several occasions. So, even in a case against Romania[12], it was established that the minor offence fine of 59 euros can be considered a penal sanction according to the Convention.

CONTRAVENTION AND CRIME IN THE DOMESTIC DOCTRINE AND JURISPRUDENCE

In Romania, the general regime of administrative liability is regulated by the Government Ordinance no. 2 from 2001[13]. In the first article of this law it is stated that „the contravention law defends social values which are not protected by the penal law".

Throughout the legal definition, the contravention is the act committed with guilt, established and sanctioned by law, ordinance or governmental decision, or as appropriate, by the decision of the local council.

In consideration of this definition, to correct it, in doctrine is laid out that this kind of antisocial act should fulfill three primary conditions[14]: a) to commit with guilt an antisocial act; b) the act should be less socially harmful than a crime; c) the act should be defined as appropriate and sanctioned by the law into force.

From these features, the second one is no longer found in the law, but was kept in doctrine and it is known as the feature able to make the difference between contravention and crime. The requirement removal was made according to the specialists' observations in which the interrelated crime-contravention social danger is no more relevant for the difference between one and another, especially when in some cases the punishments for contraventions were tougher than those for crimes[15].

Also in order to make the difference between contravention and crime it can be used the provision from article 1, paragraph l, sentence I of O.G. nr. 2/2001 in accordance with „the contravention law defends social values which are not protected by the penal law". But, the stipulation above-mentioned is not really useful because the laws in force abound in texts describing contraventions in a very similar way to those which describe the legal content of crimes. Manny cases we can find in Law no. 61/1991 on punishing the acts of disrespect community life rules, public order and social peace. The social value protected by this law is the same as the one protected by articles which describes crimes affecting community life from Title IXth Special part of the

[10] Cases Engel and Others v. the Netherlands, Ozturk v. Germany, Jussila v. Finland

[11] Eggs v. Switzerland, comp. Weber v. Switzerland

[12] Anghel v. Romania, 28183/03, 4 October 2007.

[13] Published in the Romanian Official Journal Part I, no. 410/2001, approved by Law no. 180/2002, as amended by Law no. 202/2010.

[14] Ioan Alexandru, Mihaela Cărăuşan, Sorin Bucur, Administrative Law, Lumina Lex Publishing House, Bucharest, 2005, p. 470.

[15] Antonie Iorgovan, Administrative Law Treaty, Nemira Publishing, Bucharest, 1996, p. 247.

Criminal Code in force. The same situation can be observed in the field of forestry contraventions described by Law nr.31/2000 in comparison to offences definitions contained in the Law 46/2008, The Forestry Code.

In these cases it appears clearly that the social value is the same, and its protection is mentioned in penal provisions and also in administrative provisions. The only factor that differentiates the two behaviors is, in fact, a different antisocial importance.

Other notes made in administrative law doctrine on how to make the correlation between the difference of gravity and penalties applied are also supported by legislative realities. This problem can be solved in a very appropriate way by respecting the requirement that any new legal regulatory edict shouldn't be contrary to the rules of the system that follows to integrate in. In this way, towards the systemic interpretation, there will no longer appear situations such as those reported.

For committing an offense it may be applied a sanction from those indicated by article 5 from O.G. no. 2/2001: main (warning, administrative fine, community service[16]); complementary (the seizure of property which was used or resulted from offenses; the abeyance or cancellation of permit, approval or authorization for exercising an activity; closing the unit; blocking the bank account; the suspension of trader activity; the withdrawal of license or approval for certain operations or activities of foreign trade, temporarily or permanently; the demolition of the work and bring the land to its original state).

The quoted text creates, however, the possibility to establish other principal and supplementary penalties, namely by special laws. This is the reason to raise some question marks on respecting the legality principle in applying administrative sanctions. At the same time, however, paragraph 5 of art. 5 O.G. no. 2/2001 provides that always "applied penalty must be proportionate to the seriousness of the committed fact."

Crime, as an antisocial act with a high level of social danger, is defined by the Penal Code in force since 1969 as being a "socially dangerous act, committed by guiltiness and provided by the criminal law." At the same time, the code expressly provides that "crime is the sole basis for criminal liability." In consideration of this definition, it has been shown in the doctrine of criminal law that a fact must meet three key features to be considered an offence: to present a social danger, to be committed by guilt and to be provided by the criminal law. Also, it is shown that in order to represent an essential feature of crime, social danger must be criminal, that is, to some degree, specific crime as criminal unlawful, distinguishing it from other forms of illicit facts (administrative, civil, etc.) and lead to a sentence[17].

From these elements of doctrine it can be seen that there is no very clear criteria to make a line of demarcation between infringement and offence. Moreover, the problem is not clarified from this point of view by the jurisprudence, either. For example, in forestry legislation[18] field, the same act of cutting standing tree can represent an infringement or an offence, based on the specific damage created by committing it or, alternatively, on the observation of persistence in the antisocial behavior over a period of two years. In some cases, it can be seen the first act of illegal cutting of trees, applied a sanction for an infringement, and upon finding indicated repeated infringement within two years to carry out criminal liability for the offence. The situation is permitted under national doctrinal acceptance regarding the *res judicata*, but, in our point of view, contrary to the ECHR rulings.

[16] Contraventional Prison Sanction was abolished from the system of administrative law.

[17] Al. Boroi, Criminal Law, Special Part, C.H. Beck Publishing House, Bucharest, 2008, p. 80.

[18] The law that settles this field is Law no. 46/2008 (Published in the Official Gazette, First part, no. 238 on 27 March 2008).

In the case of the so called *offences by habit* the situation could be similar. This is because, practically, the proof of recurrence of antisocial behavior, as a fundamental element of a crime of this nature, is the report on sanctioning same nature contraventions. Specifically, in the case of the prostitution offence (Section 328 of the Penal Code.), repeated acts of sexual intercourse that finally make up the concrete element of the crime is proved by the report on punishing the contravention defined by article 2 paragraph 6 of Law no. 61/1991. In fact, the legal content of this contravention is very close to the crime of prostitution (attracting people, under any form, committed in restaurants, parks, on streets and other public places, in order to practice sexual intercourses with them to obtain material benefits).

IMPACT OF ECHR JURISPRUDENCE ON THE SITUATIONS OF OVERLAPING CRIMINAL LIABILITY AND ADMINISTRATIVE FOR THE SAME ACT FROM DOMESTIC LAW

From what we have presented above, it is clear that the current Romanian legislation, as in the correspondent jurisprudence, there is a series of cases which are considered either contraventions or crimes, according to their specific ability to exceed the level of social risk specific to a crime. This level of risk is marked on the lack of clarity, and from this reason it generates frequent overlaps of the criminal liability and the administrative liability for the same act.

Given the ECHR decisions on this issue, we believe that it should produce a reconsideration of the boundary of the two types of antisocial acts in relation to the meaning of "criminal" term as autonomic defined by the European Court.

Moreover, the practice of administrative and judicial authorities in Romania must also undergo a shift in order to prevent the qualification of an antisocial behavior as a crime and as a contravention, at the same time, and the overlapping of two types of legal liability in the same occasion. The prohibition concerning this kind of overlap is so radical that if the act in question has already determined the application of an administrative sanction, it does not even allow the prosecution to begin against the person who was the subject of that punishment.

Conclusions

1. Both in Romanian doctrine and law it is not considered to be violated the principle of *non bis in idem* in those cases in which for the same act there are applied both criminal and administrative punishments. The solution flagrantly contradicts the ECHR decisions in this domain, which gave a more extended sense of the term "criminal" to national settlements, and regardless of their qualifications.

2. The implications of this situation on the Romanian law are among the most important, requiring a reconsideration of many elements traditionally accepted. Such efforts to align the national legislation to the requirements arising from the ECHR have been made by abolishing the punishment of contraventional imprisonment from the system of administrative penalties, but also by references to the need to comply with the proportionality rule concerning the seriousness of the act and the punishment found within GO no. 2/2001.

3. Such a research opens the perspective of a detailed investigation about the way it can be reached to a fair correlation of national reality with ECHR decisions. Such a research should identify, in the first place, a clear criteria to delimit a crime from a contravention that should permit preventing the situations of *bis in idem* in which one of the punishments is an administrative and the other a penal one.

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THE ENTERPRISE - THE LEGAL FORM FOR CARRYING ON AN ACTIVITY HAVING A PROFESSIONAL NATURE

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Abstract
The new Romanian Civil Code has institutionalised a new conception regarding the regulating system for civil and commercial legal relations. Thus, new concepts emerge to fit the new conception, concepts regarding to the persons, the professionals, and the carrying on of an organised and systematised activity that qualifies such activity as having a professional nature. As one can find the new civil code has changed the conception regarding the enterprise, as it resulted from the actual commercial code. The operation of an enterprise will represent the legal form of carrying on an activity having a professional nature.

Key words: *enterprise, organised activity, professionals, traders, new civil code*

1. Introduction

The commercial code now in force qualifies the enterprise as a trading deed. According to the article 3 in the Commercial Code there are trading deeds any furnishing enterprises, public performance enterprises, commission enterprises, agencies and business offices, construction enterprises, factory, manufacturing and printing enterprises, publishing house, book and art objects selling enterprises, personnel or goods transport enterprises, etc.

There was specified that the listing of the trading deeds in the article 3 in the Commercial Code has a declarative nature, and not a limiting one.

As the commercial code regulates enterprise types, the doctrine was preoccupied with giving a general definition of the enterprise.

Within the classic conception of the commercial law the enterprise was defined as an economic organism led by a person called an entrepreneur, which combines the forces of nature with the capital and the labour for the purpose of producing goods and services[1].

Within the modern doctrine of the commercial law was attempted the grounding of a new definition of the enterprise. It was considered that within the traditional conception the material side is too much emphasised, the enterprise being only defined as a group of goods the entrepreneur allots to the carrying on of the commercial activity, without a reference to the human collective carrying on the activity. Within the proposed definition the primordial element has to be the subjective and social one. Therefore the enterprise has to be defined as a human group being coordinated by the organiser for the purpose of carrying on a commercial activity[2].

There was noted that the definition of the enterprise that mainly emphasises the subjective and social element is not of nature to clarify the notion of enterprise.

Starting from the finding that a general definition of the enterprise cannot be given based on one criterion only, within the doctrine was proposed a definition that considers the classic, economic

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[1] Please refer to G. Ripert, R. Reblot, Traite de droit commercial *(Commercial Law Tractate – in French in the Romanian version of the text)*, Tome 1, 18eme, L.G.D.J. Paris 2001, pages 227-228, I.L. Georgescu, Drept comercial roman *(Romanian Commercial Law)*, vol. 1, Ed. Socec, Bucharest, 1946, page 201 and the following.

[2] Please refer to O. Căpățână, Caracteristicile generale ale societătilor comerciale *(The General Features of Trading Companies)*, in the Dreptul magazine, no. 9-12/1990, pages 28-29.

meaning of the notion of enterprise, as well as certain elements that are specific for trading deeds. Within such conception the enterprise appears as an economic and social organism; it represents an autonomous organisation of an activity by the entrepreneur, by means of the production factors (the forces of nature, the capital, and the labour), at their own risk, for the purpose of producing goods, executing works, and rendering services, in order to obtain a profit.

As a conclusion, within the conception of the Romanian commercial code, the notion of enterprise designates an activity being organised by an individual or an entity in order to produce goods and services, and not a law subject. The capacity of law subject lies with the entrepreneur, the one who organises at their own risk the activity. The same may be an individual, in the case of the individual enterprise, or a trading company, in the case of the corporate enterprise.

2. Under the influence of the doctrine opinions definitions of the enterprise were also given in certain normative documents.

Thus the article 2 in the Law no. 346/2004[3] defines the enterprise as any form of organising an economic activity that is autonomous as concerns its patrimony, and is authorised under the laws in force to perform trading acts and deeds for the purpose of obtaining a profit under competition conditions.

Then, according to the article 2 letter f in the Emergency Ordinance of the Govern no. 44/2008, the economic enterprise is the economic activity being carried on in an organised, permanent, and steady manner, in combining financial resources, attracted labour, raw matters, logistic and computer means, at the risk of the entrepreneur, and under the conditions being provided for by the law[4].

3. The new Romanian Civil Code, which was enacted by means of the Law no. 287/2009[5], has institutionalised a new conception regarding the regulating system for civil and commercial legal relations. The civil code has established the principle of the unity of regulation for the patrimonial and non-patrimonial legal relations.

According to the article 3 in the Civil Code, the provisions in the civil code are also applicable to the relations between professionals, as well as to the relations between the same and any other civil law subjects.

Within the conception of the civil code a professional is the one who is operating an enterprise, and by operating an enterprise is understood the systematic exercising by one or several persons of an organised activity consisting of producing, managing, or alienating goods, or rendering services, irrespective of the fact that the same has or not for purpose to obtain a profit.

As one can find, within the conception of the new civil code the carrying on of an organised and systematised activity qualifies such activity as having a professional nature, and the person who is carrying it on has the capacity of a professional. From those above results that the civil code has fundamentally changed the conception regarding the enterprise. While under the conditions of the commercial code the enterprise represents a category of the objective trading deeds, the civil code has generalised the notion of enterprise. According to the civil code, the operation of an enterprise represents the legal form of carrying on an activity having a professional nature.

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[3] The Law no. 346/2004 regarding the stimulating of the establishing and developing of small and medium-sized enterprises (M.Of. *(Monitorul Oficial al Romaniei – The Official Journal of Romania)* part I no. 681/29.07.2004).

[4] The O.U.G. *(Emergency Ordinance of the Govern)* no. 44/2008 regarding the carrying on of economic activities by authorised individuals, individual enterprises, and family enterprises (M.Of. *(Monitorul Oficial al Romaniei – The Official Journal of Romania)* no. 328/25.04.2008).

[5] Published with the M.Of. *(Monitorul Oficial al Romaniei – The Official Journal of Romania)* no. 511 of the 24.07.2009.

4. Based on the article 3 in the Civil Code the enterprise is a systematically organised, autonomous activity being carried on by a person (the entrepreneur) at their own risk, which consists of producing goods, executing works, and rendering services, irrespective of the fact that the same has or not for purpose to obtain a profit.

The definition of the enterprise has a general nature; it regards any activity being carried on that has a professional nature, notwithstanding the object and the purpose of such activity. From such definition arise the features of the enterprise.

The notion of enterprise designates an activity being systematically organised, which is carried on permanently, and according to own rules.

The organising of the activity has an autonomous nature; the one who organises the activity is independent as to making the decisions.

The activity is carried on by one or several persons, at their own risk. The persons who are carrying on the activity have the capacity of professionals. The object of the organised activity is to produce goods, execute works, or render services. The purpose of carrying on the activity may be to obtain a profit, or to achieve a non-profit purpose.

5. In characterising the enterprise the essential criterion is the purpose of the person or the persons who are organising the activity.

The carrying on of an organised activity, which has a professional nature, for the purpose of obtaining a profit, is inherent to the economic (commercial) activity. This means that an enterprise the purpose of which is to obtain a profit is an economic, commercial enterprise, and reversely, an enterprise having a non-profit purpose is a civil (non-commercial) enterprise.

6. A definition of the economic enterprise was given, as we stated above, by the article 2 letter f in the Emergency Ordinance of the Govern no. 44/2008. We feel however that a definition of the economic enterprise should also retain the elements of the general definition of the enterprise. The economic (commercial) enterprise is an economic activity being carried on in an organised, permanent, and systematic manner, which is carried on by one or several persons (traders) at their own risk, and consists of producing and circulating goods, executing works, and rendering services, for the purpose of obtaining a profit.

From the definition arise the features of the economic (commercial) enterprise.

The activity of the enterprise is an economic activity. According to the article 2 letter a in the Emergency Ordinance of the Govern no. 44/2008 the economic activity is the organised industrial and commercial activity being carried on in order to obtain goods or services the value of which can be expressed in money, and which are intended for sale or exchange within the organised markets, or towards determined or determinable beneficiaries, for the purpose of obtaining a profit.

The activity of the economic enterprise is carried on in an organised, permanent, and systematic manner, by one or several persons, at their own risk. Such persons may be individuals or legal entities holding the capacity of a trader. Individuals may carry on economic activities under the following forms: individually and independently, as authorised individuals, as an entrepreneur holding an individual enterprise, as a member of a family enterprise (the article 4 in the Emergency Ordinance of the Govern no. 44/2008).

The object of the economic activity consists of producing and circulating goods, executing works, and rendering services.

The purpose of the economic activity is to obtain a profit.

The carrying on of an economic (commercial) activity imposes the conclusion of legal documents, and the performance of legal deeds, and of economic operations.

As they regard an economic (commercial) enterprise, such legal documents, legal deeds, and economic operations may be conventionally called commercial legal acts.

The commercial legal acts are the legal documents, the legal deeds, and the economic operations by means of which a trader carries on economic activities regarding the producing and circulating of goods, the execution of works, and the rendering of services, within an economic (commercial) enterprise.

From the definition arise the features of the commercial legal acts.

The commercial legal acts are the legal acts being imposed by the operation of an economic (commercial) enterprise.

Such legal acts are performed by professionals being called traders.

The commercial legal acts have for object the producing and circulating of goods, the execution of works, and the rendering of services.

The commercial legal acts have for purpose the obtaining of a profit.

Under the conditions of the new civil code the legal treatment of the commercial legal acts is the same as the one of the civil legal acts.

Currently the regulation in the new civil code only includes few provisions derogating from the principle of the unity of regulation for the civil legal relations and the commercial relations.

Thus, as regards the representation, the article 1297 in the Civil Code provides for that: "(1) The agreement having been concluded by the representative within the limits of their granted powers, when the contracting third party was not aware, and ought not be aware of the fact that the representative was acting in such capacity, shall only bind the representative and the third party unless otherwise provided for by the law.

(2) However, should the representative, when contracting with the third party within the limits of their granted powers on behalf of an enterprise, claim that they are the holder of the same, the third party having subsequently found the identity of the true holder may also exercise against the latter the rights they have against the representative."

Then, as regards the solidarity, the article 1446 in the Civil Code provides for that: "The solidarity is presumed between the debtors of a liability having been contracted in exercising the activity of an enterprise unless otherwise provided for by the law."

Finally, as regards the late performance of the obligations the article 1523 paragraph 2 letter d in the Civil Code provides for that: "The debtor is notified at law in the case where an obligation to pay an amount of money, which was undertaken in exercising the activity of an enterprise, was not fulfilled."

7. The civil (non-commercial) enterprise is an activity being systematically organised, which is carried on by one or several persons, at their own risk, and has for object legal acts and deeds having a civil nature, without having for purpose to obtain a profit.

The activities representing the object of the civil (non-commercial) enterprise are the activities being carried on within the liberal professions (lawyers', doctors' activities, etc.).

The persons carrying on the activity have the capacity of professionals, and are carrying on such activity under the structural law that regulates the legal treatment of the relevant profession.

Such persons are making available for the concerned persons their knowledge and competence, in consideration of which they receive fees, and not a profit.

The legal issues the operation of a civil (non-commercial) enterprise involves are civil legal acts, and are regulated under the special law.

8. Conclusions. Under the conditions of the new civil code, the enterprise is no longer a trading deed, but it represents the legal form for carrying on an economic or civil activity having a professional nature.

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INDIVIDUAL EMPLOYMENT CONTRACT SPECIAL STIPULATIONS OTHER THAN THOSE PROVIDED BY THE LABOUR CODE

ADA HURBEAN*

Abstract
The individual employment contract parties can negotiate and provide stipulations that govern their juridical labour relations, other than those stipulated by Labour Code, according with the paraghraph1 article 20 of the bill in discussion. In principle, this legal liberty is the expression of the will's autonomy of the parties to conclude any legal act. We have to say that these stipulations transform the employment contract of an act imposed, an adhesion act in one governed by the principle of contractual freedom, even if the juridical literature calls these nonessential and optional clauses.
In concreto, the employee and employer may agree to any provision not contrary to imperative stipulation of law, public order or morality. Thus, in this study we aimed to analyze those terms often encounter in labour relations: terms of intellectual propriety rights, conscience, stability, risk, delegation of responsibilities, objective, restriction of free time, index clause, without claiming exhaustive treatment of this topic, considering the development and adaptation of labor relations in Romania in the European context and beyond.

Keywords: *labour relationship, labour contract, negotiation, contractual optional stipulations, contractual freedom.*

Introduction

As stated in the specialized legal literature[1], the individual employment contract is a mixed contract, if we take under consideration its clauses, because it contains both a legal and a conventional part. If the legal part of this contract refers to clauses expressly provided by law, clauses also named essential and obligatory, the conventional part reports to those clauses which the parties may negotiate and insert in the concluded contract.

Although in this study we proposed ourselves to analyse only the optional clauses of the individual employment contract, we believe it is necessary to make some explanatory notes regarding the clauses imposed by the legislator to be included in this contract.

On the one hand, as we have already mentioned, the statutory individual employment contract contains elements of a general nature provided, in principle, in Article 17 of the Labour Code. These general elements are also stipulated in Article 18 (the situation when the employee should perform his/her activity abroad), Article 102 (the individual part-time employment contract), and Article 106 (the individual home working contract). Specifically, according to the framework model of the individual employment contract[2], it must necessarily include the following elements: the parties of the contract, its subject, period, workplace, occupation/position, job description, work conditions, length of the working time, annual leave, remuneration, specific rights regarding the health and safety at work, other clauses referring to the probationary period, the notice, etc., general rights and obligations of the parties and final provisions (that concern the amendment of the contract, number of copies, resolution of the labour disputes). Within the limits stipulated by law, the essential and mandatory clauses of the individual employment contract may also be negotiated, because, generally,

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[1] Al. Țiclea, *Tratat de dreptul muncii*, ediția a II a, Ed. Universul Juridic, București, 2007, p. 429 and next.

[2] Approved by Order of the Minister of Labour and Social Solidarity no. 64/2003, amended by Order no. 76/2003.

the normative act stipulates a minimum level of the employee's rights. Moreover, even the laws are supplemented by the provisions of the applicable collective labour agreement, a real "law" in the relations between the parties. For example, the individual employment contract must include the clause regarding the employee's wage, but its amount is negotiated between the parties and it may not be set under the national minimum gross basic pay at that time or/and under the minimum wage established in the collective agreement applicable in that unit. However, the legal part of the individual employment contract reveals its importance in the case of the personnel of public institutions and authorities and that of other budgetary units, because the wages of such personnel or the length of the leave and the sum allowed for this leave are provided by legislative acts. Therefore, the personnel may not negotiate the amount of the wage because the legal clauses do not allow it.

On the other hand, the conventional part of the individual employment contract refers to two aspects: the additional clauses provided in Articles 21-26 form the Labour Code and the clauses that are not legally regulated, but which may be negotiated and included in the individual employment contract under the general legal limits. Even the legally regulated clauses, previously, were employed for the first time in practice, then accepted by the special doctrine, and finally stipulated in the code[3]. Mainly, we talk about the non-compete clause, but also about the confidentiality and mobility clauses. The existence of these additional clauses in the individual employment contract is left at the parties' decision, which are free to determine, through negotiation, if the contract that shall to be concluded or that is already concluded will contain or not these clauses (of course depending on the type of work, the tasks service involved, etc.).

The possibility of including in the individual employment contract other additional clauses, besides those provided by the Labour Code is indisputable and it results without any equivoque from Article 20 paragraph 2 Labour Code, which states "Shall be considered specific clauses, while the enumeration is not meant to be limitative: a) clause on vocational training, b) non-compete clause c) mobility clause d) confidentiality clause." Therefore, the parties of the individual employment contract may jointly decide to include in this contract other clauses too, but they must also establish their content. In this respect, it is shown the importance of autonomy and freedom of the will of the parties' employment contract, whose principles must be in compliance with the limits of the mandatory legal rules, the collective labour contract, the public order and morals.

Special stipulations other than those provided by the Labour Code

Clauses regarding the intellectual property rights

Legally, the intellectual property rights include: copyrights (referring to musical, literary, and artistic work; computer programs; photographic works) and industrial property rights (in an invention, trademark, know-how, marks of origin, production models, and industrial designs).

In the situations governed by Law no. 8/1996 on copyright and neighbouring rights[4], in principle, the economic rights to works created (by the employee) under an individual employment contract shall belong to the author. If there is a contractual provision that stipulates otherwise, its significance lies in the employer's assignment of the copyrights, part of the individual employment contract. Such an assignment is made for a certain period. Where no such period has been specified, it shall be three years from the date on which the work is handed over. When the period specified by the contract or the three years end, the copyrights revert to the author.

[3] In this respect, see Raluca Dimitriu, *Obligaţia de fidelitate în raporturile de muncă*, Ed. Tribuna economică, Bucureşti, 2001, p.24-175; Al. Ţiclea, *Consideraţii privind admisibilitatea clauzei de neconcurenţă în contractul individual de muncă*, in *Revista de drept comercial* nr. 7-8/1999, p. 136 and next.

[4] Published in *Monitorul Oficial al României*, partea I, nr. 60/26.03.1996, as amended and supplemented by Government Emergency Ordinance no.123/2005, published in *Monitorul oficial al României*, partea I, nr. 843/19.09.2005.

In the case of computer programs or photographic works, created in the course of their duties from an individual employment contract, the economic rights belong to the employer, unless it was otherwise agreed.

In the case of industrial property rights, according to Law no. 64/1991 on patent[5], if the inventor is an employee, and there is no contractual provision more favourable to him, the right to the patent shall belong as it fallows:

- to the employer, in the case of inventions made by the employee under an individual employment contract that provides expressly the performance of inventive activities, where the said activities correspond to his actual duties (representing a part of his duty); in this case, the inventor shall benefit of an additional remuneration specified by contract;

- to the employee, for inventions made by him either in the course of his duties (but without having an inventive mission expressly mentioned) or within the area of concern of the employer, through knowledge or use of technology or means specific to the employer or information available on the premises of the employer, or again with material assistance from the employer, except where otherwise provided by contract. If such a problem arises (stipulation of a contrary contractual clause), the employer shall have a preferential right to conclude a contract in respect of his employee's invention, right that shall be exercised within three months (limitation term) of the date of the employee's offer.

Subsequently to the conclusion of the individual employment contract, the law allows either an addendum contract to the individual employment contract or a contract by itself, a civil one. This represents a solution that shall meet the principle of will freedom of the parties, allowed by the generic legal formulation, too.

Litigations between the author/inventor (employee) and the employer concerning the intellectual property rights can be characterized as conflicts of rights, if the clauses related to those rights were established by the individual employment contract (if permitted by law) or by a civil contract, if the assignment of the author/inventor' rights was done through a civil contract (even when the contract would be an accessory to the individual employment contract).

Goal clause

One of the most important differences between the individual employment contract and the civil service contract is that, in the case of the first contract, the employer is interested in providing work, by the "alive" labour, while, in the case of the second contract, the beneficiary is interested in realization of work, its result. This distinction usually appears as real. But nothing impedes the parties to establish, at the conclusion of the individual employment contract or during its execution, a goal clause, too. As consequence of the existence of this clause, the employee, who occupies a certain function or job, has the (contractual) service duty to achieve a concrete goal, a determined work of major interest to the employer. In this case, the type of work that is generally established as occupation/position is also identified through a specific goal (such as, achieving a certain work, entering a certain market). In other words, the "alive" work, seen as a kind of work, must, simultaneously, be materialized into a clear result.

In order to be valid, the clause should be, on the one hand, precise and, on the other hand, attainable (*ad impossibilum nulla obligatio*).

A goal clause, for example, is that to achieve a determined item and it may be accompanied by a clause of success or performance, so as the respective item to meet certain technical parameters or certain higher quality elements.

In conclusion, in an individual employment contract of unlimited or limited duration, full-time or part-time work, having a goal clause (including the success or performance clause), the employee's obligation does not remain exclusively a means' obligation (that of working), but it turns into one of result.

[5] Republished in *Monitorul Oficial al României*, partea I, nr. 752/15.10.2002.

In exchange for achieving a particular goal, it is possible to provide certain additional benefits to the employee. Therefore, if the target was fully achieved, the employer is obliged to provide the additional benefits. If the target is not fully achieved, then the additional benefits are granted *pro rata*[6], too.

Conscience clause[7]

The conscience clause is that clause, which, once introduced in the individual employment contract, entitles the employee to not accomplish a legal work order, in so far as, if it were implemented, it would conflict with the various options determined by the employee's conscience.

The possibility to include the conscience clause in the individual employment contract is not confined exclusively to the rules of the labour law. There is a constitutional support, too, stipulated by Article 29 of the Basic Law, which guarantees the freedom of conscience, and the fact that it shall not be restricted in any form whatsoever.

The typical situation of including and application of this clause applies in the case of media employees producers. Yet, other employees, such as those in the cultural creation, scientific, medical and legal area (legal advisers), can not be excluded.

From the employee's point of view, the object of the conscience clause can be based, in our opinion, on the following reasons: religious (for example, the refusal to write critically about the legal cult, which includes the concerned employee, or to make atheistic propaganda); morals (for instance, the refusal to write materials which produce an apologia for some life habits contrary to the traditions of the Romanian people or to a certain local community); political (i.e., the refusal to write critically about the ideology or political platform of a particular political party); scientific (such as the refusal to participate in development of works in the applied or fundamental research, judged as non-productive, even harmful or dangerous to humans or human society[8]); courtesy (such as the refusal to use harsh expressions or descriptions at one/some people.)

In turn, the employer recognizes the employee's right to refuse to execute a legal work order, to the extent that, in one case or another, the conscience clause shall interfere.

In principle, the non-performance of a legal work order can (at the employer's discretion) lead to disciplinary sanction of the concerned employee. But the existence of the conscience clause in the individual employment contract can provide protection to the employee against a disciplinary liability, in a given situation. In each case, the employee must however prove with pertinence that he can not execute the legal work order because of his conscientious objection. If the employee fails to prove, conclusively, that there is such an obstacle, he shall either proceed to the execution of the legal order given by the employer, or (if he still refuses) he shall be liable to be disciplinary sanctioned.

Of course, the illegal work order shall not be executed by the employee, in any case. So, *the conscience clause regards exclusively the employee's possibility to refuse the execution of a legal work order, without incurring disciplinary consequences*. In a sense, the conscience clause can be treated as a (contractual) clause of free disciplinary liability of the concerned employee.

The Romanian labour legislation does not regulate the possibility of including the conscience clause in the individual employment contract, nor does it explicitly prohibit it. In these circumstances what is not prohibited by law shall be recognized as possible, provided that the public order or morals shall not be violated. However, such problem can not practically arise, because affecting the public order through the non fulfilment of a legal job order, in the areas where the conscience clause may appear, it is difficult to assume. Infringing the morals represent a similar situation, too. Just on the contrary, moral reasons often found the conscience clause. On the other hand, any conscience clause

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[6] See O. Ţinca, *Unele clauze specifice contractului individual de muncă*, R.D.C. nr. 6/2003, p. 54.

[7] See, extensively, I.T.Ştefănescu, *Inserarea clauzei de conştiinţă în unele contracte individuale de muncă*, in *Dreptul* nr. 2/1999, pp. 56-57.

[8] In this respect, see R.Gidro, *Opinii asupra unor dispoziţii din proiectul Codului muncii cu privire la încheierea şi conţinutul contractului individual de muncă*, R.R.D.M. nr. 1/2002, p. 25.

shall be carefully negotiated, shall be entirely clear, and shall have analytical and practical character. Otherwise it might leave place of subjective interpretations and even abuse of rights (of either party of the individual employment contract).

The conscience clause itself, because it creates an advantage for the employee, does not involve, therefore, a specific pecuniary obligation for the employer.

No employee can invoke the conscience clause (the objection) in order not to carry out a legal obligation imposed by a peremptory norm (for example, the employee may not be absent from work in a given day, when legally it is a working day, just by claiming the conscience clause); no employee can invoke a mere difference of opinions between him and the employer (in which case he must carry out the employer's order if it is legal), but only the conscience clause[9].

Stability clause. Extension clause

In the individual employment contracts of limited duration, but also in those of unlimited duration, it can be included a stability clause (or a clause of minimum duration of the individual employment contract). In Western practice of labour relationships, as the individual employment contracts of limited duration are increasing, the stability clause is used more and more often.

In essence, this is a clause which seeks to ensure preservation of the employee's job/position for a certain period of time.

During the existence of the individual employment contract, concluded for a limited duration, in principle, the employer may proceed to the dismissal of the concerned employee (as in the case of the employee who is a party in an individual employment contract of unlimited duration), as provided by law. The purpose of the stability clause is that the employer should oblige not to dismiss the employee (for reasons not attributable to him), ensuring to the latter a relative stability. Therefore, because the employee has the possibility to resign, such a clause limits the rights of the employer over a certain period, usually equal to that of the existence of the contract. The employer can not dismiss the employee, except in cases grounded on the culpability of the work's provider or for an objective reason (unrelated to the employee in question). If, despite this clause, the employer fires the employee, without the latter's culpability or without having an objective reason, the employee shall be entitled to claim compensations. Those are calculated, according to the stipulated wage, for the period measured from the moment the contract ended until the moment the employer had guaranteed the work stability.

In the developed market economies, the *extension clause* is practiced, too. This clause establishes that at the end of period for which an individual employment contract was concluded for a limited duration shall be concluded a new contract, of the same kind, for limited or unlimited duration.

The objective is similar to that of the stability clause, namely, the assurance of increased work stability for the employee. Yet, according to the Romanian Labour Code, including such a clause in the contract must be reported to Article 80 paragraph 3, corroborated with Article 82 paragraph 1, which stipulates that the individual employment contract of limited duration may not exceed 24 months (even its extension must be within the legal term).

The extension clause represents a promise of contract that must fulfil all the conditions of validity of any contract, including the fundamental elements of the future individual employment contract[10].

Risk clause

In those individual employment contracts in which the specific of work, but in certain cases the workplace too, involves special risks for the employee (particularly in terms of his safety or physical and/or intellectual health or even of his life) it can be inserted a risk clause.

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[9] See G. Couturier, *Droit du travail, Les relations individuelles du travail*, Presses Universitaires de France, Paris, 1990, p. 354.

[10] See O.Ţinca,op. *cit.*, p. 58.

Such workplaces are classified according to the Labour Code and Law no. 31/1991 on the establishment of the working time for less than 8 hours per day for jobs requiring heavy, harmful or dangerous conditions, which draw certain rights for the employees, such as: a reduced daily work schedule; a higher wage (risk increment); an additional leave; health and safety measures at work, etc.

In addition to these measures established by law, the collective labour agreements may as well additionally include special provisions for employees.

However, individually, if the services of the future employee, due to his qualities, are strictly necessary to the employer, it can be reached by initial or later negotiation to the insertion of a special clause - called risk clause – in the individual employment contract. So, assuming, by the specific of work and/or by the workplace, a particular risk, the employee may receive certain benefits. The employer is contractually bound to pay these benefits.

The risk clause may concern either the increase of the benefits that the employer already has, according to the law or/and to the collective labour agreement in force, or the establishment of some additional benefits besides those already resulting from the law and the applicable collective labour agreement. Obviously, it is possible that the two ways of realizing the risk clause to be combined with each other.

The risk clause is usually inserted in the case of the employees who act as: personnel in certain areas of scientific research, medical personnel from the medical units of infectious and contagious diseases, journalists – war reporters, reporters of special investigations in the crime area, people working as bodyguard, etc.

Restriction clause in the spare time

By this clause, the parties establish a determined period from the employee's spare time, when the concerned employee is required to remain at home or to announce exactly where he is, so as, if the employer demands it, he shall be able to respond immediately and to accomplish operatively a particular job. Therefore, the restriction clause in the spare time means that the employee is required during the period that, otherwise, represents his rest period (daily, weekly).

Normally, this clause is the employee's obligation, either for a long period, or within a certain period, in which case he should be notified in advance (by the employer).

The time worked by the employee under these conditions is part of the normal working hours, and it does not represent overtime. Therefore, in all cases, the employer must ensure, overall, the compliance with legal regulations pertaining to maximum legal length of the working time (daily and weekly). Because the insertion into the individual employment contract involves the assumption of additional obligations for the employee, the employer can commit himself to remuneration accordingly, or to other ways to stimulate the employee.

In practice, such a clause is mostly included in individual employment contracts of certain employees whose qualified training allows their effective involvement in special situations (accidents, fires, disasters, etc.).

Delegation of powers clause[11]

This is a clause whereby the employer or an employee having a management position (where the law allows) delegates to an employee under his subordination a part of his attributions. Typically, such a clause occurs during the execution of the individual employment contract, when the employer has had time to acquire the necessary confidence in the concerned employee, but it may also be agreed since the conclusion of the contract.

Delegation of powers can be accepted only under certain conditions, namely when:

- it is the will's expression of the employer and concerns only attributions that, legally, are not recognized to him exclusively;

[11] See, extensively, I.T. Ştefănescu, *Delegarea de atribuţii disciplinare în dreptul muncii*, in *Dreptul* nr.12/2004, p. 106.

- it respects the condition to delegate the same tasks, at the same workplace, to a single employee;

- it is specific, meaning that it does not result from the precise job of the delegated employee (such as, for example, the inherent attributions of a management position, consisting of surveillance the activity in a given field, in a particular area of production, etc.).

- it is accurate, meaning that the general powers of organization and control, established by the individual employment contract, does not represent - in the absence of specific directions - an express delegation of powers;

- it is effective; respectively, the employer (the delegating person) takes all the measures that enable the delegate to actually perform the tasks entrusted to him; naturally, the delegate must be able, through his professional training and ability, to perform the tasks he was empowered with; he must dispose of the material and financial resources necessary to fulfil his mission; he must have the power to control and to resort to disciplinary orders in order to be able to give mandatory disposals to other employees and to impose their compliance;

- it is accepted, because, on the one side, it refers to additional tasks besides the current ones, specific to the job (position) of the concerned employee, and, on the other side, it can lead to the liability, even criminal, of the delegated employee in place of the delegating person[12];

- the rule according to which the delegate can not delegate in his turn the attributions he received as delegate duties is respected. In other words, the rule *delegata potestas non delegatur* applies to the labour law, too. It concerns the common situations when the delegate would like to submit on his own wish to another employee, by sub-delegation, a part or all the tasks he was given by the employer. It does not concern the situations when the person entitled to delegate (the employer) agrees, on purpose, with a sub-delegation of duties. It should also be noted that this has as effect, among other things, the free of the delegating person and that of the sub-delegating person of legal responsibility that comes from the failure to exercise or the improper exercise of the powers in question (as the delegation of tasks, which frees the delegating person of responsibility).

Because "the employment relationships are based on the principle of consent" (Article 8 paragraph 1 of the Labour Code) and because it does not exist a legal requirement to the contrary, the delegation of powers does not involve *ad validitatem* the written form (although, practically, it is of course preferable)[13].

We believe some more clarifications are necessary to be done in this matter: first, the delegation of powers can not produce its effects just by specifying it, in a general way, as a possibility in the constitutive act or the standing orders (respectively in the collective labour agreement); such a clarification is useful, but certainly not enough. In light of such comments (from the constitutive act, internal rules or collective labour agreement), it must be made an explicit act of delegation of powers to a certain employee who, in his turn, accepts the delegation concerned[14]. If there is no such provision stipulated by the constitutive act, the internal rules or the collective labour agreement, it is possible (in the absence of express statutory prohibitions, general or specific), the delegation of powers by act of the employer, accepted by the employee[15].

The act of will of the employer and of the employee, who accepts the modification of his work duties, on the purpose of receiving additional attributions, act initiated by the employer, represent, in most cases, an addendum to the individual employment contract or a clause to the

[12] See F. Signoretto, *Les contrats de travail*, Editions d'Organisation, Paris, pp. 226-227.

[13] In this context, we mention that the delegation of powers, even if it usually involves, additional work tasks for the delegate, in such a hypothesis, it does not involve s*ine qua non* an additional payment, too.

[14] It is possible that in the constitutive act, the internal rules, instead of a general normative, to be stipulated in details the delegated attributions from the employer's level to the level of a/some subordinate position(s).

[15] In such a case, in fact, is incident the Article 295 paragraph 1 of the Labour Code, regarding the application in the field of employment, too, of the civil law provisions, as common law.

individual employment contract, if it is established since the conclusion of the legal employment relationship.

Delegation of powers – inclusively those regarding the individual employment contract – can be done from the level of the management/chief of the organization with legal personality to the level of the chief of the sub-unit without legal personality.

In the case of public institutions and authorities, too, the delegation of tasks (of powers) appears as admissible. Moreover, according to Article 44 paragraph 1 of Law no. 188/1999 regarding the Regulations of civil servants, republished, with subsequent amendments and completions: "Civil servants are responsible, according to the law, to fulfil the prerogatives of the civil service they exercise, as well as any other authorized prerogatives delegated to them".

Delegation of powers cease by:

- withdrawal by the employer (by the chief of the authority or public institution) of the delegation of powers[16].

- agreement of the parties. Due to its subordination, the delegated person - the employee or public servant - can not deny the exercise of the powers conferred upon him[17]. Of course, he may propose at any time to his employer to cease the delegation, in which case – if the delegating person accepts – the delegation of powers shall cease by agreement of the parties.

- when the delegation of powers reaches its term. By hypothesis, this delegation was given for a determined period or for the execution of a precise task.

- cessation of the individual employment contract (as provided by Articles 55, 56, 58, 61, 65 and 79 of the Labour Code) or of the administrative contract, in case of public servants (Article 84 of Law no. 188/1999 regarding the Regulations of civil servants).

- Intervention of a case of force majeure with definitive effects.

Wage's rise clause

The rise of the wage can be usually achieved at the request of the employee or at the employer's initiative.

Given the possible decrease of the net wage by reducing the purchasing power, the wage should be raised regularly. The increase can be done under the pressure of the employees, too - as result of a trade union's action, including a strike.

Nevertheless, it is possible, taking into account the social and economical realities, to include an indexation clause in the individual employment contract. In essence, it consists in the commitment of a regular rise of the wage (quarterly, half yearly, annually or at such other time) with at least the inflation index. Thus, automatic, the rise of the wage is closely correlated with the cost of living. Such a clause is certainly an element of interest, mainly, for the employees, but also for the employers interested to keep within them the highly skilled employees, who give maximum efficiency.

Limits of the contractual freedom in the employment law and prohibited clauses of the individual employment contract

As we have already mentioned, the presentation of the additional clauses, optional to the individual employment contract, is not exhaustive[18], the parties being free to negotiate any provision,

[16] Therefore, we think it is a case in which, although the initial legal document represents an agreement of will, it always includes, implicitly, a forfeiture clause in favour of the delegating person. Indeed, it would be inconceivable that the withdrawal of the delegation of powers to engage, under the symmetry of legal acts, the consent of the employee or public servant.

[17] Just as it is possible in the case of the mandatory to renounce to the given mandate. See F. Deak, *Tratat de drept civil. Contracte speciale*, Ediția a III-a, updated and amended, Editura Universul Juridic, București, 2001, p. 333; B. Ștefănescu, R. Dimitriu and others, *Drept civil*, vol. II, Editura Lumina Lex, București, 2002, p. 348; I.R. Urs, S. Angheni, *Drept civil. Contracte civile*, vol. III, Ediția a III-a, Editura Oscar Print, București, 2000, p. 118.

[18] For example, the legal doctrine also mentions the reserve clause by which the employee obliges to have/show a circumspect and reserved behaviour, favourable to the positive image/reputation of his employer. But in

under the principle of the contractual freedom. However, this principle is not an absolute one. In our case it is circumscribed to some general limits, but also to a special limit. The general limits of the contractual freedom are those referring to the imperative legal provisions related to the public order and morality[19]. The special limit refers to the applicable collective labour agreement.

Concerning the special limit, the employee's rights included in the individual employment contract must be reported to those stipulated by the applicable collective labour agreement, meaning that they can not be below the minimum level laid down by the latter. Thus, if the rights provided by laws represent the general minimum limit regarding the employees' rights, those contained in the collective labour agreement represent the special minimum limit, applicable only to the unit or to its branch, where the collective agreement is in force. By consequence, all clauses that derogate, meaning that they are less favourable to the employee, from the legislative provisions or from those stipulated by the collective labour agreement in force are *prohibited clauses*[20]. Also, clauses such as the exclusivity one, which would limit the exercise of freedom of association, which would restrict the right to strike or to resign, can not be included in the employment individual contract, as they are under the sanction of nullity. The celibacy clause, the dismissal clause (by which the parties agree that the employer shall decide to cease the individual employment contract at the request of the employee),the place or residence clause, if it affects the employee's freedom to choose his home, the arbitration clause (whereby the parties agree to submit to arbitration the disputes between them), the variation clause (which allows the employer, on his own unilaterally intention, to amend any of the essential elements of the individual employment contract) are breaking the mandatory rules. Therefore they are considered prohibited[21].

Conclusions

In conclusion, nothing prevent the employment contract parts to negotiate and include in the labour contract any optional clauses to satisfy their interests which are not stipulated in the law with the respect of general and special limits Also, that shows that we find ourselves in the presence of a contract with all the specifications of this bilateral legal act, ruled by the principle of free will, not in the presents of an impose contract. Even more and without denial of the legal part of the employment contract, according to the applicable legal texts there is no legal regime difference between the established rights, edicts, recognized or guaranteed by legal or conventional means (by individual or collective negotiation).

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practice, such a clause is not found under this denomination. Such obligations of the employees are stipulated by the Internal Rules.

[19] For the explanation regarding these limits see, A. Hurbean, *Legal nature of individual employment contract*, article published in Lex ET Scientia International Journal. Juridical Series), no. XVII, vol. 2/2010, pp.41-49, B.D.I. în EBSCO-CEEAS Database, INDEX COPERNICUS, CEEOL Database;

[20] O. Ținca, *Observații referitoare la unele clauze specifice din contractul individual de muncă*, in *Revista Română de Dreptul Muncii* nr. 4/2008, p. 16.

[21] O. Ținca, *op. cit.*, p. 22-23.

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DELIVERY OF GOOD IN THE LOAN AGREEMENT: CONDITION OF VALIDITY OR OBLIGATION OF THE LENDER?

LIVIU STĂNCIULESCU*

Abstract

In theory, the loan is generally defined as a contract whereby a person, called the lender, shall use or immovable property of another person, called the loan, which is obliged to repay in kind.

Based on the definition above national doctrine is unanimous in determining that the loan is a unilateral contract, because creates obligations only for the borrower. Similarly, the loan is a real contract because the manifestation of will must be accompanied by delivery of the good. Given the above, the question is obvious: delivery of the borrowed good is a condition of validity of the contract (specific for its formation) or an obligation of the borrower (operating in the execution phase) ?

Please note that determining the legal nature of the good delivery has great importance to the doctrine and practice. Thus, relative to the approach adopted: „delivery - a condition of validity" or „ delivery - obligation of the lender", legal consequences are totally different, with direct implications in defining the actual contract, the contract unilaterally rescinded the conditions in which they operate, etc.. In our approach we try to demonstrate that good delivery in the loan agreement can only be an obligation of the borrower (with all consequences arising from such qualification).

Key words: *free loan agreement, real agreement , delivery of good, sale, borrower*

a) Loan agreement in national doctrine.

Civil Code governing the two types of loan[1]: loan use and loan consummation.

The main legal regime difference[2] between the two contracts is translative of ownership (only) of loan consummation.Both loan use and loan consummation are separate, independent contracts [3].

Loan agreement, regardless of variety, is part of the real contracts

According to doctrine, the loan agreement (as for the deposit, too) is a real contract, because for the conclusion of the agreement it is necessary to achieve both will and good delivery, which is forming the contract object.[4] ".

As an exception, when at the time of the contract conclusion, the good is in the possession or detention of the tenant, the free loan agreement is valid only by the mere agreement between the parties, delivery being replaced by consent only [Art. 1593 par. (3) Civil Code]

For example, after concluding a sale, not followed by the good delivery, the parties agree that the good should be left temporary in the free use of former seller (currently tenant)

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[1] See C. Hamangiu, Balanescu I. Rosetti, Al. Baicoianu, *Romanian Civil Law Treaty*, vol II, Ed All Beck, Bucharest, 2002, p. 622.

[2] Doctrine points and other criteria of differentiation, such as the subject of the loan and its repayment. According to art. 1576 Civil Code, if there is an unexpected event and need it badly, the tenant is to return it before the deadline (not found in the college loan consummation); See J. Huet, *Traité de droit civil. Les principaux contrats spéciaux*, LGDJ, Paris, 2001, p. 921-922.

[3] Loan agreement is governed, in particular, the Civil Code, Book III, Title X "On loan" (art. 1560-1575) and Title XI "On loan" (art. 1576-1590). Other recent acts include provisions relevant to (eg, GEO. 97/2000, Government Ordinance no. 130/2000, Government Ordinance no. 85/2004 and Law no. 289/2004).

[4] See Fr. Deak, *Civil Law Treaty. Special Contracts*, Actami Publishing, Bucharest, 1999, p. 367.

The real nature of the loan, allows it, to be preceded by a pre-loan agreement, regarding the obligation to conclude a contract of loan in the future.

However, we note that the preliminary contract of free loan (or consumption) does not imply delivery of the good (being valid only with the will agreement between the parties)

The loan is a unilateral contract because obligations arises only the task of the tenant.

In this situation, the good delivery by the owner at the time of the closure, signifies the fulfillment of a validity condition of the contract (delivery) and is not a requirement (the result of a valid contract concluded)

Even if during the course of contract development (of producing effects), obligations may arise for the owner, the contract remains unilateral (because the obligation is extracontractual[5]).

Loan consummtion transfers the ownership of property „of fungible and consumable things", but free loan agreementl is translative of use only (so is not constitute a real right in the favor of the borrower).

The consequence of nontranslative character of free loan agreement is that, even after the conclusion of the contract, the owner remains the owner of the good (bearing the risk of fortuitous loss, according to the rule *res perit domino*), the tenant gaining *only good detention.* [6].

Free loan agreement may concern both movable and immovable goods, provided that beeing nefungibile (following to be returned in their individuality) and neconsumptibile (being necessary that the good do not consume at first substance use, to be returned in its nature.

Thus, the tenant must return the same thing (and not a similar one, whereas if he returns another car with the same value and quality, the contract will be exchange).

The object of a consummtion loan is gender, fungible and consumable goods, according to their nature (and the use given by the parties), which will be used (consumed) by the borrower .

Thus, the borrower will not return, at maturity, the same goods, but an equal amount of other things of same nature and quality (and we can thus say that finally is achived a so-called „ exchange" of things)

Proof of loan contract is made according to general rules, laid down by art. 1191 Civil Code, *ad probationem* is required in a single written document (if the value of the good exceeds 250 lei). The material delivery of the good can be proved by any evidence.

b) Particularities of good delivery in the sale agreement.

Valid conclusion of the sale produces a double effect: the transfer of ownership from seller to buyer (legal effect) and to create obligations on the parties (personal effects)[7].

Transmission of ownership as the main (crucial) effect of the sale, has a decisive role in fulfilling the obligations of seller and buyer[8]. Thus, transmission of ownership is not an obligation of the seller (whether is operating immediately or later) because once the contract has been perfected, the property is transferred without the intervention of the parties.

We can state that the obligations of delivery and reception of the good (due to the seller, respectively, to the buyer) are actually material expressions of alienation and acquisition of ownership[9].

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[5] See D. Chirica, *Civil Law. Special Contracts*, Lumina Lex Publishing, Bucharest, 1997, p. 219.

[6] See C. Toader, *Civil Law. Special Contracts*, All Beck Publishing, Bucharest, 2005, p. 64, D. Macon, IE Cadariu, *Civil Law. Contracts*, Junimea Publishing, Iasi, 2000, p. 203 - 204, TJ Timis, dec. no. 1573/1979, in R.R.D no. 5 / 1979, p. 54.

[7] See L. Stănciulescu, *Civil Law. Contracts and Inheritance*, Ed Hamangiu, Bucharest, 2008, p. 66 et seq ..

[8] Moreover, the French legal literature talks about the transfer of ownership as the only effect of the contract, in effect, see Ph. Malaurie, L. Aynčs, P.Y. Gautier, *Les contrats spéciaux*, Defrenois, Paris, 2003, p. 207.

[9] Civil Code does not specifically cover all the effects of the sale contract, referring only to the main obligations of the seller: "to teach him to work and be responsible for" (art. 1313 Civil Code) and the main obligation of the buyer "to pay the price at the date and place determined by the contract " (art. 1361 Civil Code).

The seller has two main legal obligations: to delivery the sold good and to guarantee the buyer for eviction and against vices (art. 1313 Civil Code).

According to art. 1314 Civil Code, " the delivery is the resettlement of the sold good in the possession and power.of buyer " "The relocation of sold good" does not mean the transfer of ownership, only detention[10].

In some cases, delivery involves a passive attitude of the seller (for example, when property is already in possession of the buyer).

In other cases, it is necessary to commit positive acts for that, the buyer enter into effective possession of the property purchased (eg, return of keys, issuing building etc..).

The delivery of the good, as a rule, is the place where it is located the object, and it is therefore portable (art. 1319 Civil Code).

If the object sold can not be located (at the time of the conclusion), the delivery must be made according to general rules (to the debtor's home seller), and in this case, Cherie.

The seller is obliged to hand over the individually-determined good "in the state it was at the time of the sale" (art. 1324 Civil Code) and " to the extent determined by the contract " (art. 1326 Civil Code), charged with fruits or not, the day of the sale, and all accessories.

In the case of generic goods (and in the absence of express clauses stipulated in the contract), the seller will be able to execute his obligation by delivering middle-quality of goods, but the size specified in the contract (art. 1326 Civil Code).

Civil Code provides special rules for delivery of land[11]. Thus, if the property was sold "with the revelation of its contents and so far" (art. 1327 Civil Code) and on delivery day or later, it is found that extension does not correspond to that shown in the contract, the difference will be considered as follows:

- when the extent is less, the buyer may require to be supplemented or a price reduction (the contract can be rescinded only if the property is not required with the purpose for which it was purchased);

- when the extent is larger, the buyer is obliged to pay a premium price for surplus (he may request termination of the contract unless it proves that the surplus is 1 / 20 of total surface - art. 1328 Civil Code)[12].

Delivery costs (weighing, measuring, counting) are the seller's obligation, and the removal costs of the place of the delivery (loading, transport, unloading) to the buyer, unless there is stipulation to the contrary.

The seller is obliged to delivery, with the good sold, also the fruits charged by transferring ownership (art. 1324 Civil Code).

The buyer is entitled also to the good selling accessories and all that was intended for perpetuuu, for example, the destination property, warranty claim or action, and appropriate accessories (art. 1325 Civil Code).

If the case that the good, it is not delivered at the conclusion of the contract, the seller is obliged to preserve it, until delivery, because the good must be delivered in the same conditions it was, when concluding the contract (art. 1074 and 1324 Civil Code) .

If the buyer, became the owner from the conclusion of the contract, he must bear the costs of maintenance. (art. 1618 Civil Code).

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[10] See Fr. Deak, op. cit., p. 72. According to art. 1604 French Civil Code, subject to delivery include the transport of good sold and put into possession of the purchaser in this regard, see J. GATS, *Droit civil. Les contrats spéciaux*, Armand Colin, Paris, 1998 p. 41.

[11] For details, see Fr. Deak, op. cit., p. 72-76.

[12] If the sale is made "otherwise than so far", in a global price, the difference between declared and actual extent not taken into account (art. 1329 Civil Code).

In case of total or partial non-execution, of the delivery obligation of the good, due to fault of the seller, the buyer may invoke the exception for non-performance (*exceptio non adimpleti contractus*) or rescinded sale compensatory damages or enforcement in nature (not excluded any possibility things like purchasing from third parties on behalf of the seller, in accordance with art. 1077 Civil Code)[13].

c) Delivery of the borrowed good in the dispositions of 2009 Civil Code

According to art. 1174 (1 and 4) Civil Code 2009, "The contract may be consensual, affirmed or real. The contract is real when, for it's own validity, a good delivery is required of the debtor ".

From those mentioned above, it results that in the case of real contracts "the delivery of the good" is a new condition of validity (in addition to the substantive and formal conditions, required by law).

According to art. 2103 (1 and 2) Civil Code 2009, "Deposit is a contract whereby, the depositary receives a movable of the depositor, with the obligation to retain for a period of time and to repay in same kind. Remission of the good, is a condition for the valid conclusion of the deposit contract[14].

Corroborating the dispositions of art. 1174 and 2103 results, undoubtedly that the deposit is a real contract and therefore, the depositor does not have an obligation to delivery the good (object of contract) to the depositary. Thus, the depositor is only obliged to pay remuneration, expenses and damages (art. 2122 and 2123 Civil Code 2009).

Article 2144 Civil Code 2009 states that "the loan is in two ways: free loan agreement, called the loan, and a consummtion loan".

According to art. 2146 Civil Code 2009, "loan agreement for use is a free contract, whereby one part, called owner, submit a movable or immovable good to the other part, called tenant to use this asset, with the obligation to return it after a certain time" and "a consummtion loan is a contract in which the lender gives the borrower a sum of money or other such fungible and consumable goods, in nature, and the borrower undertakes to return after a certain period of time the same amount of money or quantity of goods of the same nature and quality "(sn art. 2158)[15].

We have to mention, that from the articles above, we can not establish whether :"the remission of the good" is a condition of validity or a obligation of the borrower? (in particular, because in this case there is no express disposition to qualify the remission of the good as a condition of validity, such as, those mentioned above for the deposit).

In the above, we mention also, the previous dispositions (contradictory) of art. 1483 (1) and 1485 Civil Code 2009 that the "obligation to move the property that encompasses the obligation of delivery and to preserve it until the good is delivered" and "The obligation to deliver an individual determined good it contains also, the obligation to preserve it until the good is delivered".

[13] In case of delay in execution of the teaching obligation, the buyer is entitled to damages, but only from the date of notice of the seller under Art. 1081 and 1079 Civil Code, you will see the Fr. Deak, op. cit., p. 76.

[14] According to art. 2105 (1 and 2) Civil Code 2009, "When money or other funds are also remitted fungible and consumable in nature, they become property of the recipient and must not be surrendered their individuality. In this situation applies, as appropriate, the rules of a consumer loan, unless the main intention of the parties was that the assets are held in the interests of the teaching (?).

[15] By the conclusion of a valid contract, the borrower becomes the owner of the asset and bear the risk of its destruction (art. 2160 Civil Code 2009).

Thus, the legislature recognizes explicitly that the transfer of property can not be separated from delivery of good (and possibly also from its conservation). Note also the "inconsistency" of the legislature of 2009, that although in the art. 4 Civil Code section 1174, refers to delivery as a condition for its validity "(a real contract, sn), he can not find it necessary to remind it as one of the conditions of validity of the contract (in general) specifically provided for in art. 1179 Civil Code.

d) The loan, real and unilaterally agreement?

We recall that the important institution of civil law, which is a contract, has the general meaning of an agreement (agreement) between two people, ended in the law to achieve their interests.

Consequently, the loan, the lender and borrower agree to transfer ownership or possession and use of things, or sharing an interest free.

Please note that it is a widely accepted principle according to which the will is the basis of the law (wills of the parties to the contract). Thus, the borrower wants to use the good for a period of time, and the lender wants to do an free act or get money (interest).

Consequently, the agreement of wills made under the law, ending the loan agreement, which takes effect (the parties wills materializes). In this case, the main effects of the loan means the transfer of ownership or the use of temporary work (including their component materials: teaching work) and price (interest).

In the above context, that the transfer law is a legal obligation (derived directly from the contract) and teaching (delivery) work can only be an obligation of the borrower.

Per a contrario, it would have to admit that teaching a given amount borrowed money could be made during training contract, so the above agreement of wills (and the end of contact) and not afterwards, which is logically untenable.

Please note that the issue in question was examined in the European doctrine, the conclusion of the authorized views are that: the real teaching contract, may not have the legal nature of a condition of validity, at least on the grounds that returning the (material) the work is a "matter of fact" which involves the action of a party in the execution of the contract (eg free loan agreement "delivery is not a condition of contract formation, it is the first act of execution[16]").

Of course, the above means accepting reality and accept the necessary consequences that are important, for example, contracts such as loan, deposit, pledge: there are unilateral, but reciprocal obligations are contracts (subject to termination).

Furthermore, we underline that the European doctrine institution "real contract" (the Romanian origin) is considered obsolete, supporting that for abandoning the "real contracts category" (the only notable exception that could materialize ... real contract hand is the gift[17]. "

Similarly, French law has already decided that the loan of money agreed by a professional credit is no longer considered real contract, but consensual[18].

Our opinion is in favor of maintaining the of 'real' character of free loan agreement, deposit, gift, manually, because the term expresses their special nature, since their conclusion can only be designed together.

In conclusion, we may say so, that the term "real contract" has the meaning of a "contract of work accomplished by effective delivery".

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[16] See J. Four, JL, Aubert, E. Savaux, *Droit civil. Les Obligations*, 1. L acts juridique, Sirey, Paris, 2006, p. 242.

[17] See L. Pop, *The Treaty of Civil Law. Obligations.* Volume II. Contract, Publishing House, Bucharest, 2009, p. 118-121.

[18] See C. Larroumet, *Droit civil. Les Obligations. Le contrat*, Ecomomica, Paris, 2009 p. 197-198.

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NEW DISPOSITIONS WITH REGARD TO FILIATION

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Abstract
The new Romanian Civil Code[1] is a milestone for the profound reform of our judiciary as regards the matter of private law relationships, on the grounds of valuating the national and international experience.[2] The novelties are represented, mainly, by the review of certain legal institutions and promotion of new principles and solutions. On this backdrop, the regulation of family relationships also received a new face.
The present task is devoted to highlighting the amendments interfered in the matter of filiation, by presenting the systematization method of legal regulations and the critical analysis of its content.

Key words: *filiation, paternity presumption, donor assisted human procreation, possession of status, legal timeframe of conception*

I. Introduction

Filiation, the subject of this paper represents an important landmark to all law systems as it provides the rules that guarantee the child's rights to know his/her parents and the duties of all parents regarding the education and care for their own children.

The new Civil Code reiterates the existing rules but also provides for innovations and settles the dispositions regarding filiation against the new issues imposed by the evolution of Romanian society, doctrine and judicial practice. The protection of child's rights and the best interest of the child with regard to filiation remain a priority objective of the new regulation.

Considering both the importance and the innovation character of the regulation of filiation issues, we feel that a systemic approach of the issues is not only necessary but also useful, having in mind that there are few literary references to this subject.

We undertake to elaborate a general presentation of the new legal norms regarding filiation both in terms of theory and practice.

II. General aspects regarding filiation

1. Definition of filiation

Filiation is the descendent relationship between a child and his parents.[3]

It usually consists of a biological relationship resulted from conception and birth. In some cases (assisted procreation, donor assisted procreation, unjustified application of the paternity presumption and wrongful maternal or paternal acknowledgement), filiation does not entail a biological relation.

2. Filiation reference

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[1] Adopted by Law 287/2009, published in the Official Journal, Part I, no. 511 of 24 July 2009.

[2] Sources of inspiration were mainly the legislation of: France, Italy, Netherlands, Spain and Canada – Province of Quebec, and also a series of international regulations.

[3] Please see: A. Ionaşcu, M. Mureşan, M.N. Costin, V. Ursa –*"Filiation and protection of minors"*, Editura „Dacia", Cluj – Napoca, 1980, page 14.

The new civil code regulates filiation in chapter II, Second Book, Title III (art. 408 – 450), structured in 3 sections, namely: Section 1- establishment of filiation: Section 2 –Donor assisted procreation; Section 3 – Legal status of children .

III. Establishment of filiation

1. Means for establishing filiation

1.1. General aspects

Acknowledgement of filiation consists of the procedures that attest the legal fact or act proving the descendent relationship between a child and his parents.

Establishment of filiation is rather different considered the mother's or the father's side in questions.

The new legal norms maintain the existing legal provisions regarding the acknowledgement of filiation[4].

Thus, maternal filiation is the result of giving birth to the child, which applies both to marriage filiation and to out of wedlock filiation. This means that maternal filiation implies of proof of the following elements: a) the mother gave birth to the child; b) identity between the born child and that whose filiation is in question; c) proof of marriage (only in the case of marriage filiation).

In cases strictly provided for, maternal filiation is established by acknowledgement and court decision.

As regards parental filiation, it can be results out of application of the presumptions of paternity. In these cases indivisibility arises in the sense that if maternity filiation is established, the paternal filiation is not questionable.[5]

Paternal filiation for the child born out of wedlock is established through acknowledgement and court decision[6].

In order to produce legal effects, filiation must be proven, as prescribed by law. As a rule, civil status is proven with acts produced by the civil service officers and the civil office certificates handed to the parties. Thus, proof of filiation is made through the act of birth [7] of the respective person and the birth certificate produced on the basis of the former. For the children born inside a marriage, the marriage must be proven through the act of marriage and the marriage certificate.

Proof of maternal filiation is made through the certificate attesting the birth, which is a medical act and is not to be confounded with the birth certificate. The certificate attesting the birth proves not only the physical act of birth but also the identity of the child[8].

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[4] Please see Family Code (Law no. 4/1953) republished in the Official Bulletin no. 13/ 18.04.1956, as subsequently amended and modified.

[5] The attestation of paternity for the child born inside marriage through the paternity presumption is embraced by all legal systems, as an application of the principle „*pater est quem nuptiae demonstrant*" (Ingeborg Schwenzer (editor) – *Tensions Between Legal, Biological and Social Conceptions of Parentage*, Ed. Intersentia, Antwerpen-Oxford, 2007, page 5).

[6] According to article. 3 of the European Convention of the legal status of children born out of wedlock, Strasbourg, 15th of October 1975, ratified by Romanian through the Law no. 101/1992, published in the Official Monitor, no. 243 /10.09.1992: „ Paternal filiation of all children born out of wedlock may be acknowledged or attested through voluntary acknowledgment or court decision.

[7] In the sense that the birth act represents, by excellence the ultimate proof of birth please see: C. Hamangiu, I. Rosetti – Bălănescu, Al. Băicoianu –*Romanian Civil law Treatise*, Editura „Academiei", Colecția „Restitutio", București, 1997, Vol. I, page. 285.

[8] Pleasse see: Sc. Șerbanescu – *Family Code, amended and modified*, Editura „Științifică", București, 1963, pag. 157; T.R. Popescu – *Family Law, Vol. II*, Editura „Didactică și Pedagogică", București, 1965, pag. 27; I. P. Filipescu – *Family Law,*, Editura „Didactică și Pedagogică", București, 1965, pag. 146. In the sense that this act does not refer to the identity of the child, please see : P. Anca –*Maternal filiation*, în lucrarea „Kinship in the law of the Romanian Socialist Republic.", Editura „Academiei", București, 1966, pag. 32.

During judicial proceedings before the courts, proof of filiation is made through all legal means of proof, as prescribed by law. The evidentiary force of the act of birth is consolidated through the possession of status in conformity with the former.

1.2. Possession of status

Unlike the former regulations, art. 410 para 1 of the new Civil Code defines the possession of status as " the factual situation indicating the ties of filiation between the child and the family he/she is presumed to belong to". Thus, a relative presumption of filiation is introduced here.

Following, examples are provided to give clues about filiation, such as:

" a) a person behaves towards the child as if it were his own, taking care of raising and educating him/her and the child behaves towards this person as towards his/her parents;

b) the child is recognized by the family, society and if the case may be, by the public authorities as being the child of the person presumably considered his/her parent;

c) the child has the name of the person presumably considered his/her parent."

Possession of status must fulfill the following conditions:

a) it must be continuous, meaning without presenting unjustified interruptions. From this point of view, several difficulties may arise if there are lacks in the raising and education process of the child, but the subjective attitude of the parent will be decisive;

b) it must be peaceful, without any violence;

c) it must be public, meaning that it is not exercised secretly and is made known to all interested parties;

d) it is unquestionable, meaning that it provides a clear significance of the relevant circumstances.

If the possession of status and the act of birth are concordant, as for instance both point to the same woman as mother of the child, then in principle the maternal filiation cannot be questioned neither by the child - requesting another civil status - nor by other persons - contesting the respective civil status.[9] Accordingly, we are in the presence of a presumption that the civil status resulting from the act of birth and the possession of status corresponds to reality.

In exceptional cases, situations may arise when such a presumption does not correspond to reality, as for instance when children have been substituted at birth or when a woman is registered as mother of the child and she is not the one who gave birth to the child. In these circumstances, legal action in court is admissible to establish the real maternal filiation, any legal means of evidence being admissible.

1.3 Presumption regarding the legal timeframe of conception

In order to prove the maternity of the child born inside marriage and out of wedlock, the presumption regarding the legal timeframe of conception applies, as prescribed by article 412 of the new Civil Code in the same lines as the existing article 61 of the Family code, namely:

"The timeframe between the 300th day and the 180th day before the birth of the child represents the legal timeframe of conception."

However, it must be mentioned that where the uterus presents several malformations

(double cavity, for instance), the legal timeframe of conception must be determined separately for each child conceived and grown in different cavities of the uterus.[10]

We are in the presence of a legal relative presumption that can be overturn in judicial proceedings through scientific evidence. Thus it can be proven that the child was conceived in a certain period of the 121 days or even outside the legal timeframe of conception, this being one of the newly introduced issues.

[9]Please see: article 411 alin. (1) şi (2) of the new Civil Code.

[10]Please see: D. Lupaşcu –*Family Law*, ediția a V-a, Editura „Universul juridic", Bucureşti, 2010, page 220.

2. Paternity presumption [11]

According to article 414 para 1 of the new Civil Code" the child born or conceived during marriage is fathered by the husband of the mother". This provision entails the following aspects:

a) the child was conceived during marriage;

b) the child was conceived before the marriage but was born inside the marriage;

c) the child was conceived during marriage but was born after the divorce, annulment or termination of the marriage.

The new norms do not contain the former disposition prescribed by article 53 para 2 of the Family Code regarding the child conceived during marriage and born after the divorce, annulment or other termination of marriage, in which case the paternity presumption favors the ex - husband of the mother on the condition that the birth takes place before the subsequent remarriage of the mother.

This omission does not mean a change of the view of the Romanian legislator in this respect, thus the solution remains the same – as deduced from article 414 para 1 of the new Civil Code –in the sense that if the mother remarries, the spouse of the mother from the subsequent marriage is presumed the father of the child.

The paternity presumption is applicable ope legis, any wrong or incorrect data in the act of birth of the child being irrelevant (this could point to an unknown father or other person than the mother's spouse)[12].

As regards the legal nature, we are in the presence of a mixed presumption that can be overturned exclusively through an action to contest paternity, in the conditions strictly provided for by law.

We must underline that the legal norms mentioned above institute a preference order, in the sense that the child born during marriage is preferred to the one only conceived during marriage. This envisages the solution in case paternity is contested, thus father of the child will be considered the mother's spouse in the subsequent marriage.

3. Establishment of filiation through voluntary acknowledgement [13]

3.1. Definition

Through voluntary acknowledgement a person, unilaterally declares or attests the filiation bond between him/her and the child he/she pretends to be his/her child. It represents a civil status act, in the meaning of negotiun juris and must be registered in the civil status registries.

Voluntary acknowledgment may be used to establish both maternal and paternal filiation.

3.2. Legal nature

Voluntary acknowledgement is of a mixed legal nature: on the one hand it is a manifestation of intent/will that produces legal effects – with regard to the filiation between the parent and the child – and, on the other hand, it is a means of evidence (a confession to a previous legal fact).

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[11] In the sense that the former norms [art. 53 para (1) şi (2) of the Family Code) contain 2 paternity presumptions, please see: I. Albu – *"Family Law*,, Editura „Didactică şi Pedagogică", Bucureşti, 1975, page. 112; I. Bohotici –"*Establishment and contestation of paternity"*, Editura „Cordial Lex", Cluj – Napoca, 1994, page 14 – 15. In the sense that there is only one paternity presumption, please see: I. P. Filipescu, A.I. Filipescu – *Family Law Treatise*, Editura „All Beck", Bucureşti, 2001, page 302.

[12] Please see: I.P. Filipescu, A.I. Filipescu – *op. cit.*, page 303

[13] With regard to the establishment of filiation through acknowledgement, please see: A. Bacaci, C. Hageanu, V. Dumitrache –*Family law*, Editura „All Beck", Bucureşti, 1999, page 151 şi urm.; R. Petrescu –*Legal action regarding the persons' civil status*, Editura „Ştiinţifică". Bucureşti, 1968, page 165 şi urm.; I.P.Filipescu, A.I. Filipescu – *op. cit*., page 284 şi urm.; A. Corhan – *op. cit*., page.301 and next.; E. Poenaru –Recognition through will of the child born out of wedlock în Revista „Justiţia Nouă" nr. 3/1956, page 463; A. Ionaşcu, M. Costin, M. Mureşan, V. Ursa – *Filiation and protection of minors*, Editura „Dacia", Cluj – Napoca, 1980, page 23

Its legal nature also imprints the applicable regime, meaning that it should comply both with the rules which are specific to unilateral judicial acts and those regarding confession. Notwithstanding the common law, the recognition of lineage is valid even when it is made by a person lacking legal capacity or having limited legal capacity, without legal representation or the preliminary approval of the legal guardian being necessary. The only requested condition, from this point of view, is the existence of discernment at the moment of recognition.[14]

Also, acknowledgement is irrevocable, which means that it is irreversible, even if it was made by testament. However, this doesn't prevent the author to challenge it in the case of recognition by error, due to the fact that the essence of revocation is different than the one of the challenge.

3.3. Cases of acknowledgement

The new regulation maintains the current cases in which the acknowledgement of the child is possible, as follows:

1) in the case of maternity: a) the birth was not registered in civil status registries; b) the child was enlisted in the civil status registries as being born from unknown parents;

2) in the case of paternity: the child was conceived and born outside marriage.

The law doesn't distinguish with regard to the reasons for which the birth was not registered in the civil status registries, situation in which we must consider any situation related to this case (for example: the inexistence of the registers; the omission of registration by fault of the civil status officer; loss or deterioration of the registries, etc.).

An issue under the old regulations (and which, for the same reasons, is also maintained until present) is that of admissibility of acknowledgement (especially the recognition of lineage towards the mother), occurred before the birth of the child.

Some authors[15] estimate that the acknowledgement of the child before birth is not possible, because cases of establishing the maternal filiation through recognition refer exclusively to born children. Moreover, if the mother would decease immediately after the birth of the child, before she would register the child as being born, or the child would be registered as being born of unknown parents or not registered at all, proof of filiation is available through any means of evidence in a court of law[16].

Other authors[17] – whose opinion we agree with – consider this acknowledgement admissible, under the suspensive condition that at birth, the child would be in one of the limited situations provided by law in which the recognition may be made. The decisive argument is that, according to art. 36, first thesis, of the new Civil Code: „The rights of the child are recognized from conception, but only if he is born alive." Among these, there is also the right to civil status, as an attribute of identification of the natural person.[18]

The doctrinal dispute with regard to the admissibility of maternal recognition of the deceased child is ended by the express provisions according to which:"After the demise of the child, he can be recognized (both by the mother and father – s n.), only if he left natural descendants.[19]

Both minors and the adults may be thus acknowledged, the law expressly establishing such a solution.[20]

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[14] In this regard, art. 417 of the new Civil Code provides that: „The unmarried minor can recognize his child by himself, if he has discernment at the time of recognition."

[15] In this regard, please see: P. Anca – *op. cit*., pag. 32 and the following.; T.R. Popescu – *op. cit*., pag. 76 – 78.

[16] E. Ion, T. Moise – *Legal and genetic bases of legal and medical expertise on lineage*, „Medicală" Publishing House, Bucharest, 1990, pag. 26.

[17] See: A. Ionaşcu – *Liniage towards the mother,* in the work *„Linage and Minor's Care", op. cit.,* pag. 15 – 16; I. Filipescu – *op. cit*., pag. 268.

[18] See: art. 59 and 98 of the new Civil Code.

[19] See: art. 415 para. (3) of the new Civil Code.

3.4. Forms of acknowledgement

Due to the juridical effects that it produces, the recognition of the child is a juridical act of special importance, reason for which the law provided it with a solemn character, meaning that it should carry one of the limited forms provided by law, as follows: a) statement at the civil status office; b) authentic document; c) testament.

The recognition is a personal act, which, however, does not exclude the possibility for it to be made in the name of the mother or, as the case may be, the father, by a representative with a special and authentic power of attorney.

The acknowledgement is inscribed through a mention on the edge of the child's birth certificate and, if the registration of birth was not acknowledged, the birth certificate is written and the recognition is inscribed on the edge.

The statement of recognition may be made at any civil status office, but the mention on the edge of the birth certificate is inscribed only by the civil status office which produced that document.

The authority which issued the authentic document by which a person recognizes a child has the obligation to transmit *ex officio* a copy of this document to the competent civil status office, in order for the corresponding mention to be inscribed in the civil status registry.

3.5. The sanction for disrespecting the legal provisions regarding the recognition of the child

The recognition of the child must be made with the respect of the conditions for form and substance provided by law, and, moreover, they must correspond to the truth[21].

Breaching the conditions provided by law for the recognition of the child may impose the invalidity/nullity sanction, which may be absolute or relative.

The absolute invalidity occurs if a legal provision which defends a general interest is breached[22], and the relative invalidity sanctions the breach of a legal provision which defends a particular interest[23].

Art. 418 of the new Civil Code provides for three cases of absolute invalidity:

a) a child was recognized and his filiation, legally established, was not removed;

b) a deceased child was recognized and he did not leave any natural descendents;

c) the recognition was made in forms other than those provided by law.

Beside those situations, we estimate that the absolute nullity occurs also in the case when the recognition was not made by the parent personally or by representative with a special and authentic power of attorney. Practically, we are in the presence of a virtual invalidity, meaning that the sanction must be applied in order for the scope of the breached legal provision to be reached.[24]

With regard to the applicable legal regime, absolute invalidity/nullity of the recognition is imprescriptible and may be invoked by any interested person, by legal action or exception. Also, the court is obliged to invoke the absolute invalidity ex officio.

If the previous established filiation was removed through a court decision, the recognition is valid and we are in the presence of a validation of this unilateral legal act by covering the invalidity.

The recognition may be annulled in the case of vitiation of consent, by error, dolus or violence.[25] The express provision of this sanction removes another controversy of our legal doctrine.[26]

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[20] According to art. 413 of the new Civil Code: „The provisions of the current chapter referring to the child are applicable also to the adult whose lineage is under investigation."

[21] See: Al. Oproiu – *Cases of absolute invalidity of recognition*, Law Review „Justiția Nouă" no. 1/1961, pag. 131; T.R. Popescu – *op. cit.*, pag. 159.

[22] See: art. 1325 corroborated with art. 1247 para. (1) of the new Civil Code.

[23] See: art. 1325 corroborated with art. 1248 para. (1) of the new Civil Code.

[24] With regard to the virtual invalidity: see art. 1253 of the new Civil Code.

[25] See: art. 419 para. (1) of the new Civil Code.

The case when the parent did not have discernment in the moment of recognition is added to those presented above. It also regards an express provision of the relative invalidity.[27]

The action for annulment of recognition may be exerted only by the parent whose consent was vitiated or who had not discernment at the moment of recognition.

The term of extinctive prescription is 3 years[28] and starts „(…) from the date when the violence ceased or, as the case may be, when the dolus or error was discovered"[29]. We observe that with regard to error, there is a derogation from common law[30], meaning that an objective moment for the start of the prescription is not instituted anymore, respectively „(…) not later than 18 months from the day when the legal act was signed."

As regards the annulment for lack of discernment, we consider that the prescription term starts "from the day when the rightful person, his representative or the one called by law to approve or to authorize his acts, became aware of the invalidity cause, but not later than 18 months from the day when the legal act was signed."[31]

The relative invalidity of the recognition may be confirmed.

4. Court actions regarding filiation

Both in the case of lineage towards the mother and towards the father, the law provides the possibility for filing court actions.[32]

4.1. Actions for contesting filiation

4.1.1. Action for contesting filiation established by birth certificate

In this situation, we are in the presence of a complaint against the possession of status, which aims at the removal of a lineage, alleged unreal, and its replacement with another, alleged real.

The action for contesting filiation may be exerted in the case when the lineage is established by birth certificate, which is not in accordance with the possession of status.

This action may be filed by any interested person and is imprescriptible.

In court, the proof of the alleged real filiation is made through the medical certificate of birth, through forensic expertise for establishing the lineage or, if the certificate is missing or, in the case when the expertise cannot be carried out, in principle through any type of proof, including the possession of status. With regard to the testimonial evidence, this is admissible only in the following cases: a) a child substitution took place; b) another woman, other than the one that gave birth, was registered as the child's mother; c) there are documents which make the action trustable.

4.1.2. The action for contesting child acknowledgement

Recognition of filiation, if it is not in accordance with the truth, may be contested by any interested person, including the recognized child, by means of a court action.

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[26] See: Al. Oproiu – *Is it possible to file an action for annulment of lineage recognition on grounds of incapacity or vice of consent?*?, in The Law Review „Legalitatea populară" no. 9/1961, pag. 51 and the following; Sc. Şerbănescu – *Family Code, commented and annotated*, „Ştiinţifică" Publishing House, Bucharest, 1963, pag. 160 and the following.; Ghe. Nedelschi – *Note to the Decision no. 54/1955 of the Bucharest Tribunal*, in the Law Review „Legalitatea populară" no. 4/1955, pag. 431 and the following; P. Marica – *Controversial aspects in Family Law*, In the Romanian Law Review no. 7/1967, pag. 101 – 102; T.R. Popescu – *op. cit.*, pag. 161 and the following.

[27] See: art. 1325 corroborated cu art. 1205 of the new Civil Code.

[28] See: art. 2517 of the new Civil Code.

[29] See: art. 419 para. (2) of the new Civil Code.

[30] See: art. 2529 para. (1) lit. c) of the new Civil Code.

[31] See: art. 2529 para. (1) lit. c) of the new Civil Code.

[32] With regard to the court actions for lineage issues, see, for example: A. Corhan, *op. cit.*, pag. 289 and the following.

Contestation against recognition may be intended also by the author of recognition, even if at the date of recognition he was not in error, because the civil status data of the person must correspond to the truth, the person's status being of interest both for him/her and for the society.[33]

Such an action is imprescriptible and any means of proof admitted by law may be used as evidence.

As a rule, the burden of proof is incumbent to the claimant. Art. 420 para. (2) of the new Civil Code deviates from this rule, stating the following: „If the recognition is contested by the other parent, by the recognized child or by his descendents, proof of filiation must be made by the author of recognition or his heirs."

4.1.3. The action contesting paternal filiation inside marriage

The action for contestation of paternity within marriage aims at removing wrongful or fraudulent application of the paternity presumption.

In such a situation, the child was wrongly registered, as being from marriage and having the mother's husband as father although: 1) the child was born prior to the marriage of parents; 2) the child was born after 300 days since the cessation, or as the case may be, or dissolution or annulment of marriage; 3) the child's parents have never been married.

This action is imprescriptible and may be introduced by any interested person, including the child.

4.2. The action for establishing filiation

4.2.1. The action for establishing maternal filiation

The action for establishing the maternal filiation is an civil status reclamation in order to determine the lineage relation between the child and his mother.

This action may be introduced in the following situations:

a) when, for any reason, the proof of lineage towards the mother cannot be made through the birth certificate;

b) when the reality of those written in the birth certificate is contested.

With regard to the first situation, under the influence of the old regulation, in the legal literature[34] it was underlined that the action's admissibility is conditioned by the absolute impossibility to establish maternity, and not when a temporary obstacle exists, such as, for example, the hypothesis of reconstruction or subsequent elaboration of the civil status act. Also, the action is inadmissible if the birth declaration can be made at a later time.

With regard to the second case, it is not sufficient to contest the reality of those comprised in the birth certificate, but the legal possibility for such contestation must exist, for example in the situations when there is no concordance between the birth act and the possession of status.

We should underline that, within the same action, it is possible to contest the reality of the mentions on the birth certificate and to claim a different marital status, not requiring two separate actions.

Action for determining maternity has a personal character, the child being the bearer of it. If the child lacks the capacity to exercise his rights, the action is introduced, in his name, by the legal representative.

If the child died subsequently to the introduction of the action, his heirs can exert it, according to the law. Even more- unlike the previous regulation- the heirs of the child can introduce the action (if it was not prior introduced by the child).

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[33] See: T.J. Hunedoara, civil decision no. 1303/1979, în the Law Review Revista Română de Drept no. 11/1979, pag. 67.

[34] See, for example: A. Bacaci, C. Hageanu, V. Dumitrache – *op. cit.*, pag. 156; A. Corhan – *op. cit.*, pag. 300.

In our opinion, according to the procedural provisions, the prosecutor[35] can introduce or continue such an action every time it is necessary in order to protect the legitimate rights and interests of minors, of persons under interdiction and of disappeared persons.

The alleged mother has passive locus standi and, after her death, the heirs of the alleged mother.

The right to introduce an action is inalienable. If the right was not exerted by the child, his heirs, in case the child dies, can introduce the action within on year (calculated from the date of the child's death). Within such an action, it should be proven both the fact of birth by the woman against whom the action is exerted and the identity of the born child to that the holder of the action.

In terms of probation, any means of proof admitted by law can be used.

4.2.2. The action fore establishing paternity outside marriage

The action for establishing paternity outside marriage is an action in civil complaint, which is to establish the lineage between the child out of wedlock and his father, when the latter does not recognize the child.

Unlike the prior regulations - when the child and his mother were holders of the action - the new provisions state that the action belongs to the child and can be introduced, in his name, by the mother, even if she is underage, or by the legal representative of the child.

The right to introduce the action in determining paternity outside marriage is not submitted to statutory limitations during the child's life.

If the child died subsequently to the introduction of the action, his heirs can exert it, according to the law. If the child died prior to the introduction of the action, his heirs can introduce the action within one year from his death.

Also, the prosecutor can introduce the action, according to the provisions of the Civil Procedural Code.

The alleged father has the passive locus standi, and after his death this quality passes to his heirs, even if they have renounced the estate, because the action has a personal character.[36]

In case of *plurium concubentium* it is possible to summon all men with whom the mother had intercourse during the timeframe of conception.

In order to establish paternity for a child born outside marriage, the following elements need to be proved: 1) the birth of the child; 2) the intimate liaisons between the alleged father and the mother during the legal timeframe of conception[37]; 3) the fact that the child resulted from such relations.

These elements can be proved by any evidence admitted by law, including by hearings of relatives, except for the descendents.

If the defendant recognizes the child as his own, such a voluntary acknowledgement stands for recognition of paternity in authentic form.

Art. 426 of the new Civil Code provides for a relative presumption of paternity in the hypothesis that the alleged father lived together with the mother during the legal time of conception.

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[35] Concerning the action introduced by the prosecutor, see, for example: V. Pătulea -Regarding the prosecutor's right to file an action in order to establish the lineage of minor children out of wedlock, in the Legal Magazine „Legalitatea populară" no. 10/1960, p. 56; E. Poenaru – The prosecutor's action to file a civil action and establishing strictly personal rights,, in the Legal Magazine „Justiția nouă" no. 2/1964, p. 60 and the following.; P.A. Szabo – Problems related to the civil action of the prosecutor, in the Legal Magazine „Justiția nouă" no. 7/1956, p. 127 and the following.

[36] See: T.R. Popescu, op. cit., p. 77.

[37] See: Supreme Court of Justice – Civil Section, decision no. 2264/1992, in the paper „Law problems from the decisions of the Supreme Court of Justice 1990 – 1992", „Orizonturi" Publishing House, Bucharest, 1993, p. 184 – 186.

In such a case, evidence is no longer necessary for proving intercourse and its result, but the alleged father is called upon to prove - in order to remove such presumption - that he cannot have conceived the child.

The cohabitation of the mother with the alleged father involves living in same household or the existence of stable, continuous contact.[38]

It is worth mentioning that only cohabitation leads to such presumption, and not other situations, like, for example, financially supporting the child.

The new Civil Code provides for a special regulation on the compensation the mother is entitled to ask from the alleged father, concerning the expenses made during pregnancy, birth and puerperium/post partum confinement. Thus, she may ask and obtain from the alleged father the following: a) half of the expenses at birth and puerperium; b) half of the expenses made with her living expenses during pregnancy and puerperium.

Such legal action can be introduced within 3 years from the birth of the child.

The compensation can only be requested if the action for determining paternity was introduced, even if the latter is still pending.

If the action for determining paternity will be irrevocably dismissed and if the compensation were granted during this period of time, we consider that there is no reason for keeping them, the defendant can regress against the child's mother for unjust enrichment.

Compensation may be claimed even if the child was born dead or died before issuing the decision establishing paternity.

For any other prejudice caused by the alleged father, the mother of the child and her heirs have the right to compensation according to common law provisions.

4.3. Action in denial of paternity

Action in denial of paternity is an action that aims to remove the paternity established by applying the presumption of paternity.[39]

According to art. 414 (2) of the new Civil Code, „The paternity can be contested, if it is not possible for the mother's husband to be the father of the child." The cases that fall under this general rule may differ, for example: a) the physical impossibility to procreate; b) the material impossibility of cohabitation; c) the moral impossibility of cohabitation, etc.

The new provisions extend the sphere of persons entitled to formulate the action, giving this possibility also to the alleged biological father, as well as to the heirs of the mother's husband, the heirs of the mother, the heirs of the alleged biological father and the heirs of the child.

Considering the holder of the action, we distinguish the following situations:

1) When the action is introduced by the mother's husband, the child is the defendant; if the child is a minor under the age of 14, he will be represented by the mother or by the legal representative; after reaching this age, he will sit alone in court, assisted by the mother or the guardian.

If the child is deceased, the mother's husband introduces the action against the child's mother and, if the case, against any other heirs of the child.

The mother's husband can introduce this action within 3 years, calculated either form the date that he learned he is the alleged father of the child[40], or from a subsequent date, when he learned that

[38] See: Supreme Court of Justice – Civil Section, decision no. 779/1990, in the paper Law problems from the decisions of the Supreme Court of Justice 1990 – 1992", op. cit., p. 180 – 181.

[39] For other definitions, see, for example: C. Hamangiu, I. Rosetti-Bălănescu, A. Băicoianu –Civil Law Treatise, Vol. I (republishing), „All" Publishing House, Bucharest, 1996, pg. 479; A. Corhan – op. cit., p. 309.

[40] For a de lege ferenda proposal in this respect and critics to the previous solution, according to which the deadline is calculated from the date that the father learned about the birth of the child, see: F.A. Baias, M. Avram, C. Nicolescu – Changes brought to the Family Code trough Law no.288/2007, in the Legal Magazine „Dreptul" no. 3/2008, p. 35.

the presumption of paternity does not correspond to reality. If the husband died before the expiry of the deadline and did not introduce the action, his heirs can introduce it within one year from his death.

For the husband put under interdiction, the action can be introduced by a guardian, or, failing that, by a court appointed trustee.

It is worth mentioning that the deadline for introducing the action in denial of paternity is not calculated against the husband put under interdiction, the husband being able to introduce the action within 3 years calculated from the ceasing of the interdiction, if such action was not introduced by a guardian or trustee.

2) When the action is introduced by the mother, the mother's husband is the defendant, and if he is deceased, his heirs;

The mother can introduce the action within 3 years, calculated from the birth of the child.

For the mother put under interdiction, the action can be introduced by the guardian or, failing that, by a court appointed trustee.

The deadline for introducing the action is not calculated against the mother put under interdiction, she will be able to introduce the action within 3 years calculated from the ceasing of the interdiction, if such action was not introduced by a guardian or trustee. Also, if the mother died before the completion of the 3 years deadline, without introducing the action, it can be introduced by her heirs, within one year from her death.

3) When the action is introduced by the alleged biological father, the passive locus standi is incumbent to the child and the mother's husband, and if they are deceased, the action is introduced against their heirs;

Unlike the previous 2 holders of the action, the right to introduce the action does not prescribe during the lifetime of the alleged biological father. If he deceased without introducing the action, his heirs can introduce it within one year calculated from his death.

If the alleged biological father is under interdiction, the action can be introduced by the guardian or, failing that, by a court appointed trustee.

It is extremely important to note that the law imposes the condition that the alleged biological father is due to prove his paternity, in order to have his action in denial of paternity admitted.

4) When the action is introduced by the child, the mother's husband will be called upon in court, and, if he is deceased, the action is introduced against his heirs.

We consider that the provision stating that: "The action in denial of paternity is introduced by the child's legal representative, if he is a minor" can be criticized.[41]

In our opinion, the underage child having full capacity of exercise can introduce the action by himself. Also, the child of 14 years old can promote the action by himself, without needing any previous consent, taking into consideration that the right is personal and non-patrimonial.

The right to introduce the action is cannot be subject to statutory limitations prescribed during the child's life, as well as in the case of the alleged biological father.

If the child dies before the action is introduced, it can be initiated by his heirs, within one year from his death.

4.4. The action for contesting paternal filiation inside marriage

Misapplication of the presumption of paternity to the child registered civil status, as being born in wedlock, although he was born before marriage or was conceived after a period more that three hundred days after the dissolution of marriage or whose parents were never married may be the subject of an action challenging the paternal filiation of the respective spouse.

Such an action is not expressly provided for by law, but it is a creation of the doctrine[42] and received jurisprudential applications.

[41] See: art. 433 (1) of the new Civil Code.

According to art. 434 of the new Civil Code, the action for contesting the paternal filiation inside marriage is regulated in the same line as the actions concerning the civil status of the person. Thus, the active locus standi belongs to any interested party, and the right to action is not subject to prescription.

By admitting such an action, the presumption of paternity wrongly or fraudulent applied is removed and the child becomes, retrospectively, child out of wedlock, which will have implications on the name, parental care, residence, the obligation to ensure support, etc.[43]

IV. Medically donor assisted procreation

Firstly regulated in Romanian law, the medically donor assisted procreation represents a solution for the straight couples or single women who want a child and cannot bear a child naturally.

The new Civil Code regulates[44] in detail the juridical situation of children conceived through such a method. The regulation is meant to ensure the conditions necessary for the interested persons to choose such a procreation method, the confidentiality of the act, as well as the parental relations concerning a child conceived in such a manner[45].

Third donor procreation is not expressly defined by the new regulatory framework. However, judging from the legal provisions governing its effects, one can deduce that it is a human reproduction method, using specific medical techniques and genetic material that may belong not only to those who will act as parents to the child so conceived, but also to other donors. [46]

According to article 441 of the new Civil Code, persons who may resort to this procreation method may be a couple consisting of a man and a woman or a woman alone, who shall act as parents of the child so conceived. This is quite a permissive approach, also offering to single women the opportunity to have babies[47].

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[42] Known under different designations, as: „contesting the paternity of the child wrongly registered from wedlock" „action in contesting paternity", „contesting the paternity of the child apparently from wedlock", „contesting the filiations from wedlock", „contesting the paternity of the child from wedlock"(Emese Florian –Family Law, ed. 3, C.H.Beck Publishing House, Bucharest 2010, p. 325), „contesting the filiations against the father in the marriage" (Alexandru Bacaci, Viorica-Claudia Dumitrache, Codruța Hageanu – Family Law, ed. 4, All Beck Publishing House, Bucharest, 2005, p. 198), „contesting the paternity from marriage" (Dan Lupașcu – Family Law 5th Edition, amended and revised, op. cit., p. 200).

[43] Alexandru Bacaci, Viorica-Claudia Dumitrache, Codruța Hageanu – op. cit., p. 198; Emese Florian – op. cit., p. 325; Dan Lupașcu – op. cit., p. 201.

[44] The medically donor assisted reproduction is regulated in art. 441 – 447 of the new Civil Code. These provisions will be completed by special law concerning the legal regime, ensuring the confidentiality of information, as well as the way of transmitting such information.

[45] Such method of procreation is also regulated in other law systems. Thus, in France, 2 laws adopted on the 29th of July 1994 regulated this institution, one concerning the „human body", and the other one concerning the utilization of its „products" and the medically assisted procreation (see, Alain Bénabent – Droit civil de la famille, 9-ème édition, Ed. Litec, Paris, 2000, p. 360). Same provisions are found in the law of other countries, like: Austria, Netherlands, Spain, Japan, Switzerland, etc. For details: Ingeborg Schwenzer (editor) – Tensions Between Legal, Biological and Social Conceptions of Parentage, Intersentia, Antwerpen-Oxford Publishing House, 2007, pg. 9.

[46] The French Public Health Code defines the medical assistance for procreation within article 152-1 of the Law no. 94-654 of 29 June 1994, also maintained after the amendment occurred through the Ordinance no. 2000-548 of 15 June 2000, as "clinical and biological practice allowing the *in vitro* conception, embryo transfer and artificial insemination, and any technique having an equivalent effect and allowing procreation outside of a natural process" ("*Code civil*" 103e edition, ed. Dalloz, Paris, 2004, page 348). For more details, please see: Veronica Dobozi (I), Gabriela Lupșan, Irina Apetrei (II) - Lineage within the medically assisted reproduction, "Law" Review no. 9 / 2001, page 41 et seq.

[47] The possibility to resort to such a procreation method is regulated differently by various law system; thus, while in United Kingdom, Austria or Spain it is not conditioned by the marital status of the person (in this sense: Lupșan Gabriela, Irina Apetrei (II) - *op. cit.*, p. 50), France recognizes as beneficiaries of such means of procreation solely the man and woman forming a couple or able to provide evidence of a common life of at least two years, who are

Using medically donor assisted procreation will generate problems as concerns the filiation/lineage of the children born this way. The regime of this situation was clearly regulated by the legislator.

According to article 441, paragraph (1) of the new Civil Code, no filiation connection shall be recognized between the third donor and the child thus conceived. Parents will always be those who have resorted to this method of reproduction. For this reason they must give their consent before a public notary, who will explain beforehand the consequences of this act on the future child's filiation, in terms of strictest confidence. Until the time of conception, this consent will remain void in case of death, an application for divorce, the separation of fact or of its revocation by those who have expressed it.

In this context, the maternal filiation will result from the act of birth[48], according to the principle *mater semper certa est (the mother is always certain).*

The paternal filiation is determined differently, depending on the marital status of the woman who gives birth to the child. Thus, in the case of a married woman, the father's child will be the mother's husband, by applying the presumption of paternity, under article 408, paragraph (1) of the new Civil Code. In the case of an unmarried couple, the paternal filiation shall be determined through recognition or, if the man who consented to medically assisted reproduction using a third donor refuses to recognize the child's parentage, by court order. His responsibility towards the mother and child is expressly provided by law[49] and we believe that this translates into the possibility of applying to this situation[50] the provisions of article 428 of the new Civil Code.

The specific feature of the filiation resulting from the use of this procreation method is that it can not be challenged by anyone, not even by the child born through this method, for reasons relating to medically assisted reproduction. The action to contest/ deny paternity may be filed only if the mother's husband did not consent to medically assisted reproduction with third donor, under the law. We believe that such an action can also be filed by the mother's husband who has revoked his consent before the time of conception, or if, during this period, one of the following circumstances occurs: an application for divorce or separation in fact (cases when, according to the law, the effects of the prior consent are removed).

The opportunity provided by article 443, paragraph (3) of the new Civil Code – regarding the actual application of the provisions regulating the denial of paternity if the child was not conceived in this way – tries to sanction the case where a mother's extra-conjugal relation, which the child might result from, would be disguised by the use of medically donor assisted procreation. We agree with other authors[51], that this legal provision is likely to jeopardize the immutability principle of the child's civil status. This is due to the fact that in an action of denial of paternity filed in the conditions set by common law, where the mother's husband, the mother, the child, the alleged biological father

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alive and have a suitable age to procreate and who agree beforehand to embryo transfer or insemination. (*Code de la santé publique*, L. 2141-2, in *„Code civil"*, Dalloz, Paris, 2004, p. 348). There are also much more permissive legal systems, such as, for example, that in Quebec. According to the law here, heterosexual and homosexual couples, as well as single women have access to medically assisted procreation (Marie Pratte - *La tension entre la filiation légale, biologique et sociale dans le droit québécois de la filiation*, în Ingeborg Schwenzer (editor) - op. cit., p. 101. A similar situation can be found within the Greek law, where the medical assistance for procreation addresses heterosexual married couples or not, as well as single women (A.C.Papachristos – *Le droit hellénique de la filiation: parenté biologique et parenté socio-sentimentale*, in Ingeborg Schwenzer (editor) – *op. cit*., p. 211).

[48] According to article 408, paragraph (1). It is worth mentioning that the Romanian legislator has not provided the possibility of using the so-called "carrying mother" or "surrogate mothers", who keep the pregnancy and give birth to a child for another couple, child that will then be taken by his/her biological parents. Such a possibility exists in the laws of many states. For details, please see: Veronica Dobozi (I), Gabriela Lupşan, Irina Apetrei (II) - op. cit., p. 45, Emese Florian - op. cit., p. 356; Ingeborg Schwenzer (Editor) - op.cit, p. 10.

[49] Please see: article 444 of the new Civil Code.

[50] In this sense, please see also Emese Florian – *op. cit.*, p. 358.

[51] Emese Florian – *op. cit.*, p. 357

or the heirs of each of the above may have *locus standi*, it can easily be proven by scientific evidence that it is impossible for the mother's husband to be the father to the child, but it is not possible to prove whether or not the child's birth is due to medically assisted reproduction. And the negative consequences of the admission of such an action will reflect upon the child, whose filiation in relation to his/her father will remain not established.

The child conceived through medical intervention with a third donor will benefit from the parental care from the father his/her lineage was established to, under the same conditions as his natural child.

V. The child's legal condition

As concerns the legal condition of the child, the new regulations will reconfirm the equality in rights of children, irrespective of the fact that they are born in wedlock or outside it. This is actually a principle that was enshrined by the Romanian legislation since the Family Code was adopted. Thus, the law provides that the child born outside the wedlock whose lineage was established according to law has the same rights as the child born in wedlock against each parent and his/her relatives.

The difference lays only in determining the child's name, but the legislator has provided modalities converging to achieve the same solution for this case too. Thus, both the child born inside marriage and out of wedlock will have the name of one of his/her parents or the parents' names combined.[52]

VI. Conclusions

The new regulations regarding filiation bring a comprehensive and detailed approach of aspects concerning the meaning of the concept, establishing filiation to the mother and the father, the procedural means that interested persons may resort to in order to solve some practical problems in establishing lineage, as well as the cases in which lineage does not derive from the natural act of procreation. The analysis of these regulations requires a high complexity, especially given the fact that, by their nature, they comprise a number of sensitive issues, which may give rise to difficulties in their practical application.

That is why we believe that a thorough analysis, when relating to how similar rules in other legal systems are enforced, as well as the problems existing in the previous Romanian jurisprudence will prove to be of real support in the implementation of the new Romanian Civil Code.

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[52] Please see: article 449-450 New Civil Code

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DOCUMENTARY LETTER OF CREDIT IN THE REGULATION OF 600-PARIS PUBLICATION

VASILE NEMEŞ[*]

Abstract:
In the year 2007 was adopted the Publication no. 600 of Paris regarding the Rules and the Uniform Practices for documentary letters of credit which replaced the Publication no. 500.
Publication no. 600 (UCP 600) is applied to all the irrevocable documentary letters of credit when the parties make express reference to these Rules. The Publication no. 600 includes uniform rules, international practices and standards of irrevocable documentary letters of credit. The new Publication has brought a number of changes on the issues regarding the performance of the letters of credit, both in the relationship with the non-banking institutions participants and in the relationship between the credit institutions participating in the performance of the letter of credit.
This study, without being exhaustive, aims to capture the main aspects of novelty brought by the publication no. 600 and their legal approach to the new perspective of the international trade relations.
It has in view, in particular, the irrevocable character of the letter of credit, the elaboration method and procedure of the letter of credit, the participants to the unfolding of the specific relationship of the letter of credit and the main duties of the involved credit institutions.

Keywords: *letter of credit, Publication 600, documentary, irrevocable, chief accountant, issuing bank, confirming bank, nominated bank, beneficiary.*

Introduction

The documentary letter of credit is a payment method used in the international trade relations which implies, during its carrying out, the participation in the banking institutions.

In the specialty literature is considered that the documentary letter of credit may be considered as an autonomous bank guarantee[1].

The character of bank guarantee is expressed by the fact that the creditor (the beneficiary of the letter of credit), besides the debtor of the main legal relations, also has the irrevocable obligation of payment undertaken by the issuing bank of the letter of credit. At the same time, as we shall see below, the letter of credit may be confirmed by the confirming bank, which means an extra obligation of payment incumbent to the confirming bank. Therefore, it is possible that, by issuing the letter of credit, besides the debtor's obligation undertaken within the main relationship, the creditor may obtain the obligation of payment from the issuing bank or, where appropriate, the confirming bank. Undoubtedly, by this method is provided a guarantee for cashing the money by the beneficiary creditor.

The main regulation of the documentary letters of credit is the Publication no. 600 regarding the uniform rules and practice of the letters of credit provided by the International Chamber of Commerce - Paris (UCP-600).

Publication 600 has entered into force on 1st of July 2007[2] and shall be applied to the letters of credit executed after this date.

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[1] See **V. Pătulea**, **C. Turianu**, *Garanţiile de executare a obligaţiilor comerciale (Guarantees to perform the commercial obligations)*, Ed. Scripta, Bucharest, 1994, p. 80.

[2] Also see **Hubert Martini, Dominique Depree, Joanne Klein-Cornede**, Credits documentaires, Lettres de credit stand-by. Cautions et garanties, Revue banque edition, Paris 2007 p. 18.

1. Concept and legal character
Preliminary specifications

The definition of the documentary letter of credit may be found in the Publication no. 600 which foresees its main legal characters.

1.1 Notion

Publication no. 600 defines the letter of credit in the article 2, as being any arrangement, however named or described, which is irrevocable and thereby constitutes a firm commitment of the issuing bank to honor a proper presentation[3].

Within the outlook of Publication 600, to honor a letter of credit means:

a) to pay at sight if the letter of credit is usable at sight;

b) undertaking a commitment to pay on time and the payment at maturity if the letter of credit is usable by payment at deadline;

c) acceptance of a promissory note drawn by the beneficiary and payment at maturity if the letter of credit is usable by acceptance.

Finally, the proper presentation means a presentation that is consistent with the terms and conditions of the letter of credit, with the applicable provisions of the rules foreseen in the Publication and with the standards of international banking practice.

From the regulations reproduced above results the notion and the main characteristics of the letter of credit.

Pursuant to the stated regulations, we define the letter of credit as being *the instrument by which the issuing bank, at the request and after the instructions of a customer, called chief accountant, makes a payment to a person, called beneficiary, or upon his/her order, or accepts and pays bills drawn by the beneficiary, or authorizes another bank to make the payment or to accept and pay the drawn promissory notes.*

1.2 Features of the documentary letter of credit

According to article 4 of the Publication 600, the letters of credit, by their nature, are transactions distinct of the sale contracts or other agreements that underpin them and the banks are not in any way bound or implied by such contracts, even if the letter of credit makes any reference to such contracts.

From the regulations reproduced above result the main features of the letter of credit.

The documentary letter of credit is a method of payment: irrevocable, autonomous, institutionalized and subject to the submission of documentation.

A. The documentary letter of credit is an irrevocable method of payment

The irrevocable character of the letter of credit results from the definition given by the Publication 600 which qualifies it as an irrevocable commitment. The irrevocable character of the letter of credit is also resumed in the regulation of article 3 of the Publication where it expressly provides that the letter of credit is irrevocable even if there is no mention in this regard.

The irrevocable character means that the letter of credit, once drawn up and put into the banking circulation by the issuing bank cannot be withdrawn or revoked anymore. In other words, the letter of credit put into the banking circulation has to be paid by the issuing bank, respectively by the confirming bank if the letter of credit is confirmed.

[3] For the definition of the letter of credit under the regulation contained in the Publication 500, see **V. Nemeş**, Drept bancar (Bank Law), Edit. Editas, Bucharest, 2004, p. 184

The irrevocable character of the letter of credit is clearly expressed in the content of article 10 of the Publication 600 which states that a letter of credit cannot be amended or canceled without the approval of the issuing bank, of the confirming bank and of the beneficiary.

The fact that the letter of credit cannot be revoked gives a supplementary guarantee to the beneficiary creditor as regards the payment, that is why, as we pointed out above, the letter of credit is considered as a guarantee of payment, too.

B. The documentary letter of credit is an autonomous method of payment

The autonomous character means that the documentary letter of credit creates liabilities independent of the basic relationship between the chief accountant and the beneficiary. This character occurs from the provisions of article 4 of the Publication no. 600 according to which the letters of credit are transactions distinct of the sale contracts or other agreements that may underpin them.

During the carrying out of the documentary letter of credit you cannot discuss issues or raise exceptions arising from the contractual relationship under which the letter of credit was opened.

The autonomous character of the letter of credit is extended on the existing contractual relationship between the participating banks and the chief accountant and the issuing bank, meaning that such relations are not related to the payment by letter of credit. More specifically, the obligations undertaken by the participating banks in the carrying out of a letter of credit may not be the subject of the chief accountant's complaints resulted from his relationship with the issuing bank or with the beneficiary.

As well, a beneficiary cannot prevail, under any circumstances, by the existing contractual relations between the banks or between the chief accountant and the issuing bank.

In order to maintain the autonomous character of the letter of credit, the issuing bank is bound to discourage and eliminate any attempt of the chief accountant to include, as part of the letter of credit, copies of the afferent contract, of the invoice and other documents of this kind (article 4 of the Publication).

C. The documentary letter of credit is an institutionalized method of payment

The institutionalized character of the documentary letter of credit means that this method of payment requires the participation of at least two credit institutions, the issuing bank and the beneficiary's bank.

As we shall see below, along with the issuing bank and the beneficiary's bank, in a letter of credit also may be involved the confirming bank and the advising bank.

The quality of advising bank and, respectively, the confirming bank may be owned even by the beneficiary's bank or by another nominated bank.

A letter of credit cannot be carried out without the participation of the credit institutions; other legal entities can contribute, but in operations subsidiary to the letter of credit, such as shipping agencies which authenticate the shipping documents.

D. The documentary letter of credit is a method of payment subject to the submission of documentation

The documentary character of the letter of credit is foreseen by article 5 of the Publication which provides that the banks operate with documents, not with goods, services or performance mentioned in such documents.

The documentary letter of credit is opened upon request and following the instructions of the chief accountant negotiated with the issuing bank which makes the payment of the letter of credit to be conditioned by the filing of the documents mentioned in the letter of credit.

Any documentary letter of credit makes the payment of the indicated sum to be conditioned by the presentation, made by the beneficiary or by the bank nominated for that transaction, of the

following documents: shipping documents (transport contract, shipping contract, air transportation documents, way bill etc.), insurance contracts and trade invoices.

The letter of credit may provide the obligation to submit other documents, such as: quality certificates, certificates of guarantee, of origin, of goods etc[4].

The name of the letter of credit comes from the fact that it represents the mechanism which makes the payment of the amounts to be conditioned by the drawing up and submission of some documents by the beneficiary creditor of the letter of credit.

2. Mentions regarding the documentary letter of credit

Neither the previous publications nor the Publication 600 expressly regulate the content of the documentary letter of credit or the main mentions that should be included in it.

But the Publication 600 makes some references regarding the banks where it can be used and regarding the validity of the presentation period of the letter of credit and the place of payment.

Thus, according to article 6 of the Publication, a letter of credit must include the bank where it can be used or the mention that it can be used at any bank. If in the letter of credit is mentioned that it can be drawn (used) at the nominated bank, it also can be used at the issuing bank. Pursuant to the letter of credit, the issuing bank is the bank which represents the main obligation of the letter of credit and remains in that position until the completion of the operations specific to the letter of credit.

Then, the letter of credit should specify the maturity payment of the foreseen amounts. To this effect, the Publication 600 provides that a letter of credit should specify if it is usable (payable) by paying at sight, on time, or by acceptance or negotiation. The utilization methods of the letter of credit are also genuine maturities of the letter of credit. It means that the maturity may be at sight, at a settled date, or by negotiation or acceptance of some promissory notes.

Closely related to the maturity of the letter of credit is the expiry date for the presentation of the letter of credit. Before paying the amounts indicated in the letter of credit, it shall be submitted to the bank nominated to verify if the documents comply with the clauses of the letter of credit and the notification, as appropriate, to the issuing bank or to the confirming bank regarding the fulfillment of all the requirements of the letter of credit. After the checking and confirmation of such conditions, the letter of credit can be used to maturity in order to make the payments for which it was issued.

Finally, as regards the place for the payment of the letter of credit, the Publication provides that the place of presentation is the premises of the bank where the letter of credit is usable. The letter of credit may include the mention that it can be paid at any bank, meaning that it can be used at any bank chosen by the beneficiary of the letter of credit.

Being issued at the request of the debtor in the main legal relationship, the essential mentions of a documentary letter of credit will be determined in accordance with the application for opening the letter of credit and after the instructions given by the chief accountant and sent to the issuing bank.

The doctrine[5] considers that the application for opening the letter of credit and, implicitly, the instructions should include the following information: the name and full address of the beneficiary of the letter of credit (exporter, supplier); the amount; the format of the letter of credit (revocable, irrevocable, confirmed, unconfirmed etc.); the drawing up method of the letter of credit (by payment at sight, by referred payment, by acceptance, by negotiation); what kind of promissory notes should be drawn and the maturity; the brief description of the goods, specifying the quantity, the price and the maturity; if the way bill must be paid or not in advance; the documents to be submitted at the payment date; the place of loading, shipping or taking over the goods in his task, indicating their destination; if the transshipment is allowed or prohibited; if the partial shipments are allowed or

[4] For other documents regarding the payment of the letters of credit, see **I.Turcu**, *op.cit.* p. 389.
[5] See **V. Pătulea**, **C. Turianu**, *op.cit.*, p. 87-88.

prohibited; deadline of loading, shipping or taking over in his task; the term in which, after the opening date of the letter of credit, must be submitted at the payment date, acceptance or negotiation, the bill of lading or other shipping documents; validity date and place of the letter of credit; if the letter of credit must be transferable; the transmission method of the letter of credit (telegram, telex, fax etc.).

Unlike the Publication 500, the current publication does not include anymore the specification that the letter of credit shall be concluded according to the instructions and clauses sent by the chief accountant. However, the main factors and mentions of the letter of credit will be indicated by the chief accountant. This is because the letter of credit is opened at the chief accountant's request who, on the basis of some compulsory legal relationship, is the debtor for the payment of some amounts. Because the payments may be made only by bank circuit, the chief accountant notifies the main aspects of the legal relationship with the co-contractor, establishing, ultimately, the essential clauses of the letter of credit.

It is understood that the above mentioned terms will constitute the content of the letter of credit drawn up by the issuing bank and it varies according to the nature of the legal relationship which have generated the issuing of the documentary letter of credit.

3. The participants in the letter of credit[6]

From the foregoing results that, for making a payment by means of a documentary letter of credit, is required the participation of at least four parties: the chief accountant, the issuing bank, the beneficiary and the beneficiary's bank.

In the carrying on of a documentary letter of credit also may be involved the advising bank, the confirming bank, the negotiating bank and the nominated bank.

Therefore, we consider that the letter of credit is an institutionalized method of payment and it cannot be conceived and used without the participation and involvement of the credit institutions.

3. 1 Chief accountant

Publication no. 600 provides that the chief accountant is the party who required the issuing of the letter of credit.

The chief accountant is the person who must make a payment based on an international trade contract in which has the capacity of debtor of an amount. In order to make the payment, the chief accountant applies to a bank and requests the opening of the documentary letter of credit pursuant to the instructions sent to that bank. The instructions for the issuing of the letter of credit may be agreed by the chief accountant together with the beneficiary and included in the international trade contract concluded between the two parties. In this case, the letter of credit will be in accordance with contractual terms and binds the chief accountant to request to the issuing bank to remove the possible inconsistencies[7].

Therefore, the documentary letter of credit shall be triggered at the beneficiary's initiative in order to make the payment of some amounts to another person, called a beneficiary of the letter of credit[8]. It means that the letter of credit is opened at the beneficiary's initiative, for the creditor in the main legal relationship, in order the creditor to be sure that the price was paid. On the other hand, in the relationship with the issuing bank, the letter of credit is opened at the request of the debtor in the main relationship who, by issuing the letter of credit, obtains the position of chief accountant.

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[6] See **V. Pătulea**, **C. Turianu**, *op.cit.*, p.81. and **I.Turcu**, *op.cit.*, p.370.

[7] Court of Arbitration Bucharest, Judgement no.17 of June 19, 1975 in *Jurisprudența Comercială Arbitrală (Commercial Arbitration Jurisprudence) 1953 -2000*, Bucharest 2002 p. 69.

[8] For details regarding the procedure for the opening and achievement of the letter of credit, as well as its phases, see **V. Pătulea**, **C. Turianu**, *op.cit.*, p.87. and **I.Turcu**, *op. cit.*, p.370 and the following.

Therefore, the issuing bank will act according to the instructions of the chief accountant, not of the beneficiary.

Because the chief accountant has the position of debtor in the basic relationship with the beneficiary, unless the parties did not agree otherwise, all the expenses necessary to perform the letter of credit shall be borne by the chief accountant because the beneficiary has to collect the entire amount, as foreseen in the instrument of payment.

The practice of the documentary letters of credit established that the chief accountant may be bound to pay a *pro rata temporis* penalty for the delay in opening the letter of credit or the beneficiary (the creditor in the basic legal relationship) may consider the contract as terminated due to such delay[9].

Also in the banking practice it was decided that, according to the chief accountant's viewpoint, the obligation of payment incumbent to him is considered executed at the opening date of the letter of credit by the issuing bank without being necessary the date when the amount was actually collected by the creditor as a result of the transfer operations[10].

3. 2 Issuing bank

Within the outlook of Publication 600, the issuing bank is the bank that issues a letter of credit, at the chief accountant's request or on its behalf.

The issuing bank is the bank of the chief accountant which opens the letter of credit at the request and according to the instructions received from him and which undertakes to pay an amount to a third party or to his order.

Consequently, the issuing bank is the bank the most involved in the carrying on of a documentary letter of credit which undertakes the obligation to pay the amount ordered by the chief accountant, thereby becoming the main obligee of the letter of credit.

The issuing bank will open and execute the letter of credit within the terms and conditions specified therein, set by the chief accountant, in accordance with the rules of the Publication 600 and the international bank practices applicable in this field.

The conditions for the issuing and execution of the letter of credit are called instructions for the issuing and amending of the letter of credit.

The instructions under which the letter of credit will be conducted must be complete and accurate, excluding the insertion of certain excessive details.

According to the international bank practices and standards, all the instructions for the issuing of the letter of credit, the letter of credit and, where applicable, all the additional instructions for amending the letter of credit must clearly indicate the documents under which the payment is made, the acceptance or the negotiation.

Therefore, the payment of the letter of credit is subject to the submission of the documentation specified by the beneficiary to the issuing bank.

3. 2.1 The obligations of the issuing bank

Preliminary specifications

As we mentioned above, the bank issuing is the main obligee of the letter of credit. In such position, the issuing bank has to drawn up the letter of credit according to the instructions of the chief accountant, to the rules of the Publication 600 and to the international bank practices and standards applicable in this field.

Then, the issuing bank has the obligation to endeavor and to take all measures in order to facilitate the carrying on of the letter of credit. In this respect, the issuing bank must nominate the

[9] Court of Arbitration Bucharest, Judgement no. 161 of June 15, 1979 in *op.cit.*, p.69.
[10] Court of Arbitration Bucharest, Judgement no. 39 of June 11, 1973 in *op.cit.*, p.69.

banks involved in the carrying on of the letter of credit so that the amounts enter in the beneficiary's account, in his bank. Consequently, the issuing bank must find and nominate the confirming bank, if the letter of credit is confirmed, the advising bank to check the compliance of the documents, the negotiating bank, if the payment is made by accepted promissory notes and other correspondent banks, as appropriate, depending on the nature of the legal relationship specific to the letter of credit or to the beneficiary's location.

Finally, the issuing bank is required to make the payment of the letter of credit in the manner and within the terms set up in the letter of credit.

A. The obligation to pay the letter of credit

The payment of the letter of credit may be set up at sight, within a specific term or by accepting or negotiating the promissory notes issued in favour of the beneficiary of the letter of credit.

If the letter of credit has the maturity at sight, the issuing bank is required to make the payment at sight. The term *„at sight"* coincides with the submission of the documents of the letter of credit by the beneficiary and the determination of their conformity with the letter of credit. In this case, the payment will be made after the submission of the documents expressly mentioned in the letter of credit by the issuing bank or by the bank authorized for such transaction.

If the letter of credit provides the deferred payment, the issuing bank will pay to the beneficiary the amount within the terms specified in the letter of credit.

When the letter of credit contains a fixed maturity, the issuing bank is required to make the payment within the foreseen term.

The issuing bank is required not only to pay the amount mentioned in the letter of credit, but also to keep in force, at the beneficiary's disposal, within the term specified therein, undertaking a direct and personal obligation in relation to the beneficiary[11].

B. The obligation to accept the payment of the promissory notes drawn by the beneficiary

The letter of credit may stipulate that the issuing bank accepts and pays at maturity the promissory notes drawn by the beneficiary on it.

In the letter of credit may be stipulated that the acceptance may be made by a bank, other than the issuing bank, called drawee bank or nominated bank.

For this latter situation, when the acceptance is made by the nominated bank, the issuing bank is required to pay, at maturity, the promissory notes drawn by the beneficiary on the issuing bank, if the issuing bank records, in the letter of credit, the refusal to accept the promissory notes drawn on it.

The issuing bank is required to make the payment even when the drawee bank accepts the promissory notes, but it does not pay them at maturity.

C. The obligation to negotiate the promissory notes drawn by the beneficiary.

Within the outlook of Publication 600, the negotiation means to buy the promissory notes and/or documents by the bank authorized to negotiate.

The simple inspection of the documents without buying them is not a negotiation. Under the obligation of negotiation, the issuing bank has to buy the promissory notes drawn by the beneficiary and/or the documents submitted in the content of the letter of credit and to advance the funds to pay the beneficiary.

According to the Publication, a letter of credit is not valid and it cannot be usable by promissory notes drawn on the chief accountant.

[11] Court of Arbitration Bucharest, Judgement no. 161 of June 15, 1979, in *op.cit.*, p.70.

If the letter of credit uses the words *"promissory notes drawn on the chief accountant"*, the banks will consider such promissory notes as additional documents.

The bank will make the payment of the debt set up in the letter of credit from the own deposits of the chief accountant or from the loans granted to him by opening a credit line.

When the payment is made by negotiated promissory notes, their owner, namely the beneficiary is not bound to wait until the maturity of the letter of credit in order to get the corresponding amounts, but he has the opportunity to sell them to the negotiating bank or to other bank financial institutions[12].

The issuing bank may nominate another bank to negotiate the promissory notes, being called the nominated bank. The issuing bank is required to honor the promissory notes if the nominated bank refuses to pay them, even if the nominated bank has issued a firm commitment in this regard. This is because, as we mentioned above, the only banks irrevocably bound to make the payment are the issuing bank and the confirming bank. Therefore, even if the bank nominated to negotiate undertakes to make the payment, it can change such promise, may revoke its commitment and refuse to make the payment. In all cases, if the documents comply with the letter of credit and all the requirements are met, the issuing bank remains liable to make the payment, in case the bank nominated for such negotiation refuses to pay it. However, even if the bank nominated under negotiation shall make the payment, this bank pays for and on behalf of the issuing bank or confirming bank, as appropriate, not by virtue of its own obligation of payment.

Besides the issuing bank, another bank, called confirming bank, may undertake a commitment for the payment of the letter of credit.

3. 3 Confirming bank

According to the Publication 600, the confirmation of an irrevocable letter of credit by the confirming bank, under the authorization or at the request of the issuing bank, is a firm commitment of the confirming bank, added to the commitment of the issuing bank to honor or negotiate a proper presentation.

The confirming bank is the bank which adds its confirmation to a letter of credit after receiving the authorization or request of the issuing bank.

It follows that the confirming bank intervenes at the request of the issuing bank or after its approval. However, we consider that there are no impediments for the confirming bank to confirm the letter of credit of its own initiative or at the request of the beneficiary of the letter of credit.

Provided that the documents stipulated in the letter of credit comply with its terms and clauses and be submitted to the confirming bank or to other banks nominated for such operation, the confirming bank is required, just like the issuing bank, to pay the letter of credit.

By confirmation, the confirming bank undertakes an obligation, independent of the obligation of the issuing bank, to pay to the beneficiary or at his order, the amount mentioned in the letter of credit.

The payment of the amount specified in the letter of credit is subject to the compliance of the documents with the terms and directives of the letter of credit and to submit them, in due time, to the confirming bank or to other bank nominated to receive and check the documentation.

The confirmation of the letter of credit originates, for the beneficiary, the safety for the collection of the amount foreseen therein and the confirming bank will become a true debtor of the beneficiary. It means that the beneficiary can apply, for the payment of the letter of credit, at choice, to the issuing bank or to the confirming bank, both of them having the obligation to make the payment.

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[12] See **V.Pătulea**, **C.Turianu**, *op.cit.* p. 89.

3. 3.1. The obligations of the confirming bank

The obligations of the confirming bank are stipulated in the letter of credit and they are similar with the obligations of the issuing bank.

A. The obligation to pay the letter of credit

If the letter of credit set up the maturity at sight, the confirming bank is required to make the payment at sight. If the letter of credit provides the deferred payment, the confirming bank will pay to the beneficiary the amount within the terms specified in the letter of credit.

B. The obligation to accept the payment of the promissory notes drawn by the beneficiary

The letter of credit may stipulate that the confirming bank accepts and pays at maturity the promissory notes drawn by the beneficiary on the confirming bank.

In the letter of credit may be stipulated that the acceptance may be made by a bank, other than the confirming bank, called drawee bank or nominated bank.

When the acceptance is made by the nominated bank, the confirming bank is required to pay, at maturity, the promissory notes drawn by the beneficiary on the confirming bank, if the drawee bank records, in the letter of credit, the refusal to accept the promissory notes drawn on it or it refuses to pay without any explanation.

The confirming bank is required to make the payment even when the drawee bank accepts the promissory notes, but it does not pay them at maturity.

C. The obligation to negotiate the promissory notes drawn by the beneficiary.

The confirming bank must negotiate the promissory notes, if so provided in the letter of credit.

The simple inspection of the documents without buying them is not a negotiation. Under the obligation of negotiation, the confirming bank has to buy the promissory notes drawn by the beneficiary and/or the documents specified in the letter of credit.

In the event that the issuing bank changes the letter of credit, the confirming bank may reserve the right to expand its confirmation also for the amendment of the letter of credit.

At the same time, the confirming bank may undertake the obligation to approve an amendment for the beneficiary, without expanding its confirmation on the change, in which case it must immediately notify both the issuing bank and the beneficiary of the letter of credit, without being bound as regards the occurred changes. On the contrary, when the confirming bank expands its confirmation also for the amendment of the letter of credit, it will be irrevocably bound to execute the amended letter of credit.

3. 4. Advising bank (nominated bank)

Within the outlook of Publication 600, the advising bank is the bank which approves the letter of credit at the request of the issuing bank.

According to the international banking practices and standards, the approval means the operation of checking the compliance of the documents with the terms of the letter of credit. We specified that the letter of credit is documentary par excellence and the submission of the documents is the essence of documentary letter of credit. The drawing up and submission of the documents is a prerequisite for the payment of the amounts stated in the letter of credit. Due to the distance between the contracting parties, i.e. the seller and the buyer are not only in different states but also on other continents, just like the issuing bank and the beneficiary's bank. For this reason, the issuing bank, in order to be sure that the beneficiary fulfilled his obligations according to the provisions of the letter of credit, nominates another bank, called advising bank, to perform this operation of checking the

compliance of the documents with the requirements of the letter of credit. The documents specific to the letter of credit are: invoices, way bills, insurance policies and other documents such as certificates of quality, conformity, warranty, indications of origin etc. The issuing bank assigns the amounts in circuit to the beneficiary only if he proves that he loaded the goods into the transport vehicle and prepared all the documentation related to the goods sold pursuant to the main legal relationship. Due to that distance, the issuing bank has not the opportunity to check these requirements and, therefore, applies to the advising bank in order to carry out such operations.

The advising bank may be nominated by the issuing bank, by the beneficiary or by his bank.

The role of the advising bank is to check the authenticity of the letter of credit and the documents filed by the beneficiary in carrying on the letter of credit.

The advising bank undertakes no obligation to pay the letter of credit, independent of the obligation of the issuing bank or confirming bank.

According to the international banking practices and standards, within the operation to approve the letters of credit and the required documents, the advising bank *"will take reasonable care"*.

Hence, the advising bank will act in a professional manner, according to the international banking practices and customs in order to fulfil the obligation to approve the letter of credit and the specific documents.

At the same time, the Publication 600 binds the advising bank, in the event that it decides to refuse the approval of the letter of credit, to immediately notify the issuing bank.

The advising bank must require to the issuing bank to provide precise and complete information and instructions necessary to approve the letter of credit.

If, however, it decides to approve the letter of credit, the advising bank must notify the beneficiary and the bank from which it received the instructions, stating that it is unable to determine the authenticity of the letter of credit.

When the issuing bank gives instructions to an advising bank, by a certified TV-transmission, to approve a letter of credit or an amendment to a letter of credit, the transmission will be deemed to be an operative instrument of the letter of credit and/or of the operative amendment without requiring another confirmation (in writing) by mail.

If a confirmation in writing is sent, it has no effect, meaning that the advising bank has no obligation to check such confirmation with the operative instrument of the letter of credit.

When the TV-transmission shows *"full details to follow"* or some words having similar meaning, or specifies that the operative instrument of the letter of credit or of the operative amendment is the confirmation in writing, then the TV-transmission will not be considered an operative instrument of the letter of credit or of the amendment and, therefore, it will not lead to the carrying on of the letter of credit.

If the TV-transmission is not considered an operative instrument of the letter of credit or of the amendment, the issuing bank will have to send, to the advising bank, the operative instrument of the letter of credit or of the operative amendment as soon as possible.

If a bank uses the services of an advising bank in order to approve the letter of credit for the beneficiary, the bank has the obligation to use the services of the same bank to approve an amendment, too.

3. 5. Beneficiary

The beneficiary is the party of the international trade contract who has a debt against the chief accountant, having, therefore, the capacity of creditor. Neither the legal character of the contract (sale-purchase, services, commission etc.) nor the kind of the trade relationship is important.

Within the main (basic) legal relationship, the parties may agree that the delay in opening the letter of credit may justify the seller's refusal to deliver the goods. Likewise, in the judicial practice it

was determined that the permission for the arrival of the ship, representing the notification of the buyer, by the seller, that he can take over the goods, in a specific harbor, on a settled date, will not be equivalent to the seller's will to deliver the goods, as long as the letter of credit was not opened yet[13].

3. 6. The bank of the beneficiary of the letter of credit

The bank of the beneficiary of the letter of credit is the bank chosen by the beneficiary to collect, for him and on his behalf, the amount mentioned in the letter of credit.

The beneficiary will usually choose a bank located in the territory where he has the premises.

Note that the beneficiary's bank has no obligation to carry on a letter of credit, except to collect the amounts paid or transferred by the issuing bank or confirming bank in the beneficiary's accounts.

Our final statement is that the beneficiary's bank can confirm the letter of credit, in which case it becomes a confirming bank with all the consequences arising from that transaction or may act as an advising or negotiating bank, at the request of the issuing bank.

4. The forms of the letter of credit

The bank trade with letters of credit operates with multiple forms of documentary letters of credit, each type of letter of credit having its own legal system[14]**.**

Next, we set forth the main forms of letters of credit and the criteria according to which they have been classified.

4. 1. As they may be amended or withdrawn, the letters of credit are classified as follows:

- **revocable letters of credit**;
- **irrevocable letters of credit**.

The revocable letter of credit[15] is the letter of credit which may be amended or withdrawn (cancelled) by the issuing bank, at any time, without requiring a prior notice to the beneficiary.

When the issuing bank decides to revoke the letter of credit and the letter of credit was used, meaning that the payments were made at sight, by acceptance or negotiation by a bank participating in the letter of credit before the approval, amendment or cancellation, then the issuing bank is required to reimburse all the expenses and payments made under the above mentioned terms.

Note that, within the outlook of Publication 600, the letter of credit may be issued only as irrevocable letter of credit.

An irrevocable letter of credit is a firm commitment of the bank which makes the payment at sight or at the determinable maturity, provided that the stipulated documents to be submitted to the nominated bank or to the issuing bank and to comply with the terms and conditions of the letter of credit.

The irrevocable letter of credit creates the same obligation for the confirming bank if there is such a bank.

An irrevocable letter of credit, excepting the transferable letters of credit, cannot be changed or cancelled without the consent of the issuing bank, confirming bank and of the beneficiary.

4. 2. As the letter of credit creates the obligation of payment only in charge of the issuing bank and/or in charge of other banks, there are confirmed letters of credit and unconfirmed letters of credit.

[13] Court of Arbitration Bucharest, Judgement no. 161 of June 15, 1979, in *op.cit*., p.69.

[14] For other types of letters of credit, see **I.Turcu,** *op.cit*.. p. 372 şi urm..

[15] Publication 600 no longer contains the mention of revocable documentary credit; however, the parties may set up revocable letters of credit but this fact must be specified in the letter of credit, also see **Hubert Martini, Dominique Depree, Joanne Klein-Cornede,** op. cit. p33.

The confirmed letter of credit is the letter of credit which contains a commitment of payment undertaken by the confirming bank, independent of the commitment (obligation) of payment undertaken by the issuing bank.

The confirmed letters of credit offer a greater certainty that the beneficiary received the payment by undertaking the obligation of the confirming bank.

By virtue of the confirmed letter of credit, the beneficiary shall be entitled to receive the payment, either from the issuing bank or from the confirming bank and the latter cannot invoke the benefit of discussion or division.

Therefore, the beneficiary of a confirmed letter of credit may request the full payment from any of the two banks, without being bound by a specific order to that effect. Basically, in this case, the beneficiary has 2 debtors: the issuing bank and the confirming bank. Thus, is avoided the bankruptcy risk of one of the banks irrevocably required to pay the letter of credit.

The unconfirmed letter of credit is the letter of credit which contains only the obligation of payment undertaken by the issuing bank, the other involved banks having no such obligation. If in the carrying on of an unconfirmed letter of credit also assist other banks such as: the advising bank, nominated bank, negotiating bank, beneficiary's bank etc., the latter, without the confirmation of the letter of credit, do not undertake any obligation to pay the letter of credit, distinct from that of the issuing entity.

4. 3. According to the transmission criterion of the letter of credit to several beneficiaryies, the letters of credit are classified in transferable letters of credit and non-transferable letters of credit.

The transferable letter of credit is the letter of credit under which the beneficiary (the first beneficiary) may require the bank to pay at sight, at a postponed date, to accept or to negotiate the promissory notes under the letter of credit for one or more beneficiaries.

Within the outlook of Publication 600, the transferable letter of credit is the letter of credit which expressly provides that it is "transferable". A letter of credit may be totally or partially transferred in favour of another beneficiary.

The bank required by the first beneficiary to make the transfer of the letter of credit to other beneficiaries is called transferring bank.

The latter has the obligation to make the transfer of the letter of credit to other beneficiaries only if it expressly undertook an obligation in this regard.

To transfer a letter of credit, it must contain the express note *"transferable"*.

Terms such as *"divisible"*, *"commensurable"*, *"transferable"* or *"transferable"* do not confer to that letter of credit the quality of transferable letter of credit.

If, however, the letter of credit contains such terms, they will not be taken into account by the participants in the letter of credit.

The transfer of the letter of credit may be total or partial, according to its clauses.

The non-transferable letter of credit is the letter of credit under which the payment shall be made exclusively to the first beneficiary, excluding the possibility of total or partial transfer of the letter of credit to the subsequent beneficiaries (third parties).

4. 4. According to the maturity criterion of the letter of credit, we distinguish between letters of credit with payment at sight, letters of credit with payment in due time and negotiated letters of credit.

The letter of credit with payment at sight is the letter of credit under which the payment is made upon the checking of the documentation submitted by the beneficiary and the determination of its compliance with the requirements and terms of the letter of credit.

Within the letters of credit with payment at sight, the beneficiary is entitled to receive the payment when the issuing bank, the confirming bank or other nominated bank, following the checking of the documentation, concludes that it complies with the clauses of the letter of credit.

The letter of credit with payment in due time is the letter of credit to be paid at the determinable terms, according to the provisions of the letter of credit.

The payment in due time of the letter of credit may be made in several instalments, unless otherwise specified.

Specifically, the maturity of the letter of credit may be determined at a certain settled date after the checking and determination if the documents comply with the terms of the letter of credit (a fixed number of days, 7, 10 etc.) or in a certain period of time after that date (within 2 weeks after the determination of compliance of the documents).

The negotiated letters of credit are the letters of credit which provide that the payment will be made following the purchase of the promissory notes by the bank authorized in this respect, called negotiating bank that may be the issuing bank itself or any bank involved in the letter of credit[16].

In conclusion, you must note that unlike the Publication 500, in the regulation of the Publication 600, the maturity of the letter of credit may not be longer determined by the deferred payment.

5. Documents necessary to carry on the letters of credit Preliminary specifications

As noted above, the payment of the letters of credit is subject to the submission of the documentation at the dates and under the form specified therein.

In practice, there are situations in which the issuing bank authorizes the correspondent banks to make payments in advance, to the beneficiary, before submitting the documents but, for this, it is necessary that the chief accountant have expressly stipulated that indication in the instructions. Such a letter of credit is called letter of credit *"with red clause"* because the clause which entitles the issuing bank to make payments before submitting the documentation is written in red ink in order to draw attention to its special character[17].

The obligation to submit the documents is incumbent to the beneficiary or to the bank nominated with such operation, usually being the beneficiary's bank.

The main documents in return for which the payment is made within a letter of credit are: the transport documents, the insurance documents and the commercial invoices.

5. 1. Shipping documents

The shipping documents are, mainly, the way bills which contain, depending on transport method, certain mandatory indications. These documents have different names, depending on the type of transport: maritime/ocean bill of lading, for waterborne transport, air-borne transport document, road transport, railway transport (way bill), for land transport or inland river transport and, as appropriate, (multimodal) combined transport documents, when several types of transport are used.

The (multimodal) combined shipping documents are the shipping documents which cover at least two different ways of transport (maritime and road), known as combined transport.

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[16] For other forms of letters of credit, see **V. Pătulea, C. Turianu**, *Garanţiile de executare a obligaţiilor comerciale (Guarantees to perform the commercial obligations)*, Ed. Scripta, Bucharest, 1994, p.83 and the following.

[17] See **V. Pătulea**, **C. Turianu**, *op.cit*., p.86. and **I.Turcu**, *Operaţiuni şi contracte bancare (Bank operations and contracts)*, Ed. Lumina Lex, Bucharest, 1995, p.373.

These (multimodal) combined shipping documents cannot be used unless the letter of credit expressly allows it.

5.1.1. Conditions regarding the shipping documents

The requirements to be met by the shipping documents, in order to be accepted, vary according to the type of transport.

A. For waterborne transport, the shipping document is called maritime/ocean bill of lading, received in order to make the payment, has to meet the following requirements:

a. to indicate the carrier's name and be signed by him or by the ship captain or by an agent appointed to act on behalf of the carrier or of the ship captain;

b. to include an indication that the goods have been loaded on board or have been delivered with a specific ship;

c. to indicate the port of loading and the port of discharge mentioned in the letter of credit;

d. to consist of one original bill of lading or, if it is issued in several original copies, to lay down the whole set;

e. not to include any indication showing that it is a subject of a "*charter – party*" contract;

f. the cargo ship which carries the goods is not propelled only by sails;

g. to comply with all other requirements of the letter of credit.

The maritime bills of lading may be non-negotiable maritime bills of lading and charter-party bills of lading.

B. In case of air-borne transport, the Publications do not have a specific name for the shipping documents but specify the indications they must compulsorily include:

- the carrier's name, his signature or authentication thereof or of the agent who acts on behalf of the carrier;
- the specification that the goods have been accepted for shipping;
- the delivery date;
- the indication of the airport of departure and the airport of destination specified in the letter of credit;
- the statement that the documents comply with any other requirements specified in the letter of credit.

As regards the air-borne transport documents remember that the Publications establish the obligation to submit them, in original.

C. For road, railway and inland river transport, the shipping documents must include the following elements:

- the carrier's name of the agent who acts on his behalf;
- the indication that the goods have been received for loading, shipping or transport;
- the place of loading and the destination foreseen in the letter of credit;
- the statement that the documents comply with all other requirements of the letter of credit.

In case the letter of credit provides that the shipping documents will be issued by the shipping agencies, these documents will be received, at the date of payment, only if they specify the carrier's name or the chief accountant of the combined transport and if they have been signed or authenticated by the shipping agent, as the agent authorized to act on behalf of the carrier or on behalf of the chief accountant of the combined transport.

5. 2. Insurance documents

The insurance policies must include the name of the insurance companies which issued them or the name of their agents.

If the insurance document provides that it has been issued in several original copies, all the original copies will be submitted, unless foreseen otherwise in the letter of credit.

According to the Publication, the cover notes issued by brokers may not be accepted if not stated expressly in the letter of credit.

The letter of credit must specify the required type of insurance and, if necessary, the additional risks that should be covered.

If not otherwise stated in the letter of credit, the banks will accept the insurance policies, as submitted.

In the absence of a contrary stipulation, the minimum amount foreseen in the insurance policies must be at least up to the C.I.F. (cost insurance and nominated freight port of destination) or C.I.P. (transport and insurance paid until the place of destination designated for the goods) value plus 10%, but only if the C.I.F. or C.I.P. value may be determined from the documents.

The banks are not allowed to accept the insurance policies which do not indicate the minimum insured amount of 110% of the amount specified in the letter of credit or 110% of the total amount of the invoice.

The banks can, however, accept an insurance certificate or a statement under open coverage, pre-signed by the insurance companies or by their agents, if not otherwise stated in the letter of credit.

At the same time, when the letter of credit does not provide otherwise or if the insurance document does not specify that the coverage is effective no later than the date of loading on board, delivery or taking over the goods for loading, the banks will not accept the insurance documents issued with a date later than the date of loading, delivery or taking over for loading.

Our final remark is that, unless otherwise specified, the currency established in the insurance documents must be the same with the one mentioned in the letter of credit.

5. 3. Commercial invoices

According to the Publications, the commercial invoices must include the description of the goods in accordance with the specifications of the letter of credit.

However, in order to be received for payment, the commercial invoices should not be issued for amounts bigger than the ones allowed by the letter of credit.

The banks may still receive invoices containing amounts which exceed the limits of the letter of credit if it is expressly provided.

The commercial invoices will contain the beneficiary's name and the chief accountant's name.

They must not contain either the beneficiary's signature or the issuer's signature.

6. Submission and checking of documents

The documents are submitted to the nominated bank within the period specified in the letter of credit.

The issuing bank, the confirming bank or the nominated bank will have a reasonable time to check the submitted documents.

The period for checking the documents is of 5 banking days from the day following the reception of the documents.

The banks to which are submitted the documents for inspection verify if they meet the requirements and terms stipulated in the letter of credit and inform the party who submitted them whether they are accepted or refused.

When the issuing bank establishes, of own initiative or following the information given by the confirming bank or by the bank nominated to check the documents, that they do not meet the requirements of the letter of credit, it may apply to the chief accountant to obviate the discrepancies within a period not exceeding 5 banking days.

If the banks involved in the carrying on of a letter of credit find that the submitted documents do not comply with the letter of credit, within the same period of 5 banking days, following the reception date of the documents and decide to refuse the documents, are required to notify, by telecommunication or any other fast communication means, to the bank which sent the documents or to the beneficiary, if the documents were submitted by him.

Such notice must include all the discrepancies and to indicate whether keeps the documents or return them to the submitter.

If the issuing bank and/or the confirming bank breaches any of the above mentioned rules or fails to make the documents available to the submitter or to return them to him, these banks will be deprived of the right to complain about the non-compliance of the documents, having the obligation to pay the letter of credit.

7. Payment of the letter of credit

Preliminary specifications

Neither the Publication 600 nor the previous publications contained rules regarding the payment of the letter of credit. Moreover, the payment deadline is replaced with the "honor" term in the Publication 600.

Publication 600 contains specific rules regarding the honor of the letter of credit in the articles 15 and 32, but indirectly by reference to the proper submission, drawings and partial deliveries.

7. 1. Terms of payment

In accordance with article 15 of the Publication, when the issuing bank, respectively the confirming bank, decides that the submission is proper, it is required to honor the letter of credit.

The submission is proper when the documents are in strict accordance with the terms and conditions of the letter of credit.

In the regulation of Publication 600, the honor of the letter of credit means the payment of the letter of credit at sight, in due time or by acceptance and negotiation of the promissory notes drawn by the beneficiary.

As a method of making payments and checking the specific documentation, the letter of credit is a legal act with *uno ictu* execution, suddenly. It means that, under a letter of credit, we cannot make partial withdrawals of amounts or partial deliveries of goods and, implicitly, to file documents.

Publication 600 provides an exception, namely when this issue is expressly mentioned in the content of the letter of credit.

The possibility of partial deliveries and drawings arises from article 32 of the Publication. According to this article, if in the letter of credit is provided a drawing or a delivery in installments within specified periods and any installment is not used or delivered within the period allowed for that installment, the letter of credit ceases to be valid for that installment or for any subsequent installment.

Therefore, the letter of credit which is not used for a certain partial payment within the established period of validity for all the subsequent installments; in other words, the letter of credit ceases to exist.

7. 2. Date of payment

The actual methods for the maturity of the letter of credit are foreseen in the Publication 600.

One method is to pay in due time, namely at a certain date established in the letter of credit.

Another method for the maturity is the payment at sight. The letter of credit with the payment at sight is paid after checking if the documents comply with the terms and conditions of the letter of credit. In such case, the letter of credit is paid at the date when the issuing bank, the confirming bank or the nominated bank "sees" the documents submitted by the beneficiary or by his representative. So, in this method of the maturity, the payment is made at the date when the documents are submitted by the beneficiary.

The letter of credit may be paid also by acceptance or negotiation of the promissory notes drawn by the beneficiary. In the letter of credit may be provided that the payment is made by drawing promissory notes against the issuing bank, confirming bank or other bank nominated for that purpose.

Finally, as stated in the foregoing, pursuant to article 32 of the Publication, in the letter of credit may be stipulated partial payments or deliveries. The maturity of the partial payments may be determined as in the case of full payment, respectively, at fixed deadlines set out in the letter of credit, at sight, namely after the submission of the documents related to partial deliveries and by acceptance or negotiation of some promissory notes drawn by the beneficiary for partial amounts.

Publication 600 does not provide the situation of the letter of credit which does not contain aspects regarding the maturity of the payment of the letter of credit.

However, by virtue of the principles governing the payment, we believe that if the letter of credit does not provide the maturity date, the payment will be made at sight, namely after the submission of the documents.

7. 3. Place of payment

The Publication does not require the indication of the place for the payment of the afferent amounts as regards the validity of the letter of credit.

As well, the Publication does not contain explicit rules concerning the place of payment. But, indirectly, they may be determined by reference to the provisions of the place of submission of the letter of credit. According to the provisions of article 6, the letter of credit must provide a date for the submission. The submission specified in the Publication is equivalent to the submission of the letter of credit and specific documents in order to make the payment. The same article 6 of the Publication provides that the place of submission is the premises of the bank where the letter of credit is used. The letter of credit may be used in a particular bank specified in the letter of credit or may be stipulated that it may be used at any bank.

Hence, the place of submission of the letter of credit, related documents and, implicitly, the place of payment is the bank where the letter of credit is usable.

Therefore, the place of payment is closely related to the bank where the letter of credit is used.

7. 4. Effects of the payment of the letter of credit

By paying the amounts recorded in the letter of credit, all the obligations of the participants are extinguished, as well as the obligations undertaken in the main relationships.

The obligation of payment under a letter of credit is incumbent to the issuing bank or to the confirming bank if the letter of credit is confirmed. The issuing bank and the confirming bank may nominate another bank to pay the letter of credit, but the nominated bank will make the payment for and on behalf of the issuing bank or confirming bank that appointed it, not on its behalf and as its own obligation.

It follows that by paying the amounts recorded in the letter of credit, all the obligations arising from the letter of credit are extinguished, out of which the most important are the obligations to check the compliance of the documents and to pay the amounts.

The amounts recorded in the letter of credit arise from the main, basic legal relations that generated the issuing of the letter of credit, such as relationships of sale-purchase, enterprise, execution of works, services or other legal relations generating the payment of different amounts.

As in the letter of credit are recorded amounts arising from the main legal relations, it means that the payment of the letter of credit extinguishes also these main mandatory relationships between the creditor and the debtor of such obligations.

8. Amendment of the letter of credit

Principles

We mentioned that the letter of credit is an irrevocable method of payment. The irrevocable character of the letter of credit is expressed by the fact that, once issued, it cannot be revoked, withdrawn or amended by the issuer or by other participant.

Pursuant to the Publication 600, the parties may use only irrevocable letters of credit.

However, it is possible, during the carrying on of the operations in the main relationships that have determined the issuing of the letter of credit or the ones specific to bank circuit, the amounts or the related documents, to intervene the demand to amend the letter of credit by adapting its clauses to the current requirements of the market.

In response to these practical requirements, the Publication 600 establishes certain rules governing the amendment of the irrevocable documentary letter of credit.

Thus, as a principle, within the article 10 of the Publication is provided that a letter of credit cannot be amended without the consent of the issuing bank, confirming bank and, if any, of the beneficiary.

Consequently, although the letter of credit is put into circulation by the issuing bank, it cannot be amended subsequently without the consent of the confirming bank and of the beneficiary. The consent of the confirming bank is justified by the autonomous obligation of payment undertaken by the confirming bank and the beneficiary's consent is based on the fact that the amounts recorded in the letter of credit represent the price due to him according to the main mandatory relations.

As not otherwise specified in the Publication, theoretically, may be amended any notes in the letter of credit, the date of payment, the period for submission the documents, the conditions for drawing up the documents, the place where the letter of credit may be used etc.

If the amendment was agreed, the issuing bank will be bound according to the new amendments, once the amendment has been issued. It is understood that, by virtue of the irrevocable character of the letter of credit, its amendments also become irrevocable.

For the confirming bank, since the date of extension of the confirmation, the amendments are compulsory also for the occurred changes. The Publication provides that the confirming bank can only approve the amendments, namely to notify that it took into account this issue without expanding the confirmation over the changes. In such a situation, the letter of credit becomes partially confirmed, meaning that the confirmation for the letter of credit shall be kept in its original form and it is not confirmed for the amendments unaccepted by the confirming bank.

As concerns the beneficiary, the consent regarding the amendment of the letter of credit may be express or tacit. Publication 600 provides that the letter of credit is valid in its original form until the time the beneficiary notifies his agreement regarding that amendment. The beneficiary must notify his acceptance or refusal as regards the proposed changes. If the beneficiary stays in passivity and communicates his viewpoint as regards the proposed amendments, they become irrevocable and it may be considered that the beneficiary accepted them.

The amendment of the letter of credit shall be notified to all the banks involved in the carrying on of the letter of credit and they must express their acceptance or approval for such changes or their refusal. In this respect, according to the Publication, the bank that approves the amendment must notify the bank which sent the amendment and if it accepts or rejects the amendment.

Partial acceptance of amendments is prohibited and such acceptance shall be deemed as a notice of rejection of the amendments (article 10 of the Publication).

9. Transfer of the letter of credit

General notions

In the absence of express stipulation, a transferable letter of credit may be transferred only once.

In this case, the secondary beneficiary may not request the transfer of the letter of credit to other third party, as beneficiary.

If in the letter of credit is provided that it may be transferred to several beneficiaries, the refusal of acceptance of one or more secondary beneficiaries does not affect the acceptance of the letter of credit by the other secondary beneficiary.

The same happens with the amendments to the letter of credit, meaning that the rejection of the amendments to the letter of credit by one or more secondary beneficiaries has no effect on the other beneficiary/beneficiaries who accepted the changes. It is understood that for the beneficiaries who refused the changes of the letter of credit, the letter of credit will be deemed unchanged.

Pursuant to the Publications, in case of transferable letters of credit, the first beneficiary has the obligation, upon the application for transfer and before operating the transfer of the letter of credit, to provide to the transferring bank the instructions regarding the transfer operation.

When the transferring bank agrees the transfer, within the terms established by the first beneficiary, it is required to notify the other beneficiaries about the transfer instructions.

As we mentioned above, the letter of credit may be transferred only within the terms and conditions specified in its original form, except: the amount of the letter of credit, the specified unit price, the delivery period, the validity expiry date and the period of submission of the documents.

Publication 600 allows the name of the first beneficiary to be replaced with the chief accountant's name, but if the chief accountant's name is expressly requested in the original letter of credit, it must be written down in all the documents, excepting the invoices.

Within the transferable letter of credit, the first beneficiary is entitled to replace his own invoice and the promissory notes with those of the secondary beneficiary.

The invoices and the promissory notes of the first beneficiary replaced by those of the secondary beneficiary cannot include amounts bigger than the original amount indicated in the letter of credit. If there is a difference between the original amount, indicated in the letter of credit, and the amounts specified in the replaced invoices and promissory notes, the first beneficiary can draw the letter of credit for the difference.

In the absence of a contrary stipulation, the first beneficiary may request that the payment or the negotiation of the letter of credit be made by the secondary beneficiaries, at the place where the letter of credit was transferred.

It should be noted that, if the letter of credit was transferred and the first beneficiary will submit his own invoices and promissory notes in exchange for the invoices and promissory notes of the secondary beneficiaries, but he did not do that on the first demand, the transferring bank is entitled to send to the issuing bank the documents received within the transferred letter of credit, including the invoices and promissory notes of the secondary beneficiaries, without any responsibility in relation to the first beneficiary.

10. Assignment of receipts from the letter of credit

Although the current practice of the documentary letters of credit uses the expression "assignment of the letter of credit" or "transferred letter of credit", actually it is about the assignment of the proceeds from the letter of credit.

The main function of the letter of credit is to perform, by bank circuit, the transfer of some amounts from the debtor in the main legal relations, becoming chief accountant by issuing the letter of credit to the creditor in the same main relations who became the beneficiary of the letter of credit.

Whereas the letters of credit are documents containing genuine rights of debt, such debts may be transferred[18].

Publication 600 establishes the transfer of the amounts related to the letter of credit by setting up some rules in the article 39.

Thus, according to the Publication 600, the fact that a letter of credit does not specify that it is transferable will not affect the beneficiary's right to assign any receipts to which he is entitled under the letter of credit, in accordance with the provisions of the applicable law.

Assignment of the receipts does not mean and does not constitute the transfer of the right to use the letter of credit.

The regulation of the Publication provides that the transfer of receipts from the letter of credit cannot be confused with the transfer of the letter of credit. In other words, a transferred letter of credit is not confused with a transferable letter of credit. A letter of credit may be transferred only if there is an express indication to that effect in the letter of credit. On the other hand, the assignment of the debts may be done even if the letter of credit is transferable or non-transferable. In other words, the assignment of the receipts may be performed regardless the type of the letter of credit.

Then, the transfer of the letter of credit is performed as provided in the content of the letter of credit, while the assignment of the receipts shall be performed in accordance with the law chosen for the assignment.

Unless otherwise indicated in the Publication, the assignment may be total, namely all the debts related to a letter of credit may be transferred, or partial, when only a portion of the receipts is transferred.

The transfer is performed according to the assignment contract concluded between the beneficiary of the letter of credit and the assignee of receipts. The assignment is based on the main relationships, under which the assignee may be the manufacturer or the supplier of the goods sold by the beneficiary of the letter of credit to the chief accountant. For the safety of price collection by the supplier or manufacturer is concluded the assignment contract under which the receipts or a portion thereof are transferred to the supplier, respectively to the assignee manufacturer. Thereby, the assignee may be the bank or other financer of the beneficiary of the letter of credit.

According to the assignment contract, after the notification of assignment by the beneficiary of the letter of credit or by the assignee, or following the date of acceptance of the assignment, the payment of the amounts will be made to the assignee, not to the beneficiary of the letter of credit.

11. Cessation of the letter of credit

Publication 600 does not contain rules regarding the cessation of the documentary letter of credit.

However, following the provisions of the Publication may be detached certain cases of cessation of the irrevocable documentary letter of credit.

As a general rule, the letter of credit ceases by carrying on its specific effects, namely the checking of compliance of the documents and the payment of the related amounts to the beneficiary or to the person appointed by him, in case of assignment or transferable letter of credit.

[18] For the assignment of debt performed under the common law, see C. Stătescu, C. Bârsan Drept civil. Teoria generală a obligațiilor (Civil Law. The general theory of obligations), Edit. All Beck, Bucharest, 2000, p. 341 and the following; Liviu Pop, Drept civil. Teoria generală a obligațiilor. Tratat, Ediție revizuită (Civil Law. The general theory of obligations, Treatise, Revised edition), Edit. Chemarea, Iași, 1994, p. 455 and the following; I Dogaru, P. Drăghici, Drept civil. Teoria generală a obligațiilor (Civil Law. The general theory of obligations), Edit. All Beck, Bucharest, 2002, p. 485 and the following.

Then, any letter of credit should include the validity period of the submission, having as consequence that the expiry of the validity period automatically draws the cessation of the letter of credit.

Finally, we saw that there is a possibility that the letter of credit may specify partial deliveries and drawings and if they are not observed, meaning that the deliveries are not performed, respectively the drawings made during the periods mentioned in the letter of credit, it cannot be used for installments or subsequent deliveries. Therefore, we deduct that the failure to comply with the terms in a letter of credit with partial installments draws the validity of that letter of credit, which corresponds with the cessation of the effects of the letter of credit.

Note that, due to its irrevocable character, the letter of credit cannot cease and cannot be withdrawn or cancelled at the initiative of the chief accountant or of the issuing bank.

For this reason, the letter of credit is the safest method of payment used in the international commercial relations.

Conclusions:

Of those mentioned above, the letter of credit is presented as one of the most stable and secure bank payment arrangements international trade relations.

Publication 600 from Paris, brought important changes to the letter of credit, such as: irrevocability of the letter of credit, letter of credit and the amendment revoking the ban without the consent of all participants, the possibility of making advance payments or partial performance of, the issuing and processing in electronic form letters, etc..

For these reasons, the letter of credit requires more care, both from the perspective of the issuer and its beneficiary, and especially banking entities involved in the movement of monies and related documents.

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ASSIGNMENT OF DEBTS AS PROVIDED BY THE NEW CIVIL CODE

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Abstract
Assignment of debts is a procedure based on which a debt is transferred from an original creditor to a new creditor. This procedure consists in a bipartite agreement (free of charge or for consideration) concluded between the original creditor (acting as assignor) and the new creditor (acting as assignee); the debtor is not part of the agreement. Nevertheless, according to the provisions of the New Civil Code[1], there are certain situations when the consent of the debtor is required (e.g. the debt is essentially related to the assignor's person).
As mentioned above, the main function of the debts assignment consists in transferring the debt. However, the doctrine and jurisprudence have revealed other functions of this legal procedure, e.g. payment of a debt that the original creditor (assignor) owes to the new creditor (assignee), guarantee the achievement of a receivable.
Although extensively treated by Romanian scholars, the provisions of the New Civil Code bring certain amendments as regards the procedures to be observed in case of an assignment of debts. The purpose of this paper is to highlight the amendments brought by the New Civil Code and to explain their impact on the procedure under discussion.

Key words: *assignment of debt, debt assignment, debt, assignor, assignee, creditor, original creditor, debtor, New Civil Code, transfers.*

Introduction

A common business practice whereby a creditor in need of cash assigns his debt in exchange of the immediate cashing-in of its price or gives it for payment to his own creditor, assignment of debts dates back to the primitive law. Thus, according to Roman jurisconsults, *inter vivos* transfer of a debt was in theory incompatible with the purely personal idea of the obligation rapport, both in terms of the active subject (creditor's right) and of the passive subject (debtor's obligation). For Roman jurisconsults, debtor's obligation was inseparable from the person of the creditor as the beneficiary of the obligation, in exactly the same way as the creditor's right was inseparable from the person of the debtor from whom the creditor was entitled to claim a benefit, to the extent that substitution of either of them could only take the form of a novation, that is by replacing the old rapport coming to extinction by a new rapport having as object a new obligation, given that it was in the charge or in the benefit of another person[2].

After a long evolution[3], modern law has finally come to accept the possibility of a direct transfer of the debt as an asset (alike any other proprietary item) under an agreement concluded between the original creditor and the person substituting him.[4]

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[1] Law no. 287/2009, published in the Official Gazette of Romania, Part I, No. 511 of 24 July 2009;

[2] Ioan Adam on www.legalis ro, excerpt of a work regarding the assignment of debts, a quote from D. Alexandresco, *Theoretical and practical explanation of the Romanian civil law by comparison with old legislation and main foreign legislation*, vol. VIII, p. 780.;

[3] The idea of a debt assignment in the true sense of the term was recognised during the reign of Emperor Justinian. The French Civil Code of 1804 recognised fully and regulated the debt assignment, seen as a sale and buy

In this essay, we intend to highlight the changes brought to the assignment of debts, seen as a means of transmission of obligations, by the New Civil Code.

Similarly to other civil law institutions, in the case of assignment of debts, too, the New Civil Code has felt the need to respond to doctrinaires by including provisions on which they have delivered opinions over the time.

Definition. Relevant provisions. Also known by the name of "debt conveyance"[5] in the relevant doctrine, the assignment of debts is the agreement under which the creditor transfers his right to claim (*drept de creanță* in Romanian language) to another person[6]. The creditor transferring his right is called *assignor* (*cedent* in Romanian language), the person acquiring the creditor's right under the assignment agreement is called *assignee* (*cesionar* in Romanian language), and the debtor of the assigned debt is called *assigned debtor* (*debitor cedat* in Romanian language). Although the agreement produces its effects with respect to three persons (assignor, assignee and assigned debtor), the only parties in the agreement are actually the assignor and the assignee; the assigned debtor being third party to the assignment agreement[7].

While the Old Civil Code[8], in force at the date of this paper, regulates the assignment of debt in respect of the sale - purchase agreement (Articles from 1391 through 1398 and Articles from 1402 through 1404), the New Civil Code devotes an entire chapter to the institution in question – *Title VI Transmission and Conversion of Obligations, Chapter I – Assignment of debts, Articles 1566-1592.* The provisions under Articles from 1566 to 1586 are establishing the general framework of the debt assignment, while Articles from 1587 through 1592 are dealing with the assignment of debt incorporated into registered, promissory or a bearer security.

Terms of the Assignment of debts. While until the passing of the New Civil Code, the only debt assignment expressly regulated was the assignment of debt for consideration in the form of a sale – purchase agreement[9], the new Civil Code comes to answer the doctrine by implementing what it has unanimously accepted in the specialised literature. Thus, according to the provisions of Article 1567 of the New Civil Code, debt assignment may be both for consideration and for free. If the debt assignment is for free, the validity conditions established in the matter of donation contract must be observed[10]. Also, in the case of assignment of debt for consideration, the parties must comply with the legal provisions governing the type of instrument chosen by them for the execution of the obligation (sale – purchase agreement, exchange agreement etc.).

Since the assignment of debt is a bipartite agreement concluded between the assignor and the assignee, where the simple will as such of the parties is enough to ensure its valid conclusion[11], the consent of the assigned debtor is, in principle, not required. However, the New Civil Code establishes the obligation to obtain the consent of the assigned debtor, for the assignment to be effective even between the assignor and the assignee, there where, as the case may be, the debt is essentially linked to the creditor's person.

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transaction. For details, see Liviu Pop, *Civil Law Treaty. Obligations. Vol. I. General legal regime* (Bucharest: CH Beck, 2006), pages 217 and 218;

[4] Ioan Adam on www.legalis ro, excerpt of a work regarding the assignment of debts;

[5] Liviu Pop, *cited work*, p. 223

[6] Constatin Stătescu and Corneliu Bîrsan, *Civil Law. General obligations theory*, (Bucharest: Hamangiu 2008), p. 363;

[7] Liviu Pop, *cited work*, p. 223

[8] The former Romanian Civil Code was adopted in 1864 and came in effect on 1 December 1865;

[9] Liviu Pop, *cited work*, p. 224. Cristina Zamșa, *Civil Law. General obligations theory. Workshop manual.* CH Beck Publishing, 2010, p. 165;

[10] Supreme Court, Commercial Section, Decision no. 5103 of 28October 2010;

[11] Prahova Tribunal, decision No. 101 of 27January 2010;

As regards the object of the assignment, basically, any debt may be subject of debt assignment, and not only the debts having a pecuniary value (i.e. debts that have as their object a sum of money)[12]. Moreover, a debt assignment may cover both present and future debts. For the latter category, the New Civil Code has expressly provided that the deed of assignment should include elements allowing the identification of the debt so assigned. Future debt is deemed transferred right upon the execution of the assignment agreement, and not from the time the debt as such is born.

However, there are categories of debts declared by law as unassignable, such as, for example, the alimony[13], the debts arising from a mutually binding agreement - synallagmatic agreement (unassignability, in this case, comes from the fact that the creditor is concomitantly a debtor, these two functions being inseparable)[14].

With regard to assignment of debts that have as object other obligation than the payment of an amount of money, the New Civil Code provides that such assignment may only take place unless the obligation subject to the assignment becomes substantially more onerous for the assigned debtor.

Although not regulated by the Old Civil Code, yet unanimously accepted by the doctrine[15], conventional unassignability is explicitly regulated under Article 1570 of the New Civil Code. Thus, debt assignment may be prohibited or restricted by assignor and debtor by an express clause incorporated in the text of the legal instrument giving birth to the debt. Nevertheless, even in the case of conventional unassignability, debt assignment may still have effects on the assigned debtor, if: (i) the debtor has consented to the assignment, (ii) the prohibition is not expressly stipulated in the document acknowledging the debt and the assignee was not aware nor was he expected to be aware of the existence of such prohibition as at the time of assignment, (iii) the assignment deals with an obligation to pay an amount of money.

Further on, the New Civil Code resumes the provisions of Article 1391 of the Old Civil Code and establishes under Article 1574 an obligation *to do* (*obligație de a face* in Romanian language) on the part of the assignor, whereby the assignor is required to submit to the assignee the deed acknowledging the existence of the debt, held by the debtor, as well as any other documentary proofs of the right being assigned. With regard to this obligation, the relevant doctrine has rightfully established, in our opinion, that failure of the assignor to fulfil this obligation entitles the assignee to abstain to fulfil his own obligations and to claim a rescission of assignment in court, there where the assignment has occurred under a mutually binding agreement[16].

Partial assignment. Governed by Article 1571 of the New Civil Code, partial assignment occurs when the assignor assigns only a part of his debt towards the debtor. Partial assignment can always take place when the debt deals with payment of an amount of money. Therefore, when the subject of a debt is other than a pecuniary benefit, such debt can be transferred provided only that the debt is divisible and unless it becomes more onerous for the debtor after the transfer.

In the case of partial assignment, the assignor's obligation to handover the document acknowledging the debt ceases, the assignee being entitled to receive a notarized (authenticated) copy of such document and to have the assignment mentioned and duly signed by both parties on the original document. If after the partial transfer the assignee acquires the rest of the debt as well, thus becoming the sole creditor of the assigned debtor, the assignor shall have the obligation to submit the document acknowledging the debt.

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[12] For more details, see Liviu Pop, *cited work*, p. 226;

[13] Constantin Stătescu, Corneliu Bîrsan, *cited work*, p. 363. Liviu Pop, *cited work*, p. 226;

[14] Gabriel Boroi, *Civil Law. General part. Persons.* Forth Edition, revised and completed. Hamangiu Publishing, 2010, p. 53. The author considers also that any party in the synallagmatic agreement may, in principle, make an assignment in favour of a third party (a debt, in this case), subject only to prior consent of the other party in the agreement;

[15] Liviu Pop, *cited work*, p. 227;

[16] Liviu Pop, *cited work*, p. 239;

Opposability of the assignment of debts. As mentioned above, the validity of debt assignment does not, in principle, depend on obtaining the prior consent of the assigned debtor, as the assigned debtor is a third party in relation to the agreement between the assignor and the assignee. However, for the debt assignment to become enforceable also against all categories of third parties, including the assigned debtor[17], certain publicity formalities need to be fulfilled, as follows:

a) *Acceptance of assignment by the assigned debtor* - regulated by Article 1578 paragraph (1) letter (a) of the New Civil Code, meaning that the assigned debtor has been made aware of the assignment occurring between his original creditor and the new creditor[18].

Under the new regulation, in order to be enforceable against all categories of third parties, the acceptance by the assigned debtor has to take the form of a writ carrying a certified date (*dată certă* in Romanian language).

Under the former regulation, acceptance by the debtor had to be given in the form of an authenticated document, in order to become enforceable against all categories of third parties[19]. However, the doctrine and, in particular, the jurisprudence have admitted that the consent may also be given in the form of a deed made under private signature, or even tacitly[20], yet, in this case, the assignment is enforceable only against the assigned debtor.

Basically, by the new regulation the lawmaker has intended to satisfy the longstanding practice in this matter, according to which what the law sought by requiring that acceptance of the assignment should derive from an authentic act was not to confer the acceptance as such the character of solemn formality, but to establish the certainty of the date of acceptance, since it is the date that establishes the precise moment in time when the assignment can be deemed to have actually occurred in relation to third parties; in other words, an acceptance, even if given in the form of a deed made under private signature and registered with a public authority and, thus, acquiring a certified date, is sufficient to ensure compliance with the provisions of Article 1393 Civil Code[21].

b) *By written notice to the assigned debtor* (Article 1578 paragraph (1) letter (b) of the New Civil Code). Written notice submitted by the assignor or the assignee is another way by which the assigned debtor may be made aware of the debt assignment.

Notice may be given on paper or electronic support and must necessarily specify the following information: identification data of the assignee, identification of the debt being assigned and, in the case of partial assignment, the extent of the assignment. Most of the times, notification takes the form of an order of payment (*somație de plată* in Romanian language) sent through a bailiff, especially in cases where the debt is or has become due[22].

To protect the assigned debtor against possible frauds, the New Civil Code gives him the possibility, upon receipt of a notification from the assignee, to request the latter to produce a written proof of assignment, failing which renders the notification given by the assignee ineffective. Moreover, the assigned debtor is entitled to suspend payment pending receipt of such proof.

c) *Notification submitted together with the application of summons (cererea de chemare în judecată* in Romanian language*).* This way of notification of assignment of debt to the assigned

[17] Supreme Court, Commercial Section, Decision No. 75 dated 13 January 2006 "Debt assignment is not enforceable against the assigned debtor as long as the formalities required by law regarding notification and acceptance are not fulfilled...";

[18] Constantin Stătescu, Corneliu Bîrsan, *cited work*, p 364;

[19] Article 1393 of the Old Civil Code stipulates: "(1) Assignee may not enforce his right against a third party unless he has notified the debtor about the assignment. (2) The same effect applies also in the case of acceptance of assignment by the debtor under an authenticated deed";

[20] Liviu Pop, *Cited work*, p 230. Corneliu Bîrsan, Constantin Stătescu, *cited work*, p. 364;

[21] Cas. II, Civil decision No. 915 of 22 November 1937;

[22] Liviu Pop, *cited work*, p 228;

debtor reveals from the provisions of Article 1580 of the New Civil Code, establishing that when the assignment is communicated together with the application of summons against the debtor, the latter may not be required to pay legal charges, if he pays the debt before the date of the first hearing, unless, at the time of notification of assignment, the debtor is already in default.

The analysis of the above mentioned article reveals that the assignee, upon submitting the application of summons, also provides the court with the agreement executed with the original creditor. The court thus invested, once having satisfied itself that all legal requirements regarding the application of summons are met, establishes the date of the first hearing and orders the summoning of the assigned debtor, while submitting the assigned debtor copies of the application of summons and of other documents in the case file.

d) *Registration of assignment in the Electronic Archive of Secured Movables (Arhiva Electronică de Garanții Reale Mobiliare* in Romanian language*).* This method of debt assignment publicity, regulated by Law no. 99 of May 26, 1999 on some measures for accelerating economic reform[23] and extensively tackled by specialized doctrine, is now expressly regulated by the New Civil Code under the articles regarding assignment of a universality of debts, on one hand, and successive assignments, on the other hand.

Thus, according to the provisions of Article 1579 of the New Civil Code, assignment of a present or future universality of debts is not enforceable against third parties unless it is registered in the Electronic Archive of Secured Movables. However, debt assignment becomes binding on assigned debtors only from the moment of its communication. Therefore, in the case of assignment of a universality of debts we are dealing with a complex, two-step procedure. On the one hand, we are dealing with the obligation to notify third parties other than the assigned debtors, by registering the assignment in the Electronic Archive of Secured Movables, and, on the other hand, the obligation to communicate the assignment to the assigned debtors by any of the means of notification provided by law and described herein.

As regards the successive assignments, Article 1583 paragraph (2) of the New Civil Code provides that the prevailing assignee is the one who registered the first the assignment in the Electronic Archive of Secured Movables, irrespective of the date of the assignment or of the date of communication thereof to the debtor.

Effects of debt assignment. It should be noted that the assignment of debts has, first and furthermost, the same effects as the effects normally associated with the type of the legal instrument enshrining the assignment: sale – purchase agreement, donation, exchange agreement etc. Secondly, debt assignment produces a number of specific effects on the parties in the assignment, on the one hand, and towards third parties, on the other hand[24]. Third parties in a debt assignment transaction are: (i) the assigned debtor, (ii) the subsequent and successive assignees and (iii) the creditors of the assignor.

For purpose of this paper we will confine our analysis to the effects of debt assignment: a) between the parties; and b) between the assignee and the assigned debtor.

a) *Effect of debt assignment between the parties*. Between the parties, the main effect of the debt assignment is the transfer of the debt from the patrimony of the assignor into that of the assignee, with the debt retaining its civil or commercial nature[25]. Thus, the assignee acquires all of the rights that the assignor enjoys in relation to that debt. The assignee may ask the assigned debtor

[23] Published in the Official Gazette of Romania no. 236 of 27 May 1999;

[24] For more details on effects of assignment on third parties see Liviu Pop, *cited work*, p. 236. Corneliu Bîrsan, Constantin Stătescu, *cited work*, p. 365;

[25] Prahova Court Tribunal, civil decision No. 101 of 27 January 2010;

to pay the debt at its par value, regardless of the price paid to the assignor and irrespective of whether the assignment was for consideration or for free[26].

According to the provisions of Article 1568 of the New Civil Code, the assignment of debt will result not only in the transfer of all of the rights enjoyed by the assignor in connection with the debt, but also in the transfer of the guarantees and accessories associated to the debt[27]. However, when payment is secured by a pledge on a movable asset, the assignor cannot surrender the pledged asset to the assignee without the consent of the pledgor. Where the consent of the pledgor cannot be obtained or the pledgor raises objections, the pledged asset remains in the assignor's custody.

Suppose that, in the lapse of time from when the agreement between the assignor and the assignee is concluded and the time when the debt assignment becomes enforceable against the assigned debtor, the assigned debtor makes payments to the original creditor (the assignor), the assignee is entitled, in this case, to claim and receive all that the assignor receives from the assigned debtor. Moreover, under the same circumstances, the assignee is entitled to take actions in order to conserve the assigned right, such as, for example, interruption of the course of extinctive prescription.

The assignee, once acquiring the debt as is in the assignor's patrimony, shall be entitled to receive all the interest amounts and any other proceeds associated with the debt as are due from the moment of assignment[28]. Also, according to Article 1576 of the New Civil Code, unless the assignor and the assignee agree otherwise, the latter is entitled to charge interest and any other debt-related proceeds, which are due but not yet collected by the assignor by the date of assignment.

Where the debt is assigned for consideration, the assignor has also a guarantee obligation to the assignee. Therefore, according to the provisions of Article 1585 of the New Civil Code, the assignor is obliged to guarantee the existence of the debt and its accessories as of the date of the assignment[29]. In other words, the assignor is obliged to guarantee that at the time of the assignment agreement, the debt being assigned is actually existent, that the assignor is the holder of the debt as such, and that no debt extinction[30] has occurred to that date, such as, for example, debt payment or an extinctive prescription.

According to the same Article 1585 of the New Civil Code, the assignor is not liable for the assigned debtor's creditworthiness (*solvabilitate* in Romanian language). It means that, if the assignee cannot obtain payment from the assigned debtor due to the latter's insolvency, the assignee has no right of recourse against the assignor[31]. However, if at the time of debt transfer, the assignor was aware of the assigned debtor's insolvency, the former shall be held liable in the same way as a bad-faith seller is liable for hidden flaws in the sold good.

Nevertheless, given that the rules of guarantee described above are suppletive, the parties may amend them through explicit provisions, called *conventional guarantee clauses*[32]. Such clauses may enhance or restrict the obligation to guarantee.

Under a provision for enhanced warranty obligation, the assignor undertakes to also warrant for the creditworthiness of the assigned debtor. By an express provision to that effect, the assignor may further undertake to warrant the future solvency of the assigned debtor; otherwise, it is presumed that only the creditworthiness of assigned debtor as at the time of assignment is warranted.

Regardless of the extent of the warranty for the assigned debtor's creditworthiness, the assignor's liability is strictly limited to the price of the assignment plus any expenses incurred by the assignee in connection thereof (Article 1585 paragraph (3) of the New Civil Code).

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[26] Liviu Pop, *cited work*, p 237;
[27] Liviu Pop, *cited work*, 236;
[28] Liviu Pop, *cited work*, 237;
[29] Corneliu Bîrsan, Constantin Stătescu, *cited work*, p. 366;
[30] Corneliu Bîrsan, Constantin Stătescu, *cited work*, p. 366;
[31] Liviu Pop, *cited work*, p. 240;
[32] Corneliu Bîrsan, Constantin Stătescu, *cited work*, p. 367;

By a limitation clause the parties may restrict the warranty obligation of the assignor under the law, releasing the assignor from any such obligation[33].

The assignor under a debt assignment for free may not be held liable for guaranteeing the existence of the debt at the time of the transfer or the assigned debtor's creditworthiness. Also, in this case, the parties may agree to establish warranty obligations on the part of the assigned debtor.

However, even where the parties agree to limit the assignor's guarantee obligation, the assignor shall nevertheless be held liable to the assignee for the impossibility of the assignee to acquire the debt in its own patrimony or to make the debt enforceable against third parties due to a personal fault of the assignor. In this case, too, the assignor shall be held liable in just the same way as a bad-faith seller is liable for hidden flaws in the sold good (Article 1586 of the New Civil Code).

In case of a partial assignment, where both the assignor and the assignee are the creditors of one and the same debtor, they will be paid proportionally with the value of each one's debt. This rule applies also in the case of assignees acquiring the same debt in common (Article 1584 of the New Civil Code).

b) *Effects of debt assignment between the assignee and the assigned debtor*. With regard to assigned debtor, debt assignment becomes effective only after fulfilling the publicity procedures, even where there are reasons to believe that the assigned debtor may have indirectly found out about the existence of the assignment agreement[34]. Until the publicity procedures are fulfilled, even if the debt assignment is effective between assignor and assignee, it will not be enforceable against the assigned debtor as well, the latter having the freedom to simply ignore the assignment of the debt and proceed to valid payment thereof directly in the hand of the assignor.

According to the provisions of Article 1582 of the New Civil Code, the assigned debtor may oppose the payment made to the assignor, before the assignment becomes enforceable against him as well, or of any other causes of extinction of obligations as may have occurred to that date, whether or not the assigned debtor is aware of the existence of other assignments. If court proceedings are commenced against the assigned debtor by the assignee, the assigned debtor can defend himself by presenting proofs of payment, obtained from the assignor following the payment, even if the proof is bearing a later date than the date of assignment, provided however that proof must bear a date before the date of notification or acceptance of the debt assignment[35]. Consequently, the validity of these proofs does not depend on the date on which the assignment occurs, in so far as even though the debtor has paid the assignor after the date of assignment, the debtor will still be released of obligation, if the payment has been made before the fulfilment of the publicity procedures[36].

Moreover, the debtor may enforce against the assignee the payment made personally or by its trustee (fideiussor) in good faith to an apparent creditor, irrespective of whether the formalities required by law for enforceability of debt assignment against the debtor or other interested third parties have been fulfilled or not. Payment made to an apparent creditor is distinctly regulated by the New Civil Code under Article 1478[37], whereby payment made in good - faith to an apparent creditor is deemed a valid payment, even if it is later determined that the apparent creditor was not the true creditor.

After fulfilling the publicity procedures, the assigned debtor becomes the debtor of the assignee and, consequently, he may make a valid payment only directly in the hand of the assignee. Also, according to Article 1582 of the New Civil Code, where the debt assignment has become enforceable against the debtor following acceptance, the assigned debtor can no longer enforce

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[33] Corneliu Bîrsan, Constantin Stătescu, *cited work*, p. 366;

[34] Prahova County Tribunal, civil decision No. 101 of 27 January 2010;

[35] Liviu Pop, *cited work*, p. 243. ;

[36] Prahova County Tribunal, civil decision No. 101 of 27 January 2010;

[37] Article 1478 of the New Civil Code– "(1) Payment made in good faith to a known creditor is a valid payment, even if later it is determined that the known creditor was not the true creditor. (2) The known creditor shall be held liable to refund the true creditor the payment received, as per the rules regarding restitution of obligations";

against the assignee the compensation[38] which he could otherwise invoke in relation with the assignor. While Article 1582 refers strictly to the case where enforceability of debt assignment occurs through acceptance of assignment by the assigned debtor, this article is further expanded by the provisions of the second paragraph of Article 1623 of the New Civil Code, according to which a debt assignment which is not accepted by the debtor but which has nevertheless become enforceable against him by any of the other means permitted shall only prevent the netting off (compensation) of those debts of the original creditor that are subsequent to the date the assignment has become enforceable against the debtor.

Note should be made that, in case of successive assignments, the debtor is released of obligation by making the payment under the assignment that has first been communicated to him or which the debtor has accepted first by a written document with certified date.

Assignment of a debt established by registered securities, promissory or bearer securities.

Assignment of a debt established by a credit instrument is now explicitly regulated by the New Civil Code, in the Articles from 1587 to 1592. By their circulation, credit instruments are divided into: registered, promissory notes or bearer securities.

According to Article 1587 of the New Civil Code, to transfer debts incorporated in registered, promissory or bearer securities, the simple free will of the parties is not suffice; the New Civil Code establish a set of rules governing such transfers:

a) in the case of registered securities (*titluri nominative* in Romanian language), the transfer of right by assignment of the debt must be specified both on the transfer document and in the register kept for this purpose by the issuer.

b) in respect of promissory securities (*titluri la ordin* in Romanian language), the endorsement is mandatory, i.e. the assignor (endorser) must sign on the back of the document, specifying (optional) the name of the assignee (endorsee) followed by the handing over of the title[39].

c) in the case of bearer securities (*titluri la purtător* in Romanian language), the debt contained by the bearer security is transferred by the simple physical remittance of the title, with the debtor following to make payment to the bearer of the title. In the case of misappropriation of a bearer security, the person deprived of the security cannot prevent the debtor from paying the debt to the person who produces the security concerned, other than by a court sentence delivered to this effect.

Conclusion

It is our view that, by its provisions in the field of assignment of debts, the New Civil Code successfully clarifies most of the inconstancies occurred in the past between the legal provisions and the legal practice.

Furthermore, the New Civil Code provides an answer to the critics formulated by Romanian scholars to the former regulation of assignment of debts in the Old Civil Code, by implementing through its provisions most of the suggestions formulated in the doctrine.

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[38] Compensation is regulated by the New Civil Code under Title VII – Extinguishment of Obligations, Chapter II, Articles 1616 – 1623;

[39] Liviu Pop, *cited work*, p 235.

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PRIMARY REGIME AS REGULATED BY THE NEW ROMANIAN CIVIL CODE

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Abstract
The regulation of patrimonial relations between spouses shall find a modern approach in the new Civil Code[1]*, according to the legislation of the European countries, which shall provide any family the possibility to choose its matrimonial regime applicable to the concrete situation and interests.*
Moreover, in order to protect the interest of the family and its life environment, the new Civil Code establishes a set of general provisions, applicable to any family, irrespective of the matrimonial regime chosen by the spouses to regulate their patrimonial relations. Even though the legal text summons those norms under the title of „Common provisions"[2]*, the doctrine assumed the name most used in the law systems having similar provisions, namely the „primary regime".*
Among the objectives of this work it is also the analysis of provisions setting up the primary regime applicable to spouses in the new Romanian Civil Code, and also its implications on the protection of the family life from a patrimonial perspective.

Key words: *primary regime, imperative rules, family house, marriage expenses, spouses*

I. Introduction

The regulatory framework on family relationships, which is reflected in the new Civil Code[3], includes many new elements, both concerning personal relations between spouses and their patrimonial relations. The patrimonial effects of marriage become more complex and more suited to the contemporary society.

Since spouses are recognized the possibility to choose the matrimonial regime applicable to their relationship, in most European countries legal systems one may find a minimum set of common mandatory rules for any marriage. We are talking about a mandatory set of rules, most often called the primary regime.

The scope of regulating a primary regime is the establishment of equitable relationships between spouses, as well as a minimum of patrimonial cohesion.

The great interest arising from such a subject, due to the novelty it brings to the Romanian law, the importance of the primary regime for the patrimonial relations specific to any given family and considering the still quite insufficient legal literature in the field we believe that deepening such a subject will be of real support in preparing its practical application.

We will try to meet this goal using an approach that will highlight the specific of the new regulation and will emphasize the reasoning behind the various aspects of the patrimonial effects of marriage contained in the primary regime.

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[1] Adopted by Law no. 287/2009, published in the Official Journal, Part I, no. 511 of 24 July 2009 *brevitatis causa* we shall use the abbreviation "N. Civ. C.".

[2] The above mentioned norms can be found in Section I – „Common provisions", of Chapter VI – „Spouses` patrimonial rights and obligations" of the new Civil Code.

[3] The provisions concerning family law can be found in Section II "About the family" (articles 258-534) of the new Romanian Civil Code, adopted by Law no. 287/2009.

II. General views considering the primary regime

II.1. Notion

Patrimonial relations of the spouses are an extremely important issue, with major implications for family life. The current rules on the topic are obsolete[4] and do not offer the necessary flexibility for an organization adapted to the realities of the contemporary society. In this context, a new Civil Code, which profoundly reforms this matter, represents a genuine progress, salutary in the framework of the contemporary Romanian law.

The new Romanian Civil Code brings a modern approach to the application of matrimonial regimes, which will also require some measures of protection for the material life of the family.

Irrespective of the matrimonial arrangement applicable to marriage, the new regulation provides a set of general imperative rules, which will apply to all families and which will be the support of spouses' solidarity, which expresses, in fact, the essence of the patrimonial side of family life.

We are talking about a series of special rules that apply to certain specific assets, to all marriages, regardless of the matrimonial arrangement governing[5] them. The scope of such rules is to balance the spouses' life conditions during marriage by creating a stable living environment for all family members and a minimum of material and psychological comfort for both spouses and their children, both during marriage and after divorce (until the dissolution of the matrimonial arrangement). As stated, the role of the primary regime is to daily ensure "cohesion in freedom, independence in interdependence."[6]

Perceived as a genuine "constitution" of matrimonial arrangements[7], this set of imperative rules has received different names in other legal systems. Thus, in French legal literature, it was called, for example, "primary regime"[8], "basic overriding status"[9], "basic matrimonial arrangement"[10]; "basic marital status"[11], "primary matrimonial regime or the effects of marriage."[12]

Given that the law includes the regulations under the generic name of "Common Provisions", the Romanian doctrine took over from other legal systems expressions such as "primary regime"[13] and "mandatory primary regime."[14]

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[4] The patrimonial effects of marriage are regulated in Section II - *Spouses` patrimonial rights and obligations* of Family Code, adopted by Law no. 4/1953 and republished in the Official Journal no. 13/18 April 1956, as consequently amended and completed.

[5] Pierre Voirin, Gilles Goubeaux – „*Droit civil. Droit privé notarial. Régimes matrimoniaux. Successions-libéralités*", Tome 2, 24e édition, Ed. L.G.D.J., Paris, 2006, p. 10; François Terré, Philippe Simler – „*Droit civil. Les régimes matrimoniaux*", 4e éd., Ed. Dalloz, Paris, 2005, p. 41.

[6] Philippe Malaurie, Laurent Aynès – „*Cours de droit civil. Les régimes matrimoniaux"*, 4e éd., Cujas, Paris, 1999, p. 45, apud Cristina Nicolescu – „*Consideraţii generale privind regimul matrimonial primar*", Curierul Judiciar nr. 6/2008, p. 58.

[7] Gérard Cornu – „*Les régimes matrimoniaux*", PUF, Paris, 1997, p. 79; Paul Vasilescu – „*Regimuri matrimoniale. Partea generală*", Ed. Rosetti, Bucureşti, 2003, p. 33.

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[9] André Colomer – „*Droit civil. Régimes matrimoniaux*", 10e éd., Litec, Paris, 2000, p. 32.

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[14] Cristina Nicolescu – *op. cit*., p. 56; Paul Vasilescu – „*Regimuri matrimoniale. Partea generală*", Ed. Rosetti, Bucureşti, 2003, p.; Marieta Avram, Cristina Nicolescu – „Regimuri matrimoniale", Ed. Hamangiu, Bucureşti, 2010, p. 111 and the following.

To summarize, we believe that the primary regime is *a set of fundamental and imperative rules, applicable irrespective of the matrimonial arrangement governing the patrimonial relations between spouses and between spouses and third parties.*

The primary regime can not be confused with the matrimonial arrangement applicable to marriage. While the matrimonial arrangement includes all the rules that govern patrimonial relations of spouses and their relations with third parties, the primary regime includes only some common rules, which are essential for the proper functioning of family life and which apply to all spouses, regardless of the matrimonial arrangement chosen.

The matrimonial regime and the primary regime put together represent the patrimonial charter of marriage.

II.2. The aim of regulating the primary regime

The provisions which compose the primary regime can be found in Section 1 of Chapter VI of Book II of "About Family" of the new Civil Code. The provisions of this section apply necessarily to all spouses; they can't conclude any contrary agreement, under the penalty of nullity, unless the law provides for exemption (paragraph (2) of Art. 312 from the new Civil Code).

The protective role of the provisions under the primary regime is achieved through two types of legal provisions: some apply to the normal course of family life, while others apply to extreme situations, of marital crisis.

The first category mainly comprises rules regarding the protection of the family house and the contribution of spouses to marriage expenses, and also some minimal rules concerning the patrimonial side of family life, concerning the application of matrimonial regime, the conventional mandate, the patrimonial independence of the spouses, their right to information and the matrimonial convention.

These are legal rules which try to ensure, on the one hand, a limitation of the spouses' independence in order to ensure the interdependence premises that family life involve and on the other hand, a certain independence of the spouses in their relations. Given that spouses might become individualistic while adopting a separation matrimonial regime or very interdependent in cases when they choose joint matrimonial regimes, regulating a set of minimal imperative rules is likely to balance the family life and to ensure the equality of spouses.

As regards the spouses' relations with third parties, the purpose of applying the mandatory rules specific to the primary regime is twofold: on the one hand, to prevent that the patrimonial situation of spouses holds back the freedom of their civil circuit and their legal autonomy, and secondly, to prevent damage to marriage due to the spouses' autonomy[15].

Most of the provisions of the primary regime are of great practical importance, considering their daily application, which can not be said about all of the rules specific to each of the matrimonial regimes; its specific rules represent the essence of the patrimonial mechanisms necessary for many households[16].

II.3. The specific features of the primary regime

The specific provisions of the new Civil Code regarding the primary regime include the direct patrimonial effects of marriage. This clearly results from the fact that they apply to every family, by the mere fact of concluding the marriage.

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[15] Marieta Avram, Cristina Nicolescu – *„Regimuri matrimoniale"*, Ed. Hamangiu, Bucureşti 2010, p. 113.

[16] A. Colomer – *„Régimes matrimoniaux"*, Litec, Paris, 1990, p. 38; Cristiana-Mihaela Crăciunescu – *„Dreptul de dispoziţie al soţilor asupra bunurilor ce le aparţin, în diferite regimuri matrimoniale"*, Ed. Universul Juridic, Bucureşti, 2010, p.18. In a more pessimistic note, J. Flour said: *„En ce sens, le prétendu régime primaire est celui sous lequel on vit. Le régime proprement dit est celui sous lequel on meurt*" (apud J. Pineau, D. Burman - *„Effets du mariage et régimes matrimoniaux"*, Ed. Themis, Montréal, 1984, p. 16).

Even if spouses will be able to choose, by convention, the matrimonial regime applicable to each marriage, depending on their interests and preferences, the rules provided under the primary regime will be compulsory applicable.

The imperative nature of these legal provisions is expressly provided in paragraph (2) of Art. 312 of the new Civil Code, which states that they can not be eluded unless the law provides such a possibility.

Therefore, the primary regime applies to all families, together with the matrimonial regime which spouses have agreed to follow in their patrimonial relations.

Unlike matrimonial regimes, which according to the new Civil Code will have a changeable nature, meaning that they can be modified during marriage, the specific rules of the primary regime can not change; they shall be common to all marriages concluded in Romania and shall not depend on the will of the spouses. Therefore, the marriage itself implies that spouses agree by default to the application of the rules specific to the primary regime.

III. Provisions of the primary regime applicable to spouses during normal cohabitation

III.1. Overview

During normal times, of marital harmony, the primary regime comprises a combination of rules, some specific to separation regimes and other to joint arrangements, aimed at establishing a balance between spouses in terms of patrimonial relations, as well as a fair relation between the couple's necessary cohesion and the autonomy of each spouse.[17]

They are the essential rules that govern the patrimonial side of family life and the common denominator of patrimonial relations between spouses, as well as between them and third persons. Their daily application is likely to ensure a minimum of patrimonial cohesion for the couple[18], whatever the matrimonial regime applicable, and also the necessary independence of each spouse.

III.2. Family cohesion

The provisions of the primary regime intended to ensure family cohesion are provided in most states laws that enable the spouses to choose between the various matrimonial regimes. These relate primarily to providing special protection to the family house and to pay the marriage expenses. [19]

III.2.1. Family house

According to article 309 paragraph (2) of the new Civil Code, one of the spouses' personal duties is to live together; they may decide to live separately only for serious grounds. The purpose of marriage, to found a family, can only rejoin spouses in a common housing that they manage together. The unjustified abandonment of the common dwelling or the refusal by one spouse to live with the other spouse is considered a violation of the spouses' obligation to live together and may be a serious ground for divorce. [20]

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[17] Cristiana-Mihaela Crăciunescu – „*Dreptul de dispoziție al soților asupra bunurilor ce le aparțin, în diferite regimuri matrimoniale*", Ed. Universul Juridic, Bucureşti, 2010, p. 19.

[18] Cristina Nicolescu – „*Coeziunea patrimonială a cuplului – finalitate a regimului matrimonial primar*" (II), Curierul Judiciar nr. 7/2008, p. 60.

[19] In some legal systems, the primary regime establishes an even stronger interdependence between spouses. One example is offered by the Quebec Civil Code, which governs the establishment of a primary patrimony, consisting of the property used as the family house, the car used by the family's members for transportation, as well as certain rights acquired during marriage. In this regard, please see: Danielle Burman et Jean Pineau – „*Le patrimoine familial*", Les Editions Thèmis, Universite de Montreal, Quebec, p. 1991, p. 7; Marieta Avram, Cristina Nicolescu – „*Regimuri matrimoniale"*, Ed. Hamangiu, Bucureşti 2010, p. 112.

[20] Marieta Avram, Cristina Nicolescu – „*Regimuri matrimoniale"*, Ed. Hamangiu, Bucureşti 2010, p. 115.

A special protection of the house where spouses leave their family life[21] was given in the legislation of many countries, based on the consideration that the living environment is very important for the balance and normality of the family, linking the personal and patrimonial effects of marriage.[22]

The concept of family housing is new in the Romanian Family Law. There is a legal definition of this concept in article 321 of the new Civil Code, according to which "family house is the common dwelling of the spouses or, failing that, the home of the spouse where the children are". One can see that the home is determined by a factual situation -that of either both spouses or one of the spouses and the common children actually living in a building. Difficulties in establishing the family house might arise, for example, when spouses have no children and live in several buildings, alternative, or when the spouses have several children, who live separately, some with their mother and other with their father. For such cases the law does not provide for the possibility of establishing several buildings as family house.

Therefore, it is not imperative that the family house should correspond to the spouses' domicile; one can not exclude cases where spouses have different domiciles, but in fact, live together. In such cases, the family house is different from the domicile of one or both spouses, and is the building where the family actually lives.

As far as the regulation on the primary regime is concerned, the concept of "family house" involves two elements: an objective, material component, represented by a housing estate and a subjective, voluntary component, which is the expression of the spouses' will to use it as the family's residential property. [23] Therefore, not every building that is owned or used by spouses is the family house, but only the one that serves the above mentioned purpose.

In terms of legal nature, the building representing the family house may be a shared asset or the exclusive ownership of one of the spouses, or it can be a leased building or a building used by spouses by virtue of another legal title, without being in their property.

The building representing the family house can be registered in the land registry as having such a destination, at the request of either spouse, even if he/she is not the owner. Thus, if the building used as family house is the exclusive ownership of one's spouse, it can be registered in the land registry with this destination even at the request of the other spouse.

The failure to register the building in the land registry as the family house affects the legal documents concerning that building, in breach of the law, as required by article 322 paragraph (5) of the new Civil Code.

The regulations contained by the primary regime concerning the protection of the family house refer to the spouses' right to dispose of the building having such a destination and the goods that furnish or decorate it.

Thus, in the case of the building determined as the family house that is the exclusive ownership of one of the spouses, the property right itself is concerned, in the sense that the spouse who owns it gives up a part of his/her prerogatives by the mere fact of such a destination. He/she can not dispose of this asset without the written consent of the spouse who does not own the building (article 322 paragraph (1) of the new Civil Code). [24] Thus, the property right lacks one of its fundamental attributes, namely the right to dispose of assets.

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[21] The concept of family housing can be found in several law systems. Thus, the protection of family housing can be found in article 215 of the French Civil Code and articles 401-405 of the Civil Code of Quebec, which were also a source of inspiration for the Romanian legislature (in this regard, Marieta Avram, Cristina Nicolescu – *op. cit.*, p. 124), or article 169 of the Swedish Civil Code.

[22] François Terré, Phillippe Simler – *"Droit civil. Les régimes matrimoniaux"*, Ed. Dalloz, 4 édition, Paris, 2005, p. 51.

[23] Marieta Avram, Cristina Nicolescu – *op. cit.*, p. 118.

[24] The content of paragraph (1) of art. 322 of the N.Civ.C. will change through article 49, section 3 of the Act implementing the Law no. 287/2009 on the Civil Code (which is currently a draft law that can be found on the website

Also, the law provides for the obligation of gathering written consent from the spouse who did not participate to the settlement anytime he wishes to dispose of "rights on the family house". Which are the rights included? In the absence of a legal provision, we believe that it comprises of all patrimonial rights recognized by law to the owner of the property right (rights *in rem*, principal rights and ancillary rights, as well as debt collection rights) or to the owner of a lease contract.

Moreover, none of the spouses can dispose of the assets that furnish or decorate the family house and cannot be displaced from the home without the written consent of the other spouse, regardless of who owns them (art.322 para (2) new Civil Code)[25].

Consequently, any of the spouse who needs the written consent of the other or, if absent, of the authorization of the guardianship court, in order to settle any act of disposal regarding the building that constitute the family house or the assets that furnish or decorate it. Otherwise, the spouse who did not give his consent to the settlement can request its annulment within a year. The date will be calculated from the time he became aware of the settlement, but no longer than a year calculated from the date of ceasing the matrimonial regime, if the family house was registered in the land registry or if the third party knew, in any other way, that the building was a family house. If the third party was not informed or did not become aware in any other way, the spouse that did not participate to the settlement can request only damages from the other spouse[26].

The authorization of the guardianship court concerning a settlement on the family house made by one of the spouses can only be requested only if the other spouse's refusal is not based on a legitimate reason (art.322 para (3) new Civil Code). The law does not provide for the conditions necessary to appreciate if the reason invoked by one of the spouses to refuse the settlement on the family house is legitimate; thus, we consider that such situation can be encountered when the lack of consent is purely meant to tease the other spouse, the settlement not infringing in any way the family's interests.

In the case of moving out of the family house of assets that furnish or decorate it, by the owner spouse, without the written consent of the other spouse, the law does not clearly provides for the conditions in which the other spouse can act. By the strict application of the same legal provisions, the latter will have the possibility to ask the court to oblige the owner spouse to bring back the moved assets or to pay for damages, if the home was not registered in the land registry. Nevertheless, we consider that, even if the home was not registered in the land registry, the spouse that did not express his consent can request to bring back the assets in the family house, and not for damages, as long as the assets were not sold and, thus, no third party will be prejudiced (such a third party should be protected by registering in the land registry or by any other means of information).

In the case of rented houses, the law provides for ensuring the locative rights of both spouses, the new Civil Code providing an own locative right for each spouse, even if only one is the holder of the contract or even if the respective lease is completed before the marriage[27].

These regulations in the new Civil Code, protecting the family house, find their base in preventing selfish manifestations of one of the husbands, who, by selling on his own the family

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of the Ministry of Justice at http://www.just ro/Sections/PrimaPagina_MeniuDreapta/Proiectulnouluicodcivil/proiectul deLegepentrupunereainaplicareaLeg/tabid/1452/Default.aspx), to include the specification that none of the spouses can conclude legal documents that might affect the use of the family house without the written consent of the other spouse.

[25] It was considered that, by this limitation, the risk of moving and selling the assets from the family house without the consent of both spouses will be eluded, respecting thus the special protection regime (Cristina Nicolescu – „*Coeziunea patrimonială a cuplului – finalitate a regimului matrimonial primar*" (II), Curierul Judiciar nr. 7/2008, p. 64.

[26] Cristiana-Mihaela Crăciunescu – „*Dreptul de dispoziție al soților asupra bunurilor ce le aparțin, în diferite regimuri matrimoniale*", Ed. Universul Juridic, Bucureşti, 2010, p. 168.

[27] Such provision existed in the Romanian law, being stated by Law no. 5/1973 on administering the locative fund and regulating the reports between owners and tenants. The Law no. 114/1996 did not took over the same provision.

house or by selling the assets that furnish or decorate it, can lack the family its home or affect the known environment, thus degrading the quality of the family life.

Such regulations can seem exaggerated, compared to common law, by lacking some of the attributes of the property right, but their impact is diminished by the final purpose of protecting the family and by their intrinsic acceptance on marriage.

The application of the specific provisions of primary regime is completed with thus specific to the matrimonial regime that governs the patrimonial reports between spouses.

For example, when applying a matrimonial regime of community, the building that represents the family house can be owned by either one of the spouses or be a common asset. For the family house that is a common asset, the interdiction to sell is doubled by the law of co-owning in the field of community of goods, according to which the disposal acts on common assets can be only made with the consent of both spouses[28].

If the family house is exclusively owned by one of the spouses, the written consent of the other spouse is necessary in order to conclude disposal acts on the building, according to provisions of art.322 para (1) new Civil Code Such consent only signifies the lack of opposition to concluding a legal act that will infringe on life conditions, because the spouse that has no property right could not become a part to the contract. In the case of alienating the family house by the owner spouse, he will be the sole beneficiary of the obtained price, that will enter his patrimony as personal asset (even within the matrimonial regime of community of goods, the assets or sums of money that substitute for a personal asset are a personal asset, according to art. 340 lit. g new Civil Code), being in the presence of real subrogation.

As it has been shown in the doctrine[29], the principle of the explicit consent of both spouses, for all disposal acts concerning the family house, does not determine that the family house cannot be followed for debts contracted by one of the spouses, without having the consent of the other spouse.

The lack of express consent of both spouses is admitted on concluding some juridical acts that concern the family house, such as disposing by will of the building or requesting for partition if the family house is in joint possession with another person.

Also, when the family house is owned based on a lease, ancillary to a work contract, it is acceptable that, in order to ensure the freedom of exercising the profession, the holder of the lease can resign without the written consent of the other spouse, even if, by doing so, the family loses the house[30].

The spouses' house can also be submitted to acts of forced alienation, like expropriation, without the consent of any of the spouses.

The consent of the spouse that does not participate to the settlement must be written, according to provisions of art.322 para (1) new Civil Code Taking into consideration that the law does not impose the form of the authentic act, we consider that the consent can be expressed in an act under private signature, thus being requested *ad probationem*.

The doctrine concluded[31] that, taking into consideration that it is about a building that must be registered in the land registry, are also applicable provisions of art. 1244 new Civil Code, according to which, the conventions that modify or constitute rights *in rem* to be registered to the land registry must be completed by authentic acts, under the sanction of void. Thus, if the building is common asset or shared property, taking into consideration that each spouse becomes a part of the disposal

[28] Marieta Avram, Cristina Nicolescu –*op.cit*, p.122

[29] Marieta Avram, Cristina Nicolescu –*op.cit*, p.124; see also Gerard Cornu- "Les regimes matrimoniaux", 9e edition mise a jour, PUF, Paris, 1997, p.90.

[30] Cristina Nicolescu – „*Coeziunea patrimonială a cuplului – finalitate a regimului matrimonial primar*" (II), Curierul Judiciar nr. 7/2008, p. 65.

[31] Marieta Avram, Cristina Nicolescu –*op.cit*, p.126.

act, and that the consent of both spouses must be requested as they are co-owners, the act must have the *ad validitatem* form provided by art. 1244 new Civil Code.

We also believe that, in such a hypothesis, the co-owner spouse who does not participate to the settlement will express his consent on exerting his own right, and this will have the value of a conventional mandate between spouses, and not that of a tacit consent concerning the settlement made by the other spouse. Consequently, the act by which the spouse who was not present to the settlement contest it must have the same form as the initial act of disposal of an common asset subject to registration in the land registry, namely authentic form.

Regarding the content of the act expressing the consent, in the doctrine[32] it was debated if an agreement in principle on behalf of the spouse that does not participate to the settlement is sufficient, or if it is necessary for the consent to be given according to the conditions of the settlement. We believe that the content must differ, according to the specific conditions.

Thus, if the asset is solely owned by the spouse that will conclude the disposal act, the other spouse will only express consent for not opposing. The settlement will not provide for rights or obligations for this spouse, thus his consent will be only one in principle, in no way relevant to the concrete conditions of the settlement.

On the other hand, when there is a common asset, the settlement will be opposed to the spouse who did not participate, creating rights and obligations. In such situations, the spouse will have to express his consent concerning concrete conditions of the settlement[33].

Finalizing the settlement without the written consent of the spouse who does not participate is sanctioned according to provisions of art. 322 para (4)-(6) new Civil Code

Thus, if one of the spouses disposed on a building registered in the land registry as family house, the spouse who did not express his consent might appeal against the act at the guardianship court, which can dispose its annulment. The deadline for contesting is of one year, calculated from the time he became aware of the settlement, but no longer than a year calculated from the date of ceasing the matrimonial regime.

If the building was not registered in the land registry, the damaged spouse by the conclusion of the act without his consent will not be able to request damages but from his spouse, except the situation in which the third party knew about the quality of family house.

Thus, the relative invalidity of the act concluded on the family house by one of the spouses without the express consent of the other one is under a sanctioning regime different from the common one.

III.2.2 The marriage expenses

Another way in which the new law contributes to the strengthening of the family cohesion is including, within the primary regime applicable to spouses, some provisions concerning their obligation to ensure mutual material support and to both contribute to the marriage expenses.

The obligation to ensure mutual material support, part of the patrimonial effects of any marriage, is also present in the current law, namely art. 2 of the Family Code, which states the general framework of family relationships and that family, are indebted to ensure each other material and moral support.

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[32] Cristina Nicolescu – „*Coeziunea patrimonială a cuplului – finalitate a regimului matrimonial primar*" (II), Curierul Judiciar nr. 7/2008, p. 65.; Marieta Avram, Cristina Nicolescu –*op.cit*, p.128.

[33] In the French doctrine and jurisprudence, it was considered that the limitation of the spouse's consent when admitting in principle the settlement is not sufficient, the consent being expressed also concerning the constitutive elements of the settlement. See also: François Terré, Philippe Simler – „*Droit civil. Les régimes matrimoniaux*", Ed. Dalloz, 4e édition, Paris, 2005, p. 57.

Appreciated as the most comprising form of patrimonial assistance between spouses[34], the obligation to ensure material support is specified in any form of material assistance that spouses give each other.

The Romanian doctrine interpreted the content of this obligation, peculiar to spouses, as including the obligation to support the expenses of the marriage (provided for in art.29 Family Code) and the obligation between spouses to support each other (provided for in art. 86 of the same Code)[35].

The new Civil Code also comprises a series of provisions that regulate participation to marriage expenses, namely "Marriage expenses'[36]. The regulation starts by setting the general obligation of spouses to grant each other material support, thus materializing the feelings that fund a family.

The obligation to contribute to the expenses of the marriage is regulated by art.325 para (2) of new Civil Code, namely that for each spouse the contribution is due according to his incomes. This solution is also present in the new law[37].

The new Civil Code also provides for the possibility to modify this proportion by matrimonial convention, which is an institution not found in the actual Family Code. But not even according to this new provision, it will not be possible for only one husband to support marriage expenses, a convention bearing such provisions being considered unwritten (art.325 para (3) new Civil Code). This is a sanction that, in what concerns its effects, can be assimilated to void, taking into consideration that it cannot be validated in any way.

Obviously, as long as the spouses are in a good relationship, they can derogate from the provisions on the contribution to the marriage expenses, established by law or matrimonial convention. The problem of establishing each spouse's contribution arrises only when the spouses are in a conflict[38]. In such situations, the court will not be able to force the spouse that refuses to comply to his obligation but for his share according with the convention or the legal framework stated by art. 325 para (2) new Civil Code.

The notion of "marriage expenses" was determined by the Romanian doctrine widely, including, as well as the everyday cost of living (groceries, fuel, etc), costs concerning the upgrade and education of children and costs concerning the spouse found in incapacity to work[39].

The new Civil Code provides clearly that the work of any of the spouses in the household and for raising the children represents a contribution to the marriage expenses (art. 326 new Civil Code)[40].

The evaluation *in concreto* of the marriage expenditures shall be made on each case, according to the economic evolution of society and the patrimonial situation of the family, this having a variable[41] content.

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[34] I. Albu – „*Dreptul familiei*", Ed. Didactică şi Pedagogică, Bucureşti, 1975, p.115.

[35] Emese Florian – „*Dreptul familiei*", 3rd Edition, Ed. C. H. Beck, Bucureşti, 2010, p. 97; Dan Lupaşcu – „*Dreptul familiei*", 5th Edition, amended and updated, Ed. Universul Juridic, Bucureşti, 2010, p.105.

[36] See subsection 3 "Marriage expenses", part of Section I "Common provisions" of Chapter IV "Patrimonial rights and obligations of spouses", Title II "Marriage", in the new Civil Code.

[37] Art. 29 of the Family Code states that: "The spouses have to contribue, according to their means, to the marriage expenses".

[38] Cristiana-Mihaela Crăciunescu – „*Dreptul de dispoziţie al soţilor asupra bunurilor ce le aparţin, în diferite regimuri matrimoniale*", Ed. Universul Juridic, Bucureşti, 2010, p. 22

[39] I. P. Filipescu, A. I. Filipescu – „*Tratat de dreptul familiei*", 8th Edition revised and completed, Ed. Universul Juridic, Bucureşti, 2006, p. 66; Marieta Avram, Cristina Nicolescu- *op.cit*, p. 142; Emese Florian- *op. cit*., p.98

[40] This a solution also present in the Romanian doctrine and jurisprudence. See also: Emese Florian- *op. cit*., p.106

[41] Dan Lupaşcu – op.cit. p.105; Cristina Nicolescu – „Patrimonial cohesion of the couple – goal of matrimonial primary regime" (II), Curierul Judiciar nr. 07/2008, p.70.

The new regulation sets the condition of fulfilling the obligation to contribute to the marriage expenditures on a privileged position, according to its importance in ensuring the good functioning of the common living. Thus, the liberty of each spouse to exert a profession and to dispose of the incomes, as regulated by the provision of art.327 of the new Civil Code is accompanied by the mention on the necessity to fulfill this obligation.

Also, appraisal of the contribution to the matrimonial expenditures constitutes one of the elements according to which it shall be evaluated the right for compensation of the spouse who effectively participated to the professional activity of the other spouse.

Enforcement of the obligation to contribute to matrimonial expenditures has a successive and permanent nature. As an effect of marriage, it shall enforced during its entire duration, irrespective of the fact that spouses live together or are separated, including during the divorce procedures[42].

Supporting the matrimonial expenditures is an obligation that each of the spouses must fulfill according to the available means, from the common or independent goods in his or her property. This may be fulfilled, according to the situation, in money or in goods.

Generally, this obligation is enforced without counting the contribution of each spouse, according to the actual possibilities and the common living exigencies.

III.3. Mutual independence of spouses

The legal provisions specific for the primary regime provide spouses a normative framework optimal for affirming the independence of each of those, but only if their living within the family is not affected, thus creating a necessary balance for a normal social and personal life[43].

Spouses` patrimonial independence is regulated on several levels, namely: in the exertion of a profession, as regards the possibility to conclude legal acts having a patrimonial character, or in the relations with banks.

Spouses` independence in the professional area is regulated by art.327 of the new Civil Code on two issues: the possibility of each spouse to exert a profession, without the consent of the other spouse, and also the liberty to dispose of the incomes, with the observance of the obligations for contributing to the matrimonial expenditures.

Thus, choosing a profession by a spouse is not subject to a prior consent granted by the other spouse, irrespective of the nature of the profession. But it is also possible that exerting a certain profession might produce to the family some patrimonial or moral damages. For example, a profession exerted by one of the spouse might worry the other spouse as regards the education of their common children, or a profession involving high financial risks, exerted by one of the spouses, may represent a threatening for the patrimonial balance of the family.

A question arises: what is the solution that one spouse may adopt in order to end such situations? We appreciate, together with other authors, that such situation can only be solved by mutual consent of the spouses, eventually by involving mediation procedures, otherwise the only option being the divorce[44].

The liberty of choosing a profession by the spouses also attracts the possibility to change the profession according to the same conditions, thus without the consent of the other spouse.

Also, the right to renounce at the exertion of a profession, by resignation, belongs to each of the spouses, independent of the others will, even if this renunciation would affect the family interests (e.g. if the family dwells in a real estate with a title accessory to the labor contract).

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[42] Marieta Avram, Cristina Nicolescu – *op.cit*., p. 147.

[43] In doctrine it was stated the goal of regulating those norms within the framework of primary regime is, especially in the situation of applying communitarian regimes, that the „autonomy of the married person shall not be entirely sacrificed on the community altar. (Cristina Nicolescu – "*Spouses` economic and social independence as outlined by the provisions of the primary matrimonial regime* (III), Curierul Judiciar no.9/2008, p.91).

[44] Marieta Avram, Cristina Nicolescu – *op.cit*, p.150, on the same opinion, B. Vareille – "*Le regime primaire*", in Michel Grimaldi (coord.) – "*Droit patrimonial de la famille*", Dalloz, Paris, 1998, p.47.

The second aspect on the professional independence of spouses refers to the liberty of each spouse for disposing of the incomes resulted from a profession. Article 327 of the new Civil Code conditions this right only to the observance of the obligations incumbent to its titular for the contribution on marital expenses and for observing the special provisions of law.

It should be reminded the norms set up by the primary regime constitute only basic rules applicable to each marriage and shall be supplemented by those of the matrimonial regime concretely applicable to each family; thus, if the matrimonial regime is of separation, the incomes from a profession shall be the own good of the spouse able to obtain them, and if the applicable regime is one of community, those could become common goods, according to law. In the latter case, the right of disposal belonging to the titular spouse shall be exerted in a different manner, according to certain specific rules.

It is also possible that spouses are willing to collaborate on the grounds of their agreement for developing a professional activity by one of them, in a manner going further to the obligation of mutual material support or that of contributing to the matrimonial expenditures. For those situations, article 328 of the new Civil Code provides for the right of the spouse who exerted this kind of voluntarily activity for which he/she did not claim or receive a remuneration, to obtain compensation, if the other spouse was enriched. This issue regards a special application of the principle of unjust enrichment in the relationship of spouses[45].

We appreciate that such compensation could be obtained by an agreement of spouses or by judicial means, during the marriage or within the divorce proceedings for the allotment of spouses` common goods.

Another situation when the specific dispositions of the primary regime provided for by the new Civil Code regulates the patrimonial independence of spouses refers to the spouses right to conclude any legal acts between them or with other persons, if not provided otherwise by the law (article 317 point (1) new Civil Code).

This right, thus provided for, awards to each spouse a larger or smaller degree of patrimonial independence, according to the matrimonial regime concretely applicable to each family, because the law regulates the spouses` right of disposal in a different manner according to the regime.

The biggest independence of each one of the spouses is manifested in the relationship with the banks. Also, in the framework of new regulation, any spouse shall be able to act alone, without the consent of the other spouse, for constituting bank deposit and for acts related to it.

Thus being provided for within the primary regime and without mentioning any exceptions or possibility to negotiate, this independence shall be applicable to all spouses, irrespective of the matrimonial regime governing the patrimonial effects of marriage and of the legal nature of funds deposited to the bank. It is a liberty that spouses will not be able to limit by a convention, because it is disposed by an imperative provision of the law.

Consequently, in the relations with banks, any spouse shall act as a bachelor, being able to open accounts and make any operations related to those with the consent of the other spouse.

Furthermore, according to the provisions of article 317 point 3 new Civil Code, in the relationship with the bank, the spouse titular of the account shall keep the independence on the right for disposing of the deposited funds even after the end of the marriage or after the divorce, excepting the case when a court decision provides otherwise.

On the grounds of those legal provisions, it was appreciated[46] the bank shall not be liable for an eventual abuse of power made by the depository spouse, excepting the case when the bank acts together with the client spouse, but in this situation the fraudulent intention must be proved by the interested person.

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[45] Cristina Nicolescu – "*Spouses` economic and social independence as outlined by the provisions of the new primary matrimonial regime*" (III), Curierul Judiciar, no. 9/2008, p.96.

[46] Cristina Nicolescu – "*Spouses` economic and social independence as outlined by the provisions of the new primary matrimonial regime*" (III), Curierul Judiciar, no. 9/2008, p.98.

Because in the relationships between the spouse and the bank are applicable special rules, removing the co-management mechanism for the common goods, specific to the matrimonial community regime, the credit institution can not interrupt the normal functioning of an account only at the request of the other spouse, allegedly harmed, but it is necessary a court decision to this end[47].

This independence, quite generously regulated by the new Romanian Civil Code within the framework of the primary regime, it is somehow alleviated by setting a right to informing each spouse and the correlative obligation for making possible to exert this right.

The absolute novelty in the Romanian family law, the spouses` mutual obligation on informing each other on the goods, incomes and debts results from the provision of article 318 N.C.C, described with the marginal name of "right to information".

Observing this right and the correlative obligation will be possible to be imposed even by judicial means, the tutelage court having the competence to oblige the plaintiff's spouse or any other person (if that person is not compelled to preserve the professional secret) and to provide the required information and to deposit the necessary evidence. The law also sets up a relative presumption, according to which the claims of the plaintiff spouse are true until when, according to law, the information required may be obtained only at the request of the defendant spouse who refuses to make the request.

IV. Provisions of the primary regime applicable to spouses during periods of matrimonial crisis

The primary regime regulated by the new Romanian Civil Code is not limited to regulating some imperative legal norms which shall guide the functioning of matrimony during the normal periods, but also sets up certain mechanisms applicable during the periods of matrimonial crisis.

Any family may be confronted, sooner or later, with unfortunate periods, in which the selfishness or the recklessness of one of the spouses, or with some circumstances independent to the will of spouses that may endanger the normal family life, including the patrimonial relationships.

For this kind of situations, the Romanian legislator confers to the tutelage court the competence to interfere for solving the problems, by providing two specific mechanisms, namely the judicial extension or limitation of the power for one of the spouses. Those mechanisms, together with the legal amendment of the matrimonial regime (which shall not be a part of the provisions composing the primary regime), will allow the saving of marriages in which the normal development of spouses` patrimonial relations becomes impossible, at least for a period.

The first mechanism available for the tutelage court in order to interfere in the situations when one of the spouses is not able to express his/hers will is the so-called "legal mandate", regulated by art.315 new Civil Code In such situation, the court may approve that the other spouse shall represent the other spouse who is not able to manifest his/hers will in the exertion of the rights granted according to the matrimonial regime. Thus, we discuss about an extension of the powers for the spouse asking for this approval, in the framework of a mandate for which the court shall determine conditions, limits and period of validity.

The judicial mandate can not be granted without a time limitation, because otherwise it would amend the applicable matrimonial regime, fact not allowed by law in this form. When the conditions requiring the setting of a legal mandate have disappeared, the rationale for its existence will no longer exist, thus being temporarily by its nature.

Also, by setting the limits and conditions within which the judicial mandate may be exerted it is also ensured the concluding of the urgent and necessary acts for the proper functioning of the matrimonial regime, in order to surpass the crisis period of the respective marriage, so that when the

[47] For more details see also Marieta Avram – "*Spouses mutual independence on bank deposits*", Pandectele Romane, Supplement no.2/2006 *in honorem* Corneliu Bîrsan, Liviu Pop, p.25

spouse who was unable to express its will got over this situation, he/she will be able to regain the powers temporarily took over by his/hers spouse.

This is a solution that, even though can not serve for solving the matrimonial conflicts generated by the unjustified answer of a spouse to express its consent in order to conclude certain necessary and useful acts for the family, has the vocation to cover a great diversity of practical cases[48].

The second situation of family crisis that may ask for an intervention from the tutelage court is that regulated by article 316 new Civil Code on the case when a spouse concludes legal acts by which he/she gravely endangers the family interests. In those situations, the tutelage courts shall be able to temporarily limit the power of the spouse who concludes acts damaging the family interest, by conditioning the use of disposal right on certain goods to the express consent of the other spouse.

This measure may be adopted by the tutelage court only for a limited period, which could be prolonged for at most two years.

Being a measure affecting the validity of certain legal acts, it is subject to forms of immovable or movable publicity specific to those goods, in order to be known by the potential contractors. This is because the same article of the new Civil Code provides the sanction of annulling the acts concluded without the observance of court decisions that may be required by the harmed spouse within a term of one year since the acknowledgement of the act.

If the applicable matrimonial regime is one of community, for the common goods those provisions shall be applicable together with those specific for the matrimonial regime, provided by articles 346 and 347 new Civil Code.

Both measures can be adopted only in exceptional situations and have a temporary, provisional and precarious nature, so that may be amended or ceased when the circumstances generating their pronunciation have ended or changed.

V. Conclusions

If the Romanian legal system shall return to a regulation which provides to spouses the possibility of choosing the matrimonial regime governing their patrimonial relationships, it is more then welcome the adoption of a set of fundamental, imperative legal norms ensuring the equality of spouses and a fair percentage between their independence and their interdependence.

The daily functioning of any marriage shall find the balance and security of a quiet home within the application of specific norms on the primary regime, but also a balance in their contribution to the marital expenditures and also the necessary independence for developing the professional activity of each spouse.

For more difficult periods, of marital crisis, the same primary regime will provide solutions for a series of problems, thus being able to save the marriages from the appearance of certain conflicts with consequences that could affect the scope of marriage.

We appreciate that for a correct, efficient and unitary application of the matrimonial regime provisions, a continuation of the exhaustive research of the primary regime, compared to the matrimonial regime provided for by the new Romanian Civil Code, it would be welcome.

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[48] See also Cristina Nicolescu - Adapting the matrimonial regime according to the situation of family crisis” (IV) [in Romanian], in Curierul Judiciar no.10/2008, p.26.

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THE NULLITY OF THE JURIDICAL PERSON IN NEW CIVIL CODE

CRISTIAN GHEORGHE[*]

Abstract

The nullity of the juridical person is a notion without correspondence in the old civil law theory. In fact the regulation of the juridical person is a matter that enters relatively recent civil law because in traditional approach civil law dealt with natural persons and associations of natural persons only.

The difference between the nullity of the agreement of association and the nullity of the juridical person itself, born by such association, is clearly revealed by the law. The two notions are still linked. One cannot imagine a nullity of the agreement without the nullity of the legal person born by such agreement. Nevertheless the nullity of the juridical person is laid down independently, comprising limited cases of occurrences.

The regulation of the nullity of the juridical person finds out its correspondence in the Company Law. The nullity of the company has a distinct regulation, in Company Law, in line with the regulation of the nullity of the juridical person.

In this case the civil law imported the notion from commercial law in order to limit the incidences of the nullity aiming the security of the civil circuit and the interest of the third persons.

In a general accepted way, nullity represents a civil sanction which impedes the effects of an act concluded in a way that breach the law. The principles of the effects of the nullity are well recognized and accepted by scholars but the sanction of nullity, applied at a superior level, of the juridical person, has a totally different effects than the old nullity.

Key words: *juridical person, the nullity of the juridical person, New Romanian Civil Code, nullity of the company.*

Introduction

Besides the general provisions of the nullity, which have a precise legal base in the new legal system, the new Civil Code comprises special cases for the institution of nullity.

In all area where the legislator focuses his interest there are explicit civil sanctions remembering the nullity.[1]

The nullity of the company and the nullity of the articles of association expose different characteristics than the general notion of nullity.

The nullity of the legal person from the new Civil Code has its roots in European and … commercial regulation. It is not difficult to realize that the nullity of the legal person follows closely the nullity of the company in the way the latter is laid down in Company Law.

The new Civil Code thoroughly regulates the legal person in the framework of the civil law. This regulation comprises the modern provisions regarding the nullity of the company too, translated, *mutatis mutandis*, in the general domain of legal person[2], irrespective of civil or commercial status.

This approach brings in civil law an original regulation, a *sui generis* nullity, if not a sanction different from the old nullity.

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[1] For example, Art. 66, 144, 147, 172, 196, 197, 206, 207, 215, 216, 293, etc. It is easy to observe the legislator's tendency to underline the kind of nullity: relative or absolute ones.

[2] New Civil Code, Art. 196.

Romanian specialized literature has already focused on the implementation of the nullity of the company in commercial branch of law[3]. The scholars studied and revealed special effects of the nullities and their characteristics[4].

An approach of the nullity of legal person cannot fail to observe the roots of regulation. Secondary European Law (Company Law Directives)[5] was very carefully in order to protect the third party rights in connection with company, to insure a level playing field for all the participants in the European common market. This original law was repealed in 1999[6] and replaced with an evolve directive dealing with the same subject: protection of third parties. The main principle remain in place: cases in which nullity can arise and the retroactive effect of a declaration of nullity are both limited, further more there shall be a short time limit within which third parties may enter objection to any such nullity.

These are the roots of the Romanian regulations about special commercial nullity.

The nullity of the juridical person as civil law institution will enjoy an increased interest from scholars after the enforcement of the new Civil Code.

The nullity of the agreement of association

The nullity of the articles of association, the agreement of association, from new code shall follow the implementation of subject of the legal person nullity. The aim of founding of the legal person asks for synchronization of the two regulations. As it happened in commercial law too, cannot be conceived a nullity of the agreement the legal person is found on outside of the legal person nullity itself (putting apart the partial nullity that ignores such synchronization).

The regulation of the agreement of association comes with a new element: it enforces the express nullity only. As the legislator stated, in this area virtual nullity are not longer available. The nullity of the agreement of association (simple society agreement in civil law) is applicable only in the case of breach of law which contains express nullity sanction. The law states an exemption: the nullities engaged by the breach of general conditions laid down for the formation of the contract remain active.

In fact the sanctions in this field make possible only the express nullity, for the rest a different mechanism, the "unwritten" sanction, being employed. The law declares unwritten the provisions of the association agreement that breach the law, unless the express nullity is provided[7].

The practitioners shall find out express nullities related to this subject to study the cases of nullity involved. They should scrutinize the law for express nullities.

Among provision on association agreement we will find only one provision with express nullity that govern the formal conditions and the minimum content of the agreement: the contract which establish a legal person shall be executed in written form and shall stated the person of the

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[3] Carpenaru, St. D., *Tratat de drept comercial roman*, Bucharest: Universul Juridic, 2008; Gheorghe C., *Drept comercial european*, Bucharest: CH Beck, 2009.

[4] Piperea, Gh., *Drept comercial*, (Bucharest: CH Beck, 2008), 161.

[5] FIRST COUNCIL DIRECTIVE of 9 March 1968, on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, no. 68/151/EEC, published in OJ L 65, 14.3.1968, p. 8.

THIRD COUNCIL DIRECTIVE of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies no. 78/855/EEC, published in OJ L 295, 20.10.1978, p. 36.

DIRECTIVE 2005/56/EC of the European Parliament and of the Council of 26 October 2005, on cross-border mergers of limited liability companies.

[6] DIRECTIVE 2009/101/EC of the European Parliament and of the Council of 16 September 2009, "on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent".

[7] Ibidem, Art. 193 al. 2.

associates, contributions, legal form, object, legal name and registered office. Other sanctions of nullity are applied to acts beyond the framework of the association, respective acts executed in the course of the activity of company: issuing of financial instruments[8] and encumbrances[9].

Even the revealed express nullity is limited to legal persons – which have already a specific regulation – not to civil association agreement which, as a rule, doesn't possess a legal person status.

The conclusion is that in the civil association agreement matter the only nullity cases are those inflicted by the general condition laid down for the formation of the contract. For other cases the unwritten sanction is available, but not nullity.

Effects of the nullity of the civil association agreement.

Irrespective of nullity type the agreement can be kept in force by removing defects founded until the moment of closing arguments delivered in the court case.

The judge of the case is bound to insist to this end. The "regularization action" of the agreement is the aim of the legislator.

All the other classic effects of the nullity should be forgotten: the nullity operates only for the future (the agreement ceased to exist from the day when the nullity judgment was rendered) the effect consists of winding up of the association. Declaration on nullity doesn't inflict any damage to third parties as long as its effect failed to act for the past, legal liaisons preceding the nullity remaining in force.

From regulation of the association agreement we shall keep in mind the limitation of the nullity to the general condition put down for the formation of the contract.

Even if the exemptions from old nullity are overwhelming, at least the nullity of the association agreement is built on the hypothesis of this sanction: a contract executed outside of the rules laid down for its legal formation.

Nullity of the legal person.

Besides the nullity of the agreement the legal person is based on, the Code regulated specific sanctions for the legal person itself. The sanction of nullity of the legal person is regulated apart from its agreement of association, as is happening in the area of company law, too[10].

Although the rules seem to be as expected, the regulation contains a legal innovation for civil law. The premises for old nullity sanction rest on the contract only, on the compliance of this with the law as being verified at the moment of its formation. Although the contract is not outlined in the definition of nullity, this is beyond any doubt the only Cartesian references for the nullity sanction.

In this case nullity is not applied to contract but to an upper level represented by juridical institution. Legal person is a corpus, a superior entity which projected on the plan of contracts reveals a bundle of acts of different nature: articles of association (the association agreement), the administrative authorization for establish the legal person or for pursuing the activities (if applicable), the sentence for incorporated the legal person, etc. Legal person transcends any of these acts in order to represent a new reality with specific characteristics. Applying a sanction at this level – not to one or some acts implied by the process of legal person formation – it surpasses the particular consents concurring to establishing and functioning of the legal person. Such "holistic" approach is almost revolutionary for common law. Traditionally nullity, as concept, is attached to juridical acts, to mutual consents that can be enforced in front of a court of law. The provisions can be understood in the term of the evolvement of legal concept. In fact, legal person is after all a relatively new

[8] Ibidem, Art. 1293.
[9] Ibidem, Art. 1908.
[10] Ibidem, Art. 196.

construction. First, the old nullity doesn't observe the legal person level because such person is construed based on association agreement between associates. This agreement can be challenged from nullity point of view and such possibility sufficed a long time for legal purposes. Concept of nullity has a "curing" aim. It is trying to protect persons from effect borne outside the law. In the case of legal person principles of protection was involved too. The new principles try to prevent nullity from affecting the validity of any commitments entered into by or with the legal person. In the end, third parties protection proved to be more important than parties' protection. Legal effects cannot be inflicted to third parties acting in *bona fide*.

The sanction of nullity applied to legal person is inspired of company nullity, both of them transposing a European provision from Company Law Directives.

Despite the commercial law that could easily depicts such nullity as an commercial exemption from general regime of nullity, civil law shall focus on construction of such sanction, now ordinary for every legal person, civil or commercial one.

The effects of the nullity of the legal person

The effects of such nullity are thoroughly described by the law. The cases of nullity are prescribed in a limited manner which excludes the occurrence of the sanction at the contract level with the consequences of adding new nullity cases at the legal person level[11].

Studying the nullity cases we observe that these were translated, *mutatis mutandis*, from the company law[12]. The only difference is represented by a necessary correction, already revealed by scholars. The connection between the nullity of articles of association and the company nullity is generally accepted. Thus, it cannot be conceived a nullity of the articles independent from the nullity of the legal person. A different approach should deny the limited manner of regulation in respect of legal person or should lead to an absurd conclusion: legal person will survive the nullity of the articles of association that establish the legal person itself.

Company law provisions don't comprise, among cases of nullity of company, the general condition for the formation of the articles of association. In this legal framework the consent alteration (or even the lack of any consent) does not induce the nullity of company in respect of the limited cases of nullity (among which the legal consent elapses).

The last case of nullity of the legal person – breach of legal provisions on act of association which imply express nullity – is welcomed amendments that strengthen the weakness of the Company Law regulation.

The effects of the legal person nullity are different ones and limited, as we compare them with common civil law. The real effect means that from the moment the sentence on nullity is rendered, the legal person is wind up. In the absence of the principles of nullity which implies retroactive effects and *restitutio in integrum*, all commercial liaisons between third parties and company are kept in force[13].

This sanction knows a favourable regime; his action can be put aside. Nullity cases can be removed until the day of closings before the court.[14]

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[11] New Civil Code, Art. 196 par. 1. Cases are similar with European Directive. The nullity cases rest only on the ground : that no instrument of constitution was executed or that the rules of preventive control or the requisite legal formalities were not complied with; that the objects of the company are unlawful or contrary to public policy; that the instrument of constitution or the statutes do not state the name of the company, the amount of the individual subscriptions of capital, the total amount of the capital subscribed or the objects of the company; of failure to comply with the provisions of the national law concerning the minimum amount of capital to be paid up; of the incapacity of all the founder members; that, contrary to the national law governing the company, the number of founder members is less than two.

[12] Law no. 31/1990, with modifications, Art. 56.

[13] New Civil Code, Art. 198, 199.

[14] Ibidem, Art. 197.

European provisions on commercial regulation of the legal person.

European secondary legislation[15] doesn't consist in rules for every fundamental institution from material law.

The reference to nullity from European law was rapidly adopted by national legislator (Company Law, New Civil Code, etc.) and it regulates companies only. Company Law Directives have already had an age, being regarded as a juridical achievement in secondary legislation and a pattern of specific harmonization of national law system[16]. The aim of regulations is coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies with a view to making such safeguards equivalent.[17]

In this framework und following this goal, secondary legislation enforced the nullity of the company[18]. Preamble of the First Directive on Company Law stressed its aims: restrict the grounds on which obligations entered into in the name of the company are not valid, to limit the cases in which nullity can arise and the retroactive effect of a declaration of nullity in order to ensure certainty in the law as regards relations between the company and third parties. [19]

The cases of nullity (nullity must be ordered by decision of a court of law) are strictly limited, no addition being allowed[20]. The cases are enforced *ad litteram* in Romanian Company Law[21].

The only difference comes from the internal control procedure (sentence rendered by Romanian specialized judge, authorizations) which are added to the original cases[22].

New Civil Code proposes a better approach by adding the nullity cases related to general condition for the formation of the association agreement.

Besides the limited cases of nullity, the effects of the nullity are different from the old nullity theory. In these special provisions the nullity has no retroactive effect and shall not, itself, affect the validity of any commitments evolving the third parties entered into by or with the company.

Nullity shall entail only the winding-up of the company[23], and shall not, itself, affect the validity of any commitments entered into by or with the company, without prejudice to the consequences of the company's being wound up[24].

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[15] After The Reform Treaty being enacted (Treaty of Lisbon, 2007, in force from 1.12.2009) the European Treaties become Treaty on European Union and Treaty on the Functioning of the European Union. The most relevant „horizontal" new provisions ask for giving up "European Community" and „of Community" replaced by "European Union" respectively "European". In this context "community legislation" should be replaced with "European legislation". Cristian Gheorghe, *Drept comercial european*, (Bucharest: CH Beck, 2009), 44.

[16] Cristian Gheorghe, *Drept comercial european*, (Bucharest: CH Beck, 2009), 66 – 72.

[17] The legal base was represented by Treaty of Rome (Treaty establishing the European Community), Art. 54, turn into Art. 44 para. 2 g) after Nice codification. In present, after The Reform Treaty the provision is found at Art. 50, Treaty on the Functioning of the European Union.

[18] FIRST COUNCIL DIRECTIVE of 9 March 1968, on co-ordination of safeguards which, for the protection of the interests of members and others (no. 68/151/ECC) regulated nullity of the company. Now this directive is replaced by a new one, Directive 2009/101/EC from 09.16.2009, published in OJ of EU no. L 258, 1.

[19] Directive 2009/101/EC, Preamble.

[20] Ibidem, Art. 12. The nullity cases rest only on the ground : that no instrument of constitution was executed or that the rules of preventive control or the requisite legal formalities were not complied with; that the objects of the company are unlawful or contrary to public policy; that the instrument of constitution or the statutes do not state the name of the company, the amount of the individual subscriptions of capital, the total amount of the capital subscribed or the objects of the company; of failure to comply with the provisions of the national law concerning the minimum amount of capital to be paid up; of the incapacity of all the founder members; that, contrary to the national law governing the company, the number of founder members is less than two.

[21] Law no. 31/1990, with modifications, Art. 56.

[22] The link to "judicial control" is contained by cited Directive, too (Art. 10).

[23] Ibidem, Art. 13.

[24] Ibidem.

The European legislation has a pragmatic writing. These provisions do not tackle the institution of nullity but aiming strictly the effects that the legislator intends to prohibit: retroactive effect and so on.

In this approach the distinction between the stages the sanction is applying at, *i.e.* to a bundle of acts, doesn't matter at all.

The lack of interest for theoretical matter is underlined by the legal term chosen (a company shall not be subject to any cause of non-existence, absolute nullity, relative nullity or declaration of nullity).

National law has already adopted these sanctions and has to accommodate such notions with its legislation system.

Conclusions

The nullity of the company has been translated almost identical from commercial law in civil law in the form of nullity of legal person.

The reasons underlined by commercial legislation target third parties protection, safeguarding the company itself, preserving the security of the commercial trade, functioning on opportunities-oriented bases.

Civil Code doesn't contain many of these principles, it being characterized by homogeneity and strictness.

The assimilation in civil area of the nullity of the legal person has born "twin legislation" with the commercial subject matter, making the latter to become redundant.

As the new Civil Code will enter to force commercial law should observe the lapping of legislation. The nullity of the company should be preserved in cases it is different from common regulation. Enacting an express nullity of the legal person should be observed in all branches of the juridical sciences and subsequent legislation should use these provisions as a starting point from their special purposes. The effect of redesigning of very basis of the legal system, as common law is, is an expected one: the trembling wave will have been observed at a moment in all upper level of law. Legal person subject has impact on a large range of juridical issue from different domains. These domains should adapt their legal provisions according the new approach of the nullity from the common law.

The limited effects of the nullity of the legal person shall be treated in a restrictive manner in order to preserve the general concept of nullity and to avoid the tendency of construing it in a limited manner in other domains, not covered by express provisions.

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STATUS OF ENTREPRENEUR – NATURAL PERSON

SILVIA CRISTEA[*], ANGELICA ROŞU[**]

Abstract:
The necessity of limitation of the entrepreneur as a natural person who organizes an economic company within which the economic activity is developed in an organized, permanent and systematic way, combining the financial resources, the attracted labor market, raw materials, logistic and informational means, on the entrepreneur's risk from other categories of persons who realize trade activities like familial firm or trade companies was the starting point of this scientific research.
According to Law 26 / 1990, republished and modified "the traders are the natural persons and the family associations which realize usually trade acts, the commercial companies, national companies and enterprises, the autonomous administrations, the groups with economic interest and trade character, the groups of trade character and the cooperative organizations" (art. 1 paragraph 2).
Corroborating the provisions of OUG 44/2008, respectively the art. 2 letter h), according to which "the family enterprise is the economic enterprise, without legal personality, organized by a natural person entrepreneur with his family" with art. 4, according to which the natural persons can develop economic activities individually and independently, as natural authorized persons, or as owner holders of an individual enterprise, or as members of a family enterprise, we conclude that in the actual regulation, which abrogates the Law 300 / 2004, the notion of family association is replaced with the one of family enterprise.
The present study wants to analyze the modifications brought to OUG 44/2008 in the field, observing on one side the differences from the previous regulation concerning the family associations, and on the other side, the elements which particularize the family enterprises in comparison with PFA (natural authorized person) and with individual enterprises.

Key words: *legal status, entrepreneur, natural person, economic activity.*

Introduction

In determining the legal status of an entrepreneur – natural person is important to establish the legal personality or the lack of it and so it is necessary that the economic activity developed by the natural person entrepreneur to be compared with the activity of the familial firm, but also with the one developed by a trade company.

Entrepreneur, natural person who organizes an economic company within which the economic activity is developed in an organized, permanent and systematic way, combining the financial resources, the attracted labor market, raw materials, logistic and informational means, on the entrepreneur's risk; in this meaning the notion of individual enterprise has to be understood as economic enterprise, without legal personality, organized by a natural person authorized to develop any form of economic activity, in legal limits, using mainly its labor force.

The necessity of limitation of the natural entrepreneur from other categories of persons who realize trade activities (acts) is resulting from at least three regulations in force, namely: the Romanian Trade Law, Law no. 26 / 1990, with the ulterior modifications and amendments, regarding Trade Register, the Emergency Ordinance no. 44 / 2008 regarding the development of the economic activities by authorized natural persons[1], the individual firms and the familial firms, but also from the similarities that can be drawn between these three categories of entrepreneurs (natural person, familial firm and trade companies).

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[1] Published in Official Monitor no. 328 on April 25th, 2008.

Starting from the legal provisions in force, respectively art. 4, letter b) from the Governmental Emergency Ordinance no. 44 according to which a natural person can develop an economic activity "as entrepreneur, holder of an individual enterprise" and those from art. 2, letter g) from the same normative act, according to which through personal enterprise follows for us to understand "economic enterprise, without legal personality, organized by a natural person", during this study we will try to answer the question to which situations from practice follows to correspond this institutions and which are the differences between it and the existent legal institutions.

Regarding the legal status of family enterprise, this study aims to examine two issues in particular regarding the effect of family enterprise registration in the Register of Commerce and the situation of minors of 16 years, especially since the Romanian legal doctrine was positioned constantly in the meaning of a declarative effect, in the meaning that at the date of registration of the natural person to trade register it appears a relative presumption of commerciality.

1. Definition

From the legislation in force we can detach some definitions of the natural entrepreneur and other categories of persons who realize trade activities (acts), as following:

- From the Romanian Trade Law, according to which "there are entrepreneurs those who develop trade activities, having the trade as usual profession and the trade companies" (art. 7), from which we can understand the dichotomy between the natural person entrepreneur / trade entity;
- From Law no. 26 / 1990, with the ulterior modifications and amendments, regarding Trade Register, concerning to which "the entrepreneurs who are natural persons and the familial associations which develop usually trade activities, trade companies, national companies and national firms, the autonomic organizations, the groups with economic interest with trade character, the European groups of economic interest with commercial character and the cooperating organization" (art. 1 paragraph 2), from which we observe, from one side the natural person entrepreneur, on the other side the trade entities with / without legal personality;
- The Emergency Ordinance no. 44 / 2008 regarding the development of the economic activities by authorized natural persons, the individual firms and the familial firms, in conformity to which the natural persons can develop economic activities in Romania under the following versions: a) individual and independent, as authorized natural persons; b) as entrepreneurs of an individual firm; c) as members of a familiar firm" (art. 4); we can separate this way the natural person entrepreneur who develops alone, as authorized person or as owner of an individual firm (entity organized by an entrepreneur natural person, without having legal form) and finally, as member of some familial firm.

From these three categories of entrepreneurs (natural person, familial firm and trade companies) there can be established the following similarities:

- they have as object of usual activity the exercise with profession title of one of the activities named at art. 3 Trade Code, considered objective acts (activities) of trade;
- they have as purposes the profit achievement (with lucrative character), not like the association / foundation which doesn't try to obtain profit (non-profit);
- the achievement of entrepreneur quality is related to the procedure of registration at the Trade Register;
- there are certain conditions requested regarding the legal capacity (the one of use and also the one for exercise);
- for the trade claims the legal responsibility has a certain extent (related to the exercise one);
- there is the obligation to obtain a specific authorization.

2. Conditions to Become Entrepreneur

a) Conditions concerning the person

- in exercising the right of free initiative, of the right of free association and the right of foundation, any natural person, Romanian citizen or foreign citizen from a state member of the European Union or of the European Economic Space, can develop economic activities in Romania, in the limits of law;

Regarding the **use capacity** of the authorized entrepreneur there are the following aspects to take in consideration:

- there is a succession of **incompatibilities** between the entrepreneur profession and other professions. By example, the organic law of attorneys interdicts them expressly to develop a trade activity whose object of activity would be the exercitation of the attorney profession;

- there is a succession of **interdictions** regarding the economic activity developed, starting from the respect for the state monopole in certain fields (how it would be the deposits extraction and processing or from some limits which are implied for the activities through contracts concluded (for example the clause of non-competition implied by the franchisor to the franchise's beneficiary);

- the **decays** from the entrepreneur quality could appear in case of penal order remained definitive, and pursuant to which through court order is forbidden expressly to the convicted the exercitation of entrepreneur profession, as sanction for the penalty.

Regarding the **exercise capacity**, it has to be remarked the fact that the development of an economic activity on its own account, implies that the entrepreneur has to have the age of 18 years. In other words only a major person, having full power of exercise, can become a entrepreneur, even if we talk about a woman or a man.

Because, pursuant to legal provisions in force a young woman and a young man can not marry before they are majors, there is no difference between genders regarding the obtaining of entrepreneur quality.

A special problem appears in the hypothesis of the familial firms, from which the underage of 16 years old can be part, but this will be analyzed at the section regarding the familial associations.

b) Conditions related to the developed activity

We can remark as first similarity between the authorized natural person, familial firm and the trade company, the obligation to choose as object of the main activity, exercised with profession title, of one of the activities considered by art. 3 Trade Code as trade activity.

We can ask ourselves from what point we can talk about obtaining the entrepreneur quality.

The most simple answer regards the trade companies, which, obtaining the legal personality at the moment of the registration at the Trade Register, become entrepreneurs at that date, fact that marks the apparition of a new subject of trade law.

The answer is more complicated at the authorized natural person, meaning that through registration doesn't appear a new legal subject, if exists, concretized in the natural person, who is recognized as being a entrepreneur from the moment of the registration at the Trade Register.

Is it possible that facts which are anterior to the registration to be qualified as being commercial? The answer is definitely affirmative, the Romanian doctrine marking this particularity of the legal acts closing with trade effects, even before the registration, when these have as purposes the profit and not the civilian finality. In the same manner, the loss of the entrepreneur quality can be anterior to the non-registration from the Trade Register, if we refer to a final legal act with commercial effects, closed by an authorized natural person.

At the familial association the answer is a little bit more complicated (see the next section).

For the commercial acts developed by an authorized natural person to have a professional character, the entrepreneur has to have a qualification conceived as professional formation or as professional experience, which can be proved with:

- diploma, certificate of graduation of an academic or post graduation educational institution;
- the certificate of graduation of a form of professional formation;
- certificate of professional competency;
- crafter book;
- labor book of the applicant, with which it can be proved that he was employed on a duration of minimum 2 years in the activity, profession or occupation for which the authorization is requested;
- notoriety statement.

These can be found in the OUG 44/2008 between the documents necessary for the registration at the Trade Register under the name: documents which attest the professional training/ professional experience.

Regarding the special notifications for the authorization for activity development, these can be found between the documents necessary for the registration under the name of frame statement on own responsibility which attests the fulfillment of the legal conditions for functioning provisioned by the special legislation from the sanitary field, sanitary – veterinary field, environment and labour protection.

3. Entrepreneur Holder of an Individual Enterprise versus the Trade Fund

The trade fund represents the legal universality in fact, constituted from the totality of the fixed assets, tangible and intangible assets which a trader can use in the exercise of his activities.

Through this formulation we understand that the trade fund has no legal personality (unlike the patrimony, which being constituted from the totality of rights and obligations to a legal subject, is a legal universality of fact) and it cannot be protected legally, unlike the regulations of the French law.

If until OUG 44/2008, the Romanian law regarding the trade law, was embracing the existent theory of the French doctrine, according to which the trade fund is a universality of fact and that each element keeps its own individuality (marks, export licenses, labour contracts and all the tangible movable assets), being able to be transmitted separately from the trade fund, we consider that after the regulation of OUG 44/2008 appears a new conception.

Starting from the theory of patrimony of affectation we assist at the centralization of some assets into a different trade patrimony, represented by the trade fund.

Of legal protection benefits the debtor – entrepreneur who can invoke the existence of a civilian patrimony (“nest egg”, constituted with the assets which are not used in trade activity) and a different trade patrimony, respectively the trade fund/individual enterprise.

This explication is argued by art. 26 from OUG 44/2008, which constitutes the liability of the holder of the individual enterprise with affectation patrimony, if this was constituted, and with the entire patrimony, in addition. The formula chosen by legislator is perfectible.

From the interpretation of art. 26 we can conclude that the natural person could answer with the entire fortune. If it’s so, why would chose a person this legal status, when it is already the one as natural authorized person?

On other side, understanding the amplitude of the trade fund from the doctrinaire definition enounced at the beginning of the present section and the notion of affectation patrimony, we consider that this time we assist at a notional superposition between the individual enterprise and trade fund, where we introduce also the notion of labour force employed, how it will be analyzed in the section 3.3.

4. Individual Enterprise versus Unipersonal Limited Liability Company (LLC)

According to art. 3 paragraph 3 of Law 31/1990 concerning the trade companies, associations of a LLC answer only until the concurrency of the registered equity. In the case of foundation through the act of will of a single person it is concluded a constitutive act, a status. (art. 5, paragraph 2).

Corroborating these provisions with those contained by art. 1 paragraph 2 and namely that the trade companies with headquarter in Romanian are Romanian legal persons, we observe that through an advantage of choosing the unipersonal LLC is that of the own legal personality, which the individual enterprise doesn't have. Although, associate is a natural person the one concluding the agreements assumes rights and obligations, the one who has the quality of employer, of contributor, etc is the unipersonal LLC, meaning a legal personality.

Having a registered equity, the unipersonal LLC can decide its putting-up for growing the credibility before thirds and to amplify the scope of businesses, meaning profit.

The accountable registration of a LLC will be developed in "double faction", each trade operation having a double registration, since at individual enterprise the registration is realized through "simple faction" (according to Law of accounting no. 82/1991). Therefore, the accountant registration of a unipersonal LLC is more rigorous.

An advantage which cannot be ignored by the entrepreneur is the fiscal one. The unipersonal LLC benefits of facilities and fiscal exceptions, the individual enterprise being deprived of them. (tax income, deducibility, etc.).

Also, the legal system is favorable for the unipersonal LLC regarding the assignation to third parts. The assignation of shares is allowed in any moment, on trade company duration (for example, through transformation from unipersonal LLC to pluripersonal), while in the case of an individual enterprise any assignation of rights and obligations would have to be realized as a transfer with universal title between living people, forbidden under the conditions of Romanian Civil Code.

Of course, the patrimony can be transmitted *mortis causa* in case of an individual enterprise, but this way of assignment is allowed also for the unipersonal LLC.

According to OUG 44/2008 the heritors of the natural person entrepreneur, holder of an individual enterprise can continue the enterprise in case of the holder death, if they manifest their will in this meaning, through an authentic statement, in term of six months from the date of the inheritance opening. If there are more heritors it can be chosen the activity continuation under the legal form of familial enterprise (acc. to art. 27).

From the point of view of the employer quality, the unipersonal LLC and the individual enterprise can conclude labour contracts, but holder of the obligation to pay income taxes from salaries is in the first case the legal person (LLC) and in the second one the entrepreneur holder of the enterprise.

Regarding the insolvency procedure regulated by Law 85/2006, in the case of individual enterprise is applied the simplified procedure, the debtor answering with the affectation patrimony or with the entire patrimony (ac. Art. 26 of OUG 44/2008). Again, the situation of the SRL is favored, the liability of the debtor – the trade company being limited at its patrimony and not at the one of the sole associate.

5. The Legal Status of the Authorized Natural Person

The natural person authorized benefits of certain rights and has obligations, which, together, constitutes the content of the legal status of the authorized natural person.

The most important obligations of the authorized natural person are:

- registration at the Trade Register;
- concluding the trade documentation;

According to OUG nr. 44/2008, both for the authorized natural person, but also in the case of the familial enterprises, the incorporation certificate, containing the sole identification number, becomes the document which proves **the registration** at the Trade Register, the **authorization for functioning** and also the **registration in the register of the competent fiscal authority.**

The documentation concerning the registration at the Trade Register, fiscal registration and the authorization of an authorized natural person is the same as in the cases of familial enterprises.

During trade exercise, according to art. 21 of Law no. 26/1990, the authorized natural person is due to register at the Trade Register all the modifications which will be called **registrations**, regarding:

a) donation, location, selling or real guarantee constituted over the trade fund, and also any document through which there are brought modifications of the registrations in the Trade Register or which cease the firm or the trade fund;

b) informations concerning the identity of the assignee. If the right of representation is limited at a certain filial or branch, the mention will be done only in the register where the filial or the branch is registered;

c) the investment licenses, the trade, production and services marks, the original names, the origin indication, firm, logo and other distinctive marks over which the authorized natural person or the familial enterprise has a right;

d) the divorce order of the trader, and also the one of the common assets sharing, pronounced during trade exercise;

e) the decision of interdiction for the authorized natural person or of institution of its trusteeship, and also the decision through which these measures are canceled;

f) the opening of the procedure of legal reorganization or bankruptcy, by case, and also the registration of the respective mentions;

g) the decision of conviction of the authorized natural person, of the administrator or censor for penal acts which make him incompatible or enable to exercise this activity;

h) any modifications concerning the registered acts, facts and mentions.

In case the authorized natural person has subsidiaries and/or branches is due to request their registration, like in the case of the familial associations, at the Trade Register where it was registered the main headquarter. The request of registration of branches / subsidiaries will be accompanied by copies after the certificates of main headquarter office, and copies concerning all the acts based on which the "mother company" was registered.

According to art. 24 of Law 26/1990, in the situation when an authorized natural person has its main quarter abroad and incorporates in Romania branches and/or subsidiaries is due to respect the provisions regarding the registration, mentioning and publishing of the documents and facts requested for the national traders.

6. The Obliteration of Registrations

According to art, 25 of Law 26/1990, republished "anyone who considers itself prejudiced through registration of through a mention from the Trade register has the right to ask its obliteration".

The authorized natural person ceases its activity and it is obliterated from the Trade Register in the following cases:

a) death;

b) its will;

c) under the conditions of art. 25 of Law 26/1990, republished, with the ulterior modifications and amendments.

The request is submitted and it is addressed at the Trade Register where the incorporation was realized. In term of three days from the date of the submission, the Trade Register Office address the

request to the court from the territory where headquarter of the familial enterprise is, and in the cases of the subsidiaries incorporated into another district, to the court of that district.

The court solution the request summoning the Trade Register Office and the familial enterprise, communicating after for the Trade Register Office the legal order pronounced, in legalized copy, mentioning that remains irrevocable.

The court decision of settlement of request can be appealed only through appeal, and the term of appeal starts from the pronouncement, for the present parties and from the communication for the absent parties (art. 25 paragraph 4).

The Trade Register Office will realize the obliteration and will publish the irrevocable court decision in the Official Monitor.

Another main obligation of an authorized natural person is the registration in the accountant registers of the activity developed.

The registers of an authorized natural person are private, and they contain all the operations concerning the trader patrimony.

Like in the case of the familial enterprises, the authorized natural person has to keep its accountancy in simple faction.

Law no. 82/1991 (art. 20) settles, explicitly, the following obligatory documents to be concluded:

- journal register;
- inventory register;
- copying book;

According to art. 25 of Law no. 82/1991, the accountancy registers, the acts and the documents that stood at the base of registration are kept for ten years, starting with the date of the closing of the financial exercise during which they were concluded.

6. Introductive Notions: Family Enterprise

The family enterprise is created at the initiative of a natural person and is constituted from two or more members of its family.

The members of a family enterprise are: the husband, the wife and their children who have the age of 16 years, at the date of the authorization of the family enterprise, like their relatives until the forth level included.

In comparison to the previous regulation we consider a progress mentioning the minimum number of members of the family enterprise, respectively two, and also the renouncing to the disposition concerning the obligation of the domicile/ residence in Romania.

Regarding the number of two associates, the regulation is argued, considering there are more members, the natural person having for the individual activity of PFA, or for the 9individual enterprise. In the same time, we have to mention the fact that the members of the association (taking about the major ones), can be in the same time PFA or holders of some individual enterprises (acc. to art. 28 paragraph 2), the cumulus of these two qualities being expressly forbidden by OUG 44/2008 (art. 19, paragraph 1).

Any member (this time including the underage of 16 years) can have the quality of associate with the one of employee of a third person who functions both in the same field, and also into other activity field that the one where the family association was organized (art. 19, paragraph 2).

The natural persons can provide activities within family enterprises since 16 years old, as proper employees (how they are named by Law 300/2004[2] within art. 3, paragraph 1), name which is not used within OUG 44/2008.

[2] Law 300/2004 concerning the authorization of the natural persons and of the family associations which develop economic activities independently, published in the Official Monitor nr. 576 on June 29th 2004.

The proper employee doesn't suppose labour reports before an employer, the quality of proper employee regarding the right of the owner to be assured in the public system of pensions and with other social insurances rights.

Like the previous regulation, the family enterprise cannot hire third persons with labour agreements, the ration being that exactly the reason for which the enterprise was incorporated was to use the labour force of associates, even of the underage of 16 years – for the members being allowed to have labour agreements.

With the third legal or natural persons is allowed the collaboration in order to realize economic activities (art. 29, paragraph 3).

Interesting is the order off art. 321, according to which "the members of the family enterprise are natural trader persons from the date of its registration with the Trade Register and answer jointly and indivisible for the debts contracted by the representative".

The same formulation is used also in art. 23, but concerning the owner entrepreneur of an individual enterprise.

These are the problems we believe it should be analyzed:

- Is it about the constitutive effect of appropriation by the members of the family enterprise of the natural trade person through registration at the Trade register?

- What is the situation for the underage of 16 years; can we extend the trader quality to those too?

Regarding the possible interpretation of a constitutive effect of registration, we consider that this kind of solution is wrong. The Romanian legal doctrine[3] was positioned constantly in the meaning of a declarative effect, in the meaning that at the date of registration of the natural person to trade register it appears a relative presumption of commerciality.

We consider that the lawgiver, through the legal norm adopted wanted to understand that even though became a member of family enterprise, the major has legal regime of PFA, in the meaning that achieves all the rights he would have achieved if he was registered as PFA.

Regarding the under age of 16 years (both, for the young boy or girl of the same age), we can consider that is a trader invoking the following arguments:

- from 16 years he can hire; this is why, not by chance through law 300/2004 it was called "proper employee"

- at the registration moment is considered as having the status of PFA, and this is the trader.

Against the trader quality can be invoked the following arguments:

- trader can become a natural person that fulfills cumulatively the conditions named at art. 8 paragraph 1 letter a-d), meaning 18 years old, they didn't do facts that need fiscal criminal record, they have a professional headquarter and declares on own responsibility that they fulfill the legal conditions of functioning, regarding the legislation of the sanitary field, sanitary – veterinary, the environment protection and labour safety.

We consider that all these conditions assume the age of 18 years.

- The jointly and indivisible responsibility, and the affectation patrimony stipulated by art. 31, assume the right of disposition of the natural person of the member of 16 years old has the capacity of restrain exercise, according to the Romanian civil code.

- For the arguments invoked previously, we consider that the answer to the question is negative, meaning the minor of 16 years, member of the family enterprise can not be considered trader.

Regarding the headquarter, before the previous regulation, we observe that it is used the name of professional headquarter, which is declared through the request of registration at Trade Register. For establishment of the professional headquarter it is obligatory that every member of the family

[3] In this context see S. Angheni, M. Volonciu, C. Stoica, "Commercial law", C. H. Beck, Bucharest, 2008, p. 19.

enterprise to hold a functioning right over the real estate to which address is declared (art. 9, paragraph 2). The law mentions at least a functioning right (without specifying if is exercised with onerous or free title) so there is no impediment for exercising a property right. In case the activity is developed by the citizens of a member state UE or SEE (European Economic Space) the professional headquarter has to fulfill the conditions of a permanent headquarter[4].

OUG 44/2008 introduced between the definitions of art. 2 and the working points, as locations where the activity is developed, in this case it is not developed exclusively at the professional headquarter 9excepting the ambulant trade, regulated by OUG 99/2000)[5].

Incorporation Agreement

The family enterprise is constituted through an incorporation agreement concluded between the members of the family enterprise in written form, as ***ad validitatem*** condition.

The incorporation agreement will contain:

- name and surname of the members;
- representative of the family enterprise
- date of the concluding;
- participation of every member to the developed activity by the family enterprise;
- the conditions of the participation;
- the contingents;
- the rate which will share the net incomes of the family enterprises;
- the reports between the members of the family enterprise;
- the conditions to take the members out of the absolute nullity sanction.

We observe that the provisions of OUG 44/2008 represent a progress in comparison to the previous regulation which was not containing a rule concerning the incorporation agreement.

Benefic is also the regulation concerning the representative named by the members of the enterprise. This manages the interests of the family enterprise, being in many ways like the administrator of the company trade, but the enterprise not having a own legal character, the representative has a distinct position with the one of the administrator who concludes document on behalf of a trade company, subject to a different law.

Just like the administrator, the representative:

- is named through a special power of attorney, which like a document under private signature;
- assures the collaboration with the third parts, no matter is they are natural or legal persons;
- assures the relation with Register Trade;
- assures the current management of a family enterprise;
- assumes its obligation of loyalty, confidentiality and con-concurrence.

Not like the administrator, the representative of a family enterprise:

- is the only one who can register documents at the Trade register;
- his act of empowerment will be signed by the main members of the enterprise, for minors will sign the legal representatives, who can be third persons before the enterprise;
- he doesn't represent a different legal subject, but the responsibility for the contracted obligations is shared and indivisible, in the limits of the affectation patrimony or even of the entire personal fortune;

[4] In this context, see S. Cristea "The taxation headquarter and the permanent headquarter. Notional delimitations", in the Romanian Review of taxatyion no. 17/2008, p. 38-41.

[5] OG 99/2000 concerning the trade with mail products and services, republished in Official Monitor no. 603 on August 31st 2007.

- the representative is always a member (he cannot be a third, like the administrator), and even it is not mentioned the employee quality he benefits of all the rights of an employee (previous regulation brings the notion of "proper employee");

- the documents of disposal over the assets of the affectation patrimony must have the previous approval of the members, obtained through the vote of the simple member majority, but also the approval of the asset's owner;

- member of the enterprise;

- in an adequate manner and in case the asset profit overpass 50% from the value of the affectation patrimony, the representative will have to have the previous approval of the members, and the asset obtained will be the members' propriety.

These last provisions must be corroborated with the ones concerning the members of enterprise, and namely:

- according to art. 30 of OUG no. 44/2008 through the incorporation agreement, the members of the family enterprise can stipulate the foundation of an affectation patrimony and through an additional act it can be established the contingent of each member of the family enterprise at the foundation of the affectation patrimony, and in case of vote unanimity these rates can be different of the to the company's contingents of profit/losses.

The remarkable progress which is realized by the new regulation in comparison to Law 300/2004, abrogated, consists in the modality of settlement of the responsibility of the enterprise's members.

If in the previous regulation the solution was shared and unlimited liability of the members (as an extent of the trade natural person quality of each member), the introduction by OUG /2008 of the notion of affectation patrimony consists a new challenge.

As an institution that contains the majority of the assets, rights and obligations of the members of the family enterprise, correspondent to the purpose of exercising an economic activity, constituted as a distinct fraction of the members' patrimony, separated by the general lien of the personal creditors of those (acc. Art. 2 letter j), the affectation patrimony restrains the responsibility of the members of a family enterprise.

The responsibility remains shared and indivisible, but becomes limited at the perimeter of the affectation patrimony, which becomes the guarantee for the satisfaction of the trade creditors' preferences.

Therefore, there is a commercial and a civil patrimony. It remains at the members' choice to enumerate the assets which follow to be destined (affected) to the economic activity, even from the incorporation agreement, the sanction for the lack of these provisions being severe and followed by the returning to the unlimited liability.

The limited nature of the liability, in case of affectation patrimony incorporation, is corroborated by art. 31 according to which, even in the case when the debts of the enterprise overpass the extent of the assets affected for economic activities, the members can be followed in completition, only in the limits of the contingents provisioned in incorporation agreement, desired to mean less than the entire personal fortune.

OUG 44/2008 doesn't induce a new institution; it only confers legal power to a theory formulated in the Romanian specialized doctrine[6] and enacted a long time ago in the French law[7].

6 The theory of the affectation patrimony was for the first time enacted in Lichtenstein through art. 834 and 896 of Civil Code of 1926. In this context see I. Voica "Legal system of SRl, with sole associate in the European Communitarian Law", vol. II, Ed. SOCEC, Bucharest, 1948, p. 515.

7 In this context see S. Angheni, M. Volonciu, C. Stoica, "Commercial law", C. H. Beck, Bucharest 2008, p. 53-54. For details, see S. Angheni "Some context concerning the trade fund in the comparative French and Romanian law", in the Review "Studies of Romanian law", no. 3-4 / 1996, p. 248-252.

Conclusions

The difference between the individual enterprise and authorized natural person results from the possibility / impossibility to hire employee personnel.

According to art. 17 of OUG 44/2008, the ANP cannot hire with labour agreements third persons for the activity is authorized for.

This provision has to be corroborated, on one side, with the ANP definition, as person who develops an activity using **mainly** the labour force (according to art. 2 letter i), with the provisions of art. 16, according to which the ANP can corroborate, in the exercise of its authorized activity, with other natural or legal persons, but also with art. 17 paragraph 2, according to which the ANP can cumulate this quality with the one of employee of a third person.

On other side, the ANP is assured in the public system of pensions benefiting of rights of social insurances and the right to be assured in the system of social insurances of health and for unemployment, meaning that it fulfills the conditions of right employee, how it was regulated by Law 300/2004, in the present abrogated through OUG 44/2008.

If the entrepreneur holder of an individual enterprise, like the ANP, can be the employee of a third person, along with the status of inherent employee (name that is no more used by the OUG 44/2008) we observe that the rest of the provisions of OUG 44/2008 distinguish the individual enterprise by ANP.

Therefore, the entrepreneur, holder of an individual enterprise, can hire third persons with individual labour agreement (art. 24).

An article that deserves a special analysis is art. 19 paragraph 1 of OUG 44/2008 according to which the ANP cannot cumulate also the quality of natural person entrepreneur, holder of an individual enterprise.

The arguments that sustain this regulation, we believe that are:

- on one side the fact the legislator distinguish the legal regime of these two institutions;
- on the other side the fact that from the liability point of view it cannot be granted with the same patrimony for two different activities.

We believe it is interesting to connect the analyzed provisions from above, context of art. 23, according to which the entrepreneur holder of the individual enterprise is the **natural person trader from the date of registration at the Trade Register.**

Using the extensive interpretation of OUG 44/2008 at least two conclusions could be formulated:

- if the ANP cannot be holder of an individual enterprise, the converse is valid; the entrepreneur, holder of an individual enterprise is ANP;
- while the individual enterprise aims always the activity of a trader, ANP can be an non-merchant, because, according to art. 20, paragraph 2, the creditors will execute their claims according to common law, in the case **when ANP doesn't have the trade quality**.

The interpretation of these conclusions is obligatory and brings a restrictive interpretation of the text of OUG 44/2008.

Therefore, if the provision regarding the validity of the formulated conversion is admitted, so the holder of an individual enterprise benefits from the status (especially rights) conferred by PFA, regarding the moment of achievement of the trade quality are necessary supplementary specifications.

It is not about the trade quality of a natural person, because in this matter the solution was consecrated by the Romanian doctrine before OUG 44/2008 and is valid until today. The registration at the Trade Register has a declarative effect for the natural person trader, but not constitutive, as in the German law.

The second conclusion, according to which the ANP can be a trader or non-trader in entirely incorrect, the legislator extending outside limits the sphere of inclusion, outside the commercial activity.

We consider that the extension of the ANP notion outside the trade law sphere is not possible because:

- the definition itself of the economic activity formulated in art. 2 of OUG 44/2008 relates with the entrepreneur risk, as risk which corresponds to the commercial activity;
- the regulation of the patrimony of affectation (art. 2 letter j), but also art. 20 and 26) allows the osculation between the civilian and the commercial patrimony, both for ANP, but also for the individual enterprise;
- the OUG 44/2008 abrogates the provisions of Law 200/2004 which regulates the commercial activity developed previously, individually, but also under the form of familial associations.

The arguments for which a natural person who wants to develop an economic activity would chose the variants of the family enterprise, would be the following:

- it is under age of 16 years and could not develop the activity on its own account and is a relative until the forth level with a major who wants to initiate a family enterprise and to be its representative;
- a major natural person, who has the initiative of incorporating a family association and having children and minor relatives until forth level, wants to assure a labour place and to have them under permanent supervision.
- There is an incorporation agreement where it can be negotiated the contingents to benefits/ losses in a way the responsibility for the contracted debts to "remain" in the limits of the affectation patrimony;
- The responsibility for debts is jointly and indivisible, so anybody can be kept for integral payment of those, but in the limits of the affectation patrimony, adequate for the contingent, but this, in our opinion concerns only the major members;
- Existing more members the risks are shared, so diminished;
- The relations with third parts are sustained by a responsible who assumes for himself the current management; the activity of the representative is strictly controlled by the members through the fact that for some documents is necessary the previous agreement of the others, as a proof of the fact that the enterprise has an owned patrimony;
- Through simple registration at trade register the members wish to achieve the status of PFA (in our interpretation we are talking about major members) ;
- The member owner of an asset from the affectation patrimony will be obligatory asked if he agrees with the asset transfer.
- The assets obtained by the representative become the member's co-property.

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PREVENTIVE AGREEMENT – THE VIABLE ALTERNATIVE TO LAW NO. 85/2006 ON INSOLVENCY PROCEDURE?

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Abstract
Given the economic crisis that Romania is going through and which influenced in a negative manner the activity of economic agents throughout the country, Law no. 381/2009 has been adopted for the implementation of the preventive agreement and ad-hoc mandate, in order to support companies facing economic difficulties in their activity. Law no. 381/2009 became applicable on January 13, 2010 and it implements, as an alternative to the difficult and time-consuming procedure of insolvency, a contractual mechanism for companies facing difficulties in organizing their activities, outside the insolvency procedure, with limited involvement from the court. This regulation is seen as a solution against the opening of the insolvency procedure. The solution applies especially to small and middle sized companies. The preventive agreement implies a longer deadline for payment liabilities based on a friendly agreement with the creditors. It is a mechanism for avoiding insolvency and it consists of an agreement made between the debtor and the creditors regarding the way in which the debtor, which is in a difficult financial position, will pay all its outstanding debts. The law applies to all legal entities which reorganize a company going through a difficult financial period, without being in insolvency and which are called debtors. Nevertheless, the preventive agreement law still forces us to relate to the notion of insolvency.

Key words: *preventive agreement, ad-hoc mandate, insolvency procedure, judicial moratorium*

Introduction

1.1. General aspects regarding the purpose and effects of the application of Law no. 381/2009 provisions

In order to approach the proposed topic it is crucial to emphasize the importance of the Judicial Moratorium Law and of the ad-hoc mandate to avoid the bankruptcy of companies. The judicial moratorium procedure must not be mistaken for the insolvency procedure (reorganization/bankruptcy), regulated by Law no. 85/2006 regarding the insolvency procedure, with all ammendments.

The judicial moratorium Law has been built starting from the idea that, in order to find financial balance, indebted companies could close a deal with the creditors for the payment of all debts.

The term 'judicial moratorium' is regulated for the first time in our country. The former Commercial Code regulated two measures to prevent bankruptcy, that is: *pre-bankruptcy moratorium*, which represented a means of delay from the debtor and the *post-bankruptcy moratorium*, both leading to unsatisfactory results in practice.

Thus, the judicial moratorium Law appeared in 1929, which eliminated the moratorium and shich, in 1938 has been recalled due to poor results in practice. It seems that the poor results of these measures meant to avoid the effects of bankruptcy are explained by the excessive involvement of the syndic judge and the court, through complicated procedures and by the fact that these institutions would intervene too late, the debtor being already bankrupt (cessation of payments).

The judicial moratorium concept is also implemented and applied in European Union countries, such as Belgium, which adopted it since 1997.

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The purpose of the application of Law no. 381/2009 regarding the implementation of the judicial moratorium is to protect societies in financial distress in order to reorganize their activities without going into the insolvency procedure. Thus, the aim is to avoid bankruptcy, by closing a deal with the creditors regarding the way in which debts will be paid. They will be able to cover the owed amounts, by means of amicable proceedings of negotiation of debts or debt-related conditions by concluding a judicial moratorium.

In order to better understand this regulation, a few succinct comments are necessary concerning the provisions of Law no. 85/2006 regarding the insolvency procedure (modified and amended by Law no. 169/2010, inclusive). The insolvency procedure is a unitary, collective and leveling enforcement procedure. It represents "that part of the debtor's patrimony that is characterized by insufficiency of funds available for the payment of exigible debts" (art. 3, item 1). This insolvency procedure can be performed in several ways, such as: the general procedure, the simplified bankruptcy procedure, the judicial reorganisation procedure and the bankruptcy procedure, which applies to the debtor in order to liquidate its fortune to cover the liabilities, being followed by the deletion of the debtor from the Registry of Commerce where he was registered. The judicial moratorium and the ad-hoc law whishes to be a new and radical solution for the treatment of enterprises in distress that go through a solvable crisis, by convincing the creditors that there are chances to regain balance, by means of an operative mechanism and procedure, other than bankruptcy, which reduce the involvement of judicial bodies to a minimum, based on a convention between the involved parties.

In other words, by means of a contractual proceeding, concluded between the creditors and an honest debtor, in financial distress, one aims at avoiding insolvency and creating a procedure of contractual reorganization between debtor and creditors.

The mentioned law itself states that its purpose is to safeguard enterprises in distress, in order to continue their activity, maintain workplaces and cover all debts of the debtor, by means of amicable procedures for the renegotiation of debts or related conditions, or by means of a judicial moratorium. The judicial moratorium implies a contract concluded between the debtor, on the one hand, and the creditors that own at least two thirds of the value of accepted and unchallenged debts, on the other hand, through which the debtor proposes a plan to reestablish the balance of its enterprise and to cover all debts to creditors, while creditors accept to support the efforts of the debtor to get over the distress that the debtor's company is in.

A new element brought by the judicial moratorium is that during its application, secondary debts – penalties and interest are stopped. Also the interdiction to start the insolvency procedure for the same period is another new element.

This procedure can be used by any debtor that meets a number of conditions: hasn't been convicted for fiscal offences, no insolvency procedure has been started against that debtor in the last five years etc. In other words, has „a good conduct in business".

The judicial moratorium Law no. 381/2009 offers companies in financial distress the possibility to avoid bankruptcy by means of an authorized person that can hire people or make them redundant, conclude or terminate contracts, everything on the purpose to avoid bankruptcy. The purpose of the law is to save a company in distress by means of one of the following procedures: the ad-hoc mandate or the judicial moratorium.

1.2. Considerations regarding the way in which Law no. 381/2009 regulates the "Ad-hoc mandate"

The ad-hoc mandate is a confidential procedure, triggered upon the request of the debtor, through which an ad-hoc representative proposed by the debtor and appointed by the court negotiates with the creditors in order to reach an agreement between one or more creditors and the debtor, in

order to get over the distress that the debtor's company is in[1]. In such cases, only the court has the authority to decide. Actually, a debtor can address the nearest court to request the appointment of an ad-hoc representative from among the authorized insolvency practitioners. The request must comprise a detailed description of the reasons for which he or she requires the appointment of an ad-hoc representative. After receiving the request, the president of the court has five days to decide the invitation of the debtor and of the proposed ad-hoc representative. After listening to the debtor, if one finds that the company is indeed in serious distress, the court authorizes the appointment of the proposed ad-hoc representative. The ad-hoc representative has the obligation to reach, within 90 days after the appointment, an agreement between the debtor and its creditors, so that financial problems are solved, debts are paid, the company is saved from bankruptcy and workplaces maintained. The ad-hoc representative has the right to propose deletions, reschedulings or partial reductions of the debt, continuation or termination of ongoing contracts, personnel reductions, as well as any other measures necessary to save the company from bankruptcy and bring it back on the floating line.[2]

Regarding the ad-hoc mandate procedure, the law does not stipulate sanctions, but only the acknowledgement of its cessation by the president of the court, if no agreement has been mediated between the debtor and its creditors.

The purpose of the implementation of the ad-hoc mandate procedure is unclear, since it cannot offer a better position of the debtor in relation with its creditors – an agreement with the creditors being possible without the involvement of the court.

1.3. Considerations regarding the way in which Law no. 381/2009 regulates the "judicial moratorium"

The judicial moratorium is a contract that has been concluded between the debtor, on the one hand, and the creditors that own at least two thirds of the value of accepted and unchallenged debts, on the other hand, through which the debtor proposes a plan to reestablish the balance of its enterprise and to cover all debts to creditors, while creditors accept to support the efforts of the debtor to get over the distress that the debtor's company is in[3]. Thus, one can notice that in both cases, the intervention of the court is limited and under no circumstances does it involve a decision to enter insolvency. It only implies the conclusion and performance of new agreements between the debtor and most of its creditors, which are concluded through mediation by insolvency specialists. But the failure of these agreements leads, inevitably, to bankruptcy. It's also necessary to emphasize that during the ad-hoc mandate or the judicial moratorium period, the debtor maintains its right to manage its own business for all current inventory documents.

1.3.1. Entering the procedure and the offer for judicial moratorium

This procedure is similar to the ad-hoc mandate procedure, because debtors can file the competent court, a request to enter the judicial moratorium procedure. By means of this request, the debtor proposes a temporary conciliator (a negotiator that can be replaced by decision of the creditors' assembly, with the consent of the debtor), from among the authorized insolvency practitioners, as per the legislation. The syndic judge appoints the temporary conciliator through irrevocable decision. 30 days after being appointed, the conciliator drafts, together with the debtor, the list of creditors as well as the offer for judicial moratory. The judicial moratory offer will be added to the open file and, for enforceability against third parties, it will be sent to the court clerk where it will be filed and recorded in a special registry. Its submission and notification will be mentioned in the Trading companies registry where the debtor is registered.

[1] Law no.381/2009 regarding the implementation of judicial moratorium and ad-hoc mandate, art.3, item c
[2] Legea nr.381/2009 privind introducerea concordatului preventive si a mandatului ad-hoc, art.10 items 2,3
[3] Law no.381/2009 regarding the implementation of judicial moratorium and ad-hoc mandate, art.3 item d

The offer for judicial moratorium will also include the judicial moratorium project, that will have attached the debtor's statement regarding the distress it faces, as well as the list of known debtors, including those whose debts are fully or partially challenged, stating the amount and pledges accepted by the debtor.

The judicial moratorium project must also include a recovery plan that has to include the following minimum measures:

a) reorganization of the debtor's activity through outplacement, modification of the functional structure, personnel reduction or any other measures seen as necessary;

b) the ways in which the debtor understands to get over the financial distress, as well as: the increase of share capital, bank loan - obligational or other, set up or abolishment of branches or lucrative facilities, selling of assets, establishing of securities etc;

c) the estimated percentage for the payment of debts, which cannot be lower than 50%, after the implementation of proposed measures.

The judicial moratorium project is considered to be approved by the creditors when all the required votes from the creditors representing the majority of two thirds of the value of the accepted and unchallenged debts are met, except those that might not be independent, as per the exceptions stipulated by law.

Through the judicial moratorium project, subject to the creditors' approval, the debtor also proposes the confirmation of the temporary conciliator, as well as the conciliator's remuneration for the period subsequent to the date the moratorium has bwwn concluded.

Nevertheless, the debtor can also ask the syndic judge, based on the judicial moratorium offer, to temporarily suspend legal seizure.[4]

The request is judged by the council, in and urgent and special manner, without summoning the parties. Temporary suspension of individual legal seizure is maintained until the approved or rejected judicial moratorium is published, or until the debtor's offer to most of the creditors is rejected. This procedure does not apply to people who were convicted for economic felonies or who entered the insolvency procedure in the last five years. Also, the provisions of the law that regulates judicial moratorium do not apply to those companies whose shareholders, associates or administrators have been convicted in the last five years for fraudulent bankruptcy, fraudulent administration, cruel intentions, deception, peculation, false testimony, forgery and use of forgery.

The debtor will develop its business activities in a normal manner, in compliance with the signed judicial moratorium and under the supervision of the negotiator. The suspension of the application of procedures against the debtor's assets is triggered in a different manner, depending on the relevant stage of the procedure. Thus:

- on the date the judicial moratorium offer is made – the debtor can solicit the court to decide to decide with respect to the temporary suspension of the application of the foreclosure proceedings;
- on the date the court confirms the judicial moratorium – the application of the foreclosure proceedings initiated by the creditors which signed the moratorium are suspended on legal grounds;
- on the date the judicial moratorium is is homologated by the court – all the proceedings for foreclosure are suspended by the court.

Only the application procedures are suspended. Any creditor that obtains a foreclosure mandate during the procedure can solicit to adhere to the moratorium or can recover the amounts owed by the debtor via any other means stipulated by law. It is not clear what are the other means stipulated by the law. The increase of interest and penalties is suspended in relation with the creditors executing the agreement of the moratorium, when the moratorium is confirmed by the court. Regarding the creditors that do not accept the moratorium, the increase of interest and penalties is only suspended under limited circumstances stipulated by law. During the homologated judicial moratorium, no insolvency procedure can be opened against the debtor.

[4] Law no.381/2009 regarding the implementation of judicial moratorium and ad-hoc mandate, art. 22, item 1

1.3.2. Conclusion, finding and homologation of the judicial moratorium

In order to exercise the vote of the creditors over the judicial moratorium project, the debtor can organize one or several collective or individual meetings for negotiation with the creditors, in the presence of the conciliator proposed by the debtor. The initiative of negotiation can belong to one or more creditors, as well as to significant shareholders or the debtor's associates. The period for negotiations regarding the judicial moratorium cannot exceed 30 calendar days.

Creditors can also vote the judicial moratorium offer, with its potential amendments as a result of negotiations, via correspondence. The judicial moratorium project is considered to be approved by the creditors when all the required votes from the creditors representing the majority of two thirds of the value of the accepted and unchallenged debts are met. If the stipulated majority is not met, after at least 30 days, the debtor has the right to make another judicial moratorium offer. After the moratorium has been approved by the creditors, the conciliator asks the syndic judge to acknowledge the judicial moratorium.

Non-signatory creditors – those who voted against the judicial moratorium proposed by the debtor – have the possibility to introduce an action for annulment within 15 days since the judicial moratorium has been mentioned in the trade register.

The individual legal seizure of all signatory creditors over the debtor are suspended starting with the date the judicial moratorium finding decision has been communicated, and on the same date the flow on interest, penalties as well as any other debt-related expenses towards the signatory creditors will be suspended.

In order to make the judicial moratorium opposable to non-signatory creditors, including unknown or challenged creditors, the conciliator can ask the syndic judge to homologate the moratorium. By deciding the homologation, the syndic judge suspends all foreclosure proceedings. Also, upon the request of the conciliator, the syndic judge can enforce the non-signatory creditors of the judicial moratorium a period of maximum 18 months to postpone the due date of their debt, a period during which the flow on interest, penalties as well as any other debt-related expenses will cease. During the homologated judicial moratorium the insolvency procedure cannot be opened against the debtor.

Any creditor that obtains an enforceable title over the debtor during the procedure can draft a request to adhere the moratorium or can recover its debt by other means stipulated by law. The deadline to pay the debts established via moratorium cannot exceed 18 months after the judicial moratorium has been concluded.

1.3.3. The causes that generate the conclusion of the judicial moratorium procedure

The creditors that voted against the judicial moratorium can ask for the cancellation of the agreement, within 15 days since the moratorium has been mentioned in the trade register.

In case of a serious breach by the debtor of obligations undertaken through the judicial moratorium (such as to favor one or several creditors to the detriment of the others, the hiding or outsourcing of assets during the period of the judicial moratorium, performance of payments without counterperformance or under ruinous conditions), the assembly of the moratorium creditors can decide the entering of the action into the resolution of the judicial moratorium, in which case the judicial moratorium procedure is suspended automatically.

If the judicial moratorium procedure ends successfully, the syndic judge will rule a conclusion that will establish the achievement of the object of the judicial moratorium.

If during the process, the conciliator appreciates that it is impossible to reach the objectives of the moratorium for reasons that cannot be imputed to the debtor, it can request the syndic judge to establish the failure of the judicial moratorium and conclusion of the procedure.

If, on the expiry date of the deadline set by law[5] the obligations provided by the moratorium are not met, the creditors will be able to vote, upon the conciliator's request, the extension of the judicial moratorium duration with a maximum of 6 months as compared to its initial duration.

As for the judicial moratorium, the law stipulates the following sanctions:

- the creditors that voted against the judicial moratorium can ask for the cancellation of the moratorium within 15 days since the moratorium has been mentioned in the trade register;
- when absolute nullity is invoked, the right to establish nullity belongs to any stakeholder and is imprescriptible;
- the court can decide the suspension of the judicial moratorium by judge's order;
- if the debtor seriously breaches the obligations undertaken via the judicial moratorium, the assembly of the moratorium creditors can decide the entering of the action in for resolution of the judicial moratorium;
- when the conciliator appreciates that it is impossible to achieve the objectives of the judicial moratorium for reasons that cannot be imputed to the debtor, during the procedure and no later than 18 months, it can solicit the syndic judge to establish the failure of the judicial moratorium and conclusion of the procedure.

1.3.4. The advantages of the judicial moratorium procedure compared to the insolvency procedure

For the debtor, the procedure regulated by Law no. 381/2009 representes a series of advantages, such as:

- the debtor can propose measures to postpone or reschedule the payment of its debts;
- the debtor can propose the complete or partial deletion of some of the debts or only of the interest or delay penalties;
- the debtor can propose compensations and novations via debtor exchange;
- the debtor can propose partial reductions for fiscal liabilities; in this case, the agreement of the National Fiscal Administration Agency must be expressed within 30 days, otherwise the agreement is presumed;
- the debtor can obtain from the syndic judge a temporary suspension of legal seizure, based on the offer for judicial moratorium; the temporary suspension is maintained until the appoved judicial moratorium is published or until the offer of the debtor towards the majority of the creditors is rejected;
- the homologation of the judicial moratorium by the syndic judge determined the suspension of all foreclosure procedures;
- the individual legal seizure of all signatory creditors over the debtor are suspended starting with the date the judicial moratorium finding decision has been communicated;
- at the same date, the flow on interest, penalties as well as any other debt-related expenses towards the signatory creditors will be suspended;
- the measures incorporated by the judicial moratorium, including the modification of debts, profits and co-debtors, fidejussors and third guarantors;
- during the procedure, the debtor will continue its activity within the boundaries of the usual business, under the conditions of the judicial moratorium, under the supervision of the conciliator;
- the modification of debts stipulated in the judicial moratorium remain irrevocable if the procedure finalizes successfully.

[5]Law no.381/2009 regarding the implementation of judicial moratorium and ad-hoc mandate, art.21, par. 2, let.d

Conclusions

Law no. 381/2009 regarding the implementation of the judicial moratorium and the ad-hoc mandate introduces a more flexible mechanism, compared to the insolvency procedure, for companies in distress that is having problems reorganizing its activity, whose truly important characteristic, which cannot be achieved contractually, is the power to have all debtors executed by the creditors.

Basically, this law is addressed to those debtors that are victims of unfavourable circumstances, but that deserve protection, because the business has a chance to recover, for the benefit of its employees, its creditors (including the state, for budgetary debts), the local community and itself, its disappearing caused by bankruptcy being able to generate unfavourable consequences for the entire social environment it performs, starting with the employees (who rick to lose their jobs), local community, (which loses the income generated by taxes and fees, and which has to bear the increase of the unemployment rate locally), the Romanian state (which loses a tax payer and is to bear the unemployment expenses as well as those for professional reorientation of those made redundant), for suppliers and banks etc. The judicial moratorium is a solution to avoid the entrance of companies into insolvency.

Even if the provisions of this law apply to any legal person that reorganizes a company in financial distress, we believe it will target especially medium and large companies, since both the ad-hoc mandate as well as the judicial moratorium involve significant additional costs, consisting in the remuneration of the ad-hoc mandate, the conciliator, the expert accountant or the authorized auditor. Since these costs are hard to be sustained by a small company, while the economic, financial, fiscal and social implications are more important for medium-sized and large enterprises, due to the specialization involved by the size of the company and the difficulty to chose another type of activity. Compared to the insolvency procedure, the judicial moratorium agreement has a smaller impact on the image and trading credibility of the company in distress and besides, it is based on an amicable agreement with the creditors. Nevertheless, more concepts and time spans used by the law are unclear or inappropriate, being capable to make the successful practical implementation difficult.

Indeed, the solution offered by the lawmaker is a method to avoid insolvency, based on legal grounds, but one can never know if it will be able to save the companies from bankruptcy, if no additional and more permissive measures are implemented together with an infusion of capital.

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THE DETERMINATION AND THE IMPACT OF THE PREFIGURED MODIFY OF ROMANIAN LABOR CODE ON THE LABOR INDIVIDUAL AND COLLECTIVE RELATIONSHIPS

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Abstract:
The Romanian Labour Code – Act no 53/2003 – has been modified several times during its application. The most important modifications were aiming at the following aspects: the termination of the labour contract (especially the individual and collective dismissal and the rightful termination of the contract), the individual labour contract for a limited duration, the work time and the rest time. These modifications were punctual and determined by the necessity of assuring a balance between the position of the employees and the one of the employers.
A lot of critics have been formulated by the representatives of the employers after the Labour Code got in force. They consider that the actual regulation is too restrictive for them. It is still extremely favourable for the employees, who are protected by the Code even in situations which are not necessary to assure this protection (professional evaluation, individual dismissal, disciplinary procedure and liability). These were the reasons which determined a constant pressure from the employer's trade unions in relation with the Government in order to modify those parts of the Code which are too favourable to the employees.
The draft of the modification act includes the following major aspects: the written form of the individual labour contract; the non-competition clause; the unilateral modification of the individual labour contract by the employer; the individual dismissal; the work time; the collective bargaining and the collective contracts; the material liability of the employee; the labour jurisdiction.

Key words: *Labour Code, labour relationship; individual labour contract; dismissal; disciplinary liability; material liability; non-competition clause.*

1. Introduction

One of the most important field of regulation in Romanian law system is the labour legislation. According to art. 1 paragraph 3 of Romanian Constitution, "*Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed*".

The social character of the Romanian state had determined the special protection of the labour – in generally – and of the workers, especially. The art. 41 from the Fundamental Act – suggestively entitled "Labour and social protection of labour" – settle:

"(1) The right to work shall not be restricted. Everyone has a free choice of his/her profession, trade or occupation, as well as work place.

(2) All employees have the right to measures of social protection. These concern employees' safety and health, working conditions for women and young people, the setting up of a minimum gross salary per economy, weekends, paid rest leave, work performed under difficult and special conditions, as well as other specific conditions, as stipulated by the law.

(3) The normal duration of a working day is of maximum eight hours, on the average.

(4) On equal work with men, women shall get equal wages.

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(5) The right to collective labour bargaining and the binding force of collective agreements shall be guaranteed.".

Based on these principles, the Labour Code – Act no. 53/2003[1] – was built and represent the regulatory body of the labour legislation. Since the first period of application, it was obvious that the regulation is not equilibrate. The rights and the social protection of the employees were (and mostly, are) much more represent in the Law then the rights and legal recognition of the employers' interests.

It was the reason why the Labour Code was successively modified[2]. The Romanian Legislative organisms – both Parliament and Government – had tried to determine a necessary equilibrium between the rights and interests of the labour relations parts: employees and employers.

The global financial crisis and its reflection in Romanian economy and social life has shown that the economic productivity and the labour force flexibility are far to law compared to other countries (form European Union and beyond the European Union).

On this background, the social partners – trade unions, employers' representatives and the representatives of the Government – decided to identify the possible modification of the labour legislation, especially of the Labour Code, in order to achieve a higher performance and flexibility of the labour. Of course, the opinions are not convergent, because the trade unions wants to preserve the majority of the actual legal solutions, which assure the "social status" of the employees.

The results of the consultations between the social partners determined few drafts of the Labour Code modifications, but the Government had recently announced that intends to promote a legislative initiative in the Parliament, based on its political responsibility.

We had compared the different forms of the drafts and they include the following major aspects: the written form of the individual labour contract; the non-competition clause; the unilateral modification of the individual labour contract by the employer; the individual dismissal; the work time; the collective bargaining and the collective contracts; the material liability of the employee; the labour jurisdiction.

2. A critical examination of the proposed major modification of the Labour Code

a) The written form of the individual labour contract

According to art. 16 of Labour Code, in the actual form:

"*(1) An individual labour contract shall be concluded based on the parties' consent, in writing, in Romanian. The employer has the obligation to conclude the individual labour contract in written form. Any employer who is a legal entity, any natural entity authorised to be carry out an independent activity, as well as the family association shall be under the obligation to conclude the individual labour contract, in written form, prior to beginning any labour relationship.*

(2) If the individual labour contract has not been concluded in written form, the presumption is that it has been concluded for an unlimited duration, and the parties may make the proof of contract provisions and the work performed by means of any other piece of evidence.

(3) The work performed based on an individual labour contract shall give the employee length of service"[3].

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[1] Published in the Official Gazette of Romania, part I, no. 72 of 5th February 2003.

[2] By the: Law No. 480/2003; Law No. 541/2003; Government Emergency Ordinance No. 65/2005; Law No. 241/2005; Law No. 371/2005; Government Emergency Ordinance No. 55/2006; Law No. 94/2007; Government Emergency Ordinance No. 82/2007; Law No. 237/2007; Law No. 202/2008; Government Emergency Ordinance No. 148/2008; Government Emergency Ordinance No. 28/2009; Government Emergency Ordinance No. 37/2009.

[3] Ion Traian Ștefănescu, *Tratat teoretic şi practic de dreptul muncii* (Bucharest, Universul Juridic, 2010), p. 252-258; Alexandru Țiclea, *Tratat de dreptul muncii* (Bucharest, Universul Juridic, 2009), p. 412-414

The Government intents to abrogate the second paragraph of the art. 16, correlated to the intention of the legislative to determine the criminal liability of the person – individual or company – who will use labour force without signing a written labour contract. In present, if an employer doesn't conclude a written individual labour contract, only material and/or administrative liability are engaged.

b) The non-competition clause

The regulation of the non-competition clause in the Labour Code are the following:

"*ART. 21*

(1) Upon the conclusion of the individual labour contract or throughout its execution, the parties may negotiate and include in the contract a non-competition clause under which the employee shall be under the obligation, after contract termination, not to perform, for his/her own interest or that of a third party, an activity which is competing with the one performed for his/her employer, in exchange for a monthly non-competition emolument which the employer undertakes to pay for the entire non-competition time period.

(2) The non-competition clause shall only take effect if the individual labour contract clearly stipulates the activities the employee is prohibited from performing from the date of contract termination, the amount of the monthly non-competition emolument, the time period for which the non-competition clause causes its effect, the third parties on behalf of whom the performance of the activity is being prohibited, as well as the geographic area where the employee might be in actual competition with his/her former employer.

(3) The monthly non-competition emolument due to the employee shall not represent wages, shall be negotiated and shall be at least 50% of the average gross wages in the last 6 months prior to the date of termination of the individual labour contract was terminated or, if the duration of the individual labour contract was less than 6 months long, of the average gross monthly wages due to him/her for the contract period.

(4) The non-competition emolument shall represent an expense made by the employer, shall be deductible upon the calculation of the taxable profit, and the tax shall be charged from the beneficiary natural person, under the law.

ART. 22

(1) The non-competition clause may cause effects for a period not exceeding 2 years as from termination date of the individual labour contract.

(2) The provisions of paragraph (1) shall not be applicable when the termination of the individual labour contract has taken place rightfully, except for the cases provided in Article 56 d), f), g), h) and j), or when it has been based on the employer's initiative for reasons which not pertaining to the employee' person.

ART. 23

(1) The non-competition clause may not have as effect the employee being absolutely prohibited from exercising his/her profession or specialization.

(2) Based on a notification by the employee or the territorial labour inspectorate, the competent court of law may diminish the effects of the non-competition clause.

ART. 24

In the event of the employee having violated, in ill will, the non-competition clause, he/she may be obliged to return the emolument and, as applicable, pay damages corresponding to the prejudice caused by him/her to the employer"[4].

The principals modifications of the non-competition clause regulation are referring to the possibility of the employer:

[4] Ion Traian Ştefănescu, *op. cit.*, p. 312; Alexandru Ţiclea, *op. cit.*, p. 405-409

- to increase the period of the former employee's interdiction to work for another employer or to work on an individual and independent form in an activity related to the activity of the former employer; the actual period of two years (art. 22 paragraph 1);

- to negotiate the amount which the former employee will receive in change of the respect of the non-competition obligation; in the actual form of the Code, the employer has no possibility to bargain an amount under the minimum value mentioned by the art. 21 paragraph 3 – which is at least 50% of the average gross wages in the last six months prior the date of termination of the individual labour contract was terminated or, if the duration of the individual labour contract was less than six months long, of the average gross monthly wages due to the employee for the contractual period;

- to unilaterally denounce the non-competition clause, during the period of its application, in order to stop the payment of the former employee; in the actual regulation, if the former employee notify the former employer (the debtor of the payment of the non-competition emolument) its position of entire respect of the non-competition obligations, the former employee has to pay the non-competition emolument all the period negotiated with the employee (maximum two years), even the employer has no or limited interest in respect by the former employee of the non-competition obligation. It is possible to have such positions because the non-competition clause is negotiated at the conclusion of the individual labour contract and produce its specific effects only after the termination of the contract. Between the two mentioned moments it is possible that the initial interest of the employer to assure that the employee will respect the non-competition obligation could vanish.

c) The trial period

One of the most sensitive modification of the Labour Code implies the modification of the norms having object the trial period. In the actual settlement, the norms are the following:

"*ART. 31*

1) In order to check the abilities of the employee, on the conclusion of the individual labour contract, a trial period not exceeding 30 calendar days may be established for executive positions, and not exceeding 90 calendar days for management positions.

(2) The check of professional abilities when employing disabled persons shall be based only on a trial period of not exceeding 30 calendar days.

3) As far as unskilled workers are concerned, the trial period shall be exceptional and shall not exceed 5 workdays.

4) Graduates of higher-education institutions shall be employed, at the beginning of the employment in their profession, based on a trial period not exceeding 6 months.

4^1) Throughout the trial period or at the end of it, the individual labour contract may only be terminated, based on a written notice, following the initiative of either party.

5) During the trial period, the employee shall enjoy all the rights and have all the obligations stipulated in the labour legislation, the applicable collective labour contract, the internal regulations, as well as the individual labour contract.

ART. 32

1) During the progression of an individual labour contract, there may only be one trial period.

2) As an exception, an employee may be subject to a new trial period if he/she starts up in a new position or profession with the same employer, or is to perform his/her activity in a work place under difficult, harmful, or dangerous conditions.

(3) The failure to inform the employee, before the conclusion or amendment of the individual labour contract, about the trial period, within the term set under Article 17 (4), causes the employer to lose the right of checking the employee's abilities by such means.

4) The trial period shall represent length of service.

ART. 33

It is prohibited to successively employ more than three persons for trial periods for the same position".

The modification aim at the following results:

- the Government intends to increase the trial period for all employees' positions categories (executive positions, management positions) from 30 calendar days up to 90 calendar days for the executive positions and from 90 calendar days up to 180 calendar days for the management positions; the interest of the Government is here related to the interest of the employers representatives, because throughout the all trial period or at the end of it, the individual labour contract may only by unilaterally and unconditioned terminated by the employee, based on only a written notice (without the respect of all formal and material conditions asked by the law related to the dismissal of the employee) – art. 31 paragraph 4^1;

- the Government wants to abrogate the stipulation of art. 33 – which obliges the employers not to hire more than three persons for trial periods for the same position; if the legal provision will be abrogated, the employers will have the legal permission to conclude more than three individual labour contracts for the same position, determining the termination of each one based on the written notice addressed to the employee at the end of the each trial period; in this way, it is possible to have an undetermined number of employees hired successively on the same position with the permission of the employer to fire them without the respect of the dismissal's conditions.

d) The individual dismissal

In the actual regulation of the individual dismissal – an unilaterally way of termination of the individual labour contract – the employer could determine the end of the labour relation only if is in one of the hypotheses which are settle by art. 61 and art. 65 from the Labour Code:

"*ART. 61*

The employer may order the dismissal for reasons pertaining to an employee's person under the following circumstances:

a) if that employee has perpetrated a serious departure or repeated departures from the work discipline regulations or those set by the individual labour contract, the applicable collective labour contract, or the internal regulations, as a disciplinary sanction;

b) if the employee has been placed under police custody for a period exceeding 60 days, under the terms of the Criminal procedure code;

c) if, following a decision of the competent medical examination authorities, physical and/or mental incapacity of that employee has been found, which prevents the latter from accomplishing the duties related to his/her current work place;

d) if the employee should not be professionally fit for his/her current position;

ART. 65

(1) The dismissal for reasons not pertaining to the employee's person shall represent the termination of the individual labour contract, caused by the suppression of that employee's position, for one or several reasons not related to the employee".

The Government representatives, including the Prime-Minister, affirmed that the restrictive way of the dismissal regulations is an factor which contributes to a low degree of efficiency of the employers activity, both in the public and private sectors of activity. This is the reason why the future solutions are in order to increase the flexibility of the labour relations and the accent in this matter to be put not on the social protection of the employees, but on the professionalism and efficiency of their activity.

The employer is suppose to have the legal permission to evaluate the activity of the employees and to determine the termination of the labour relation for the ones who do not fully respond to its economical interests.

The trade unions representatives affirmed that a such solution will determine an so called "salary slavery", because the employees will depends of the simple will of the employers: when an employee shall not be necessary anymore for the employer, the last one will denounce the contract without the possibility for the employee to defence.

e) The individual labour contract for a limited duration

The principle stipulated by the Labour Code in the matter of the individual labour contract's duration is that this contract should be concluded by its parts on an unlimited duration (art. 12 paragraph 1). The exception is the limited duration of the contract. Art. 80 regulates:

"*(1) As an exception to the rule stipulated under Article 12 (1), the employers may be permitted to employ, for the purpose and under the terms of the present code, personnel based on individual labour contracts for a limited duration.*

(2) An individual labour contract for a limited duration may only be concluded in a written form, expressly stating the duration it is being concluded for.

(3) An individual labour contract for a limited duration may be extended even after the expiry of the original delay, based on the parties' written consent, but only within the delay stipulated under Article 82 and no more than two times consecutively.

(4) No more than 3 successive individual labour contracts for a limited period may be concluded between the same parties, and only within the delay stipulated under Article 82.

(5) Individual labour contracts for a limited period concluded within 3 months from the termination of a prior labour contract for a limited period shall be deemed as successive contracts".

The situations which allow the employers to propose to the future employee a limited duration of the individual labour contract are settled by the art. 81. They are the following:

- replacement of an employee in the event his/her labour contract is suspended, except when that employee participates in a strike;
- a temporary increase in the employer's activity;
- progression of some seasonal activities;
- if it is concluded based on some lawful provisions issued with a view to temporarily favouring certain categories of unemployed persons;
- hiring a person who, within 5 years from the hiring date, meets the terms of retirement for age limit;
- occupying an eligible position within the trade, employers' or non-government organizations, for the duration of the term of office;
- the hiring the retired persons who, under the law, may cumulate the pension and the wages;
- in other instances expressly stipulated by special laws or for the progression of works, projects, programs, under the terms set forth by the national and/or branch collective labour contract.

According to art. 82 paragraph 1, an individual labour contract for a limited duration may not be concluded for a period exceeding 24 months. If an individual labour contract for a limited duration is concluded with a view to replacing an employee whose individual labour contract has been suspended, the contract duration shall expire when the reasons having caused the suspension of the individual labour contract of the full employee have ceased to exist (paragraph 2 of the art. 82).

The Government intends to prolong the actual limit of 24 month up to 36 month, which represents an increase with 33% of the duration.

f) The duration of the work time

Art. 111 in its actual form regulate the maximum duration of the work time:

"*(1) The maximum lawful length of the work time shall not exceed 48 hours/week, including extra hours.*

(2) As an exception, the length of the work time, including the overtime work, may be extended over 48 hours/week, provided the average number of work hours, as calculated for a reference period of 3 calendar months, does not exceed 48 hours per week.

(2^1) For certain sectors of activity, units, or professions listed in the national sole collective labour contract, under applicable collective labour contract at the level of branch of activity, reference periods that exceed 3 months may be negotiated, without, however, exceeding 12 months.

(2^2) When establishing the reference periods stipulated under paragraphs (2) and (2^1), the length of one's annual rest leave and the instances when the individual labour contract is being suspended shall not be taken into account.

(3) The provisions of paragraphs (1), (2) and (2^1) shall not apply to young people who have not turned 18 years of age".

The Government doesn't intend to increase the maximum duration of the weekly work time – 48 hours – but wants to modify the second paragraph of art. 111, in order to prolong the reference period from the actual solution (three month) up to four month.

g) The collective bargaining and the collective labour contracts

The actual principle regulation of the labour bargaining and collective labour contracts is find on the art. 236-247 of the Labour Code.

"*ART. 236*

(1) The collective labour contract shall be the agreement concluded in a written form between the employer or the employers' organization, on the one hand, and the employees, represented by their trade unions or in any other manner stipulated by the law, on the other hand, in which clauses are set up concerning the work conditions, the wages, as well as other rights and liabilities deriving from the labour relationships.

(2) Collective negotiation shall be mandatory, except when the employer has less than 21 employees.

(3) When negotiating the clauses and concluding the collective labour contracts, the parties shall be equal and free.

(4) The collective labour contracts, concluded in compliance with the provisions of the law, shall constitute the law of the parties.

ART. 237

The parties, their representation, and the procedure for negotiating and concluding the collective labour contracts, shall be established under the law.

ART. 238

(1) The collective labour contracts shall not contain clauses which set up rights at a lower level than the one set up in the collective labour contracts concluded at a higher level.

(2) The individual labour contracts shall not contain clauses setting up rights at a lower level than the one set up in the collective labour contracts.

(3) When concluding a collective labour contract, the provisions of the law concerning the employees' rights shall constitute a minimum standard.

ART. 239

The provisions of the collective labour contract shall cause effects for all employees, irrespective of their date of employment or affiliation to a trade union.

ART. 240

(1) The collective labour contracts may be concluded at the level of the employers, branches of activity, or at a national level.

(2) The collective labour contracts may also be concluded at the level of groups of employers, hereinafter called groups of employers.

ART. 241

(1) The clauses of the collective labour contracts shall cause effects as follows:

a) for all employees of an employer, in the case of the collective labour contracts concluded at such level;

b) for all employees hired by employers that belong to the group of employers for which the collective labour contract has been concluded at such level;

c) for all employees hired by all the employers in the branch of activity for which the collective labour contract has been concluded at such level;

d) for all employees hired by all the employers in the country, in the case of the collective labour contract at national level.

(2) At each of the levels stipulated under Article 240, a single collective labour contract shall be concluded".

The modification prefigured by the Government are in order to:

- increase the number of employees of the employers who are obliged to bargain from 21 up to 50;

- renounce at the mandatory provisions of the collective labour contract at national level.

In the actual form, the Labour Code determines a mandatory solution even for the employers who were not represented at the negotiation of the collective labour contract at national level. They have to respect all the content of the collective labour contract, without having the possibility to determine this content. The employers claimed that it is a excessive solution, and proposed to be abrogated. The Government representatives affirmed that the collective labour contract concluded at the branch level will become the rule in this matter. Each branch of activity will have its specific labour relations regulations.

h) The labour jurisdiction

An important modification of the rules of labour jurisdiction was already operated by the Act no. 202/2010, which modified the composition of the labour specialized panels: in the composition enters only one judge, not two, how was settled before the entered in force of the Act no. 202/2010.

An other modification which is prefigured is referring to the provisions of art. 287 from the Labour Code:

"*The employer shall be responsible for providing evidence in labour conflicts, being obliged to submit evidence in his defence by the first day of trial*".

The Government intends to renounce at this solution, in order to determine the application of common solution in a civil trial (art. 1169 Civil Code – the claimant shall be responsible for providing the evidences).

3. Conclusions

The modification of the Labour Code is a difficult and risky task for every part which is implicated in this process. One thing is certain: the modification is necessary in order to establish a functional regulatory settlement in the field of labour relations.

In this framework, the most important institutions which need to be modify are: the written form of the individual labour contract; the non-competition clause; the unilateral modification of the individual labour contract by the employer; the individual dismissal; the work time; the collective bargaining and the collective contracts; the material liability of the employee; the labour jurisdiction.

In the future, depending on the final form of these modifications, the specialists will be able to affirm their utility or, *a contraire*, the fact that one or more modification were useless or even had determined difficulties in application.

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CONTRACTUAL FREEDOM AND FORMALISM IN THE CREDIT AGREEMENT

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Abstract:
The credit agreement meaning is trust. It involves a psychological relationship between two or more persons, characterized by predictability the third one involving present or future action on the status of a particular person.
This relationship is psychological, in a certain context, social relationship and may take legal meanings. If at the beginning, people borrowed food and tools, later borrowed money to buy everything you wanted. Financial lending institution has become very popular, creating a group of people who have dealt with this service.
Over time, this community has turned into banks. Being originally a loan of money covered by the Civil Code, the credit is used daily by both individuals and by professionals, becoming an engine of capitalist society. Unprecedented expansion of this contract led to a strict control of public authorities and subsequent legislative interventions, the articles of the Civil Code is supplemented by regulations governing the progressive banking, legal interest, namely consumer credit.
Under the credit agreement, the economic situation of the parties is not equal, one party is disadvantaged in comparison to the other, protecting the disadvantaged part of the legislature making it a target in credit operations.
In French doctrine, consumer credit has been praised as "a contract of all pleasures"; but at the same time "an agreement of all risks".

Key words: *credit agreement, formalism, pre-offer, vices, contractual freedom*

Introduction

According to the principle of contractual freedom, any person capable of contracting may conclude a contract of loan money, as the lender. In the case of consumer credit, the legislature has intervened to limit freedom of contract, by strict definition of categories of persons who can act as „creditors", and control over their work.

The legislature has limited category of persons who may be professionals creditors.

Thus, firstly, consumer credit may be granted only by a professional, ie a legal person, in the course of his trade or professional activities (article 7, section 5 of the OUG. 50/2010)

Secondly, the field of consumer credit can speak of a monopoly of the credit institutions established by law. Can creditors, according to GEO. 99/2006 and GEO. 50/2010, credit institutions: banks, credit cooperatives, credit institutions, foreign branches, which operate in Romania, foreign non-bank financial institutions that operate on the territory of Romania. Banks and financial institutions are traditional forms of credit institutions.

The major difference between them lies in the fact that non-bank financial institutions to finance lending operations they carry out are not allowed to collect deposits from the public, but are obliged to use their own funds or interbank market.

This monopoly of credit institutions is likely to ensure reliability and competence of individuals, but also to protect a hazard specialists of their profession, the invasion of any persons.

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This status allows credit institutions to comply with an order that certain statutory provisions and be subject to control.

For a contract which the parties have content they wish, they must express their will freely and consciously. To this end, the legislature has established certain limitations on freedom of contract, in terms of consent, subject matter and because of the credit. Under art. 948 Civil Code, one of the essential conditions for the validity of an agreement constitutes a valid consent of the party who undertakes. Expressed to be valid, consent must come from a person with discernment, to be expressed with the intention of producing legal effects, to be externalized and not tainted by any defect of consent[1].

These common law rules applicable in the case of consumer credit. Given, however, the specifics of this contract, and especially the desire of the legislature to protect the consumer, certain rules designed to ensure a free and conscious consent of it have emerged in the EU and national legislation. Protecting consumer consent is subject to numerous laws, the legislature from its position in inferiority relation with professional lender.

Consumer is not always able to understand grativitatea its commitment with its immediate consequence of duty. Protection of their consent is secured by means of both common law and the law through specific consumptions.

Common law makes domestic consumer will prevail by the vices of consent theory. Protection provided by the vices of consent legislation applies to all types of lending, including consumer credit. The most common defects of consent for a loan of money is the error, the fraud and violence, the presence of any of them at the time the forfeiture may act.

Consumer vices of consent takes the form of a pre obligations incumbent upon the creditor, the borrower consumer information and advice.

If at home, the theory that a liberal society, composed of free men and managers, each was obliged to inform gradually abandoned this theory, the concern heading towards consumer protection.

The basis of the obligation of information and advice can be found in the provisions of art. 970 par. 2 of the Civil Code

The Convention obliges not only express what is in themselves, but all the consequences which equity, custom or law gives the obligation according to its nature.

French Court of Cassation affirmed the existence of the obligation borne by the creditor information and advice.

The question has arisen whether a bank, giving the consumer a credit agreement, based on a prior offer strictly regulated, was held and an obligation to advise his client. The Court held that the submission of a prior offer the creditor does not dispense professional advice to the borrower's obligation, especially if, for professional, total cost of credit appears to be excessive in relation to the limited resources of the consumer. In the same way, Romanian legal doctrine holds that the bank is obliged to inform customers of all banks and all terms of contracts of mutual commitments of the Parties[2].

Freedom of borrower-consumer contract is extended at the expense of freedom of contract to the creditor. To ensure that consumer consent is free and uncorrupted, that the balance between consumer and professional lender is retained, the legislature amended the usual conditions of formation of a contract.

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[1] See Gh Beleiu, Romanian Civil Law, Introduction to civil law, civil rights issues, 6th edition -, revised and enlarged by M. Nicholas and P. Trusca, Ed Chance, Bucharest, 1999, p. 151.

[2] See, I. Turcu, Operations and banking contracts. Banking Law Treaty , vol II, Editura Lumina Lex, Bucharest, 2004, p. 20-22;

The formalism of the consumer credit

In the consumer credit agreement may exist situations of inequality between the parties, whereas the contractual partners, even though they have the same rights, same legal capacity, don't have the same level of knowledge or proper understanding of the consequences of their commitment.

On the other hand, consumers pressured by the need to obtain a loan, risk to assume a commitment without properly assess its consequences, because of lack of expertise.

To avoid excessive consumer debt, the legislature has provided, in close correlation with the substance, certain special rules on formal requirements to be met by a consumer credit agreement..

To restore consumer contractual freedom, the principle of mutual consent is removed by an formalism information, rigorously regulated by law, with the inevitable result of the encroachment of creditors contractual freedom.

On the other hand, the lender obligations can not be considered contractual obligations, but legal obligations, as they do not arise from the contract.

Contractual freedom of the creditors is restricted because they can not circumvent this formalism information provided by the legislature. It can be said that in the case of consumer credit, the legislature created a special legislation in derogation of common law obligations.

Pre - formalism

In relation to consumer credit, the formalism is essentially challenging the very existence of the contract.. The aim of the legislature is to dispel any doubt, to prevent any disputes.

This formalism has led to massive limitation of freedom of contract, consumer credit is, as stated, a contract of adhesion, the negotiations on the valid conditions have a limited framework. The validity of the legal act depends more on what is written, rather than what is desired by the parties.

This limitation of contract freedom, is found both in terms of advertising of consumer credit and in offers of the creditors to consumers.

Formalism in a prior offer of consumer credit agreement

Directive no. 87/102/CEE , does not include special reference to the prior offer of consumer credit contract, and is concluded, attaching the same regime as an advertising (Article 3).

Act no. 289 of 2004, our legislation transposing the Directive, reflects the provisions of Article 3, adding certain obligations for the creditor, before the conclusion of the agreement, that is offering for free to the consumer, on paper or another durable medium, a repayment schedule, and a copy of the draft credit agreement, by request from a consumer; and provide the consumer ,full, fair and accurate information about the credit agreement envisaged., to inform the consumer of all documentation necessary to award a loan credit.[3].

Formalism in the supply offer is clear, the creditor not having the freedom to provide information required by law in the form desired by him.

Thus, article 5 states that the information provided on paper or durable, are supplied via form „The Standard European Consumer Credit Informations" contained in the annex. 2. Any additional information that the lender would like to deliver to consumer must be provided in a separate document that can be attached to that form.. However, the consumer will be provided on request and free of charge, in addition to the standard form of contract, a project loan agreement.

[3] Article 6 of Law no. 289 of 2004: The documents that must include at least: 1. Current financial statements of the borrower and any guarantor of its compliance with relevant regulations; 2. a description of how to guarantee full payment of the debt or, if appropriate, an assessment of the goods covered by the warranty.

State legislature has regulated also the credit agreement by using a means of distance communication which does not allow providing standard information; in this case, the creditor has the obligation to provide all the information pre-consumer, using the form „The Standard European Consumer Credit Informations", immediately after the credit agreement.

We note that efforts at EU level, on harmonization of national laws in the consumer protection, have led to the development and implementation into national law of the form „Standard information on Consumer Credit Informations" contained in the annex. 2. But the directive leaves the Member free to regulate potentially binding nature of the information provided before the consumer credit agreement, that period the information is bound to the lender. Such standardization is meant to provide complete information to consumers and an aware and informed of their decision to conclude a credit agreement, restricts freedom of professional creditors. On the other hand standardization, highlights the character of adhesion of consumer credit agreement. Consumers can join or not, the standardized contract, negotiations on the substantive conditions are very low.

In all cases, the purpose of a detailed information to a consumer, expressed as free and conscious consent to the conclusion of a consumer credit agreement is secured.

Transposing this Directive into national law, the Emergency Ordinance no. 50/2010 devote Section 2 -, Chapter II „pre-information" covering both the content of the information obligation incumbent on creditors and credit intermediaries but also form you need to wear any offer of credit, creditors freedom in this area is much smaller.

Thus, Article 11 provides that the creditor or credit intermediary to provide the consumer information required by law, on paper or on another durable medium, in writing, clearly and easily read. Failure to comply with legal provisions on credit supply formalism is in accordance with Article 86 para. 1 offense and is punishable by a fine of 10,000 to 80,000 lei.

Contract Formalism

Directive. No. 87/102/EEC., provide in article 4 item 1, the obligation to conclude the credit agreement in writing, the consumer receives a copy of the written agreement. The written contract should include the mandatory elements set out specifically. Article 7 of Law no. 289 of 2004, provide that credit agreements be in writing, on paper or another durable medium, at least two copies, one original copy is delivered to each party. The written agreement must include all data specified by law.

Formalism, specific to consumer protection is maintained during the execution of credit agreement, Article 9, providing the creditor must inform the consumer in writing about any changes during the duration of the agreement, on the annual interest or costs incurred after signing the contract, when this change occurs.

The legislature has provided that such disclosure is made by registered letter with acknowledgment of receipt or statement of account through which the consumer is provided free of charge. The penalty provided by law for breach of contract formalism is fine offenses. In the case of consumer credit contracts in which the total amount of loan repayment is made in installments, creditor has the obligations to provide the consumer with a statement as an amortization table or reimbursement schedule on paper or on another durable medium, as determined by the consumer.

The table should indicate the rates payable, terms and conditions of payment of these amounts, should contain a breakdown of each repayment showing the total amount of loan repayment, interest at the borrowing rate, any additional costs.

Article 50 para. 1 of the Ordinance provides for the creditor the obligation to inform, on paper or on another durable consumer in connection with any change in borrowing rates.

Formalism refers also to the termination of the credit, the creditor has the obligation to provide the consumer, free, by default, a document attesting the extinction all obligations of the parties arising from the credit agreement. In connection with the penalty that occurs for failure to

comply form conditions, is required some discussion, as interesting to determine whether that form is required by law ad validitatem or only ad probationem.

Considering the scope of these laws, to protect the consumer found in a inferior position to the professional creditor, it appears obvious that the penalty occurs in the formal non-compliance is the absolute nullity of the contract, form as required by the legislature as a condition of validity of the agreement.

Clearly, however, written form will serve as proof of the existence and content of consumer credit contract, and to prove that the creditor has the obligation to inform the consumer.

Such a penalty is not, however, likely to protect consumer interests in the event of detection of absolute nullity of the contract, being in a position to repay the loan amount immediately.

In the absence of legal provisions, legal doctrine expressed within the meaning of decay professional lender from the right to claim interest stipulated in the contract, following the French model[4]. Loss of professional law regarding debt interest is a more effective comminatory sanction and appropriate to consumer needs whenever information formalism required by law has been infringed[5].

Binding of consumer credit agreement

Binding force principle of contract[6] , enshrined in Article 969 para. 1 Civil Code, works also for the credit agreement: parties to such a contract are also bound by obligations arising from their agreement. In other words, the consumer credit agreement, legally bound the parties as strictly as the law. Parties are free to choose whether or not a contract ends, but once completed they are required to fulfill the obligations arising from that contract in their task. In order to protect the party in the contract, the right of consumption tend to restrict the effects of this principle.

A new concept of binding force is defined as opening the emergence of the rule of proportionality or balance of contract, that good faith in contract performance. Along with limiting freedom of contract and mutual consent, the principle of binding force of contract, knows a real decline. Parties are not free to determine the contents of consumer credit contract, making him a contract of adhesion. The legislature is to decide how to execute a credit agreement, so that we can say that the law became the foundation of the principle of binding force of this agreement.

In terms of the binding force of contract is interesting to consider both the actual execution of the consumer credit agreement and also the cases where any party fails to fulfill its contractual obligations.

Binding of the contract, regards both the performance the execution of professional creditor obligations - mainly payment of capital, starting as a genuine act of commencement of performing the contract -, and fulfilling the obligations incumbent upon the consumer, in particular capital repayment loan, plus interest due.

On the other hand, binding force of the agreement must be followed in respect of the funds destination, in those situations where the parties have agreed on a particular destination.

Compliance with the founds destination interested in both the consumers whether he is free to use the destination borrowed funds, and the creditor to know when the task arises, the obligation to monitor the use of funds by the consumer, according to the agreed destination. An incorrect use of borrowed funds can produce prejudice both consumer and professional lender.

If the consumer does not comply with the destination of the funds borrowed, the lender is entitled to terminate the contract, the refund of the money borrowed and any damages.

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[4] See V. Magnier, Les Sanctions du informatif formalisms, in "La Semaine juridique" no 5. May 2004, p. 178

[5] See Juanita Goicovici, Sergey Golub, "Formalism information - a special view to credit consumer" in Consumerism contract. Benchmarks for a general theory of consumer contracts, coordinator Paul Vasilescu, Legal Publishing Sphere, Cluj-Napoca, 2006, p. 94.

[6] Civil Code Article 969: "Legal agreements have the force of law between contracting parties".

Similarly, if the parties have agreed that payment be made by creditor directly to a third party and the creditor does not comply with these destinations will incur contractual liability to the creditor, subject to proof by the consumer injury.

On the basis of such liability, the creditor will be required, to perform in good faith their commitments under the contract of consumer credit.

Conclusions

According to the principle of binding force of contract, the parties are required to fulfill obligations under the contract. Being a contract with successive execution, consumer credit contract is extended in time so that the parties may be at random in this interval. In economic crisis, consumer credit contract enforcement is not a certainty, and so the consumer may have financial difficulties in repaying the loan.

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- O.G. no. 90/2004;
- O.G. no. 50/2010;
- Directive. No. 87/102/EEC

INSURER SEQUESTRATION OF THE DEBTOR'S IMMOVABLE PROPERTY IN BUSINESS

NICOLAE GRĂDINARU[*]

Abstract
Insurer sequestration is the insurance measure that the creditor resorts to and that is applicable if the object of the litigation is the payment of a sum of money and that consists of the unavailability of the debtor-defendant's sequestrable movable or immovable property, until the final (irrevocable) decision given in the main trial in order to profit from the property when the creditor will obtain a writ of execution. In this regard, there are the provisions of Article 591 paragraph 1 thesis I of the Civil Procedure Code: "A creditor who does not have the writ of execution, but whose claim is proven by written act and is exigible, may request the setting up of an insurer sequestration of the debtor's movable and immovable property, if he proves that he took legal action". Thus, the provisions of article 907 are understood by reference to the provisions of article 591 paragraph 1 thesis I art.591 of the Civil Procedure Code, in that: in business, the insurer sequestration may also be set up on the debtor's immovable property.

Key words: *insurer, sequestration, exigible claim, appeals in the interest of the law.*

Introduction

Insurer sequestration is the insurance measure that the creditor resorts to and that is applicable if the object of the litigation is the payment of a sum of money and that consists of the unavailability of the debtor-defendant's sequestrable movable or immovable property, until the final (irrevocable) decision given in the main trial in order to profit from the property when the creditor will obtain a writ of execution.[1]

The interested party has the opportunity provided by law to require the court to order the taking of some precautionary measures, namely blocking and conservation measures to hinder the opposing party, during the process, to destroy or alienate his property or to diminish his patrimonial assets.

In the legal practice it was found that there is not a unitary point of view on the interpretation and application of the provisions of articles 907 and 908 from the Commercial Code, in relation to the provisions of article 591 of the Civil Procedure Code, relating to the setting up of the insurer sequestration and on the immovable property not only on the movable property of the debtor in commercial cases.[2]

By the appeal in the interest of the law, pronounced by the general prosecutor of the High Court of Cassation and Justice, it has been made obvious that in the legal practice there is no unitary point of view on the interpretation and application of those provisions.

Thus, some courts have considered that the insurer sequestration in business can only be ordered on the debtor's movable property, according to the provisions of article 907 of the Commercial Code.

In justifying this point of view it has been shown that the provisions of the Commercial Code have a waiver character to the rules set out in the Civil Procedure Code, so that in business the insurer sequestration is governed only by the provisions of articles 591 - 594 of the Civil Procedure Code. Other courts, on the contrary, have considered that the insurer sequestration may be set up also

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[1] V.M.Ciobanu, G.Boroi – Drept procesual civil (Civil Procedural Law,), Ed.All Beck, 2005. p. 219.
[2] Mihaela Tăbârcă – Drept procesual civil (Civil Procedural Law,), Ed.Universul Juridic, 2008, p.427-434.

on the debtor's immovable property; in this respect the provisions of article 907 of the Commercial Code being applicable, related to article 591 of the Civil Procedure Code.

Insurer sequestration of the debtor's immovable property in business

Thus, according to the provisions of article 907 paragraph 1 of the Commercial Code[3], any party interested in a commercial cause will be able, once with the suing, to request the setting up of the insurer sequestration of the debtor's movable property.

He will also be able to follow and to seize for the sums included in his writ or the sums or the effects owed to his debtor by a third party.

Regarding the other aspects of setting up the insurer sequestration in case of commercial litigations, the interested party may not be exempt from observing the provisions of the Civil Procedure Code concerning this insuring measure, provisions to which refers the regulation norm contained in article 907 of the Commercial Code, that is to say article 614 of the Civil Procedure Code.[4]

In case the ascertainment document is a writ of execution, the setting up of the insuring or protective measure lacks any interest, since the creditor can trigger the forced execution.

The insuring measure may be required when the document is not a writ of execution or when the claim is not established by a document.

In this context, there are the provisions of article 591 paragraph 1 thesis I of the Civil Procedure Code: "The creditor who does not have a writ of execution, but whose claim is proven by written document and is exigible, may request the setting up of an insurer sequestration of the debtor's movable and immovable property, if he proves that he took legal action.

He may be forced to pay a bail in the amount established by the court and that will be determined under the provisions of article 723^1 paragraph 2 the Civil Procedure Code.

The same right is held by the creditor whose claim is not ascertained in written, if he proves that he filed action and submits, together with the request of the sequestration, a bail of half the value claimed.

The court may allow the insurer sequestration even if the claim is not exigible in the cases in which the debtor has reduced by his deed the assurances given to the creditor or did not give the promised assurances or when there is the danger for the debtor to avoid surveillance or to hide or to dissipate his assets. In these cases, the creditor must prove that the fulfillment of the conditions: the claim is ascertained by written document, he proves that he sued and he pays a bail whose value shall be determined by the court.

The provision of article 591 of the Civil Procedure Code, "the creditor who does not have the writ of execution, but whose claim is ascertained by written document and is exigible, may request

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[3] Article 907 of the Commercial Code

The interested party in a business cause will be able, together with suing, to put insurer sequestration of the debtor's movable property according to article 614 and the following from the civil procedure according to the differences stated below.

He will also be able to follow and to seize for the sums included in the writ or the sums or the effects owed to his debtor by a third party, complying with the provisions of article 456 and the following of the Civil Procedure Code.

Article 908

The sequestration or the seizure will not be set up unless there is payment of the bail, except when the request for sequestration or seizure is made under a bill of exchange or other commercial effect to order or to bearer, protesting for non-acceptance or non-payment.

Judecătoria se va pronunța asupra sechestrului în camera de consiliu fără prealabilă chemare a părților.

The insurer sequestration can only be released if the debtor deposits the sum, capital, interests and costs for which the sequestration was set up.

[4] The provisions of article 614 and the subsequent ones of the old Civil Procedure Code, to which reference is made by article 907 paragraph 1 from the Commercial Code, are found in article 591-596 of the current regulation.

the setting up of an insurer sequestration of *the debtor's movable and immovable property*", thus imposes to implicitly consider modified the content of article 907 paragraph 1 of the Commercial Code as well, which refers only to the insurer sequestration of the debtor's "movable property", in the context in which, under the current legislation the insurer sequestration can be ordered both of movable and immovable property.

Therefore, in the event of failure or improper fulfillment of the commercial obligations incumbent on the parties of the agreements concluded, because the debtor's fault or because of other causes, the creditor must be enabled to gain access to such guaranties to insure both the full fulfillment of the obligations taken by the debtor, and his efficient protection against the risks that could prevent his wealth.

The creditor who does not have a writ of execution, but whose claim is ascertained in writing and is exigible, may request the setting up of an insurer sequestration of the debtor's movable and immovable property, if he brings evidence to prove the start of the litigation[5]. If the request to set up the insurer sequestration is submitted together with the request for suing which initiates the litigation, the creditor must enclose the ascertaining document of the claim, for the situation stipulated in paragraph 1 of article 591, it may be required to pay a bail of a sum determined by the court.

The court may allow the insurer sequestration if the claim is not exigible, in the cases in which the debtor has reduced by its deed the assurances given to creditor or did not give the assurances promised or when there is the danger for the debtor to avoid the surveillance or to hide or to dissipate his assets. In these cases, the creditor must prove that the fulfillment of the other conditions stipulated by paragraph 1 and to deposit a bail whose value shall be determined by the court.

The same right is held by the creditor whose claim is not ascertained in written, if he proves that he filed action and submits, together with the request of the sequestration, the document to prove the deposit of half of the value claimed in the litigation, for the situation provided by paragraph 2 of article 591 of the Civil Procedure Code.[6]

In case the request for setting up the insurer sequestration is made after recording the request for suing, the evidence which shows the initiation of the litigation must be enclosed.

Concerning the bail and the court's sentence on the insurer sequestration there are also the provisions of article 908 paragraph 1 of the Commercial Code, which require that the sequestration

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[5] V.M.Ciobanu, G.Boroi – Drept procesual civil (Civil Procedural Law,), Ed.AllBeck, 2005. p. 218-224.

[6] Decision no.886/2007 of the Constitutional Court published in the Official Gazette no.785/20.11.2007.

The provisions of article 591 paragraph 2 of the Civil Procedure Code concerning the sum of the claim deemed excessive of the creditor who does not have a written ascertaining record of his claim, has been the object of the unconstitutionality plea, settled by the Constitutional Court by Decision no.886/2007, by rejecting plea.

Thus, the provisions of article 591 paragraph 2 of the Civil Procedure Code, which establishes the payment obligation of a bail, aim at protecting the interests of the debtor against exercising in bad faith by the creditor of his procedural rights. The payment of the claim is not an admissibility condition of the action through which the creditor pursue the fulfillment of his rights, but only one condition for the setting up of the insurer sequestration of the debtor's movable and immovable property, in the context in which the claim is not ascertained in written and the creditor proves that he has filed civil action. Therefore, the guaranty granted to the debtor of the obligation, justified by preventing the abusive exercise of some procedural rights by the creditor, can not be regarded as a means of preventing free access to justice.

Regarding the violation of the provisions of article 16 paragraph (1) of the Constitution, the Court finds that to the extent to which the regulation deduced to the control applies to everybody in the situation stipulated in the hypothesis of the legal norm, law without any discrimination, on arbitrary grounds, the criticism as such an object is unfounded.

The Court can not hold either the criticism according to which the provisions of article 591 paragraph 2 of the Civil Procedure Code would contravene the principle of guaranteeing private property, so long as, according to article 723^1 paragraph 3 of the Code, "The bail is issued to the person who has deposited it as far as the one entitled to it has not made a request for payment of the due compensation, within 30 days from the date on which, by irrevocable decision, the cause has been settled".

or the seizure can only be set up by release of bail, except when the request for sequestration or seizure is made by virtue of a bill of exchange or of another commercial effect to order or to bearer, protested by non-payment.

The court competent to hear the case is competent to settle the request for setting up the insurer sequestration, so it will settle the request for setting up the emergency insurer sequestration on the Council premises without prior calling of the parties, pronouncing a closure execution. The sentence may be delayed up to 24 hours and the drawing up of the closure must be drawn up within 48 hours from the pronunciation.

Therefore it has been appreciated that article 907 of the Commercial Code was implicitly amended by the provisions of article 591 paragraph 1 of the Civil Procedure Code.

In this respect article 889 of the Commercial Code, provides that "the exercise of commercial actions is regulated by the Civil Procedure Code, except the provisions of the present code".[7]

The applicability also in business of the regulation in article 591 paragraph 1 of the Civil Procedure Code is also required by the provisions of article 721 of the Civil Procedure Code, according to which the provisions of this code "form the common law procedure in civil and commercial matters." Such an interpretation is also required by the peculiarity of legal relationship of commercial law, which is characterized by swiftness so that the closure of its amendment or cessation can be done with maximum efficiency and in good faith, so that the final reason of such a legal relationship is its just fulfillment.

The proper settlement of this situation of maximum importance for ensuring the effectiveness of the trade relationships has imposed examining the evolution of the existing legislation and the adoption of Decision no.84/2007[8] by the High Court of Cassation and Justice, which allowed the appeal in the interest of the law, in that sense that the provisions of article 907 are interpreted by reference to the provisions of article 591 paragraph 1 thesis I of the Civil Procedure Code, in that: in business, the insurer sequestration can also be set up on the debtor's immovable property.

Conclusion

Insurer sequestration is the insurance measure that the creditor resorts to and that is applicable if the object of the litigation is the payment of a sum of money and that consists of the unavailability of the debtor-defendant's sequestrable movable or immovable property, until the final (irrevocable) decision given in the main trial in order to profit from the property when the creditor will obtain a writ of execution.

The interested party has the opportunity provided by law to require the court to order the taking of some precautionary measures, namely blocking and conservation measures to hinder the opposing party, during the process, to destroy or alienate his property or to diminish his patrimonial assets.

The insuring measure may be required when the document is not a writ of execution or when the claim is not established by a document.

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[7] G.C.Frenţiu, D.L.Băldean – Codul de procedură civilă comentat şi adnotat (The commented and annotated Civil Procedure Code), Ed.Hamangiu, 2008, pp 1408.

[8] Decision No. 84 of December 10, 2007 of the High Court of Cassation and Justice, published in the O.G. no.697 of 14/10/2008.

It allows the appeal in the interest of the law declared by the general prosecutor of the High Court of Cassation and Justice.

The provisions of article 907 of the Commercial Code shall be interpreted by reference to the provisions of article 591 paragraph 1 thesis I of the Civil Procedure Code, in that:

In business, the insurer sequestration may be set also up on the debtor's immovable property.

The court competent to hear the case is competent to settle the request for setting up the insurer sequestration, so it will settle the request for setting up the emergency insurer sequestration on the Council premises without prior calling of the parties, pronouncing a closure execution. The sentence may be delayed up to 24 hours and the drawing up of the closure must be drawn up within 48 hours from the pronunciation.

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CONSIDERATIONS REGARDING THE VALIDITY REQUIREMENTS FOR THE CONSENT

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Abstract
For a valid conclusion of a juridical act it is, firstly, necessary for a valid consent to exist. However, the mere existence is not sufficient. For the act to be valid it is necessary that the consent expressed for its conclusion is also valid. Therefore, beside the formal existence of the consent, a few more requirements need to be fulfilled. The requirements of the consent represent another subject insufficiently clarified. The present study is an attempt to clarify some of the aspects of this matter, that have been rarely analyzed by the Romanian doctrine, keeping in mind the future legal provisions.

Key words: *consent, validity, discernment, intent, exteriorization*

Introduction

The subject of the present study is represented, as the title shows, by the requirements for the validity of the consent, excluding, though, the matter of the vices of consent, a subject matter so diverse that it needs a separate analysis. This matter has no yet received an exhaustive analysis in the Romanian legal doctrine. Furthermore, without bringing substantial changes to this matter, the new Civil Code (still not in force)[1] calls for a few comments. Therefore, the re-analysis of the requirements for the validity of consent, complemented by references to the new legal dispositions, is, without any doubt, very useful, especially given the importance of consent in the process of formation of the juridical act.

Paper content

It is generally[2] admitted that for the validity of a juridical act, four cumulative conditions, regarding the consent, should be met:

a) the consent must come from a person having discernment;
b) it must not be altered by a vice of consent;
c) it must be exteriorized;
d) it must have been expressed with the intent of producing juridical effects.[3]

I avoided naming them "validity conditions regarding the consent" and I presented them as "validity conditions of the juridical act required in connection with the consent" because some of them regard not so much the validity, but the very existence of consent.

Thus, the third of the named requirements regards the very formal existence of consent, presuming by definition an exterior manifestation, in the absence of which we can only talk about a

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[1] The new Civil Code has been adopted by Law No. 287/2009, published in the Official Monitory No. 511/24.07.2009, and it will come into force at a future date, to be established by the laws to be issued for its application.

[2] G. Boroi, *Drept civil.Partea Generala. Persoanele,* (Bucharest, 2010), 211, Gh. Beleiu, *Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil,* 152.

[3] The new Civil Code expressly mentions these conditions (except for the one under letter c), which regards the very existence of consent), in a different enunciation. Thus, according to article 1204 of the new Code, the consent of the parties must be earnest, free and expressed wittingly.

decision that has been made, as a part of the psychological process thorough which the will is formed, having no juridical relevance.

Then, the last requirement and, somehow, the second one too (and we take into consideration the obstacle error and some cases of duress) regard the real existence of the consent, meaning that if they were not fulfilled we would find ourselves in the presence of an exterior manifestation, but this would only appear as consent and in reality the latter would not exist because the decision to conclude the juridical act would not exist.

Finally, the first and, generally the second condition indeed regard the validity of the consent, expressing the necessity for it to be the result of a witting and free will[4].

The consent must be *clarified* and *free*.

Firstly, the consent must be *clarified*. As any act of will, the decision to conclude a contract is preceded by a *deliberation*, in the course of which the interested person, analyzing the advantages and disadvantages of the operation they are considering, estimated that the advantages outweigh the disadvantages. This deliberation is obviously *illusive* if the person lacks discernment. Also, the deliberation of the party can be *distorted* by error, either casual or provoked by the counterparty's fraudulent manipulations. In the juridical terminology, the term *error* regards a casual fact. When the cause of the error consists in the manipulations of the counterparty or, in some cases, of a third party, the error is named *undue influence*.

These two vices affect the consent in its *intellectual element*: the party in error or that has been a victim of undue influence did not wittingly consent.

Secondly, the consent should be *free*. It is not free when the decision, instead of really "rising" from a deliberation, is the result of a constraint brought upon the interested party which led him to accepting disadvantageous conditions – this time consciously – in order to escape the threats they faced in case they refused to conclude the contract. The third vice of consent, *duress*, affects its *element of freedom*.[5]

However let us, in turn, analyze all these conditions.

The consent must come from a person having discernment

This requirement rises from the conscious character of the civil juridical act, the later comprising the parties' manifestation of will. The juridical act is first and foremost an intellective operation, as the will to conclude a contract presumes the knowledge of the elements of the projected operation, an operation which is "weighed" by each party before its conclusion[6]. Thusly it is a premeditated juridical operation, as the parties previously take into account all the resulting advantages and disadvantages.

However, to this point it is necessary for each party to have the intellectual faculties needed to "comprehend" and, then, to "want".

In other words, the consent must be given by a person that acknowledges the juridical consequences which result from the conclusion of the juridical act, that can conceive not only the rights they would acquire, but also the obligations they would undertake. And this capacity of representing the consequences consists exactly in the existence of the discernment.[7]

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[4] These two conditions rather regard the cause of the juridical act and only indirectly, by way of the aforementioned, the consent. However, given that they are usually analyzed in connection with the consent, I shall follow these footsteps.

[5] See J. Flour, J.-L. Aubert, E. Savaux, *Les obligations. 1. L´acte juridique*, edition XII, (Paris, 2006), 143-144.

[6] I. Dogaru, *Valențele juridice ale voinței*, (Bucharest, 1996), 70.

[7] The lack of discernment is provided by the new Civil Code in article 1205. The disposition does not bring new elements, but, virtually, consecrates the doctrinal and jurisprudential conclusions.

The condition regarding the existence of the discernment must not be confounded with the condition of capacity[8], although they are strongly connected (the discernment representing, theoretically, a premise for acknowledging the capacity of concluding juridical acts). The capacity is a state of law (*de iure*), rising from the law, and the discernment is a state of fact (*de facto*), being of a psychological nature and needing to be assessed from person to person, taking into consideration their psycho-intellectual ability, although the law has provided some presumptions regarding it.[9]

Hence, the private persons with full exercise capacity are presumed to have the discernment needed to conclude civil juridical acts. The one lacking exercise capacity (the minor under 14 years of age and the one under court interdiction) is presumed to lack discernment, either because of their young age, or because of their mental health situation. As for the minor between 14 and 18 years of age it is generally assessed that their discernment is developing, in order to emphasize the intermediary situation they are in. but this situation rather regards their capacity and not their discernment. From the hereunder point of view we must specify that the minor between 14 and 18 years of age is presumed to have discernment, as , where the juridical acts which they can conclude on their own are concerned, according to the rules on capacity, their eventual lack of discernment must be proved by the one that invokes it.

As a matter of fact, when we question the existence of discernment we are interested only in the acts concluded by persons who have full exercise capacity and those concluded by the person with restrained exercise capacity (the minor between 14 and 18 years of age) on their own, but for which the rules on capacity did not require a prior approval.

The matter of the acts concluded by those lacking exercise capacity or of the acts concluded by those with restrained exercise capacity, but for which a prior approval is required, will be solved by the rules of capacity, an assessment on the existence of the discernment not being necessary.

Beside the cases in which a person is presumed by law to be lacking discernment (*legal incapacities*), there are also cases in which persons that have discernment by law (for whom, as previously shown, a presumption of existing discernment operates) are in fact temporarily lacking discernment (namely cases of *natural incapacity*). For that matter, have been mentioned drunkenness, hypnosis, somnambulism, rage (*ab irato*).[10]

I want to specify that, in some of these situations, for example in the case of drunkenness, if it has been voluntarily caused, the counterparty could request damages for the prejudice caused by the annulment of the contract for lack of discernment, unless of course they had contributed to appearance of that state (in which case we could even be considering it to be undue influence) or they had somehow tried to take advantage of the respective state of the other party (immoral cause), situations in which he would be prevented from doing that by the existence of their own fault.

To these aforementioned natural incapacities we must also assimilate the situation of the mentally alienated and weaklings before they had been placed under court interdiction, of course in the hypothesis they are adults. Thus, until the court interdiction, they could be considered to have full

[8] The French doctrine, when analyzing the ability to consent, took two elements into consideration: on the one hand, *the incapacities* – the matter of the persons for whom it s impossible to express a veritable consent, in connection with the lack of juridical capacity, and on the other hand, *the spiritual insanity* – where we consider persons that have juridical capacity, but that cannot acknowledge the importance of their acts and, therefore, cannot express a valid consent. For both situations the sanction is, on principle, relative nullity. For details, see F. Terré, Ph. Simler, Y. Lequette, *Droit civil. Les obligations*, 98-105.

[9] To the same effect, the jurisprudence has ruled: "the capacity of contracting, as well as the undertaking party's valid consent are, in accordance with the dispositions of art. 948 Civil Code and Decree no. 31/1954, validity conditions for the juridical acts, the lack of either one being sanctioned with nullity. Even if one had not been declared incapable, according to the law, a valid consent cannot be deemed to exist if on the date of the conclusion of the act, for reasons of illness, the party was lacking discernment", see H.C.C.J., s.civ., dec. no. 51/15.01.2003, in C.J. no. 4/2004, page 75.

[10] See Fr. Deak, *Tratat de drept civil*, II, 181 and quoted practice: Suceava Tribunal, s. civ., dec. no. 837/1972.

exercise capacity and, therefore, presumed to have discernment. Nevertheless, there is no doubt that the respective illness affects discernment and, therefore, any juridical acts they might have concluded could be annulled for the failure to fulfill this requirement regarding consent. In these cases it is possible that lucidity episodes appear. If the act was concluded during a lucidity episode, the cause for relative nullity under discussion no longer exists.[11]

This situation is also taken into consideration by the new Civil Code. According to article 1205 align. 2 of the new Civil Code, the contract concluded by a person that is subsequently placed under court interdiction can be annulled if, at the time of the conclusion of the act, the causes for court interdiction existed and were generally known.

This disposition will generate controversy when applied in practice, the reason for it being adopted, given the enunciation, being far from clear. A grammatical interpretation of the sentence leads to the conclusion that nullity *could be* sanctioned only if two cumulative requirements are met: the causes for the court interdiction to exist at the time of the conclusion of the juridical act and, at the same time, they should be generally known. But the second requirement appears to be excessive and difficult to accept. Firstly, it would itself raise interpretation problems, given the used terms – "generally known". Then, it would create significant difficulties as far as proof is concerned. Last but not least, the reason for establishing that the lack of discernment leads to the invalidity of the juridical act is incomprehensible, as it contradicts the expressly provided (in the previous article – 1204) requirement according to which consent should be expressed wittingly.

The reason for which the lack of discernment leads to the annulment of the juridical act is exactly because, in such case, the consent is not expressed wittingly. And, in the hypothesis hereunder, if at the time of the conclusion of the juridical act, due to the causes which subsequently determined the placing under interdiction, the person did not have discernment, the requirement for the consent to be wittingly expressed is not fulfilled. And that happens independently from the fact of weather the respective causes where known or not. The knowledge of the causes which determined the lack of discernment has no relevance with regard to the validity of consent. Weather the lack of discernment or the causes which have determined it were ("generally") known or not, the consent was not validly expressed. The knowledge of the causes that determined the placing under interdiction could raise the matter of the immoral purpose, but have no relevance regarding the lack of discernment.

A second possible interpretation of the legal disposition would lead to the conclusion that its purpose was only to enunciate the possibility of annulling the contract in the hypothesis in which, at the time of its conclusion, the causes that later determined the placing under interdiction existed and were known, without representing requirements for the sentencing of the annulment. However, this interpretation comes with two big flaws. Thus, it does not take into consideration the wording of the legal disposition, leaving aside the reference to the knowledge of the causes that determined the placing under interdiction. Moreover, in this interpretation, the legal disposition has no effect. The possibility of sentencing the annulment under the given circumstances (however implying the analysis of the extent to which, at the conclusion of the contract, the discernment had been affected) exists without the necessity for a legal disposition which expressly mentions it. Meaning, in this interpretation, the legal disposition would be futile, which contradicts a traditional interpretation rule (that comes from the subject matter of the juridical act) – *actus interpretandus est potius ut valeat quam ut pereat*.

Finally, in another possible interpretation we could assess that the legal disposition institutes a presumption of lacking discernment in the hypothesis in which, at the time the contract was concluded, the causes for the subsequent placing under interdiction existed and were known. This interpretation comes with the advantage of finding, for the reference to the knowledge of the causes for the placing under interdiction, a justification which would not contradict the requirements for the

[11] See Ch. Larroumet, *Droit civil. Les obligations. Le contrat*, 2003, 286.

validity of the consent. Therewith, it would also bring utility to the hereunder disposition, by admitting its effect of establishing the presumption of lacking discernment.

This was probably the intention of those who have written the new Civil Code. But the enunciation of the disposition is however imperfect, lacking clarity.

Nevertheless, even if this legal disposition was not to be reformulated or clarified by way of the subsequent laws which will be adopted for the application of the Code, I think that this third interpretation can be considered for the hereunder provision, given that the first two present inacceptable flaws.

The lack of discernment at the conclusion of a juridical act leads to the sanction of relative nullity of that juridical act.[12]

The consent must not be altered by vice

This requirement urges from the same conscious character of the juridical act, which we have already presented with regard to the first validity condition required for the consent. It is also imposed by the free character of the juridical act, which determines the necessity of a free will, of a party's (parties') manifestation of will which is a result of their own decision and not a result of an external, unnatural influence. The will which is comprised by the contract must really be the result of an inherent psychic process.

The vices of consent are those circumstances which affect the free and conscious character of the will to conclude a juridical act, which alter the psychological process of the formation of consent at the conclusion of the respective act.

As previously shown and same for the abovementioned requirement, this condition regarding the vices of consent refers to the qualities the consent should have. In the circumstance in which a vice of consent is present an exteriorized manifestation of will exists (hence, consent also exists), but it is altered in its intellectual, conscious contents, as the case is with error and undue influence (which, implying a misrepresentation of reality, generate the impossibility of a coherent analysis of the elements of the juridical act, the failure to assess the latter's consequences, similarly to the hypothesis of lacking discernment), or in its free character, as the case is with duress (which limits the freedom of assessment by violently introducing an unnatural element, which is determinant for the making of the decision to conclude the juridical act).

There are also situations that are usually analyzed together with the vices of consent due to their strong connection to the latter, in which the consent is deemed to be lacking completely (obstacle error and some cases of duress), but these represent more than simple vices of consent, the only connection to the latter being the mechanism that produces them, the effects being far more serious (they destruct will).

We should remark that the civil law does not use neither the expression "vices of consent"[13], which is used by the majority of the authors, nor that of "vices of will", which is more rarely used,

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[12] See G. Boroi, *op. cit*., pag. 212. For parctical applications see, e.g. Braşov Appeal Court, s. civ., dec. no. 374/R/1995, in C.P.J. 1994-1998, 51 (*the lack of discernement at the time of making the will*); C.A. Bucureşti, s. a III-a civ., dec. nr. 2079/1999, în C.P.J.C. 1999, 80 (*the lack of discernement at the time of the conclusion of a sale-purchase agreement*) and dec. no. 3247/1999, în C.P.J.C. 1999, 64 (*the lack of discernement at the time of the conclusion of a exchange agreement*); Iaşi Appeal Court, s. civ., dec. no. 193 – 03.11.2000, in M. Gaiță, M.-M. Pivniceru, *Jurisprudența Curții de Apel Iaşi în materie civilă pe anul 2000*, (Bucharest, 2001), 47-48; Ploieşti Appeal Court, s. civ., dec. no. 282 of 01/02/1999, în *Curtea de Apel Ploieşti, Buletinul jurisprudenței, Culegere de practică judiciară, semestrul I, 1999*, (Bucharest, 2000), 212-215; Ploieşti Appeal Court, s. civ., dec. no. 3454 – 22/10/1999, in I.-N. Fava, M.-L. Belu-Magdo, E. Negulescu, *Buletinul jurisprudenței, Culegere de practică judiciară a Curții de Apel Ploieşti, semestrul II, 1999*, (Bucharest, 2001), 139-142.

We would like to specify that the same sanction is provided by the new Civil Code (article 1205).

[13] The new Civil Code use this expression in the very title of the paragraph which deals with this subject matter, "The Vices of Consent", articles 1206-1224.

these expressions being creations of the doctrine. As it has already been assessed[14], of the two expressions, the more suited (adequate as far exactness is concerned), is the phrase "vices of will", and that is because, on the one hand, the respective vices alter not only the consent but firstly they alter the cause (the purpose) of the juridical act[15], which together form the juridical will, and, on the other hand, as the notion of consent has two meanings (of unilateral manifestation of will and of concurrence of wills), and as vices can be met not only in bilateral or multilateral juridical acts, but also in cases of unilateral acts, confusion can be caused by using the other phrase. Nevertheless, not wishing to initiate further discussions, I shall use the already traditional expression of "vices of consent", in order to comply, under this aspect, with the majority of the authors.

The vices of consent are, according to article 953 of the Civil Code, error, undue influence and duress. Many of the authors also include lesion in the area of the notion of vices of consent, but the qualification of the lesion is, in the light of the in force legislation, subject to controversy. The provisions of the new Civil Code eliminate this controversy, by qualifying lesion as a vice of consent.[16]

The sanction for the case of vitiated consent is, as a general rule, the relative nullity of the juridical act.

However, the analysis of the vices of consent is not subject to the study hereunder.

The consent must be exteriorized

This requirement is urged by the very definition of consent: the decision of concluding a juridical act, which is manifested in the exterior.

The requirement regards the existence of the consent and in case it is not fulfilled the latter is lacking, as the decision made to conclude a juridical act, if it is not exteriorized, does not have the worth of consent.

Therefore this requirement is equivalent to the condition that consent exists. Nonetheless it could have not been named accordingly, as it only covers the hypothesis of the formal, material lack of consent, and it is necessary for the latter to exists as far as its contents, substance are regarded, meaning it should declare, reflect a real decision to conclude the juridical act. Further, as we shall see, sometimes a mere exteriorization of the made decision is not sufficient and it needs to take a certain from required by law, in the absence of which consent cannot be deemed as given, at least not for the juridical act for which the decision had been made.

Hence, this requirement establishes the connection between consent and the form of the civil juridical act, as the principle and conditions applicable in relation to the form of the juridical act regard the very exterior manifestation of will, which is consent.

Thus, the general rule applicable with regard to the exteriorization of consent is that the mere concurrence of the parties' wills is sufficient for a valid juridical act to be concluded. This means that the parties are free to choose the exteriorization form for their will, the way the decision to conclude the contract is brought to knowledge remaining irrelevant as long as it takes place.

There are though exceptions[17] from this rule, as the case of those juridical acts for which the law requires that the manifestation of will takes a certain, special form, a form tha is required *ad validitatem*.

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[14] G. Boroi, *op. cit.*, 214; A. Pop, Gh. Beleiu, *Curs de drept civil. Partea generală*, (Bucharest, 1973), 268-269.

[15] In fact they alter the cause and, indirectly, the consent.

[16] Article 1206 align. 2 of the new Civil Code.

[17] For some juridical acts an express manifestation of will is necessary (acts for which a particular form is required *ad validitatem*, the acceptance of a donation – article 814 align. 2 of the Civil Code, the conventional solidarity in civil law – articles 1034 and 1042 of the Civil Code, *et cetera*).

In such cases, it is mandatory that the parties' will is expressed and acknowledged in the form required by law and cannot otherwise produce any effects or, at any rate, not quite the effects that the parties had in mind.

We must not leave aside the form requirement *ad probationem* because, although it does not affect the validity of the juridical act, in case the parties' manifestation of will does not fulfill the mandatory form, due to the probation issues, it could come to producing no legal effects.

The form required for the contract to be opposable to third parties does not generally concern the matter of the manifestation of consent, as it presumes the fulfillment of some formalities subsequent to the conclusion of the juridical act and, hence, to the exteriorization of the manifestation of will.

The manifestation of will can be exteriorized *expressly*, when it is expressed in ways liable to directly transmit it to the counterparties or to third parties (irrespective of the used practical means: verbally, in the case of persons that are present, by phone, fax, e-mail, by documents, by signs[18]), or *tacitly*, when it is implied, as from the parties action or attitude the intention of concluding a contract results.

For example, article 689 Civil Code provides the cases when *the acceptance of the inheritance* is express and when it is tacit. The tacit manifestation of will present the advantage of saving time, though it sometimes comes with the disadvantage of being equivocal. Moreover, such manifestation is excluded in the case of some of the legal acts, as those for which a certain form is required *ad validitatem*.

The means of exteriorization are diverse. Therefore, consent can be verbally expressed (for consensual juridical act), the agreement being considered fulfilled as soon as the parties have stated their harmonious will to fulfill the agreement. Another mean of expressing consent is represented by the deeds, in their authentic (usually requested by solemn agreements) form or in their private signature form (these being requested *ad validitatem* or in other cases *ad probationem*). Consent can be also expressed through conclusive actions or gestures (e.g.: an idle taxicab with the "vacant" light on, holding your hand up when asking to buy a newspaper etc.)

A specific issue regarding the exteriorization of consent is establishing *the judicial value of silence* (seen as the absence of any exterior manifestations).

It is unanimously considered that, on principle, silence does not mean consent, as civil law does not follow the adage "*qui tacit consentire videtur* ("qui n edit mot consent").

Still, there are certain situations when, by exception, silence is considered an expression of will in fulfilling an agreement, as follows:

- when the law specifically provides this (e.g.: article 1437 of the Civil Code[19]);
- when the parties establish by express will that silence is to be considered consent (.e.g.: by pre-contract or even contract when establishing the means of renewing an agreement or denouncing it)[20];

[18] See, e.g., R. Bercea, *Consimţământul virtual şi consimţământul real în contractele încheiate în mediul electronic*, in Dreptul no. 1/2004, 90 and fl.

[19] Article 1437 states that "after the lease term has expired, if the tenant does not move out and is left in possession, the lease is being considered renewed, its effects being regulated by the rules regarding the no term lease". Therefore, the text establishes the tacitly renewal of the lease.

[20] I would like to mention that the significance granted to silence must be the result of the parties' agreement and not the statement of a single party by itself. This is why we cannot take into consideration the example given by some authors (see D. Alexandresco, *Explicaţiune teoretică şi practică a dreptului civil român în comparaţiune cu legile vechi si cu principalele legislaţiuni străine*, (Iasi 1898), 44): not replying to a letter sent by a merchant that considers the recipient his debtor (a common practice these days as well) could be regarded as an acceptance of debt by the recipient.

• when silence is considered consent according to custom. In theory, these situations are called "circumstantiated silence", when the regularity of previous contractual relations between parties and customs do not impose an express acceptance to contract[21].

Apart from these situations, there are a few other cases when silence is to be considered consent:

• in matters of offer and acceptance, when the offer is made exclusively to benefit the other party, the latter's silence is seen as acceptance[22];

• when, at the request of one party, the other party fulfills the obligation, without having to expressly answer, in which case, the latter's silence is considered acceptance[23].

Italian theoreticians state that, for silence to be regarded as consent, the usual way of taking action or good faith, in the parties' relations, must impose the obligation to talk, or that according to a given specific historical or social timeline and regarding the quality of the parties and their business relations, one party's silence should be understood as its acceptance of the other party's will.[24]

Consent must be expressed with the intention of producing juridical effects (*animo contrahendi negotii*).

This requirement, also expressed as "consent must be stated as a juridical commitment"[25], emerges right from the essence of the civil juridical act, which is an exercise of will with the intent of producing juridical effects.

The requirement concerns the existence of consent in its substantial form. Consent is the decision to fulfill an agreement, revealed to the exterior. This decision essentially implies the intention to engage in juridical acts, to modify or extinguish juridical relations, in other words, precisely fulfilling the requirement in case.

Not fulfilling this requirement is equivalent to not making a decision on fulfilling a juridical act, or to not expressing it through an exterior act of will. There would be a statement of will creating apparent consent, but it would not be related to a decision made as to fulfill the juridical act. Consent would exist merely as a frame without content.

Thereby, we will consider this requirement not to be fulfilled, as consent is expressed without the intent of producing juridical effects, in the following cases[26]:

1. When the expression of will has been stated as a joke (jocandi causa), out of friendship, courtesy, or pure compliancy[27]. In these cases, the intention of assuming a juridical agreement is obviously missing, possibly remaining in the area of moral obligations, unsusceptible of being accomplished, if needed, through the coercive force of the state. If, in certain circumstances, some juridical effects could be born out of such acts, they would not originate in juridical acts, but in

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[21] The silence of a customer of a regular provider, who picks up the merchandise left at his doorstep, with no will exchange, being possible, is considered to be a sale; see D. Cosma, *Teoria generală a actului juridic civil,* 128.

[22] C.Stănescu, C. Bârsan, *Drept civil. Teoria generală a obligaţiilor*, edition IX, (Bucharest, 2008), 48; D. Cornoiu, *Drept Civil, Partea generala,* (Bucharest, 2000), 142; A. Pop, Gh. Beleiu, *Curs de drept civil. Partea generală,* (Bucharest, 1973), 267; A. Cojocaru, *Drept civil. Partea generală,* (Bucharest, 2000), 191.

[23] I. Dogaru, *op.cit.*, 72-73. In this case, this silence is not in the above mentioned sense, an expression of will being revealed through the execution of the obligation.

[24] See Cass, sez. lav., 1603.07, n. 6162, in *Mass. Giust civ*., 2007, 3 cited by L. Viola, *Il contratto. Validita, inadempimento, risarciemento*, vol. 1, CEDAM, 2009, 718.

[25] Tr. Ionaşcu, *Tratat de drept civil, Vol. I, Partea generală*, (Bucharest, 1967), 263.

[26] For qualifying these situations as "non-juridical" expressions of will, see P. Vasilescu, *Manifestări de voinţă non-juridice*, in P.R. no. 1/2003, 239 and fol.

[27] The juridical literature offers many examples on this matter: promising to pay someone a visit, attempting to come to the aid of a stranded motorist, in general providing free of charge services to others. See Tr. Ionaşcu, *op.cit.*, page 263, A. Cojocaru, *op.cit.*, page 191, M. Mureşan, P. Ciacli, *Drept Civil. Partea generală*, (Cluj-Napoca, 2000), 120.

simple juridical actions (e.g.: the obligation to indemnify for damages resulting out of an illicit action)[28].

The French doctrine[29] took into consideration, regarding the compliance of wills, compliances of wills that are "non-compulsory", as follows: "*acts of courtesy or compliancy*" and "*honorable commitments*".

"Acts of courtesy or compliancy". There are compliant wills that do not oblige, from a juridical point of view, because the parties involved did not want to establish a juridical relation that would allow the claim of an obligation.[30] This is the case with *political promises* that do not oblige, legally speaking, their authors[31]. *Compliancy acts* can be seen as agreements based on "*fashionable relations*", which only compel to courtesy rules (an invitation made and accepted does not represent a legal contract)[32] . Among friends, people one knows, or family members, promises are often being made, and there is an agreement as to what aspects impose a certain "interdependence": children are being promised trips or various items in exchange for their progress in school; promises to visit back are being made; meetings for recreational purposes are being set in a certain place; certain services are being promised etc.

All of these examples are non-juridical acts, as the parties involved do not want to establish juridical relations or to capitalize the promised advantages through legal means. They are simply the result of a mannerly conduct and of natural bonds between people, with no legal connotations.

The borderline between a contract and a "courtesy act" appears to be more difficult to draw, especially when it comes to providing free of charge services.

Various activities can be performed based exclusively on the courtesy and kindness of the person assuming these responsibilities: small favors you do for a family member, a friend or a neighbor; help and advice in case of illness; counseling by a specialist in different fields (legal, financial, technical etc.); hauling people and goods free of charge etc. We can easily notice that these activities can represent the object of well defined legal provisions, resulting from proper contracts (work, contracting, counseling, transport etc.). What sets them apart is not the characteristic of being performed with no interest in gaining something, but rather their cause and their effects. These operations lack a legal cause, what is being performed is based on friendship or family bonds, and the effects are different. There is no doubt that not carrying out- *lato sensu*- a convention will lead to an assumption of responsibility for the culpable party, an unconceivable fact when it comes to courtesy acts.

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[28] M. Mureşan, P. Ciacli, *op.cit.*, 120.

[29] See F. Terre, Ph. Simler, Y. Lequette, *Droit Civil. Les obligations*, 58-60.

[30] See the French jurisprudence, Paris Appeal Court, the 26th of September 1995, R.T.D. Civ. 1996, 143, observations by J. Mestre- in a contract, the parties "make promises and assume obligations; there are only promises made with the intention of assuming obligations, granting the other party the right to claim their fulfillment, resulting in a contract and a convention. But there are also other promises that we make in good faith and with genuine will to fulfill them, but without the intent of granting the other party the right to claim their fulfillment. In other words, the person that makes the promise also states that he/she does not assume an obligation, this being made possible in some situations by certain qualities of the one making the promise or the one for whom the promise is being made. For example, when a father promises his son, a law student, that he will reward him with a pleasure trip, provided that he manages his time properly, it is obvious that the father, while making a promise, does not assume an obligation, not in a juridical sense anyway.

[31] See Paris Court of Appeal, 18th of October 1994, R.T.D. Civ. 1995, 351, observations by J. Mestre. For the situation in which a journalist's press accreditation for some private charity events can be considered a contract, see T.G.I. Paris, 7th of October 1996, R.T.D. Civ. 1997, 126, observations by J.Mestre.

[32] E. H. Perreau, "*Courtoisie, Complaisance et usage non obligatoires devant la Jurisprudence*", R.T.D. Civ. 1914, 481 and following; D. Mayer, "*L'amitie*", JCP, 1974, I, 2663; P. Bedoura, "*Amitie et le droit civil*", (Poitiers, 1976).

Still, the French doctrine and jurisprudence has seen a great deal of controversy over the juridical nature of an act of assistance[33]. In order for the person that suffers a prejudice to receive compensation, the jurisprudence based it, on several cases, on tort liability or on business administration. However there are also court decisions that admit the existence of an assistance convention, a solution that reveals a strong artificial character[34].

See, for example, the case of free labor performance for the benefit of a neighbor or a friend, as well as in the situation of free medical services[35]. If the solution characterization removes some solutions to these contractual benefits, most analyze the relationships within the voluntary help of a free service contract. If some of the answers dismiss the solution of qualifying these benefits[36] as contractual, others analyze the voluntary help relationships within a free service agreement[37].

However, when it comes to these complaisance acts, tort liability is the only liability that can be undertaken, with the application of the ordinary law on the matter and with no juridical connection with the fact that the prejudice was triggered by the "performance" of said complaisance act. The hypothesis that circumscribes itself best to the last situation is represented by the damage caused during the voluntarily conveyance of passengers and goods. In this case, it was decided that the act of complaisance of the "carrier" can only be the source of tort liability, with the obligation, legal of course, to repair the damage caused by his act or his work. Tort liability applies here, not due to the fact that the conveyance is voluntary and free, but due to the fact that its source is not a legal agreement, the act of "carriage" lacking legal cause (obviously, the parties' intent to undertake legal obligations is lacking)[38]. A legal agreement will be needed though, in the situation of paid hitchhiking.

The situation of remanding various goods, of varied values, in the occasion of the anniversary of an event. It was also argued that we give and receive such objects, without any liberal intention, without being impressed of the object's value, without expecting gratitude or the return of the gift. No trace of legal intent can be detected in these acts, and any attempt to detect a juridical cause in such expression of will or the intention to make such realities into legal relationships, which the "parties" ought to execute by the force of the law, falls on the ridiculous[39].

It is also true that the tradition of gifts is only occasional and individual, with the clearly stated aim of producing pleasure and joy to another whom, in turn, appreciates the gesture of kindness of the former. Therefore, it is clear that the intentional spring of such gestures comes from the more or less sincere affection we have for each other. But this is the case, when will is expressed with the intention of it taking legal effects, namely to convey property. It is the typical situation of the manual gift, a variety of donation. It is true that, beyond the remanding of the good, the parties have no legal obligations. And it is also true that, forced execution is not the case, because the only assumed obligation, the remanding of the good, was performed (without the delivery of the good, the legal act does not exist). However, the fact that the producing of legal effects was intended, namely the transfer of property, is enough, in order to describe the manifestation of will, as a legal act

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[33] See R. Bout, "*La convention dite d'assisttance*", Melanges Kayser, 1979, pages 157 and following; C. Roy-Loustanau, "*Du domage eprouve en portent assistance benevole a autrui"*, Aix thesis, 1980.

[34] See F. Terre, Ph. Simler, Y. Lequette, "*Droit civil. Les obligations*", *op. cit.*, page 60.

[35] A. Rouast, *La prestation gratuite de travail*, Études Capitant, (1939), 695; M. Boitard, *Les contrats de services gratuits*, (Paris 1941); F. Grua, *L'acte gratuit en droit commercial*, (Paris 1978); A. Viander, *La complaisance*, in JCP, 1980, I, 2987, quoted by F. Terré, Ph. Simler, Y. Lequette, *Droit civil. Les obligations*, 59

[36] See: Cass., 2e civ., dec. of 18.03.1992, n JCP 1992, IV, 1525; dec. of 26.01.1994, in R.T.D. Civ. 1994, 864, obs. by Jourdain; Cass., 1re civ., dec. of 07.04.1998, 1050; Cass., 2e civ., dec. of 10.06.1998, in JCP 1999, II, 10042.

[37] See: Cass., 1re civ., dec. of 08.11.1977, 10.10.1995, 16.07.1997, 17.12.1996 and 13.01.1998, quoted by Ph. Simler, Y. Lequette, *Droit civil. Les obligations, op. cit.*, pag. 59.

[38] Driver's liability can only tort liability. For an international application, see Cass., 1re civ., dec. of 06.04.1994, in JCP 1994, I, 3781, no. 1, obs. by Fabre-Magnan, and in R.T.D. Civ. 1994, 866, obs. by Jourdain.

[39] See, P. Vasilescu, *Relativitatea şi obligativitatea actului juridic. Repere pentru o nouă teorie generală a actului de drept privat*, (Bucharest, 2003), 94-95.

(moreover, if this operation was not qualified as mentioned the transmittal of property could not be justified, because legal effects could not be acknowledged as far as a non-juridical act is concerned). And the consideration of the person, the wish to bring them joy, have legal relevance themselves, representing the very determinant reason for the conclusion of the juridical act, which is one of the two elements that form the cause of the juridical act.

„Gentlemen's agreements". It happens that some people commit themselves to "honor". Designated also by the term "gentleman's agreement", this practice is more common than might appear at first sight, whether we refer to family, professional, economic relations or frienship. However, these agreements call for an answer to the next question: are they binding or not[40]?

Since these agreements fall within the field of family relationships, they generally seem devoid of such binding, revealing themselves as convenience relationships or courtesy relationships.

For the other relationships mentioned, things are not the same. Whether they wanted to compensate a lack of the law or to "escape" the enforcement of certain rules, or – even simpler, but perhaps more significant – to have had understood, by hesitation or repugnance, not to engage "in a valid form", the parties of these agreements seek much less to evade the effects of the law, then to situate their agreement outside of the state law field. But the state law does not acknowledge this separation and interprets gentlemen's agreements as legally binding for their authors, according to the commune rules of contracts, the case law stating the same effect[41]. The intention of the parties to take their agreement outside the limits for the application of the law is not relevant in the area of the analysis hereunder. It is sufficient that the parties' intention of concluding a binding agreement is established for that agreement to be qualified as being a juridical act. Further, it is an issue of interpretation left in order to establish the contents of the parties' manifested will, respectively, what are the effects which the parties had in mind. Surely, the issue of the intention of the parties of undertaking obligations by way of such agreements must be assessed from case to case, as the hypothesis in which such an intention did not, actually, exist cannot be excluded.

Therefore, the distinction between the non-legal expressions of will and the legal ones sometimes raise difficulties. Without being able to enunciate a general rule, some elements are in this respect, helpful. For example: the gratuity of the benefit, the type of benefit, the scope of the agreement, the legal and economic importance of the transaction, the value of the good, the risk of making the benefit. But these can only act as signs that delimitate the expression of will that produces legal effects from the one that lacks such effects.

2. *When consent was given under a pure potestative condition by the part that binds* (Article 1010 Civil Code[42]), namely under the form "I bind if I want to", being interpreted that such a condition is practically equivalent to the lack of intent to be bound - "*sub hac conditione, si* taken yet.

3. *When the expression of will is too vague,* the intention of undertaking a legal commitment or the content of such legal engagement, that the party intends to undertake, are not resulting unequivocally.

4. *When the one to whom the declaration of will is being addressed to, knows that its author gave it without the intention of legally engaging himself,* or as commonly referred to in the legal literature, when the expression of will was made with a mental remoteness (*reservatio mentalis*) known by its recipient. I preferred to avoid this enunciation because it contains a mistake: as long as the remoteness is known by another person as well, no longer can it be qualified as mental

[40] See: K. Zweidert, *Du sérieux de la promesse. Remarques de droit comparé sur la distinction des actes qui obligent et des actes qui n'obligent pas*, (1964), 33 and fol.; B. Beignier, *L'honneur et le droit*, (Paris, 1995), 562 and fol.; D. Ammar, *Essai sur le rôle de l'engagement d'honneur*, (Paris, 1990), 396 and fol.

[41] For details on the solutions adopted by the French doctrine and practice in the matter, see F. Terré, Ph. Simler, Y. Lequette, *Droit civil. Les obligations, op. cit.*, 60 and P. Vasilescu, *Relativitatea actului juridic civil (...)*, 99-100.

[42] Article 1010 of the Civil Code provides that „the obligation is void when affected by a potestative condition on behalf of the undertaker".

remoteness because, hypothetically, it was already expressed. However, the idea is clear. It refers to the situation in which the lack of intention to be bound, the remoteness is known by the other party, but hidden from the others, third parties. Namely, it creates an appearance of legal commitment, contradicted by the secret understanding between the parties. Certainly, simulation also falls under this hypothesis (it represents the case presented above, under the form of the fictitious act[43]).

It should be noted however that in such a case, the juridical act, and thus the consent can be considered valid in relation to good faith third parties.

Some authors consider that other requirements relating to consent should also be met, such as: "consent should emanate from one of the legal act's parties[44]", "consent should come form a person with full legal capacity[45]", "consent should be reliable[46]"," consent should be precise[47]", "will should be free[48]"," will should be conscious[49]".

However, it is not necessary that these requirements should be retained, due to their futility, or their being included in the content of other such requirements, or, in fact, their not concerning the consent.

Thus, the requirement that consent must emanate from one of the juridical act's parties is unnecessary. The party expressing its will shall be bound, as a party of the juridical act (except when the party acts as a legal mandate). It makes no sense to look at the problem form a reversed point of view, namely, to first establish the parties and then to identify a new requirement for the expression of consent. And if the point was to evoke the idea that nobody can be bound without his consent, it is a matter beyond our discussion regarding consent, being related to the legal effects of the juridical act, namely, the principle of relativity that applies to them.

The requirement for consent to come from a person with full legal capacity refers to, in fact, another condition of the juridical act, namely the capacity. It is certain that, in order to validly conclude a legal act it is required that all its essential requirements should be met, but also, said requirements should be considered separately and the validity of one of them is not to be confused with the validity of the juridical act itself. In any case, the requirement is also inaccurate, because not only those with full legal capacity can perform juridical acts; for example, minors between 14 and 18 years old may conclude certain legal acts by themselves, even without prior approval.

The requirement of being reliable is included in the content of the requirement stating that consent must be expressed with the intent of producing juridical effects.

The requirement of being precise regards the object of the juridical act, which needs to be determined or determinable, or the offer. In any case, to the extent that it could regard the consent, it would be also included in the content of the requirement of being expressed with the intent of producing juridical effects, which implies, as we have seen, the expression of will to be clear Even more, the expression of will can also be tacit, and therefore not quite precise, nevertheless being given a value of consent.

At last, the conditions stating that the will should be free and also conscious represents the presentation, under a different name, of the requirements regarding the lack of consent vices and the existence of discernment.

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[43] See D. Cosma, *op. cit.*, 120; E. Lupan, *op. cit.*, 215; P. Vasilescu, *Relativitatea (...), op. cit.*, 73 and fol.

[44] R.P. Vonica, *Drept civil. Partea generală*, (Bucharest, 2001), 562.

[45] R.P. Vonica, *op. cit.*, 562; Tr. Ionașcu, *op. cit.*, 263.

[46] Tr. Ionașcu, *op. cit.*, 263-264, V.V. Bica, I. Burghelea, *Drept civil. Teoria generală. Persoanele*, (Bucharest, 2001), 59.

[47] *Idem.*

[48] V.V. Bica, I. Burghelea, *op. cit.*, pag. 58-59.

[49] *Idem, as in the previous note, this is about the authors' references to the work of another author, regarding to which I think a misinterpretation occured. In that work there are no additional requirements concerning consent, but they are simply presented under a different title.*

In the end, I would like to mention that the sanction that intervenes for not fulfilling the requirements for consent is the nullity of the juridical act in case. We will have *absolute void* when the conditions regarding the existence of consent are missing, both its formal existence- not exteriorizing the consent (in this case, as a general rule, no sanction can exist as the juridical act itself does not exist, not even having an apparent validity), and also in the existence of the content, of the decision made to fulfill a juridical act- lack of intention to produce juridical effects, the obstacle error[50] and some violent situations. On the other hand, we will have *relative nullity* when the conditions regarding the quality of consent are not fulfilled, the free and conscious character- lack of discernment or the existence of a vice of consent.

Conclusions

As we have seen, the validity requirements for consent still represents a present subject, an ampler approach being needed, from a perspective that also includes aspects which are especially revealed in the French doctrine. The present study completes the classic approach to the subject in discussion. The analysis can serve for a better understanding of the notion of consent, of the requirements for its validity and for a correct appraisal of the situations in which these are not fulfilled, leading to the application of the specific sanction, the nullity of the juridical act. Evidently, nevertheless, the subject is far from exhaustion. On the one hand, the matters taken into consideration in the present study need an ampler analysis and, on the other hand, other aspects have been left out, as the case is with the matter of the vices of consent. But these matters shall be object to future studies.

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[50] The new Civil Code, including the obstacle error in the notion of essential error (that also includes the classic vice error), sanctions it with relative void (article 1207)

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CONSIDERATIONS REGARDING THE GENERAL ASPECTS OF THE SUCCESSIONAL OPTION IN THE LIGHT OF THE NEW CIVIL CODE

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Abstract:
Law no. 287/2009 regarding the Civil Code, whose date of entry in force has not been established yet, brings in the successional option matter many new elements, reconfiguring it in some parts. In this paper we will analyze the general aspects of the successional option in the light of the new Civil Code dispositions. We will thus be able to reveal the novelties brought by the new regulation in the matter subjected to our analysis and to appreciate its progressive nature. As regards the general aspects of the successional option, the new Civil Code innovates mainly relative to the term of successional option.
We hope that through our approach, we enrol in the overall effort to make known and understood the disposition of the new Civil Code, until its entry in force.

Key words: *erede, successional option term, retransmission of the option right.*

1. Introduction

Our paper aims to analyze the general aspects of the successional option in the light of the new Civil Code.

Law no. 287/2009 regarding the Civil Code, published in the Official Gazette no. 511 from 24th of July 2009, whose date of entry in force has not been established yet, conveys to the successional option a new configuration. The analysis of this issue in the light of the new civil regulation presents, in our opinion, a special utility and actuality, because we believe that by making known and explaining the dispositions of the new Civil Code in this matter we bring our contribution to improve the act of justice, once this law comes into force.

Along with those who implement the justice, are also interested in knowing the dispositions of the new Civil Code in the successional option matter the justice partners, the law theorists, the public notaries, the civil servants with responsibilities in this area, Law and Public Administration specialization students. The legislator himself, being always concerned in perfecting his legislative work, is interested in *de lege ferenda* proposals stated by the legal doctrine.

In this paper we will analyze only the general aspects of the successional option in the light of the new Civil Code dispositions, the valences of the successional option right being analyzed separately in different papers. We will analyze the following aspects: the notion and the legal regulation of the successional option, the subjects of the option right, the legal characters of the act of successional option, the validity conditions of the act of successional option and the prescription of the successional option right.

About the novelty elements brought in the right to inherit matter by the new Civil Code have been written few studies in the volumes of some conferences, in the short time elapsed from the date of the publication of Law no. 287/2009 (the end of July 2009) until now. The successional option matter in the regulation of the new Civil Code was broached, from our information, only in "Noul Cod civil. Comentarii" volume, in "Continuitate şi discontinuitate în reglementarea opţiunii succesorale[1]" study, in which the author aims to observe "the level of transformations that have

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[1] Bogdan Pătraşcu, "Continuitate şi discontinuitate în reglementarea opţiunii succesorale" in *Noul Cod civil. Comentarii*, coordinator Marilena Uliescu (Bucharest: Universul Juridic Publishing House, 2010), 246-72.

occurred in the successional law institutions and how profound are they", "whether or not the continuity prevails in the regulation", "but without exhausting the subject"[2].

Compared to this study, we intend to analyze the general aspects of the successional option in light of the new Civil Code, in a complete and didactic manner.

Under this consideration, we appreciate that the subject we have proposed is actual and our scientific approach is useful.

2. Content

2.1. The successional option notion[3] and its legal regulation

As one of the patrimony features is that it can not remain without a titleholder, the successional patrimony is transmitted, as a consequence of *de cujus* death, to his legal heirs or to his testamentary beneficiars, independently of any manifestation of will from the latter. Under the same legal character, the successional patrimony, transmitted by law to the *de cujus erede*[4] who dies before exercising the successional option right regarding the inheritance, is retransmitted, also by law, to the own heirs (article 1105 N.C.C.).

The retransmission of the inheritance does not generate the obligation of the heirs to accept it, according to the dispositions of the article 1106 N.C.C. "Nobody can be forced to accept a rightful inheritance". As a consequence, each *erede* has the possibility to have a choice regarding the inheritance, in respect to which he has this quality, meaning either to accept it or to repudiate it, within the applicable term of the option right regarding the inheritance their author. Furthermore, the new Civil Code, in article 1105 paragraph (2) says that the part of *erede* who benefits by the retransmission of the option right and who gives it up will be taken by the others heirs of their author.

The transmission of the successional patrimony is realised in fully right at the opening date of the inheritance. However, this transmission has only a provisional character, it being considered reinforced only after one exercise his successional option right. Although it is exercised after the opening of the inheritance, the right of successional option right has no effects from the date of exercise, but it has retroactive effects from the date of the *de cujus* death [articles 1114 and 1121 paragraph (1) N.C.C.].

Like *de lege lata*, the successional option right does not either benefit in the new Civil Code of a definition, reason why we can next appreciate that it represents the subjective right, appeared at the death time of the one who leaves the inheritance, in the person of his *erede*, consisting of a choice between the acceptance and the rejection of the inheritance and which may be exercised only in accordance with the law[5].

Although the successional option right does not benefit of a legal definition, its valences are identified in a specific manner in the new Civil Code, in article 1100 paragraph (2). These are the following two ones:

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[2] Ibidem, 246.

[3] Regarding the valences of the successional option notion, ibidem, 248.

[4] The latin term "*erede*" has been used for the Romanian term "succesibil" (from the French "succecible") due to the lack of the English term that denominates a person who receives or is expected to succeed or is in line to receive a heritage due to a hereditary rank.

[5] In the same terms is defined the successional option right by: Constantin Stătescu, *Drept civil. Contractul de transport. Drepturile de creație intelectuală. Succesiunile* (Bucharest: Didactică și Pedagogică Publishing House, 1967), 210; Dan Chirică, *Drept civil. Succesiuni* (Bucharest: Lumina Lex Publishing House, 1996), 200; Alexandru Bacaci and Gheorghe Comăniță, *Drept civil. Succesiunile* (Bucharest: C.H. Beck Publishing House, 2006), 173; Veronica Stoica, *Dreptul la moștenire* (Bucharest: Universul Juridic Publishing House, 2008), 272; Ioan Popa, *Curs de drept succesoral* (Bucharest: Universul Juridic Publishing House, 2008), 266; Ion Dogaru, and the others, *Bazele dreptului civil. Volumul V. Succesiuni* (Bucharest: C.H. Beck Publishing House, 2009), 51.

a*) the acceptance of the inheritance*, under which the legal heirs and the legatees general and with general title answer for the debts and burdens of the inheritance only with the assets from the successional patrimony, proportionately to each other quote - *intra vires hereditatis* [article 1114 paragraph (2) N.C.C.].

Thus we identify a double novelty brought by the new Civil Code in the matter subjected to our analysis. So:

- the new Civil Code regulates only the acceptance of the inheritance, as a valence of the successional option right, giving up to the acceptance under benefit of inventory;

- the new regulation in civil matter assigns the effects of the acceptance under benefit of inventory to the acceptance of the inheritance from the regulation in force.

b) *the rejection of the inheritance*, which involves the retroactively abolishing the inheritance vocation of *erede* who rejects it, so that he became alien to the inheritance, not benefiting by the assets of the inheritance and not being responsible for the debts and burdens of the inheritance. According to the dispositions of the article 1121 paragraph (1) N.C.C., the person entitled to inherit who gives up to the inheritance is considered never to have been heir. The part of the giving up person is a profit for the heirs who otherwise would have been excluded from the inheritance or for the heirs whose part would have been diminished if he had accepted the inheritance [article 1121 paragraph (2) N.C.C.].

We consider as being just the legislator option to drop to the acceptance of the inheritance under benefit of inventory and to assign to the acceptance of the inheritance the specific effects of the acceptance of the inheritance under benefit of inventory from the regulation in force, ensuring in this way protection for any *erede*. Regulating the acceptance of the inheritance under benefit of inventory, the Civil Code in force assures protection for only a few categories of *erede*. Through its regulation though, the new Civil Code ensures protection for any patrimonial interests of any *erede*.

As we have shown before, in the lights of the new Civil Code dispositions, the debts of the inheritance will be paid by the acceptant heir only within the assets of the inheritance, not being available anymore, like *de lege lata*, a confusion between the successional patrimony and the one of the acceptant heir. This provides a protection to the acceptant heir, who will not have to bear in any way the debts of the succession from his own patrimony.

Another merit of the new Civil Code is that for the first time in our legislation the notion of "*erede*" is defined. So, according to the dispositions of the article 1100 paragraph (2), "By *erede* one can understand the person who meets the conditions required by law, but who was not yet exercised his successional option right". Therefore, the quality of *erede* subsists until the moment of exercising the successional option right, after this moment being replaced by the quality of successor

In fact, the notion of "*erede*" has about the same significance these days. Therefore, according to the literature, *erede* represents the person with successional vocation, but who has not yet exercised his successional option right. So, now, the *erede* quality is reported only to the successional vocation, while the new Civil Code reports the discussed quality to all the conditions of the right to inherit.

Regulation the notion of "*erede*", the new Civil Code is inspired by the relevant and fair view of the doctrine, aspect which we consider to be positive.

2.2. The subjects of the successional option right[6]

In light of the new Civil Code, are entitled to exercise the successional option right, all persons who cumulative meet the following conditions:

- have successional capacity;

- they are called to inheritance (general successional vocation), either by law (the legal heirs from the four classes and the surviving spouse), either according to the will (the legatees), no matter if their vocation is general, with general or particular title;

- they are not unworthy.

[6] Ilioara Genoiu, *Drept succesoral* (Bucharest: C.H. Beck Publishing House, 2008), 270-3.

In an exhaustive list, the persons who have the right of successional option are: legal *erede*, the legatees (general, with general and particular title) and the personal creditors of the legal or testamentary *erede*.

a) the legal heirs;

The persons with the successional option right are not only the persons with concrete inheritance vocation, being in a preferential class and kin degree, but all the persons with general legal vocation, from any classes of heirs, and also the surviving spouse.

It is obvious that to the inheritance would not come all the persons who accepted it, but those who are in a preferential class and kin degree. The required solution for *erede* in subsequent degree to exercise the successional option right stays in the possibility of the preferential degree *erede* to drop the inheritance, towards the end of the period established by law in this regard. If the preferential degree *erede* accept the inheritance, their right on the inheritance will be consolidated retroactively from the date of the inheritance opening. The option of the subsequent *erede* will thus be without any legal effects, their rights on the inheritance being retroactively abolished.

b) the legatees;

The new Civil Code recognizes, in several of its texts[7], the successional option right also for the legatees, no matter if they are legatees general, with general or particular title. The reasons that have determined the legislator to recognize such a right for the legatees are, mainly, the following ones[8]:

- the general vocation or with general title of the legatees involves, besides the achievement of the assets of the inheritance and bearing the liabilities of the inheritance, the possibility to reject the inheritance recognised to the legatee;

- the particular title vocation of the legatee, even if it usually doesn't mean bearing the liabilities of the inheritance, proportional with the value of the legacy [article 1114 paragraph (3) N.C.C.], it still involves moral judgments (nobody can be gratified against his will), and the legacy with liabilities also involves patrimonial interests.

c) the erede creditors.

According to the dispositions of the article 1107 N.C.C., „The *erede* creditors may accept the inheritance on oblique way, in the limit of their satiated claim".

Equally, the new Civil Code, in article 1122, also regulates the possibility of *erede* creditors who rejected the inheritance in their fraud to ask the court to revoke the rejection on their part, but only within three months from the date they found out about that rejection. The admission of the action in rejection produces the effects of the inheritance acceptance by the debtor *erede*, but only in respect with the complainant creditor and in the limit and in the limit of his claim.

We thereby identify another strong point of the new regulation in successional matter, which offers a fair solution to situations commonly encountered in practice, but that are now not legally regulated. Moreover, the solutions established by the legislature in these cases are those that currently enjoy the majority doctrinal support.

Compared to these legal dispositions, we consider that the successional option right has not an exclusive personal nature, being able to be exercised by the *erede* creditors.

2.3. The legal characters of the successional option act

The act of successional option represents the manifestation of will of the holder of the successional option right, expressed in the legal term, towards an acceptance or a rejection of the inheritance.

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[7] We mention, as examples, article 1102 paragraph (2), article 1103 paragraph (2), article 1114 etc.

[8] Francisc Deak, *Tratat de drept succesoral*, second edition, updated and completed (Bucharest: Universul Juridic Publishing House, 2002), 382.

New Civil Code refers to the legal characters of the successional option right, in article 1101, stating that: "Under the sanction of the absolute nullity, the successional option is indivisible and can not be affected in any way". It is worthwhile the legislature's choice to identify the legal characters of the successional option act but as far as we are concerned, we consider that, under this aspect, the law in question records a decline, being at least incomplete[9]. In fact, the successional option act has the following legal characters:

a) it is an *unilateral legal* act, being available only through the successional option right holder's manifestation of will. In case of multiple *erede*, they can not collectively exercise the right of successional option.

From the unilateral character point of view, although similar to the will, the successional option act is different from the latter since it isn't essentially a personal act. As a consequence, *erede* can realise the successional option act either in person, either by using a legal or a conventional representative[10].

b) it is a *legal voluntary act*, since nobody is obliged to accept a rightful inheritance (article 1106 N.C.C.), and *erede* can choose any of the valences of the successional option right, without being held to demonstrate the reasons for his choice[11]. In the case of multiple heirs, each may choose differently on the same inheritance.

Specific to the successional option act, freedom of choice manifested on the three planes is diminished, as we have shown, by the possibility of *erede* creditors to exercise the oblique action, respectively the action in the revocation of the fraudulent rejection.

Moreover, in the light of the new Civil Code, this principle entails the following exceptions:

- the forced acceptance of the inheritance, regulated by the article 1119 N.C.C.;

According to the mentioned dispositions of the new Civil Code, *erede* who, in bad faith, has concealed or has stolen assets from the successional patrimony or has concealed a donation subject to the report or to the reduction, is deemed to have accepted the inheritance, even though he had previously rejected it;

- the retransmission of the option right, regulated by the dispositions of the article 1105 N.C.C.

Under these legal dispositions, the heirs of those who died without having exercised the successional option right exercises it separately, each for his part, in the applicable term of the option right regarding the inheritance of their author.

If, however, *erede* made acts of tacit acceptance of the inheritance, his right being exercised, it is not likely to transmit to his own heirs.

In the absence of such papers, *erede* heirs have the possibility to exercise two option rights: the own option right regarding the deceased *erede* inheritance and the retransmitted option right, aiming the previous opened inheritance The second option right can be exercised only if the inheritance of the deceased *erede* has been accepted. The rejection of his inheritance doesn't give the possibility to the rejecting person to accept the retransmitted inheritance.

In conclusion, the option regarding the two inheritances need not be identical, but in order to be accepted the retransmitted inheritance, one must not abandon the inheritance of the deceased *erede*.

Regarding the retransmitted inheritance, the option right must not be exercised by the unitary coheirs, the new Civil Code regulating the possibility that one or more *erede* to reject the retransmitted inheritance, by the part of the rejecting persons taking advantage the others successors of their author.

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[9] See also Bogdan Pătraşcu, *op. cit.*, 263.

[10] Civil Court, civil collective, decision no. 778/1962, in *Culegere de decizii pe anul 1962*, 162-5.

[11] Mihail Eliescu, *Moştenirea şi devoluţiunea ei în dreptul Republicii Socialiste România* (Bucharest: Academiei Publishing House, 1966), 91.

The text of the article 1105 N.C.C. is inconsistent. In the first paragraph of this law text it is stated that "the heirs of the person who deceased without exercising the successional option right, exercise it separately, each for his part…", and in the second paragraph, the legislator contradicts himself and states that "from the part of *erede* who rejects the inheritance profit the others successors of their author".

As a result, the following question needs to be answered: How can benefit the others successors of their author of the rejecting person's part if the latter have accepted only their part, so they have a vocation limited only to their part of inheritance? So that the others successors of their author benefit of the rejecting person's part, the former should have vocation to the generality of the inheritance, meaning to choose (to accept) in respect with the whole retransmitted inheritance, and not only for a part of it[12].

Under these circumstances, we advise the legislator to reconsider this law text and to remove the obvious contradiction between these two paragraphs.

c) it is, in principle, an *irrevocable legal act*, as it is not possible for *erede* to reconsider the choice made;

Actually, only the acceptance act of the inheritance is absolutely irrevocable, as the heir who accepted the inheritance can no longer reconsider the choice he made (*semel heres semper heres*)[13], the subsequent rejection of the inheritance having no efficiency[14].

Irrevocability, which characterizes the rejection of the inheritance, is not, however, absolute, so that the owner can reconsider it, by accepting the inheritance, only if the prescription term of the option right has not expired and only if the inheritance has not been accepted meanwhile by other *erede* (article 1123 N.C.C.).

d) it is an *indivisible legal act*, *erede* being forced to choose unitarily for the entire inheritance;

Considering this nature of the successional option act, it is not allowed to *erede* to accept only a part of the inheritance and to reject the other part[15].

Not only the successional option act of the legal heirs, but also the legatees' one, no matter if they are general legatees, with general or particular title, has an indivisible character.

Trough the indivisible nature of the successional option act it must not be understood that if there is a plurality of heirs they must choose unitarily, this requirement not being characteristic anymore even for the retransmission of the inheritance, in the light of the new Civil Code.

So *erede* can choose differently in the same inheritance matter, some of them accepting it and some of them repudiating it. The indivisibility of the option aims only the inheritance, and not the heirs' person[16].

The indivisibility principle of the successional option includes, in the light of the new Civil Code dispositions, the exception of the multiple vocation to the inheritance[17]. Therefore, according to the dispositions of the article 1102 paragraph (1) N.C.C., "The heir who, under the law or the will, accumulates more vocations to the inheritance has for each of them a separate option right". So, the legatee called to the inheritance as a legal heir could exercise his option in any of these qualities, regarding the same inheritance, exercising two right of successional option and making two papers of successional option. This is possible due to his double call to the inheritance: bosth legal and

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[12] See also Bogdan Pătrașcu, *op. cit.*, 256.

[13] *Semel heres, semper heres* = once became heir, stay heir forever.

[14] See as an example: Civil Court, civil division, decision no. 1968/1972, in *Repertoriu II pe anii 1969-1975*, 200; Supreme Court, civil division, decision no. 1984/1991, in *Deciziile Curții Supreme de Justiție pe anii 1990-1992*, 126-8; Galați District Court, civil decision no. 878/1976, in *Revista Română de Drept* (12/1976): 61.

[15] Civil Court, civil collective, decision no. 1778/1960, in *Culegere de decizii pe anul 1960*, 241-2.

[16] Francisc Deak, *op. cit.*, 392.

[17] In the recent literature is assessed that the multiple vocation to inheritance is not a true exception from the indivisibility character of the successional option act. See in this regard Bogdan Pătrașcu, *op. cit.*, 266.

testamentary. Such *erede* can, in respect with his interests, to accept the legal inheritance and to reject the legacy or vice versa.

However, if it results from the will (which does not affect the successional reserve) that the deceased wanted to diminish the quote of the legatee as a legal heir, the latter may choose only as a legatee [article 1102 paragraph (2) N.C.C.].

e) it is a *legal act unsusceptible by means*, so that it can not be affected by term or condition. The presence of a mean attracts, according to the dispositions of the new Civil Code, the absolute nullity of the successional option act.

As far as we are concerned, we consider that the successional option act, although unsusceptible by means, can not be absolutely considered just an act, because such a qualification would lead to ignoring *erede* will farther in class and kinship degree. The latter, *erede* in the meaning of the new Civil Code, can not accede to the inheritance, unless *erede* in preferable class and degree reject the inheritance. Therefore, the successional option act of *erede* farther in class and kinship degree is affected by the condition that *erede* in preferable class and kinship degree not to accept the inheritance. We can even appreciate that this condition is the essence of the successional option act, being implicit, and that the act in discussion can not be affected by any other condition than the previous mentioned one.

f) it is a *legal declaratory act of rights*, the effects of exercising the option right occurring, according to the dispositions of the article 1114 and 1121 N.C.C., retroactively, from the opening of the inheritance time, regardless of the chosen option (acceptance, rejection or even revocation of the rejection).

Exceptionally, however, the rights acquired by the third parties of good faith between the time of rejecting the inheritance and the revocation of the rejection will be respected [article 1123 paragraph (2) N.C.C.].

In respect with the regulation of the new Civil Code, we appreciate that, under the legal characters of the successional option right, this is totally inappropriate.

2.4. The validity conditions of the successional option act

The successional option act must comply with all the legal validity conditions. Thus, the successional option act must come from a capable person, his consent must be valid, his object must be determined, possible and lawful, the cause must be available and according to the law (article 1197 N.C.C.). These conditions will be analyzed next only under the particular aspects.

2.4.1. The required capacity to exercise the successional option right

The new Civil Code does not qualify the successional option act as a disposition act. In the literature[18] though, to whose opinion we agree, it is generally accepted that the persons without legal exercise capacity (minors under the age of 14 years old and person under interdiction) exercise their successional option right trough their legal representants and with the authorization of the guardianship court, and those with limited exercise capacity (minors with the ages beween 14 and 18 years old) exercise by themselves that right, but they still need the approval of their legal representatives and the authorization of the guardianship court (article 41 and next N.C.C.).

2.4.2. The uncorrupted consent

In the successional option act, *erede* consent must be serious, freely and knowingly (article 1204 N.C.C.). The corruption of the consent problem, in the successional option matter, rarely appears in practice due to the notary successional procedure.

[18] Mihail Eliescu, *op. cit.*, 92-4; Stanciu Cărpenaru, „Dreptul de moştenire" in *Drept civil. Contracte speciale. Dreptul de autor. Dreptul de moştenire*, Francisc Deak and Stanciu Cărpenaru (Bucharest: The University of Bucharest, 1983), 492; Francisc Deak, *op. cit.*, 385; Dumitru Macovei, *Drept civil. Succesiuni* (Bucharest: „Chemarea" Publishing House, Iaşi, 1993), 144; Dan Chirică, *op. cit.*, 204.

Although the new Civil Code (in article 1124) refers only to violence, we consider that the vitiation of the consent in this matter can be achieved also through fraud and error (both the fact one and the law one). Through the error of law it can be obtained the annulment of the successional option, only if it is excusable and represents the determinant cause of the option act.

Fraud, like the others vitiations of consent, can corrupt both the acceptance act of the inheritance and the rejecting one, and while the successional option act has is unilateral, it may come from any person.

As far as we are concerned, we believe that, in the light of the new Civil Code's regulation, the lesion can not be invoked by *erede*, in the successional option matter.

The vitiation of *erede* consent in the matter subjected to our analysis attracts the annulment of the option act.

2.4.3. The object of the successional option act

Like any legal act, the successional option act must have a determined and lawful object, under the penalty of absolute nullity [article 1225 paragraph (2) N.C.C.]. It is considered to be unlawful, according to the dispositions of the article 956 N.C.C., the acts through which is accepted or rejected the inheritance, before its opening.

2.4.4. The cause of the successional option act

The cause of the successional option act must exist, must be moral and lawful [article 1236 paragraph (1) N.C.C.]. The cause of the successional option is unlawful when it is against the law and public order and when the acceptance or the rejection of the inheritance represents only the mean to dodge the application of an imperative legal norm. The cause of the successional option is immoral when it is contrary to morality.

The unlawful and unmoral cause of the successional option act attracts its absolute nullity. But the lack of cause in the successional option matter attracts its relative nullity.

2.4.5. The form of the successional option act

The express acceptance of the inheritance can be achieved either through an authentic document or in writing under private signature. So, the solemn form in the acceptance of the inheritance case is not about its essence but about its nature. But the declaration of non-acceptance, regulated by the new Civil Code in article 111, represents an authentic act of notary. The rejection of the inheritance represents in all cases an authentic act of notary, which can be done by any public notary or by the diplomatic missions or consular offices of Romania. The absence of the form required by law in the successional option act's case attracts its absolute nullity.

In addition, for the third party information, the declaration of renunciation of the inheritance will be posted, on the expense of the rejecting person, on the national notary register, kept in electronic format.

2.4.6. The sanction for the non-observance of the validity conditions of the successional option act

Following the intervention of the nullity (absolute or relative), the option act is retroactively abolished, *erede* being allowed to opt again[19], under the law.

2.5. The prescription of the successional option right

2.5.1. The term of successional option

According to the article 1103 N.C.C., "The right of successional option is exercised in term of one year since the inheritance opening".

[19] Mihail Eliescu, *op. cit.*, 115; Francisc Deak, *op. cit.*, 387.

Thus we notice that the new Civil Code extends the deadline in which *erede* can choose about the inheritance to which they have the vocation. In this way it is assured for *erede* a longer term to exercise the option right, thing that can be considered as another positive aspect of the new regulation in the successional matter. It is true though that, in respect with the deadline of the successional option, we can equally identify also a negative aspect. So, by extending the deadline for exercising the successional option right to one year, it is also prolonged the uncertainty about the owners of the successional rights over the assets of the deceased. But we consider that, as far as the deadline of the successional option is concerned, it prevails the positive aspect identified above.

The one year term in which the successional option right must be exercised and which is regulated by the new Civil Code in article 1103 paragraph (1) should not be confused with the term in which is prescribed the right to action in the annulment of the acceptance or of the rejection, regulated by the legislative act mentioned in article 1124. The deadline for exercising the right to action in the annulment of the successional option has the legal nature of an extinctive prescription term and lasts six months, starting as follows:

- in case of violence, since it stops;
- in the other cases, from the moment when the owner of the right to action knew the relative nullity cause.

2.5.2. The legal nature of the successional option term

We appreciate that the new Civil Code, through the dispositions of the article 1103 paragraph (3), simplifies the problem of the legal nature of the successional option term. According to the legal mentioned dispositions, to the one year term is applied the provisions of the new Civil Code regarding the suspension and the reinstatement in the extinctive prescription term.

So, as far as we are concerned, the one year term is an extinctive prescription term.

2.5.3. The subject area of the successional option term

About the subject area of the 6 months option term, from the civil regulation in force, in the literature have been formulated different opinions. According to the majority's opinion, the six months term is applicable to all the *erede*, even to the legatees with private title.

However, according to the minority's opinion, the six months term is applicable only to the general transmissions or to those with general title, meaning to the legal heirs, to the legatees general or to those with general title. Consequent to this view, for the legatees with particular title are applicable the common law dispositions regarding the prescription.

The new Civil Code, in article 1103 about the successional option term, does not realise any distinction between the general transmissions and those with general title, on one hand, and those with particular title, on the other hand. On the contrary, in this law text, the new Civil Code uses terms like "legatee", "*erede*", which allow us to believe that the successional option term in discussion is applicable both to the general successional transmissions and to those with general title, and also to those with particular title.

This term is equally applicable to the state and to the administrative-territorial units, as the legatee general, with general or particular title. But if the state, the commune, the city, or where appropriate, the municipality collects *ope legis* a vacant inheritance, the legal option term becomes inapplicable[20].

2.5.4. The beginning of the successional option right prescription

As a rule, the successional option term starts from the date of the inheritance opening, meaning since *de cujus* death [article 1103 paragraph (2) N.C.C.].

[20] Ilioara Genoiu and Olivian Mastacan, "Moştenirea vacantă în lumina Legii nr. 287/2009 privind Codul civil", *Dreptul* (1/2010): 51.

Any option related to the inheritance, made before this moment, represents a pact not allowed on a future succession and it is, according to the disposition of the 956 N.C.C., null and void. *Erede* who chose so can choose differently, after the date on the inheritance opening, but this time his choice will produce legal effects, as it is exercised under the law conditions.

Similarly, it isn't valid the obligation undertaken before the inheritance opening, to choose in a certain sense about the inheritance. As a consequence, *erede* can choose at the opening date of the inheritance.

The rule according to which the successional option term starts from the date of *de cujus* death, regardless of the moment of his inclusion in the civil status registers, operates also in the following assumptions:

- *erede* found out latter about *de cujus* death;
- *erede* lives in another place than the opening place of the inheritance[21];
- *erede* doesn't know the composition of the successions;
- *erede* has only general vocation to the inheritance, but not specific vocation;
- *erede* inherits not only by himself, but also by representation or retransmission.

In case of retransmission, the must exercise his successional option right within the remained term, which is within the date of *erede* death and the date whent the one year term expires. The heirs of the death *erede*, after the opening date of the inheritance, but before exercising the successional option right, can not benefit of a longer term than the one of the death *erede*. For example, if the opening date of *de cujus* inheritance is 1st of January 2010, the successional option term expires on 1st of January 2011. *De cujus erede* dies on 1st of April 2010, before exercising the successional option right in respect with the opened inheritance. The option right of the deceased *erede* is transmitted to his own heirs. The latter ones have the right to choose in respect with the retransmitted inheritance in a nine months term. The non-exercitation of the option right in the remained term means the extinguishment of this right and also the extinguishment of the heir title.

In contrast, regarding the inheritance of the deceased *erede* and not the retransmitted one, his heirs have the right to choose in the one year term, which starts on 1st of April 2010 (which represents the opening date of the inheritance in respect to which they choose).

The following waivers from the rule that governs the beginning of the successional option right prescription are admitted by the new Civil Code:

a) for the child conceived at the opening date of the inheritance, but born afterwards, the option term starts at his birth [(article 1103 paragraph (2) letter a) N.C.C.];

b) in case of the legally declared death person's inheritance, the term starts from the date of registration of his death in the civil status register, under the declaratory judgement of death, unless if *erede* knew the death or the declaratory judgement of death at an earlier date, case in which the term starts from this latter date [(article 1103 paragraph (2) letter b) N.C.C.];

c) for the hypothesis in which the will that contains legacies is discovered after the inheritance opening, the term starts from the date when *erede* knew or should have known his legacy [(article 1103 paragraph (2) letter c) N.C.C.];

d) in case in which the kinship relationship on which is based the *erede* vocation is not known at the date of the inheritance opening, the option term starts from the date when *erede* knew it or should have known it [(article 1103 paragraph (2) letter d) N.C.C.].

Thus, we see that the new Civil Code also innovates regarding the exceptions of the rule about the beginning of successional option right prescription. We believe that the novelties brought by the legislator regarding this aspect may be considered positive aspects of this new regulation in civil matter.

[21] Civil Court, civil division, decision no. 1413/1973, in *Revista Română de Drept* (12/1973): 156-7; Civil Court, civil division, decision no. 213/1987, in *Revista Română de Drept*, (10/1987) 74-5.

2.5.5. The suspension and the reinstatement in the prescription term of the successional option right

According to the express dispositions of the article 1103 paragraph (3) from the new Civil Code, the prescription term of successional option right is liable of suspension and reinstatement in term. The problem of interruption the prescription term of the successional option right is not valid, since it is being exercised in the legal term, the successional option right is "consumed"[22].

A) The suspension of the successional option right prescription

The new Civil Code contains special dispositions regarding the suspension of the prescription in successional matter, being innovative under this aspect too. Therefore, causes that usually entail the suspension of the extinctive prescription are not applicable in the successional matter, it having specific causes of suspension. So, according to the dispositions of the article 2533 N.C.C., the prescription does not run in the following cases:

a) against the creditors of the deceased regarding the claims they have on the inheritance, as long as the inheritance has not been accepted by *erede* or, in the lack of the acceptance, while a guardian was not appointed to represent them;

b) against the deceased's heirs, as long as they haven't accepted the inheritance or a guardian was not appointed to represent them;

c) against the heirs, regarding the claims they have on the inheritance, from the date of the inheritance acceptance until its liquidation.

After the cessation of the suspension cause, the prescription resumes its course, taking into account the time passed before its intervention, but it will not be fulfilled, before the expiration of a six months term, reckoned from the cessation of the suspension cause [article 2534 N.C.C.].

The new Civil Code keeps therefore from the regulation in force the effects of the prescription's suspension, including the special effect, but keeping all other causes of suspension. Moreover, we consider that the legislator has done just, adapting the causes of the extinctive prescription to the specific of the successional matter.

The suspension causes of the extinctive prescription mentioned above, generally applicable in successional matter, are also about the statute of limitations in the annulment of the successional option act.

B) The reinstatement in the prescription term of the successional option right

The reinstatement in the prescription term of the successional option right may be ordered by the jurisdictional body, under the dispositions of the article 2522 paragraph (1) N.C.C., only if it finds for good reasons that *erede* didn't exercise the successional option right in term. *Erede,* who overcome the legal term of successional option, may ask the reinstatement in term and the prosecution of the case, only within 30 days, starting from the day when *erede* knew or should have known the end of the reasons that justified the overcoming of the prescription term [article 2522 paragraph (2) N.C.C.].

From the analysis of these legal dispositions it result another novelty brought by Law no. 287/2009 – the reinstatement in the extinctive prescription term must be requested by the entitled person with 30 days and not a month, as the Decree no. 167/1958 regarding the extinctive prescription states.

Furthermore, either the new regulation in civil matter does not determine the legal nature of the 30 days term in which can be ordered the reinstatement in the extinctive prescription term, reason for which, next, this aspect will be judged by the doctrine and by the jurisprudence[23].

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[22] Francisc Deak, *op. cit.,* 406.

[23] Regarding the legal nature of the reinstatement term, see also Ion Deleanu and Gheorghe Beleiu, "Repunerea în termen, în condițiile art. 19 din Decretul nr. 167/1958", *Revista Română de Drept* (9-12/1989): 32-44.

Likewise, Law no. 287/2009, and the Civil Code in force, doesn't define the notion of "good reasons" and either offers examples. As a consequence, "good reasons" may be considered those circumstances with the following features:

- prevents *erede* to exercise his successional option right;
- they are not imputable to *erede*;
- they does not meet the force majeure character, as they are not absolutely invincible.

So, by "good reasons" should be designated the fortuitous cases, those cases which, although not absolutely prevent *erede* from exercising the successional option right within the legal term, however, they can not be imputed to him.

For example, such cases are:

- hiding in bad faith the *de cujus* death, from the heirs[24];
- *de cujus* death occurred abroad, and the links between him and his heirs were abnormal;
- death in a prison[25];
- non-exercising by the mother, by leaving the child, of the parental rights and duties[26];
- wrong direction by the notary, followed by delays on the part of local administration[27];
- not knowing the will by the legatee[28];
- subsequent finding of the kinship with the deceased[29];
- state of long and serious illness[30].

Competent to order the reinstatement in the prescription term of the successional option right are only the jurisdiction bodies and not the public notaries or the state administration bodies[31]. The reinstatement in the prescription term produces effects, not only for *erede*, but also for the third parties.

Regarding the effects produced by the admission of the request of reinstatement in term by the competent jurisdiction body, we consider that this fact has the significance of an implicit acceptance of the inheritance by the plaintiff *erede*, so that the jurisdiction body will not grant a new term for exercising the successional option right.

In respect with the dispositions of the new Civil Code, that regulates as valences of the successional option right only the acceptance of the inheritance and its rejection and according to which the acceptance of the inheritance has as effect the successional liabilities within the limits of the inheritance assets, it is obvious that *erede* who asked for the reinstatement in the prescription term intends to accept the inheritance and not to reject it.

So, the question of granting a new term, within *erede* to choose, can not be put in the light of the new regulation in successional matter.

2.5.6. The reduction of the option term

Law no. 287/2009 in article 1113 regulates the possibility to reduce the one year successional option term. So, "For good reasons, at the request of any interested person, *erede* may be asked to, under the appliance of the procedure provided by law for the injunction, to exercise his successional

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[24] Miron Costin, "Principiul prescriptibilității dreptului de opțiune succesorală", in *Contribuția practicii judecătorești la dezvoltarea principiilor dreptului civil român*, Aurelian Ionașcu, and the others, (Bucharest: Academiei Publishing House, 1973), 211.

[25] Ibidem.

[26] Civil Court, civil division, decision no. 590/1986, in *Culegere de decizii pe anul 1986*, 82-5.

[27] Civil Court, civil division, decision no. 470/1970, in *Culegere de decizii pe anul 1970*, 167-70.

[28] Supreme Court, civil division, decision no. 129/1993, in *Buletinul Curții Supreme de Justiție pe anul 1993*, 81-8.

[29] Francisc Deak, *op. cit.*, 407.

[30] Ibidem.

[31] Supreme Court, civil division, decision no. 129/1993, in *Buletinul Curții Supreme de Justiție pe anul 1993*, 81-3.

option right within a period specified by the court, shorter than the one provided in article 1103", meaning shorter than one year. Furthermore, *erede* who does not chose during the term established by the court is considered to be a rejecting the inheritance person.

Thus we identify another novelty brought by Law no. 287/2009. The reduction of the option term is has, therefore, an exceptional character, intervening only in situations where it is imposed the ascribing of the successional assets in terms shorter than one year. Such reasons may be, for example, the risk of destruction, degradation or deterioration of the successional assets.

2.5.7. The extension of the successional option term

As a novelty, the new Civil Code regulates in article 1104 the possibility to extend (to prolong) the successional option term. So, "In the case in which *erede* asked the inventory before exercising the successional option right, the option term is not completed before two months earlier than the date on which it is communicated to him the inventory minutes. While performing the inventory, *erede* can not be considered an heir unless he has accepted the inheritance".

Erede, the creditors of the inheritance or any interested person can ask to the competent public notary for an inventory of the successional assets [article 1115 paragraph (1) N.C.C.]. Only *erede* request to perform the inventory of the successional assets can generate the extension of the successional option term. In order for the extension to interfere, it is necessary that the inventory application of the successional assets to be made between the successional option term limits of one year, so before the exercitation of the successional option right. In such a case, the option term is extended with two months from the date when to *erede* is communicated the inventory minutes.

Therefore, we meet in practice the following situations:

- the inventory minutes is communicated to *erede* two months before the expiration of one year option term, so that the extension of the option term is no longer necessary;
- the inventory minutes is communicated to *erede* after the expiration of the one year option term, so that the extension of the option term with two months is no longer necessary;
- the inventory minutes is communicated to *erede* before the expiration of the one year option term, but until the end of this period are less than two months, becoming necessary the extension of the option term, so that when the inventory minutes is communicated it have to run another two months term.

We believe this addition of the legislature to be fair, thus providing protection for the interests of *erede* and allowing the latter to choose in respect with the inheritance for which he has vocation, being fully informed.

2.5.8. The prescription's effects of the successional option right

As a consequence of the non-exercising of the successional option right in the legal term, *erede* is presumed by law (article 1112 N.C.C.), until proven guilty, to has rejected the inheritance. So, the legislator treats *erede* who doesn't exercise the successional option right similar with the person who rejects the inheritance. By this assumption, which has only a relative character and can be countered by the contrary evidence, is concerned only *erede* who, despite knowing about the inheritance opening and his quality of *erede*, as a result of his notification under the law conditions, does not accept the inheritance in the legal term.

On the contrary, *erede* who did not know about inheritance opening and about his quality, not being notified under the law conditions and who does not accept the inheritance in the legal term of the successional option, can not be considered a person who rejects the inheritance, he being able to retain under the law conditions the tacit acceptance of the inheritance or to claim to the competent jurisdiction institution the reinstatement in the period of limitation, under the law conditions.

Stating this, the new Civil Code removes the present doctrinal controversy concerning the effect of the prescription of successional option right. So, by prescribing the successional option right, *erede* is considered to be a person who rejects the inheritance, being considered never to be

heir. The rejection of the inheritance produces *erga omnes* effects, and it can be invoked by any interested person and to any person (such as co -heirs, subsequent heirs, legatees, creditors and debtors of the inheritance).

3. Conclusions

From the analysis undertaken in this paper regarding the general issues of the successional option in light of the new Civil Code's dispositions, it obviously results quasi-total reconfiguration of the successional option.

Law no. 287/2009 keeps from the regulation in force only the items whose correctness and timeliness have not been denied in the literature and in the judicial practice. But the new Civil Code brings many novelty elements in the successional option matter, imposed by the new social realities.

As for the general aspects of the successional option, we reveal the following new aspects brought by Law no. 287/2009: for the first time is defined the term of "*erede*"; it regulates the retransmission of the successional option right, clearly distinguishing in this way this institution from the successional representation one to which it resembles; it doesn't regulates anymore, as a valence of the successional option right, the acceptance under benefit of inventory and ascribes to the acceptance of the inheritance new effects, so that the liabilities of the inheritance will be considered only in the limits of its assets; regulates the possibility of exercising the successional option right in the oblique way by the *erede* creditors, and also the possibility of revocation by the *erede* creditors of the fraudulent rejection of the inheritance; in comparison with the regulation in force assigns a longer period of time for successional option term, equally regulating the its possibility of reduction and extension; clarifies in a greater degree than the Civil Code in force the problem of the legal nature of the successional option term, stating that it is liable for suspension and for reinstatement in term; in comparison with the regulation in force establishes new exceptions to the rule about the beginning of the prescription of the successional option right and new causes of suspension of the prescription in successional matter; identifies the prescription effect of the successional option right.

All these aspects are, in our view, the advantages of this new regulation in successional matter, constituting its strengths. Unfortunately, the new Civil Code improperly regulates the legal characters of the successional option act. Although the legislature's intention to regulate the legal characters of the successional option right is commendable, it can not be understood his option to retain only two of them, seeming to prioritize them. Then, although the new Civil Code establishes, under the penalty of nullity, the purely and simply character of the successional option act, in our view, this is illusory.

Second, the expression of the legislator used in article 1105, which regulates the retransmission of the option right, is obviously contradictory. As a consequence, we recommend to the legislator to reconsider the discussed law text and to reformulate it, taking into account the criticisms and suggestions in the literature.

We conclude therefore that, far from perfect, but only perfectible, the new Civil Code, currently using a specialized language, ensures a proper, a complete, a consistent and a fair regulation for the successional option.

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NON-COMPETITION CLAUSES IN COMMERCIAL CONTRACTS

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Abstract
We begin with an analysis of areas where rivalry between economic agents can not show (any act of competition committed in this area drawing the liability of the author), we will then analyze competition in relations between the trader and servant or other employees and continue with the analysis of the legal ban on competition in the limited liability companies and joint stock companies.
So, the relevant provisions of Law 31/1990 are reviewed, views of legal doctrine and practice of judicial rulings on the nature and purpose of the relevant provisions referred to, their scope, applicability of statutory prohibition against competition in the profile activity of the company, the prohibition in the liquidation phase, procedural methods which can cover damage caused to the creditor's violated rights, as well as statute of limitations for the right to action and prescription.

Keywords: *Competition Council, non-competition, commercial code, civil code, labor code*

Introduction

Given the very high interest, in the current economic context, regarding the topic proposed for the study below I considered being important the summarization of the most important and most used aspects from the field mentioned in a material as practical as possible.

Non-Competition Clauses in Commercial Contracts

Taking into account that, a functional market economy involves the existence of an undistorted competitive environment, within which the enterprises would act freely on the market, without being affected by the unequal behavior of other enterprises, possibly located in a dominant position, or by the intervention of the state.

Also that, through the competition policy is sought to maintain an efficient competition status which would lead to the achievement of the economic progress, of a favorable climate for innovations and technical progress, **the policy in the competition field** represents a major structural factor in supporting the national economy in the process to adapt to the new competition environment created in the context of globalization.

Often, the concept of competitive market was associated with that of the democratic society, where no natural or legal person is allowed to exercise unjustified his power on another natural or legal person.

In the Romanian legal doctrine, **the completion right** was defined as being the set of rules meant to ensure, in the internal and international market reports, the normal exercise of the competition between the economic operators, in the fight to win, keep and extend the customers.

The main components of the competition right are represented by a complex of specific rules, forming the legal framework; an appropriate economical ambiance, consisting of a free market, the existence and ways to exercise the economical competition, the competition relations between economic operators.

The present paper proposes to analyze the non-competition clause concept, examining this notion both for individual commercial relations as well as within legal reports regarding goods and services circulation.

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Also, will be examined by comparison other clauses frequently met in commercial contracts, like, for example, the exclusivity clause in the distribution contracts, as well as clauses inserted, in practice, in the individual employment contracts, next to the non-competition clause, thus wanting to achieve a conceptual delimitation.

However, there are also fields closed by law for the commercial competition. For example art. 2 par. 4 from the Competition Law no. 21/1996 establishes that **this law is not applied on the labor and work relations market.** They are subjected to a specific legal system, being instituted efficient measure to protect the employees, both by Labor Code, as well as by the Romanian Constitution.

According to the Constitution of the International Labor Organization, „the labor is not a merchandise", reason for which the labor is not subjected to legal regulations regarding competition or legal regulations regarding added tax value.

Art. 41 par. 2 from the Romanian Constitution provides that the employees have the right to social protection measures. These concern the safety and health of employees, the working regime for women and young people, the institution of a gross minimum salary in the country, weekly rest, paid annual leave, work provision in particular or special conditions, professional formation, as well as other specific situations, established by law.

Consequently, the competition cannot manifest regarding the following aspects: work safety and health, maximum duration of working time, annual leave, establishing the retiring age for old age, social insurances, minimum salary, all these aspects being regulated through legally binding rules from labor legislation and social security legislation.

There are also competition interdictions regarding the reports between trader and suspected or other employees.

The legal reports between trader and suspected are regulated by the provisions of art.392 – 400 of the Commercial Code.

According to art.392 from the Commercial Code, the suspected is that entrusted with the trade of his employer, whether where he exercises it, or other place. Thus, **the suspected is a trade auxiliary** who substitutes the trader, representing in a stabile way his enterprise and concluding legal documents for and on behalf of the trader. From the analysis of the legal norms results that the suspected is at the same time an enterprise leader and a representative.

The suspected acquires this quality based on an employment contract concluded with the trader, a contract by which the suspected acquires a general and permanent representation power. The supposed has the obligation to keep the commercial registers of the person who employed him, as well as the obligation not compete with him.

Thus, art.397 of the Commercial code institutes **a competition interdiction against your own employer**: the suspected cannot, without the express consent of the employer, perform operations, or take part, in his own behalf or of another, to other trades of the same nature with that he is entrusted with. Contrary, the suspected is responsible for damages, the employer also having the right to retain for himself the benefits resulting from these operations.

Thus, for the unfair competition, those facts are made on a field on which the competition is allowed, in such cases being in discussion exclusively the morality of the means used.

The essential condition for the applicability of the provisions of art.397 of the Commercial Code is that the trade acts made to be similar to the commerce performed by the employer, respectively the activity should be performed in the same specialized functional sector of goods or services production.

Art. 397 of the Commercial Code shows that it is possible an express consent of the employer to remove the legal interdiction. It was considered that this provision may be applied, by extension, to any employee, taking into account the principle of free conventions.

As for the regular employees of a trader, the interdiction is provided by art. 4 par. 1 let. a of Law no. 11/1991 regarding the fight against unfair competition and refers to ***the provision of services, by the exclusive employee of a trader to a competitor or the acceptance of such an offer.***

Thus, the legal provision takes into account both the actual performance of the fact, referring to the will agreement concluded by the employee with a competitor of the employer, as well as a simple action of the employee in this respect, unfinished, namely, the service offer not followed by acceptance.

The service offering by an exclusive employee of a trader to the benefit of a competitor or the acceptance of such offer constitutes a contravention punishable by fine, according to art.4 par. 2 of Law no.11/1991. If the employee commits such act, by which are caused patrimonial or moral damages, against the provisions of art.9 from Law no. 11/1991, the prejudiced one is entitled to address to the competent court with the appropriate civil liability action.

Consequently, the employer is entitled to formulate against the employee a civil liability action, to grant compensations for the damages produced, including the moral ones, according to art.6 and art.9 of Law no.11/1991. By Law no. 11/1991 regarding the fight against unfair competition, published in the Official Gazette no. 24 from 30 January 1991 modified by Competition Law no. 21/1996 and Law no. 298/2001, as well as Government Emergency Ordinance no. 121/2003, with the subsequent modifications it is accepted that the person who commits an act of unfair competence will be forced to stop or remove the act, to return the confidential documents illicitly appropriated from their lawful owner and, as appropriate, to pay compensations for the damages caused, according to the legislation in force.

Furthermore, according to art.4 par. 5 from Law no. 11/1991, "in the cases of unfair competition affecting significantly the functioning of competition of the relevant affected market" may be notified to the Competition council to solve the case according to the provisions of Competition Law no. 21/1996.

As for the report between the provisions mentioned of art.397 of the Commercial code regarding the suspected and the interdiction instituted by art.4 par.1 let. a of Law no. 11/1991 concerning other employees of a trader, it was considered that the restriction does not have an unitary legal regime, the regulations lacking in sufficient coordination. In this respect, it was criticized the qualification of facts provided by art. 4 par. 1 let. a of Law no. 11/1991 as being unfair competition, in reality this instituting a competition interdiction.

In case of failure to comply with the competition interdiction by the suspected, art. 397 par. 2 of the Commercial Code provides that he may be forced to repair the prejudice incurred by the employer. Thus, the suspected is responsible for damages, in the conditions of art. 1084 of the Civil Code, indemnifying the employer for the loss incurred and the benefit not achieved. Also, the employer has the power to substitute to the suspected to collect the benefits of operations concluded without right with third persons. Thus, the employer is entitled to hold for himself the benefits resulting from these operations.

We consider that, if the employer has chosen the alternative to substitute to the suspected, he losses the possibility to initiate auxiliary the compensation action, if he finds that the benefits of those operations are inferior to the prejudice incurred, although he had estimated them as superior. Thus, the purpose of the interdiction is that to protect the trader from possible loss caused to his enterprise, by committing by the suspected the prohibited actions. If the trader chooses to take over the operations concluded by the suspected with third persons, the purpose of the mentioned provision is achieved, not existing any more competition acts made by the suspected, those actions being made by the trader himself.

If the employer has exercised the action in compensations and then he finds that there are damages which were not covered, as they were not taken into account when pronouncing the decision, he may formulate a new action, to the extent in which it is about new prejudices, caused by the same fact.

If the employer understood to substitute to the suspected, as it is shown above, the operations made by the suspected, by which the competition interdiction was breached, become of the employer, who thus supports both the benefits, as well as the loss generated by those operations.

Apart from the sanctions mentioned, the fact consisting of the breach of the competition interdiction, whether it is made by the suspected or other employees, constitute a breach of the obligations arising from the employment contract being applicable the disciplinary sanction of the termination of the employment contract.

Consequently, according to art. 61 let. a) of Labor Code, the employer may decide the dismissal for grounds pertaining to the employee, if he has committed a serious breach or repeated breaches from the rules (...) established by the individual employment contract, the applicable collective employment contract, or the internal regulations, as a disciplinary sanction.

Art. 61 let. a of Labor Code should be corroborated with art. 264 par. 1 let. f of Labor Code, that provides, as the most severe disciplinary sanction, the disciplinary termination of the employment contract. Consequently, the employer may decide the disciplinary dismissal in case of repeated breaches of work obligations, like the performance of unfair competition fact or the breach of interdictions provided by the non-competition clause.

There is also a competition interdiction against joint stock companies.

Joint stock company is the company whose obligations are guaranteed with the social patrimony and the liability of the associates for the social obligations is limited, the shareholders being obligated only until the competence of the subscribed nominal share capital. The nominal share capital is divided in actions, negotiable and transferable titles.

In the previous drawing, according to art. 145 par. 5 of Law no.31/1990, the direction committee members and the directors of a joint stock company could not be, without the authorization of the administration council, administrators, members in the direction committee, censors or unlimited liability associates, in other competing companies with the same object, neither exercising the same trade or other competitor, on his own or on other person, under the punishment of cancellation and liability for damages.

This article was abrogated by Law no. 441/2006, by which was introduced art. 15315. According to this article, the directors of a joint stock company, in the unitary system, and the directorate members, in the dualistic system, cannot be, without the authorization of the administration council, respectively the supervision council, the directors, administrators, members of the directorate or supervision council, censors or, as appropriate, internal auditors or associates with unlimited liability, in other competing companies with the same activity object, cannot either exercise the same trade or other competitor, on his own or on other person, under the punishment of cancellation and liability for damages.

The compliance with this obligation means the removal or limitation of any conflict of interests between these persons and the commercial company.

The competition restriction regarding the directors is more pronounced, besides the position of administrator, as they cannot be either censors or unlimited liability associates to another competitor company with the same object. This regulation is explained in that, as the directors exercise the operative management of the company, they need enough time to be allocated to this position.

The interdiction mentioned includes the two modalities to commit the competition acts, namely, the direct competition, consisting in the fact that the persons mentioned cannot exercise the same trade or another competitor, on their own or on other person, as well as the indirect competition. The latter involves that the people mentioned cannot be directors, administrators, members of the directorate or of the supervision council, censors or, as appropriate, internal auditors or associates with unlimited liability, in other competing companies or with the same object.

There is the possibility, provided by the mentioned legal provision, to previously authorize, by the administration council, respectively the supervision council of the joint stock company, to fulfill the competitive activity by the people mentioned.

It is noted that, before being named director or member of the directorate in a joint stock company, the assigned person is forced to notify the body of the company charged with his assignment regarding any relevant aspects according to the provisions of art. 15315, as it is imposed by art. 15317 of Law no.31/1990.

As for the sanctions applicable in case of breach of the competition interdiction, under patrimonial aspect, the company may obtain the full compensation of the prejudice incurred, via the action in liability for damages, to cover the loss incurred and the benefit not achieved. The right to act belongs to the company, and not to the shareholders. Thus, according to art.155 of Law no. 31/1990, the action in liability against the directors, respectively the members of the directorate, for the damages caused to the company by them by the breach of their duties towards the company, belongs to the general meeting.

The joint stock company does not dispose of the alternative to substitute to the directors in that operation, as this possibility is not provided by law.

The Law does not provide a term to form the action, resulting that it is applied the common right in this regard, namely the general prescription term of 3 years provided by art. 3 of the Decree no. 167/195843.

If the general meeting decides to start the action in liability against the members of the directorate, their mandate ceases from the date of adopting the decision, situation in which, the general meeting, respectively the supervision council, will proceed to replace them, according to art. 155 par. 4 of Law no. 31/1990

The action in liability against the members of the directorate may also be exercised by the supervision council, after a decision of the council itself. If the decision is taken with a majority of two thirds of the total number of members of the supervision council, the mandate of those members of the directorate ceases automatically, the supervision council proceeding to replace them, according to par. 7 of the same article.

If the action is started against the directors, they are automatically suspended from their function until the irrevocable decision, under art.155 par. 5 of Law no.31/1990.

The Law provides the possibility that the action in liability be also initiated by the shareholders representing, individually or together, at least 5% of the nominal share capital.

Thus, according to art.1551 of Law nr.31/1990, they have the right to introduce an action in compensations, in their own name, but on the company's account, if the general meeting does not introduce the action in liability provided by art. 155 and does not follow the proposition of one or more shareholders to initiate such action.

However, the law provides a condition that the shareholders mentioned to be able to introduce the action in compensation, namely, the condition that they already had the quality of shareholders when it was debated within the general meeting the problem to introduce the action in liability.

The competence interdiction against the limited liability company.

The limited liability company, intermediate form of commercial company between partnerships and capital companies, is based on the trust of the associates, whose number is limited and who are responsible only to the extent of the contribution brought to the nominal share capital of the company.

The administrators of the limited liability company may be assigned through the memorandum or chosen by general meeting, among the associates or persons outside the company.

The ethical norms applied to the administrators force them not to take part to certain actions which may create suspicion against them or to injure the interest of the commercial company he manages or of the associates of the collective entity.

The regulation of the competition interdiction is provided by art. 197 par. 2 of the Law of Commercial Companies no. 31/1990, according to which the administrators cannot receive, without the authorization of the meeting of the associates, the administrator mandate in other competitive

companies or having the same activity object, neither to perform the same type of trade or another competitive one on his own or on another natural or legal person, under the punishment of cancellation and liability for damages.

The meeting of the associates may grant to the administrators the permission to compete the limited liability company, as it results from the provision mentioned.

In case of breach of the competition interdiction, under the patrimonial aspect, the company may obtain full compensation of the prejudice incurred, via the action in liability for damages, without disposing of the alternative to substitute in that operation, as this possibility is not provided by law.

The sanction applicable to the administrator committing the competition interdiction act is the cancellation, the legal provision being express. In the regard, the former Supreme Court of Justice decided that it is null the clause from the status by which it is provided the exclusion from the company of the administrator committing competition acts, as the legal sanction is its cancellation. Thus, as no more exclusion clauses may be established, the provisions of the law being binding, the clause formulated in this respect in the contract by the company is hit by the absolute nullity, situation where it cannot be revoked as ground of the action of the plaintiff, more so since the law provides the possibility to revoke from the position of administrator if it is found that the associate with the quality of administrator performs commercial activities of the same nature on his own with another trader.

The competition interdiction in regulating the new Civil Code.

According to art.1.887 of the new Civil Code, the regulations of the Code constitute common right in the matter of the companies, as the law may regulate different types of companies when considering the form, nature or activity object.

When regulating the new Civil Code, the company contract was defined, in art. 1.881, as being the contract by which two or more persons force each other to cooperate to perform an activity and to contribute to it through cash, goods, specific knowledge or provisions contributions, in order to divide the benefits or to use the resulting economy.

The company may be founded with or without legal personality, but, if, according to the will of the associates, the company will have legal personality, this may be constituted only in the form and conditions provided by the special law conferring it legal personality.

Up to the date of obtaining the legal personality, the reports between the associates are governed by the rules applicable to the simple company.

This latter type of company, without legal personality, was introduced by art. 1.888 of the new Civil Code, next to those already known in the Romanian legislation.

The administrators of the simple company may be associated or not associated. If it is not disposed otherwise by contract, the company is administrated by the associates, who have reciprocal mandate to administrate one for the other in the interest of the company.

There are also fields closed through convention to the commercial competition.

In the French legal literature, it was found that the most radical means to stop the performance of certain competition acts is to prevent the installation of another competitor. Unlike the exclusivity clause, under which the producer refuses to treat with other partners, the non-competition clauses are more radical, as through them the person interested is protected against the establishment of another possible competitor.

The non-competition clause in met in al economical activities, like, for example, the interdiction to create a competitive trade background, in case of selling the trade background, or the interdiction to get hired by another competitor, in case of the relationship trader – former employee.

Also, the clause may appear regarding the cession of the customers for the liberal professions, when the transferor undertakes not to return in the perimeter given in a given period.

However, the non-competition clause does not represent a stand-alone contract, but a convention the parties conclude in the context of another legal document.

The non-competition clause concept.

In the Romanian legal literature, it was considered that the explicit non-competition engagement is a contractual obligation assumed by a party, not to fulfill a determined professional activity, at the expense of the other party.

Thus, the non-competition clause is the engagement one contracting party assumes, namely, the debtor of the obligation, not to perform, for a certain amount of time and in a limited geographical area, a determined commercial activity, of the same nature with that performed by the other contracting party, the creditor of the obligation.

To this definition, regarding the non-competition clause from the perspective of the obligation not to perform, limited in field, time and space, **would be added** the necessity of the existence of a legitimate interest meant to be protected through the clause, interest belonging to, of course, the creditor.

The conclusion of such legal document, in the field of production and merchandise circulation, should comply with the principle of free trade, and the validity of the agreement depends on more aspects, like the nature of the clause by which the competition is narrowed, the legal position of the parties, territorial extension, interdiction duration.

Thus, the following obligations were considered incompatible with the normal competitive environment:

a) any direct or indirect non-competition obligation, whose duration is indefinite or exceeds five years; a non-competition obligation which may be tacitly renewed after a five year period will be considered as being assumed for an indefinite period;

however, this limitation of the duration to five years is not applied when the products or the services which are the object of the agreement are sold by the buyer within the spaces owned by the supplier or rented by him to third parties which are not in the group of the buyer, provided that the non-competition obligation would not exceed the duration of using the spaces by the buyer;

b) any direct or indirect obligation determining the buyer, that after the expiry of the agreement, not to manufacture, buy, sell or resell products or services, except when this obligation:

- regards products or services in competition with those which are the object of the agreement,
- is limited to the spaces where the buyer has operated during the agreement,
- is indispensable to protect the know-how transferred by the supplier of the buyer, provided that the duration of such non-competition obligation should not exceed one year from the expiry of the agreement; this obligation with reference to the one year term should not affect the possibility to prohibit the use and revelation of know-how which did not became public, for an indefinite period;

The relevant market includes a product or group of products and the geographical area they are produced and/or sold on. The relevant market of the product includes all products considered by the buyers as being interchangeable or substitutable, due to their characteristics, price and use.

The relevant geographical market includes the area where are located the economic operators involved in the delivery of products included in the market of the product, area in which the competition conditions are homogenous enough and which may be differentiated in neighboring geographical areas due to, especially, some competition conditions substantially different.

These principles are also applied to define the relevant market for services (Competition Council Instructions regarding the definition of the relevant market, in order to establish substantial parts of the market from 26.03.2004 published in the Official Gazette, Part I no. 288 from 01.04.2004).

c) any direct or indirect obligation determining the members of a selective distribution system not to sell the products to certain competitor suppliers.

According to the Regulation from 05.04.2004 regarding the application of art. 5 par. 2 from the Competition Law no. 21/1996, "the non-competition obligation" represents any direct or indirect obligation prohibiting the buyer to produce, buy, sell or resell products or services supplied or provided by the competitor economic operators, considered substitutable or interchangeable with the products or services making the object of the agreement, or any direct or indirect obligation requiring to the buyer to purchase from the supplier or from another economic operator assigned by the supplier more than 80% from its total purchase – summing up so many products or services provided in the contract, as well as interchangeable or substitutable products or services present on the relevant market - calculated based on the values of the purchase made during the previous years.

In the contracts concluded between the parties, the non-competition clause may be expressed or implicit, in the latter case resulting from the interpretation of that contract. In the Romanian law, implicit clauses may be considered those resulting from equity, habit or law, according to art. 970 of the Civil Code, the nature and purpose of the contract, according to art. 981 of the Civil Code and from the principle of good faith.

For the international commercial contracts, the UNIDROIT Principles provide, in art. 5.1.1, that the contractual obligations of the parties may be expressed or implicit.

It was stated that certain non-competition clauses represent restrictions collectively indispensable towards the nature and purpose of the contract, situation in which those clauses would not be regarded as competition restrictive.

The non-competition clauses are most frequently met in the selling contract of a trade background, of renting a space or commercial place, of exclusive concession to distribute merchandise.

Non-competition clause and exclusivity clause.

Usually, the parties provide exclusivity clauses in the distribution contracts, the ones of agent, of exclusive concession, of franchise.

In case of *agent* contract, the exclusivity clause has in view the monopoly given to the agent to negotiate and possibly to conclude commercial contracts in the name and on the account of the *principal*, in a certain field of activity, on a certain territory established by the parties or towards certain customers.

The exclusivity the agent benefits from *may be absolute*, in which case the *principal* cannot perform commercial operations directly or through other *agents* within the exclusivity sphere the *agent* benefits from according to the contract. In such cases, as a general rule, the exclusivity given to the *agent* is accompanied by his obligation to achieve a minimum turnover being also provided sanctions for its breach. These sanctions may consist of removing or restraining the exclusivity, or even the termination of the contract concluded between the parties.

The exclusivity the agent benefits from *may be relative*, in which case through the contract concluded between the parties the principal reserves his right to sell his own products directly in the exclusivity area given to the *agent. The Principal* will be able to sell his products in this area to certain determined clients, or, if this possibility refers to any client, usually will be stipulated his obligation to pay to the agent a commission, depending on the value of the merchandise sold on his territory.

Specifically, it may be **a combination between these two clauses** within the agency contract. As for the agency services it offers, an *agent* is, generally, an independent *economic operator*, an *enterprise in the sense of art. 81 of the Treaty*. Thus, the clauses from an agency contract by which the *principal* transfers to the *agent* exclusive rights regarding certain clients or territories (the

exclusivity clause) or, on the contrary, oblige the agent not to act in the name of other principals (the non-competition clause) should be evaluated in reference to art. 81 par. 1 of the Treaty. The jurisprudence is oriented to this point of view when there are involved cases where an *agent* acts in the name of one or more *principals* or acts partly for a *principal* and partly in his behalf.

In case of **exclusive concession** or **distribution** contracts it may be inserted an **exclusivity clause to the benefit of both parties** or only of the concessionaire or grantor.

The exclusive concession framework agreement sets complex intermediation forms, over a longer period of time, having an *intuitu personae* character and giving birth to a close and constant collaboration between the parties. Thus, the concessionaire assumes the obligation to contribute in promoting the activity of the grantor, and in the context of the collaboration, the grantor assumes a refraining obligation, consisting in excluding any competition act made as damage to the concessionaire. The concessionaire may assume the obligation to refrain from competition acts for a determined period of time after the termination of the contract.

The sale exclusivity is the exclusivity in the favor of the concessionaire and involves the situation in which the grantor undertakes to sale his merchandise, in a determined geographical area, only through the concessionaire.

The buying exclusivity is the exclusivity stipulated only to the benefit of the grantor and involves the situation in which the clause contains the obligation of the concessionaire to supply exclusively with merchandise from the grantor.

The buying exclusivity is total in fewer cases, as in general it is granted to the concessionaire the right to supply from other suppliers as well to the extent of a percentage, established by contract, from his turnover.

The exclusivity clause may be stipulated in the favor of both parties, thus having a bilateral and reciprocal character, situation in which each contracting party will have the quality of creditor of the exclusivity right established in his favor and debtor of the exclusivity obligation established in the favor of the other party.

As for the categorical exemption provided by article 2 of the Regulation no. 2790 / 1999, article 5 let. a) provides that a non-competition obligation tacitly renewable by exceeding a five year period should be considered as concluded for an indefinite period and thus it is not comprised in the maximum 5 year period allowed by the Regulation.

The exclusivity clause may be analyzed as an auxiliary restriction for agreements to create a new company.

The criteria according to which it is appreciated if an exclusivity clause is an auxiliary restriction are the following:

1. the clause should be directly connected to the operation;
2. the clause should be objectively necessary for the performance of the operation;
3. the effects of the clause should be proportioned to the purpose followed.

In this context, the fact that the clause would be necessary to allow the new company to consolidate its market position is not relevant for the classification of this clause as being an auxiliary restriction.

Another analysis criterion is that of proportionality. An exclusivity clause for an initial period of 10 years is excessive taking into account that the new company should consolidate its market position before the end of this period. It cannot be excluded the possibility that an exclusivity clause, although initially designated to strengthen the competitive position of the new company on that market, ultimately to allow that, in a few years, to eliminate the competition on that market.

Non-competition clause in labor law.
The relation between the non-competition clause and fidelity obligation of the employee.
The regulation of the non-competition clause in Labor Code. Non-competition clause.

Prior to the entrance in force of the Labor Code, in the legal doctrine and practice there was a controversy regarding the validity of the non-competition clauses in the individual employment contract.

The admissibility of these clauses was sustained by invoking the necessity to make a reasonable compromise between the principle of free labor and the principles of market economy and fair competition.

In the legal practice it was considered that a non-competition clause contained in the individual employment contract, regarding the period after the termination of the contract, is inadmissible, as it limits a fundamental right of the citizen, namely to work.

It was considered that a clause by which the employee is prohibited to exercise any other professional activity in the period he is employed with an individual employment contract is unconstitutional and unequal as it prejudices the constitutional principle of free labor.

In the current regulation, according to art.38 of the Labor Code the employees cannot give up their rights recognized by law. Any transaction seeking to give up the rights recognized by law of the employees or the limitation of these rights is invalid.

As for the obligations of the employee, he has, among others, the obligation to comply with the provisions contained in the internal rules, in the applicable collective employment contract, as well as the individual employment contract, the fidelity obligation to the employer when executing the work duties, as well as the obligation to keep the work secret.

As it has an *intuitu personae* character, the individual employment contract implies from the employer a special trust in his employee. To this trust should correspond a correlative fidelity obligation of the employee to the employer.

Although the fidelity obligation and the obligation to keep the work secret are provided separately in art. 39 par. 2 of the Labor Code, they are in a report from whole to part, the first including the second.

Also, the fidelity obligation implies a non-competition obligation, even if the latter is not mentioned expressly in art.39 of Labor Code. Thus, the fidelity obligation produces its effects on the whole duration of the employment contract and involves the obligation of the employee not to undertake any action which may damage the interests of the employer, or, the competition acts against him represent such an action.

Among the aspects that may be *negotiated and included in the individual employment contract*, art. 20 par. 2 of the Labor Code lists, as being a specific clause, the non-competition clause.

It is necessary to make the distinction between the legal non-competition obligation, which exists if it is expressly established through legal norms, and the non-competition clause, representing the result of the will of the parties, by which whether it is materialized the legal obligation, or it is extended its existence, or it is established, in the silence of the law, the non-competition, as an obligation of the employee. In the conditions of a functional market economy, during the execution of the individual employment contract, the employee has the obligation not to compete with his employer.

Currently, art.21 of the Labor Code establishes that, *at the termination of the individual employment contract* or during its execution, the parties may negotiate and include in the contract a *non-competition clause* by which the employee is forced that after the termination of the contract not to provide, in his own interest or that of a third person, an activity in competition with that provided at his employer, in exchange of a monthly non-competition allowance which the employer undertakes to pay on the whole non-competition period.

Thus, the legal provision mentioned takes into account the non-competition clause which is producing its effects after the termination of the employment contract.

In the previous drawing, art. 21 of the Labor Code regulates the content of the non-competence clause for the contractual period.

Thus, the non-competition clause forces the employee not to provide, in his own interest or that of a third person, an activity in competition with that provided by his employer or not to provide an activity in the favor of a third person who is in competition with his employer. Also, the clause forces the employer to pay a monthly allowance to the employee.

After the legislative modification occurred in 2005, Labor Code no longer regulates the non-competition clause for the period of executing the individual employment contract, or the obligation of the employer to pay the employee, in this period, an allowance to comply with the non-competition clause.

We consider that, in relation to the relevant legal provisions, as they were modified, currently, for the period of executing the individual employment contract, there is a legal non-competition obligation in the task of the employee. This obligation is a legal obligation, whereas it is a component of the fidelity obligation, which is expressly provided by the law. Thus, the fidelity obligation involves that the employee will not perform any act damaging the interest of the employer, and the competition represents such act. In this situation, the law does not provide anymore the obligation of the employer to pay an allowance to the employee, obligation which is not justified, in discussion being the compliance with a legal obligation.

In this respect, it was considered that the fidelity obligation is incumbent on the employee under the law, by considering the subordination as an essential feature of the employment contract.

As for the admissible duration of the non-competition clause, according to the rule set by art. 22 par. 1 of Labor Code, in the previous drawing, the effects of the non-competition clause were produced only until the termination of the individual employment contract. Its effects could also be produced on a 6 month period after the termination of the contract for the executive positions and of maximum 2 years for management functions only if such period was expressly agreed through the contract.

Currently, art. 22 of Labor Code limits to maximum 2 years the period when the non-competition clause may produce its effects after the termination of the individual employment contract. These provisions are not applicable when the termination of the individual employment contract was produced automatically, except for the cases provided by art. 56 let. d), f), g), h) and j), or has occurred from the initiative of the employer for reasons not related to the employee.

As for the possibility of the provision of non-competition clause for a trial period, in the previous drawing, it was provided that the clause cannot be established for a trial period.

Thus, if the employee and employer provided in the contract concluded a trial period, the non-competition clause may be inserted in the employment contract only after the expiry of the trial period.

Contrary, it was expressed the point of view according to which, within the trial period, it is admissible to provide a non-competition clause in the employment contract, for management positions. We consider founded this latter point of view, also taking into account the fact that the interdiction to set a non-competition clause for the trial period was abrogated by G.E.O. no. 65/2005.

The non-competition clause produces its effects only if in the content of the individual employment contract are provided concretely: the activities prohibited to the employee on the termination of the contract, the monthly non-competition allowance amount, the period for which the non-competition clause produces its effects, third persons for whom it is prohibited to provide activities, the geographical area where the employee may be in real competition with the employer.

The monthly non-competition allowance due to the employee is not a salary, it is negotiated and is at least 50% of the average gross wages of the employee of the last 6 months previous to the termination of the contract or, if the duration of the individual employment contract was less than 6 months, of the monthly average gross wages due to him for the duration of the contract. If the employee is deprived from the benefit of this allowance, the clause has no effects.

The non-competition clause cannot have as effect the absolute prohibition to exercise the profession of the employee or the specialization he owns (art. 23 of Labor Code).

At the referral of the employee or Local Labor Inspectorate, the competent court may reduce the effects of the non-competition clause, case in which this has an abusive character.

In case of breach, by guilt, of the non-competition clause, the employee may be forced to return the allowance and, as appropriate, to damages corresponding to the prejudice he produced to the employer.

Moral damages for the breach of the non-competition clause.

In case of action for unfair competition, the conditions for engaging the tort civil liability are put into question, provided by art. 998 of the Civil Code: the prejudice, illicit act, the existence of a casualty report between the act committed and the prejudice, as well as the guilt of the fact's author. Different from these elements, it is necessary that through that fact to be committed as a competition act, committed between a competition relation, in the respect that the two competitor companies address, mainly, to the same customers, and their activity field is similar. In general, the prejudice consists of removing the customers, with the possibility to reduce the commercial ford, sales and, consequently, the turnover.

If the conditions listed above are fulfilled, having as consequence the engagement of the tort civil liability, Law no. 11/1991 provides expressly the possibility to grant moral damages.

Furthermore, even the contract concluded between the parties provided the possibility to grant moral damages for the breach of the non-competition clause.

Non-competition clause in the agreements to create a new commercial company.

In the memorandum of the newly created company may be inserted a non-competition clause, case in which, in practice, a lot of problems may appear. Firstly, it is necessary to determine if the newly created company may be qualified as a *concentrative joint venture company* or a *cooperation joint venture company*. The joint venture companies are considered to be concentrative even if there is no risk to coordinate the competitive department between the mother enterprises.

The distinction is important because, in the first case, the joint venture economical entity is a legal person constantly fulfilling all the functions of an autonomous economical entity, however without achieving a coordination of the competitive department whether between the founding economic operators, or between it and them, situation in which the operation will be subjected to the rules applicable for economic concentration.

The conditions an association operation should fulfill to constitute an economic concentration in the meaning of art. 10 par. 2 of Law no. 21/1996, are the following:

a. the existence of the mutual control;

b. the structural autonomy of the joint venture company, which exists when, as legal person, the joint venture company constantly fulfils all the functions of an autonomous economical entity, respectively has full functioning;

c. the joint venture company should not have as object or effect the coordination of the competitive department of the mother-companies and/or economic operators.

A joint venture company will not be considered as fully functioning if it takes over only a specific function from the business of the mother-companies, without having access on the market in its own name. This is the case, for example, of the joint venture companies, limited to research-development, production, distribution or sale of the products of the mother companies as sales agents or created in order to participate to a public auction.

When the joint venture company uses the distribution network of one or more of the mother companies acting in this case as agent of the joint venture company, the latter is considered to have full functioning.

In this case, ***the non-competition clause inserted in the memorandum of the new company will have the legal regime of an auxiliary restriction of the economic concentration operation.***

Transfer of rights and obligations resulting from the non-competition clause.

Broadly, by obligation we understand the legal report in whose content is both the active side, namely the debenture right belonging to the creditor, as well as the correlative of this right, the passive side of the report, namely the debt incumbent on the debtor.

Thus, the content of the legal obligation report consists of the right of the creditor to ask the debtor to give, to do or not to do something, under the sanction of constraint by the state in case of willingly non-execution, as well as from the obligation correlative to this right, incumbent on the debtor.

The object of the legal report mentioned may consist of a positive provision, respectively to give, to do something, or in abstinence, namely, not to do something that he may have done without the obligation assumed.

The non-competition obligation is the obligation not to do, its debtor giving up performing a certain economic activity, which, without assuming the obligation, he may have exercised by virtue of the principle of free trade.

The conventional non-competition obligation may have an *intuitu personae* character (for example, the mandate given to a commercial agent), case in which the rights and obligations it involves will not pass to another holder.

Of course, the *intuitu personae* character of the non-competition obligation depend on the nature of the contract concluded between the parties.

Thus, the importance of the personal factor is greater for the administration location of the trade background or for the mandate given to a commercial agent. The rights and obligations are set by considering the personal traits of the contractual partner and will not pass to another holder.

If the personal factor does not have an essential importance, the active or passive transfer may be made.

The debentures and debts may be the object of a *mortis causa* transfer. The transfer of the right of obligation by acts between alive represents a legal operation by which, under the will of the parties or under the law, the active side or passive side of the legal obligation report is transferred from the parties to another person.

Conditions to validate the non-competition clauses.

Mainly, the non-competition clauses included in the commercial contracts should fulfill certain validity conditions.

A non-competition clause is not valid only because the parties have agreed to introduce it in the contract.

Firstly, it is necessary to exist a justified interest of the clause beneficiary, to ensure honesty in using the economical instruments upon which winning and keeping customers depends on. Secondly, through the non-competition clause should not be brought excessive restrictions of the freedom of the party care assuming the obligation not to perform a certain commerce. In this respect, the clause should prohibit only the performance of a trade similar to that performed by the beneficiary, to be limited to a reasonable amount of time and to concern a determined territory.

In the specialty literature, it was shown that the freedom to undertake may be limited by a non-competition clause. The breach of such engagement commends the liability of the author, but also of third parties to this breach.

The non-competition engagement is a clause by which it is prohibited to a person to exercise a trade or an industry for an allowance. However, the practice of the non-competition clauses has developed particularly for certain contracts. We mention in this respect the employment contract, the sale or lease of trade background, franchise contract, shares concession, co-propriety regulation in commercial centers. These clauses bring a limitation in the free creation of a competitor enterprise by a former employee, the assignor of the trade background or franchisor. They are subjected to rigorous

validity conditions. In case of anti-contractual competition, the jurisprudence usually sanctions these situations based on unfair competition, and, particularly, on that of disorganization.

In the field of Labor Law, Law no. 53 / 2003, modified in 2005, introduced an express regulation of the non-competition clause in the individual employment contracts. Its insertion in the contract is at the disposal of the parties, but the production of effects of this clause is conditioned by the compliance with the conditions provided by law.

Until the modification of Labor Code by G.E.O. no. 65/2005, it was questioned the obligation of the employer to make a contra-provision in the favor of the employee, to comply with the non-competition clause, during the individual employment contract.

To validate the non-competition clause of the individual employment contract some **additional conditions** have emerged besides the ones above. Thus, the clause may be included only in the employment contracts of a certain category of employees – specialists, engineers, technicians, who thanks to this training may / could prejudice severely the interests of the employer if they were framed in an enterprise performing a similar activity. Also, the clause will be operated only if the contract ceased as a consequence of the initiative or guilt of the employee, and should be accompanied by a contra-provision, generally consisting of a growth added to the salary. To protect the employee, at his request, the body of labor jurisdiction should have the possibility to reduce the non-competition clause with an excessive character. Of course, as an application of the general rule, the clause should concern a limited period of time (2 – 3 years) as well as a geographically delimited area.

It is noted that these non-competition clauses are subjected to more restrictive conditions than those resulting from the general regime.

Thus, for the employment contracts, the non-competition clauses are especially more dangerous, as the employee often has to accept them, without the possibility to discuss them.

Another particular case is that of affecting the space in use for commercial purposes. In this situation, the non-competition clauses are valid within commercial leases, but the lessor cannot invoke them to deny a partial change of the destination requested by a tenant competing with another.

The appreciation of the validity of a non-competition clause may be much more complex by the possible application of a foreign law, especially when the supplier, in case of an international technology transport, wished to be protected against the competition that may be exercised against him by the buyer.

The protection of the legitimate interest of the clause's beneficiary.

The freedom of commerce cannot be restrained in the benefit of some persons unless they provide a legitimate interest. It was considered that the exigency of the existence of a legitimate interest of the clause's beneficiary allows the assessment of the compliance of the clause with the public order.

In such cases, through the non-competition clause, is pursued the prevention of abnormal or dangerous competition. For example, in case of selling the trade background, this operation would lose all its importance for the buyer if the seller would have the liberty to open a new business place in the immediate vicinity of the background sold. In this case, the buyer has the legitimate interest to be protected against such risk, by inserting a non-competition clause in the sale contract of the commerce background.

This clause should be limited, the buyer not having the right to request from the seller a total inactivity. Such clause cannot be accepted, both fro economic reasons, as well as moral reasons.

The beneficiary of the clause has a legitimate interest to the extent in which the parties are competitors. If in the contract concluded is inserted a non-competition clause, but specifically, the alleged prohibited activity is not in competition with that performed by the beneficiary it cannot be claimed a breach of the non-competition obligation. In a case, the two companies in dispute were performing similar activities, respectively the place of company „L". had the designation of disco,

and „M". was operating a place with live music. „L" formulated an action to prevent „M" to function as disco Friday and Saturday nights. The non-competition clause between the two companies provided that „M" will not function for night events in direct competition with the disco owned by „L". „M" started its business as place with live music, but hidden its intention to use the place as night club Friday and Saturday nights. The judge considered that this fact does not breach the non-competition obligation as the restriction imposed to „M" not to organize discos in a similar stile or addressing to the same group of possible clients like those operated by „L", and, taking into account the proofs from which it resulted differences in the given entertainment style, those involved in the industry in question may identify the difference between the different styles of night clubs situated in the two places.

The court should verify if the restrains brought to the freedom of the debtor are justified by the necessity to protect the enterprise against a possible client blast.

Also, there should be a reasonable proportion between the legitimate interests of the debtor, which must be protected, and the effects of the non-competition obligation.

In labor law, if the former employee breached the non-competition clause by accepting a position in a competitor company, it is considered that the former employer has a protectable interest, which grants him the right to apply the non-competition clause, in the sense of requesting the coverage of the prejudice caused by the breach of the clause. Thus, the non-competition clause is applicable, being a reasonable constraint of the commerce, if the employer has a protectable interest and the restriction is directly connected to that interest.

In order for the protectable interest to be considered enough to obtain the recognition of the non-competition clause validity, the employer should own, within his business, a right characterized by importance and uniqueness, to such extent to guarantee the type of protection a non-competition clause gives.

An employer owns a protectable interest enough to justify the application of a non-competition clause if the position of the employee within the enterprise gives him the possibility to obtain confidential information, access to secret information or the possibility to develop a tight relation with the clients. Also, the protectable interest may result from the fact that the employer invested in his employee, in the respect that he has given professional training, resources and different facilities.

In conclusion, a non-competition clause is justified by the necessity to protect a legitimate interest within that business.

The principle taken into account by the American courts for example, is that the employer cannot apply a post-contractual restriction to his former employee only to eliminate competition, but he must prove the existence of a legitimate interest to be protected.

The legitimate interest of the employer should be maintained in a fair equilibrium with the interest of the employee to practice his profession and, of course, with the public interest.

One of the most important protectable interests of the enterprise is the *"goodwill"*. This notion comprises both the goodwill obtained by the employee as a result of his personal qualities and of the continuous relations with the clients, as well as the goodwill which became associated with the image of the enterprise itself. Toward this double nature of goodwill, the courts were made to decide who belongs this interest to, and namely, the enterprise or its employees. The reasoning in mind was that, if the enterprise had the possibility to protect this interest, the employees should move to great distances and to change their career each time they change work place. Thus, the courts considered that the skills and competences of an employee belong to him and are not a protectable interest of the company.

In case of selling the enterprise, the courts recognized that goodwill represents a protectable interest. Thus, the price paid by a buyer also includes the good will of the enterprise, case in which this has a protectable interest, the value of goodwill being reduced considerably if the seller would start competing with the buyer after the transaction.

Keeping the economic freedom of the debtor of non-competition obligation.

The non-competition clause should not restrain or suppers the freedom of action of the debtor. For this purpose, the non-competition clause should fulfill certain conditions.

Thus, **the interdiction** should be **limited from the point of view of it activity.** It is not allowed to prohibit any economic or professional activity, **but only the activities similar to those exercised by the beneficiary.** In this regard, difficulties may arise when a trade background is sold through which are traded different products, like for example a large store. It this situation it may be considered that the non-competition clause is applied only when exercising a commerce of the same kind, thus being instituted the interdiction to open a large store, or it is applied for each variety of commerce practiced, and namely, the interdiction to sell furniture, food products, etc. If it is considered that, through the clause, it is prohibited to open a large store, than the seller is entitled to resume his activity only in the sector he deems more profitable, thus attracting the afferent customers. If it is considered that through the clause is prohibited the sale of each type of product, it is difficult to appreciate that the clause targets a determined trade.

The interdiction should be limited in time and space.

The non-competition clause is an application of good faith in executing contracts, good faith imposing to both contracting parties.

Thus, the more specialized the trade is, the more the personal relations between the trader and his customers are closer and the duration of the interdiction may be longer. The same principles are applied regarding the territorial extension of the protection. For *endetail* commerce, within which the customers are local, the perimeter where it is prohibited to reestablish the enterprise is smaller, and may even be a city district. Unlike this situation, for the specialized activities, the protection area may be legitimately more extended.

The sanction for a too long duration of the interdiction may be, depending on the circumstances of the case, either the reduction of the non-competition obligation, or the nullity of the clause, or the nullity of the contract containing that clause.

These conditions are necessary and enough. The validity of the clause is not subordinated by the payment to the debtor of the non-competition clause of an amount representing the value of the limitation of his freedom, to which he agreed by contract.

Interpreting non-competition clauses.

The interpretation of commercial clauses involves an ensemble of rules used to determine exact and complete meaning of the content of contractual clauses.

If these clauses are unclear, in the execution process of the contract, the parties are those that may perform the interpretation of the contract. However, this operation will recur to trial or arbitration courts in which case, between the contracting parties, appeared a litigation.

The interpretation of international commercial contracts involves a greater difficulty in comparison to the interpretation of internal contracts, taking into account that the first contain a foreign element which may determine the applicability of more law systems, with different rules to interpret the contract.

The principle that should govern the interpretation of contracts consists in identifying, in the express clauses of the convention, the real will of the contracting parties.

Interpretation rules of contractual clauses in common law.

When the non-competition clauses are obscure or incomplete, their interpretation is made by the trial court, after the rules of the common law.

The interpretation rules of the contractual clauses are set in the Romanian Civil Code by art. 977 – 985, within section III „About the interpretation of conventions", from Chapter 3 „About the

effects of the conventions", Title III, „About Contracts and Conventions". The rules exposed in these articles were taken over and partially modified by the new Civil Code, art.1.266 – 1.269.

Thus, the new Civil Code classifies the interpretation rules of the contracts in four categories, and namely: the interpretation after the contracting will of the parties, the systematic interpretation, the interpretation of questionable clauses and subsidiary interpretation rules.

Within the first category of rules, art. 1.266 of the new Civil Code takes over the content of art.977 of the Civil Code, according to which the interpretation of the contract is made after the common intention (concordant will) of the parties and not after the literal meaning of the terms. Thus, it is established the principle of real will priority of the contracting parties against their declared will.

Par.2 pf art.1.266 of the new Civil Code lists the aspects to be taken into account when establishing the concordant will of the parties. These consist among others, in the purpose of the contract, of the negotiations between the parties, the practices set between them and their behavior after concluding the contract.

The systematic interpretation of the contractual clauses was established by art.982 of the Civil Code, the dispositions taken over in art.1.267 of the new Civil Code. Based on this rule, the contractual clauses are interpreted ones through the others, giving each the meaning resulting from the ensemble of the contract.

According to art.981 of the Civil Code the usual clauses in a contract are implied, although they are not expressly stated. This rule was not provided in the regulation of the new Civil Code, at the section regarding the interpretation of conventions, but to that regarding the effects of the contract, and namely, in art.1.272 par. 2. The same article takes over, in par. 1, the rule currently established by art. 970 par. 2, instituting the principle according to which the contracts force not only to what is expressly provided in them, but to all consequences that the equity, habit or law gives to the obligation, by its nature.

In conclusion, based on this legal disposition, we may consider that, in certain situations, depending on the nature and purpose of the contract concluded between the parties, the non-competition clause is implied.

We consider that, as such clause limits the competitive freedom of the debtor of the obligation, the interpretation of a contract in the sense of the existence of a tacit non-competition clause should be based on legal norms applicable in the field of that contract, like, for example, for the sale-purchase contract, art. 1337 – 1339 of the Civil Code. The new Civil Code establishes, in art.1.269, the subsidiary interpretation rules of the contracts, establishing, by par. 2 of art. 1.269, that, if, after applying the interpretation rules, the contract remains unclear, this is interpreted in the favor of those who is obliged, rule taken over form art.983 of the Civil Code. By applying this legal norm, the non-competition clause will be interpreted in the favor of the debtor of the obligation not to perform a determined economic activity.

The evolution of interpretation mode of the non-competition clauses in legal practice.

If the non-competition clauses inserted in a commercial contract have an unclear or incomplete character, the matter of interpreting these clauses will be in discussion. The determination of the legal content and the meaning of these clauses, will be made, through interpretation, in case of a litigation between the contracting parties, by the trial courts.

In such cases, the appreciation of courts will be in relation, of course, to the actual state retained in this case, so as that the solutions adopted will have value only in this case.

However, from the analysis of the jurisprudence, it results certain general aspects. Two opinions were formed: in the first opinion it was considered that, as it is derogated from the common law regime of the trade freedom, the non-competition clause should be interpreted restrictively. In the other opinion, the interpretation is made after the real will of the contracting parties, based on art.977

of the Civil Code, according to which the interpretation of contracts is made after the common intention of the contracting parties.

Thus, in this interpretation a priority is granted to the real will of the contracting parties through an extensive interpretation, by which, for example, was implied the existence of a default non-competition clause in case of sale or lease of the trade background and in the agency contract.

In this context, it was considered that the sale imposes on the assignor a tacit non-competition obligation, based on which he is prevented from exercising a trade similar to that of the assignee, in his vicinity. The legal basis of this solution is represented by art. 1339 of the Civil code, against the provisions of which the seller cannot avoid in any way the liability for eviction resulting from his own act, any contrary convention being null. Taking into account that this disposition has a public order character, the conclusion is that the useful possession guarantee of the thing sold is evidently disturbed by a fact equivalent with eviction, if the seller regains what he had gave, diverting in the favor of his new enterprise with similar profile, the customer he has sent to the buyer with the trade background. It was considered that such operation would be completely useless and senseless for the buyer, as he losses the whole use this transfer should have ensured. The abusive act of the seller engages his liability against the assignee of the trade background, even if by contract was not provided a competition prohibitive clause.

It was considered that, in these situations, the non-competition clause is implied, under art.1339 of the Civil Code.

Thus, it is admitted the existence of a non-competition tacit and implied clause, resulting from the interpretation of art.1420 pct. 3 of the Civil Code.

The sanctions applicable in case of breach of non-competition clauses.

The breach of non-competition clause by the debtor draws his contractual liability towards the creditor of the clause.

Unlike this, the performance of unfair competition acts draws the tort liability of the author.

As for the contractual competitive restrictions, the matter in question is to set the legality of the conventions excluding the competition between the parties, in a determined field, on a certain territory, regardless of the appreciation of loyalty or infidelity of acts.

If the non-competition clause is considered valid, the matter in question is if, although not prohibited by the law, those contractual clauses constitute, in certain cases, unfair competition acts. The problems are interfering in such measure, that a lot of authors treat together the unfair practices and the legal regime of the prohibited practices, grouping them, not according to the objective followed, but to the nature of the means used.

Difficulties may appear in practice regarding this delimitation, as the debtor of the non-competition obligation, beside the breach of this obligation, will also commit unfair competition acts which bring a prejudice to the creditor of the clause.

Through the unfair competition is usually followed to attract and capture through dishonest means the customers of the injured economic operator, the facts being performed in the limits of the legal competition report and on a certain relevant market.

The legal regime of the two liability forms is different, so that, in the situation exposed, the contractual liability for the breach of the non-competition obligation cannot be extended on unfair competition facts. Also, the tort liability will not be extended on the breach of the non-competition convention in relations with the creditor of the expressed or implicit clause.

Thus, the sanction for the breach of the legal competition interdiction is the tort civil liability, which may be completed with specific sanctions, like the exclusion provided by art 82 and 217 let c) of L 31/1990, and the sanction for the breach of the competition clause is the tort civil liability.

In both forms of liability, the creditor disposes of preventive means, to force the debtor to cease illicit acts, as well as repairing means, to obtain compensation. The creditor may use all remedies for the breach of the contractual non-competition clause, the choice being his.

In conclusion, in case of breach of a valid non-competition clause agreed, the creditor may request to court the protection of the right resulting from that clause. Thus, the creditor may formulate an action for the forced termination of the commercial activity contrary to the non-competition obligation, as well as granting the repairing measures in case of producing a prejudice.

On the other hand, if, through the non-competition clause are breached the national or community rules in the field of competition, besides the private litigations, public law sanctions may occur, applied by the competitor authority or by the trial court.

Conclusions

I consider useful to develop legislation, which should regulate more detailed the legal status of non-compete clauses, under different contracts, in order to avoid some different interpretations.

After comparative analysis of non-compete clause in commercial contracts and employment contracts, the conclusion is that a non-compete clause, to be lawful, must not harm the freedom of the competition or the freedom of the work. For this purpose, the clause can not be limited in time, space and regarding the nature of the exercised activity, and must not be disproportionate to the subject of the contract.

Regarding the labor contracts, I believe it is necessary to supplement the provisions of Labor Code, which regulates the non-competition clause, meaning the introduction of certain additional conditions for the validation of the clause. Thus, because, by applying the non-competition clause, the right to work of the former employee is limited, we consider useful to limit the applicability of the clause to what is necessary to protect the interests of the employer. Therefore, the clause should be included only in the labor contracts of certain categories of employees - specialists, engineers, who, because of their training, can or could seriously prejudice the interests of the employer if they would hire in a competitor company.

Also certain general requirements must be set: objective justification for inserting the clause, in the context of the agreement; the existence of a legitimate interest of non-compete obligation for creditor; precise determination of the extent of the duty in time and space.

Finally, non-compete clause should not result in an unfair restriction on the right of free competition.

Therefore, the non-compete clauses can take different forms, depending on the specific field of application, and their validity depends on the requirements set for the legal domain, applicable to each Legal Report.

An impairment of the regulation has been detected in the contents of this paper, regarding the character of the three months term that the company may act to exclude the shareholder, reclaiming benefits or claiming damages, under Article 82 paragraph 4 of Law No. 31/1990. Thus, the law provides that the right of the company (mentioned in paragraph 3 of Article 82), to exclude the partner or to claim damages, turns off after three months term pass from the day when the company was aware, without having taken any decision in this regard.In the specialized literature have been expressed opinions that the respective term is a decline term and also a special term of prescription. Of the fullfiment of this term the subjective right is extinguished. I've considered that the differences between the expressed views have their origin in the lack of legal prevision rigor, situation in which would be necessary to regulate the legal status of that period.

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SOME THEORETICAL AND PRACTICAL ASPECTS REGARDING ACTION OF EVICTION

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Abstract
The paper is dealing with a few theoretical and practical aspects regarding eviction. This action is not legally established which in turn generated doctrinal debates and practical contradictions.

Key words: *action of eviction, action of claim, possession, new Code of Civil Procedure*

Introduction

Since present-day legislation does not regulate action of eviction and the very few legal texts related to eviction aren't able to establish its requirements, the features of this institution have taken shape in doctrine and jurisprudence. Still, there is no common point of view in terms of its scope, which led to different solutions to similar situations.

The present work is trying to present the institution of action of eviction combining theoretical and practical aspects in order to offer a broader vision of this matter. It is also concerned in revealing some problems regarding this subject, problems appearing in judiciary practice.

Even more, this work presents the special procedure of eviction regulated by the new Code of Civil Procedure, adopted by Law no.134/2010 published in the Official Gazette no.485/ 15.07.2010 whose date of entry into force has not been established.

Content

1. Definition

Action of eviction has no legal regulation although many times in practice, reference is made to the provisions of Article 1410 et seq of the Civil Code. That is why there is no unitary definition of this type of action, even more because its legal nature is controversial. Only in the new Code of Civil Procedure the action of eviction finds a legal basis, allocated with Title XI.

As stated in doctrine and jurisprudence, eviction is a specific sanction of legal tenancy, that is to say those relationships in which one party, called *the lessor*, has committed to purchase to the other party, called *the tenant*, the fixed-term use of a determined and unconsumptible individual good in exchange of an amount of money called *the rent*. So, the action of eviction is that action by which the use of an asset protection is done, the claimant wishing to force the defendant to leave the building.

2. Legal nature. Demarcation from the action of claim

By eviction a right to claim is protected, correlated to the obligation to give back the rented asset, that's why action of eviction is a personal, not real, prescriptive in general limitation period of three years action. It is also a realization of rights action, in terms of patrimonial estate.

In practice, in numerous cases, the difference between action of eviction and action of claim was questioned and also the scope of the two. If the admissibility of the action of eviction in case of

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the existence of locative relationship has been denied neither by any doctrine nor by jurisprudence, still there were different opinions in situations that were faced by courts.

Thus, when the lease has ended or the tenant uses the asset contrary to the destination it was rented for, when there are relationships arising from a residential lease, the lessor has access to action of eviction in order to free his estate. The tenant, as an owner without real legal rights over the asset, is forced to return it. Legal relationships regarding estate lease are obligation relationships, the ownership right of the claimant not being questioned. As stated in jurisprudence[1], the cause of the action of eviction is the defendant's occupying a home without title and the claimant's wish to stop it, establishing a status according to the claimed right, respectively handing over the estate and the cause of the application for summons is the claim of the creditor claimant against the debtor defendant. It is about the obligation of handing over the estate to the creditor which is not equivalent to the obligation of giving or forwarding a real right.

Thus, when the claiming owner aims to force the lease contract holder to free the estate, he has the action of eviction at hand. But it is questioned whether in this situation the claimant can also use the action of claim or whether it would be admissible since the defendant is not owner, but precarious holder.

In a case[2] in which a situation like that was subject to judicial review, it was said that the defendant's lack of possession of the asset makes the action of claim impossible, the claimant having only an action of eviction available. We think that the solution of The Supreme Court is too restrictive because, if we follow the theory adopted by them, after the prescription term of three years in which the action of eviction can be started has expired, the owner would not have any legal action to regain his own good. It is true that the person having the good as tenant is just a precarious holder and the action of claim is started by the not in possession owner against the non-owning possessor, but the claimed owner should still have the opportunity to choose between the action of eviction and the action of claim. Besides, in practice it is said[3] that this option right exists considering that who can do more can be less.

Action of eviction can be instituted only against precarious holder and not against a holder having the asset in property.[4]

When the defendant doesn't hold the asset as a result of a lease contract, therefore he is not a precarious holder owning the estate in someone else's behalf, the claimant hasn't got the action of eviction at hand, he has the action of claim[5]. This is a real, inalienable action, by which the claimant demands legal recognition of his property right upon the asset he has been deprived of.

Thus, when the one holding the asset has no title or he invokes the existence of a title, the property right itself is questioned, which justifies the beginning of an action of claim. In spite of all these, in practice there are solutions which deny this point of view. For instance, the action of eviction was admitted on ground that an action of claim was unnecessary in case the claimant, who has gained his ownership by a court order that substitutes an authentic act of sale purchase, has demanded that the promising vendors ,who were denying their intention of selling, to free the estate, therefore, the existence of the ownership right in the vendor's patrimony[6].

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[1] Cluj Court, decision no.1381/20.06. 2002,

[2] The Great Court of Cassation and Justice, Civil Section, Decision no. .2646/2 .07.2002,

[3] D. N. Theohari – Action of eviction, Ed. Hamangiu, București 2010, pag.29,

[4] The Great Court of Cassation and Justice, Civil Section and Intellectual Property,Decision no.2574/31.03.2005,

[5] The Great Court of Cassation and Justice, Civil Section and Intellectual Property – Decision no.3045/15.04.2005, The Great Court of Cassation and Justice, Civil Section and Intellectual Property – Decision no.3206/21.04.2005, The Great Court of Cassation and Justice, Civil Section and Intellectual Property – Decision no.2102/17.03.2005, The Great Court of Cassation and Justice, Civil Section and Intellectual Property – Decision no.2574/31.03.2005.

[6] Cluj Court, decision no.1209/20.05.2010,

Also questionable is the solution of a court invested with a cause regarding the eviction of some people who had abusively entered into a space belonging to the territorial-administrative unit, by braking the seal. In this case, the judges thought that the person occupying the building without a title was neither owner nor tenant because he was not part of a lease contract, but just a precarious holder. That's why their conclusion was:"the claimant did not try to assert his exclusive and absolute property right within an action of claim which would have forced the debtor to evacuate ant hand over the house. In other words, the claimant did not ask for the defendant to be obligated to admit his ownership over the building, but merely to evacuate and to turn it in.

The motivation of the Appeal Court that admitting the action of eviction is conditioned by the existence of a valid lease contract whose effects have already ceased for various reasons and the former tenant having refused to leave the home had no legal basis. To condition the action of eviction exclusively by the existence of a lease contract and in its absence to consider all actions of eviction as being actions of claim with all their consequences is a violation of the principles of Civil Procedure Law and of a long judicial practice, too."[7]

But according to Article 1853 of the Civil Code „the acts we exert on someone else's asset, in a precarious manner, that is as tenants, depository, beneficial owner etc. or on a common thing according to its legal destination does not mean possession as owner. Likewise it's the possession we would have on someone else's asset by means of his permissiveness."

This legal text offers a definition to a state of holding an asset namely precarious holding. Or, the precarious holder is the one who holds the asset given by another person, usually the owner, based on a legal act signed with the latter. In the case shown above the defendants did not hold the building based on a contract or by the owner's permissiveness, which is also a will agreement, but by breaking the seal. Thus, in our opinion, they didn't have the status of precarious holder, but they were holders of the building in territorial-administrative unit's property. It is true that, in order to produce legal effect, possession must be useful, and in the case above, due to breaking the seal, it was based on violence. That's why, in our opinion, only an action of claim would have been admissible.

Also in another situation[8], the action of eviction was admitted although the defendant, during the entire lawsuit, denied the claimant's status as owner of the building she was asked to leave. In this case, after a contested enforcement the acquirer of the building solicited the debtor's eviction enforced from the entire estate, consisting in building and terrain. The defendant company claimed all along the lawsuit that they owned the terrain as it had not been auctioned, but also the building, based on real estate ascent. Though the eviction of the defendant from the entire estate was ordered on ground that they owned the building without title, the action of eviction not being conditioned by the existence of locative relations. We appreciate that the situation submitted to court was much more complex and it aroused a series of problems which were not taken into account and which could have determined the inadmissibility of an action of eviction.

When the ownership itself is questioned its holder can defend it only in action of eviction. It is true that, in case the owner is also lessor, he can use action of claim too. But if there is no lease contract between the two parties the owner has only claim at hand in order to regain the asset illegally held by someone else.

By Law no.202/ 2010 regarding taking measures for speeding up solving lawsuits it was introduced Article 578 which, although referring to forced handing over of estate assets, shows indirectly the situations that can lead to person evacuation: abusive occupation, without title of a house and endangering cohabitation relations or serious disturbance of public peace. It appears that the legislator tried to solve the problem of the action's of eviction scope in the sense that it enlarged it, such actions being admissible not only in case there are lease ratios but also when the defendant

[7] Cluj Court, decision no. 1381/20.06.2002,

[8] The Great Court of Cassation and Justice, Civil Section and Intellectual Property – Decision no.713/4.03.2009.

abusively holds the building without title, or when he has improper conduct which affects cohabitation and seriously disturbs public peace.

Also in the new Code of Civil Procedure, adopted by Law no.134/ 2010, in Title XI, dedicated to the institution of eviction, it is detailed its scope being shown that this procedure applies in cases regarding evacuation of used buildings or illegally occupied by former tenants or other persons holding the estate with or without the owner's permission or tolerance.

3. Procedural issues

a. Locus

Active locus belongs first to the building's owner who is also locator, this being entitled to start an action of eviction to release his asset. In case the estate belongs to several people any of them can initiate such demand as action of eviction represents an act of administration. Regarding this issue, it was stated in jurisprudence[9] that common property of an asset does not represent for its holders an impediment in performing administrative or availability acts on it, including legal actions which tend to establish in relation to third parties the free ownership on the asset prior to a possible division of it.

Under Article 18 of Law no.230/ 2007 regarding the establishment, operation and status of Owners Associations, "when in homes one of the owners or tenants knowingly prevents the normal use of the building creating harm to the other owners or tenants, the owners or their legal representative can ask the court to decide upon the measures necessary to normal use of the building, as well as upon the damage pay." Thus, this legal text gives the owners and the owner associations the possibility to demand eviction of those whose conduct makes cohabitation in multiple-home buildings impossible.

There were also admitted actions of eviction started by holders of real rights dismemberments of the ownership[10] although they had confessor actions at hand, actions that protect such rights or possessory actions and not actions of claim in the absence of some legal locative relations among parties.[11]

The Supreme Court[12] appreciated that the right to legally demand eviction of a tolerated person is also given to the tenant, this being a manifestation of the possessory action that he benefits of.

In terms of passive locus, it belongs to the precarious holder who holds the asset for someone else based on a lease contract. The defendant's quality as possessor makes the action in eviction inadmissible. However, based on the provisions of Article 18, of Law no.230/ 2007, courts have disposed eviction even of the co-owner who was knowingly preventing normal use of the building. Also, from the interpretation of Article 578, line2 of the Code of Civil Procedure concerning measures for speeding up solving lawsuits, it is understood that can be evacuated people who abusively without any title occupy a home and people who endanger cohabitation or disturb public peace.

b. The Interest in Promoting Action in Eviction

In practice it was also the question of the admissibility of an action of eviction started by the owner to whom the estate asset was given by court after a partition against his former co-owner. As

[9] Iaşi Court decision no.211/R/21.05.2008,

[10] Bucharest Court – decision no.528/R/9.12.2008,

[11] D.N. Theohari – Action of eviction, Ed. Hamangiu, Bucureşti 2010, pag.123,

[12] The Great Court of Cassation and Justice, Civil Section and Intellectual Property – Decision no.109/13.02.2005,

stated in the doctrine[13] the partition decision remained definitive or irrevocable is an executor title if invested with executor form, being capable of executing no matter if in the request of partition was asked for the asset to be turned in or not and even if the court has not decided this handing over, so starting an action of claim against the co-owner that holds the assert and refuses to turn it in is not necessary. Starting from this issue, if one of the co-owners holds the asset and refuses to hand it over to the other, to whom it was given in court, the latter has no interest in beginning an action of eviction as he can start enforcement.

However, The Supreme Court[14], as a result of admitting an appeal for annulment shows that action of eviction for former co-owners is admissible. Motivating their solution the court showed that, resulting from the partition's declaratory effect, the exclusive ownership goes to the former co-owner to whom the entire estate has been given, the rights of all other co-owners having ceased. Therefore, the action of eviction of these was appreciated as admissible, due to lack of title.

Also the same court appreciated in another case[15], that the partition decision is a title giving the person to whom the estate was given the right to get use of the asset by means of action of eviction.

As we can see, there is no view unit upon this issue. But the new Code of Civil Procedure, adopted by Law no.134/ 2010 - which did not enter into force – solves the problem, we think, because in Article 980 it's stated that "once remained definitive and invested with executor form, the partition decision constitutes executor title and it can be applied even though the effective hand over of the asset was not requested or the court did not specifically ask for it." Thus, from the interpretation of this legal text it is understood that executing the partition decision can require also the eviction of the former co-owner.

As stated in the provisions of Article 981 of the same law, in case the parties specifically declare they do not demand handing over the assets, the partition decision is not susceptible of enforcement. Not even in such situation can the co-owner to whom the estate was given start an action of eviction, as he only has at hand an action of claim in order to take possession of the property whose handing over has been denied by the other co-owners.

For these reasons, it is believed[16]as being uninteresting the beginning of an action of eviction by the person who is entitled by a court order pronounced in an action of claim by which the owner has been forced to give him the estate in full property and peacefully, as this obligation involves the obligation to evacuate the estate too.

c) The Competent Court

In terms of the material competence, it varies depending on the issue type . thus, in civil cases competence belongs to the courthouse, based on the provisions of Art.1 of the Code of Civil Procedure and in commercial cases the competence belongs to the court, based on Art.2, line 1 of the same document.

Territorial competence is determined according to Art.5 and 10 point2 of the Code of Civil Procedure, being alternative competence. This justifies by the fact that action of eviction is specific to lease relationships and according to Article 10, point 2, beside the defendant's domicile court the court where the estate is can also be competent in demands derived from a lease relation. The provisions of Article 13, line1 of the Code of Civil Procedure according to which demands regarding estate assets can be made only to the court where the estate is are not incident. Though not obviously

[13] V.M.Ciobanu, G. Boroi, Civil Procedure, Ed. C. H. Beck, Bucureşti, 2009, pag.444,

[14] The Great Court of Cassation and Justice, Civil Section and Intellectual Property – Decision no..4083/18.05. 2005,

[15] The Great Court of Cassation and Justice, Civil Section and Intellectual Property – Decision no..6604/25.11 2004,

[16] D.N. Theohari – Action of eviction, Ed. Hamangiu, Bucureşti 2010, pag.272,

specified, this law text regards real estate actions ant not personal estate actions because for them the Article 10, line1 and 2 establish alternative territorial competence. As stated in the doctrine, the real demands go for the recovery of a real right or the protection of possession or, by action of eviction the protection of an asset's use is made, this being a personal, not real action.

d. Stamps

Action of eviction is taxed under the provisions of Article 3, letter b of the Law no.146/ 1997, modified by Law no.202/ 2010 regarding some measures for speeding up solving lawsuits, with 10 RON stamp tax and, under Article 3 line 1 of the Law no.32/ 1995 with judiciary stamp valued 0.3 RON.

e. Court Order. Means of Attack and Its Enforcement

The court decides the evacuation of the defendant from the building, a verdict which can be subject to the ordinary and extraordinary means of attack. The right to demand enforcement of a court order of tenants eviction is prescribed in 3 years, starting the day it remained irrevocable, an argument in the matter being the provision of Article 25, line1 of the Law no.114/ 1996. According to this law, eviction of the tenant can only be done upon irrevocable decision. Since exceptions are caused strictly by interpretation and application the result is that in the other cases appeared in practice the prescription term starts in the day when the decision is final.

Under provisions of Article 578 of the Code of Civil Procedure "no eviction from the home destined buildings can be done since December 1st till March 1st next year unless the creditor proves that he and his family don't have a home or that the debtor and his family have another home where they can move immediately.

Provisions of line 1 are not applied in case of evacuating persons who abusively occupy, with no title, a home nor to those who have been evicted because they endanger cohabitation or disturb public peace."

Thus, by introducing this law, the legislator wished to limit the possibility of eviction of the tenants in winter.

4. Eviction of the people occupying an estate illegally by means of presidential order

In doctrine[17] it is appreciated that once fulfilled the three conditions of admissibility, presidential order can be used in order to evacuate the tenant from the building he holds illegally. This point of view is also found in jurisprudence, some courts[18] appreciating that on ground of Article 581 of the Code of Civil Procedure it is admissible the owner's demand to evacuate by presidential order the person who occupies the building without title. But the principle solution offered by jurisprudence is that this measure cannot be disposed by means of presidential order because it regards the essence of the problem and not a temporary action.[19]

5. The special procedure of eviction regulated by the new Code of Civil Procedure

As shown before the new Code of Civil Procedure has dedicated Title XI to the procedure of evicting former tenants or other people occupying estates illegally. The one initiating the action has a choice between this special procedure and the action of common law.

[17] V.M.Ciobanu, G. Boroi, Civil Procedure, Ed. C.H. Beck, Bucureşti 2009, pag. 406,

[18] The Great Court of Cassation and Justice, Civil Section and Intellectual Property – Decision no.2426 din 25 martie 2004,.

[19] Piteşti Court, decision no.462/1998, Suceava Court, decision no. 526 din 12.09.2002,

Regardless of the action's nature competence belongs to the court of justice whom district the illegally occupied estate is in and the defendant will be summoned at this address.

In order to refer his matter to a court the claimant must previously notify the tenant or the occupier of the estate, in the conditions established by the law, the absence of this being a reason to refuse his petition. But according to Article 1026 the tenant can give up his right of being notified which leads to the conclusion that the preliminary procedure is not imperative and the exception of its absence is relative and can be invocated only by the party interested in a certain term.

If the tenant or the occupier previously notified refuses to evacuate or if he has given up his right of being notified and has lost the right to use the estate, the lessor or the owner will ask for his eviction to a court of law.

The petition is judged in emergency procedure in the council chamber with summoning the parties. Exceptionally, if the claimant asks for the eviction due to not paying the rent or tenancy and the contract is executor title for their pay, the petition is solved without summon of the parties. And if the pay of the rent has been also requested the court will solve the eviction demand with summon and will pronounce over the request of pay.

Since it's a special procedure, characterized by emergency, the new code dictates the rule that the summoned defendant cannot formulate counterclaim or a claim of drawing trial on third parties, as he can only invocate substance defence regarding the claimant's petition solidity.

Eviction verdict is enforceable an can be attacked only by appeal within five days since it's been pronounced if it's been given summoning the parties or 5 days since its communication if it's been given without the summon. Also, against its enforcement one can formulate litigation to enforcement by which procedural aspects can be subject to judiciary control if the eviction decision was made summoning the parties or even substance issues can be under control if it was made without summoning.

Usually, enforcement of the eviction verdict cannot be suspended. There is one exception of this rule in case the evacuation has been ordered due to not paying rent. In the litigation to enforcement or the appeal made by the defendant the court can order suspending the verdict's enforcement if he records in cash to the creditor's disposal the established amount of money necessary to pay the rent due until the date of the suspending petition as well as for those due all along the trial. But if, before the expiry of the term until the rent or tenancy has thus been covered, the debtor doesn't deposit the amount further requested by court to cover new rates, the suspending is automatically ceased.

The new Code of Civil Procedure regulates a special procedure for the eviction of those illegally holding estates, an optional procedure but which gives the possibility of solving these litigations in much shorter time.

Conclusions

Being a controversial institution due to its scope the action of eviction needed a legal regulation able to stop the contradictory solutions given in practice. Law no.202/ 2010 regarding some measures for speeding up solving lawsuits the scope has relatively outlined its scope, however without giving this institution legal regulation.

Eventually, the new Code of Civil Procedure allocates a title to regulating the procedure of eviction but it aims at a special optional procedure so people who choose common law to evacuate those illegally occupying their estates will still face contradictory solutions to relatively similar situations.

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- The Great Court of Cassation and Justice, Civil Section and Intellectual Property – Decision no.2426 din 25.0 2004;
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- Suceava Court, decision no..526 din 12.09.2002;
- Cluj Court, decision no.1381/20.06. 2002;
- Cluj Court, decision no.1209/20.05.2010;
- Iaşi Court, decision nr.211/R/21.05.2008;
- Bucharest Court, decision no..528/R/9.12.2008;

THE CONSUMER'S RIGHT OF WITHDRAWAL FROM CONTRACTS CONCLUDED BY ELECTRONIC MEANS IN ROMANIAN LAW

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Abstract

The purpose of this paper is to analyse the legislation, doctrinal opinions and relevant case law regarding the consumer's right of withdrawal from contracts concluded by electronic means (e-contracts).

The objectives pursued by the author are:

- establishing the juridical nature of consumer's right of withdrawal from e-contracts;

- identification of problems that could arise from law's interpretation,

- issuing of the de lege ferenda proposals.

Governmental Ordinance no. 130/2000 introduces a new exception to the principle of irrevocability of contracts in Romanian law: the consumer's right of withdrawal from distance contracts. The same Ordinance sets the scope and conditions for the applicability of this right.

Consumer's right of withdrawal from e-contracts, as a type of distance contracts, can be exercised without the need to give any specific reason and without penalties, within 10 working days from the date of receiving the goods or from the another moment depending on the specifics set out in GO no. 130/2000. If consumer cancels the distance contract on the basis that he does not like the goods, the withdrawal from the contract is valid, even if the withdrawal solely depended on the will of the consumer, this sets out a legal exception from the provisions of art. 1010 of Civil Code which stipulate the nullity of the obligations undertook by the liable person under the condition "if I want".

Sales of goods by electronic means, as a particular case of a distance contracts, is, therefore, a new form of selling, governed by its own specific legal regime.

***Keywords**: distance selling contracts, contracts concluded by electronic means, right of withdrawal, consumer, online auctions*

1. Introduction

This paper outlines the legal regime applicable to the consumers' right to withdraw from contracts concluded by electronic means, focusing specifically on: 1) the legal nature of contracts concluded by electronic means, 2) conditions of exercise of right of withdrawal, 3) legal effects of exercitation of the right of withdrawal; 4) form of exercising the right of withdrawal, and 5) the field of application of the consumer's right of withdrawal.

The subject of the paper is of a great interest, both from the perspective of scientific research and from a practical perspective, as the global Internet enabled markets have gradually expanded, amounting today to a significant share of total world's trade.

As a method of research, the paper starts from analyzing the legal provisions, relevant case law, and the doctrine in the field, both in Romania and in the European Union. It highlights the particularities of the transposition of the of EU law in the Romanian law and outlines the current status of research in Romania. Finally, the paper draws specific conclusions meant to complement the existing scientific literature on the subject, and to contribute to the development of the Romanian doctrine in this field.

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2. The right of withdrawal from contracts concluded by electronic means – exception from the contract irrevocability principle

The above mentioned theme will be treated hereinafter with special reference to sale-purchase contracts for goods, given the frequency and large spread that these contracts have in the electronic trade. The terms which will be used herein are borrowed from the Governmental Ordinance no.130/2000 on the consumers' protection upon the conclusion and execution of distance contracts[1] (hereinafter "GO no. 130/2000").

Our analysis will focus on the customization of the legal regime applicable to the consumer's right of withdrawal from distance contracts, so as to be able to determine the legal regime applicable, in particular, to the consumer's right of withdrawal from sale-purchase e-contracts.

Paragraph (2) from art. 969 of the Romanian Civil Code[2] regulates the contract irrevocability principle in Romanian Civil Law:

"Agreements can be revoked by mutual consent or for reasons authorized by the law". In the draft of the new Romanian Civil Code[3], the contract irrevocability principle is mentioned under the name „Binding force", in paragraph (2) from art. 1.270, thus: "The contract can be amended or terminated only with the parties' consent or for reasons authorized by the law".

In doctrine, contract irrevocability is treated either as a principle different[4] from the contract obligativity principle, or as a consequence and, at the same time, as a guarantee for the principle of the binding force of a legal document[5].

As per art. 1295 from the Romanian Civil Code, a sale-purchase contract concluded by traditional means is considered validly concluded when the parties express their agreement, when the conveyance of the right of ownership is made from the seller to the purchaser, even if the good was not handed over, and the price was not paid. As a rule, in compliance with the contract irrevocability principle, after its conclusion, the sale-purchase contract produces full legal effects, and neither party can withdraw from it unilaterally, unless expressly stipulated otherwise in the contract or by the law.

The mutual consent principle applies to the distance selling contracts, also. Unless otherwise agreed by parties, the distance selling contract is validly concluded when confirmation message is received by the consumer, on his command (article 5 of the GO no. 130/2000). As exception from the contract irrevocability principle, art. 7 and subseq. from GO no. 130/2000 regulates the consumer's right of withdrawal from a distance contract. This normative act represents a transposition at a national level of the Directive 97/7/EC of the European Parliament and of the Council from May 20, 1997 on the protection of consumers in respect of distance contracts[6] (hereinafter the "Directive 97/7/EC").

Whereas e-contracts concluded between a trader and a consumer are a sub-species of distance contracts (which results from the corroboration between paragraph (1) art. 2 letter (a) and paragraph (2) art. 2 from GO no.130/2000), with the same legal regime as theirs, the consumer's right of withdrawal from an e-contract is an exception from the contract irrevocability principle.

Until GO no. 130/2000 became effective, the Romanian legislation also had legal cases allowing the withdrawal from a contract, for example: the right of either of the parties of withdrawal from an unlimited lease contract (art. 1436 paragraph 2 of the Civil Code), the principal's right to

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[1] Official Gazette no. 431 from 02.09.2000, republished in the Official Gazette no. 177 from 07.03.2008

[2] BRO no. 0 from 26.07.1993

[3] Official Gazette no. 511 from 24.07.2009. The document will take effect on the date which will be established in the law concerning the putting in application thereof.

[4] Gheorghe Beleiu, *Drept civil Român. Introducere în drept civil. Subiectele dreptului civil* (Bucharest: Șansa, 1995), 170

[5] Jean Chevallier and Louis Bachi, *Droit civil. La famille – Les personnes. Les biens. Le obligations – Les suretes* (Paris: Sirey, 1974), 348

[6] JO L 144, 04.06.1999, p. 19.

revoke the mandate at any moment (art. 1552 and art. 1556 of the Civil Code), the depositor's right to ask for the return of the deposit at any moment (1616 of the Civil Code), etc[7]; all of these are also legal exceptions from the contract irrevocability principle.

3. Conditions for the consumer to exert the right of withdrawal from an e-contract

As per paragraph (1) from art. 7 (thesis 1) of the GO no. 30/2000, Consumer's right of withdrawal from distance contracts can be exercised *without the need to give any specific reason and without penalties,* within *10 working days from the date of receiving the goods.*

3.a. The *ad litteram* interpretation of the phrase "*without the need to give any specific reason*", makes us conclude that, in the case of e-contracts, the consumer has the legal right of withdrawing from the contract even for reasons of not liking the goods, although the goods are compliant with all the technical characteristics stipulated upon the conclusion of the contract. According to Romanian Law, the consumer from the sale-purchase contract concluded by traditionally means may not change its mind on the grounds of not liking the goods, after the contract was validly concluded.

According to the reasons given in the Grounds of the mentioned Directive 97/7/EC, such unlimited character of the reasons for withdrawal from a contract is not a legislative inadvertence, but it represents a means of protecting the consumer's interest, whom, not being physically present at the venue of the goods, is not able to take physical contact with the goods, to examine and test them prior to deciding whether to purchase them or not, and at the same time, it represents a means of increasing the consumer's confidence in this new sale modality, in the purpose of encouraging it. In Travel-Vac SL v Sanchis Case, European Court of Justice rules that the consumer can exercise his right of renunciation under Article 5 (1) of Directive 85/577 (this right is similar to the right of withdrawal stipulated by Directive 97/7/EC) without there being any need to prove that the consumer was influenced or manipulated by the trader.[8]

Still in order to protect the consumers' interest, the Romanian legislator set for traders, by art. 4 paragraph (1) letter b) from GO no. 130/2000, the obligation to include in the contract the following provision, in bold characters: "The consumer has the right to notify the trader in writing that it gives up making the purchase, without penalties and without the need to give any specific reason, within 10 working days from the date of receiving the goods or, in case of service supplies, from the date of concluding the contract". In case this provision is omitted, the goods will be considered as being delivered without a call-off order from the consumer. As per art. 14 from OG no.130/2000, in the case of deliveries for which no prior order was made, the consumer is exonerated from any counterperformance, the lack of an answer not being interpreted as a consent.

In our opinion, the acknowledgment of the consumer's right of withdrawing from a distance contract does not remove its right to make a complaint, both during the withdrawal term and after the expiry thereof, on the grounds that the goods are not compliant with the description thereof, submitted by the seller or that they are faulty. A contrary interpretation would be that, according to paragraph (1) from art. 7 (thesis 2), the consumer will be liable for the expenses incurred with the

[7] C-tin Stătescu and Corneliu Bîrsan, *Drept civil. Teoria Generală a Obligațiilor* (Bucharest: All, 1997), 57

[8] „Curia Europa", accessed at Febrary 19, 2011, http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&numaff=C-423/97&nomusuel=&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&alldocrec=alldocrec&docor=docor&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoor=docnoor&docppoag=docppoag&radtypeord=on&newform=newform&docj=docj&docop=docop&docnoj=docnoj&typeord=ALL&domaine=&mots=&resmax=100&Submit=Rechercher

return of the goods it did not want at any time, which would be against the scope of the Directive 97/7/EC (consumer protection), in reality prejudicing the honest-minded consumer.

Our interpretation is also supported by the dispositions of art. 23 from GO no. 130/2000:

"The provisions regarding the sale of goods and services according to this Ordinance are supplemented by the provisions from Law no. 363/2007 on the fighting against the incorrect practices of traders in their relationship with consumers and on the harmonization of the regulations with the European legislation on the protection of consumers, as well as with the national dispositions which transpose European regulations regarding certain aspects concerning the supply of goods and services, which are applied with priority, unless otherwise stipulated in this Ordinance."

Consequently, even in the case of distance contracts, the legal regime concerning the delivery of certain goods which are not compliant with the trader's specifications or which are faulty is regulated by Law no. 449/2003 on the sale of goods and guarantees related thereto[9] and which entitle the consumer to ask the trader to make such goods compliant, without payment, by repairs or replacement, as per art. 11, or to benefit from the corresponding reduction of the price or from the cancellation of the product for such goods, according to art. 13 and 14, within the terms stipulated in chapter V from Law no. 449/2003. According to art. 12 from Law no. 449/2003, the wording "without payment", as stipulated in art. 10 and 11, makes reference to all the costs necessary for making the goods compliant, including expenses related to mail, transportation, handling, diagnosis, expertise, dismantling, mounting, labor, materials used and packaging.

As far as the delivery of goods similar to the ones ordered, this is subject to the dispositions of art. 11 paragraph (3) from GO no. 130/2000, according to which: the trader can deliver to the consumer certain goods or services at a quality and price equivalent to the required ones only if this was stipulated before the conclusion of the contract and/or in the contract, so that the consumer is clearly informed about this possibility. Otherwise, the supply of certain goods or services similar to the required ones will be assimilated to the delivery lacking an order, as stipulated in art. 14. The expenses incurred with the return of goods, in case the right of withdrawal is exerted, are in this case the trader's responsibility, element which the consumer needs to know about." Art. 14 stipulates that „in the case of deliveries for which no prior order was made, the consumer is exonerated from any counter-performance, the lack of an answer not being interpreted as a consent".

3.b. *Withdrawal term. Legal nature and duration.*

The 10 days term stipulated in paragraph (1) from art. 7 (thesis 1) of GO no. 130/2000 is, in our opinion, a "*cooling off period*", at the discretion of Consumer, during which the consumer may change its mind about its offer of purchasing the goods and when it may revoke it, although the contract was validly concluded in a prior stage.

Analyzing the legal status of the contract during the cooling off period, we consider that, during the cooling off period, the contract is subject to a resolutive condition – the consumer's decision to withdraw from the contract. Whereas the consumer's decision should not be justified, it results that such resolutive condition has the form of a purely potestative condition on the consumer's part, when the consumer withdraws from the contract because it does not like the goods. In this type of situation, the legal clause that permit to the consumer to withdraw from the contract without need to justify any reason (art. 4 litt. b of GO no. 130/2000) becomes an exception from art. 1010 of the Romanian Civil Code[10], according to which "The obligation is null and void if it was contracted under a potestative condition on behalf of the party undertaking it."

In doctrine[11], the term of 10 days was interpreted as a progressive step in distance selling contract formation considered to be concluded in three steps: (i) the meeting of consents; (ii) the

[9] Official Gazette no. 347 from 06.05.2008

[10] Alexandru Bleoancă, *Contractul în formă electronică* (Bucharest: Hamangiu, 2010), 161

[11] Juanita Goicovici, *Formarea progresivă a contractului* (Bucharest: Wolters Kluwer, 2009), 292 - 303

payment of the price/collection of product by the consumer; (iii) the confirmation of the initial consent by un-using of the right of withdraw belong to the consumer. In our view, this interpretation is lawful only if the parties have agreed on this modality of contract conclusion, otherwise, as we noted above, the distance contract is validly concluded when the confirmation message is received by the consumer, on his command.

As far as the start of the cooling off period is concerned, this is marked by the date when the consumer receives the goods, if the provisions in art. 4 were fulfilled *(the obligation to inform the consumer)* of the same GO no. 30/2000. If the trader omits to transmit to the consumer the information stipulated in art. 4, the term for the withdrawal from the contract is of 90 days and it starts flowing from the date when the consumer receives the goods. If during the 90 days period, the information stipulated in art. 4 is transmitted to the consumer, the 10 working days term for the withdrawal from the contract starts flowing from that moment.

By analyzing the dispositions from the Directive 97/7/EC, it can be seen that the term stipulated by the Romanian legislation is three days longer than the seven working days term imposed by the Directive as minimum term. According to art. 27 from GO no. 130/2000, the Romanian consumer will enjoy the ten days term even in the case when, upon purchasing goods from outside the Romanian borders, the contracting parties choose as applicable law for the distance contract the law of a State which is not a member of the European Union, and the contract is closely connected to the territory of Romania or with that of other Member States of the European Union, as well as in case GO no. 130/2000 includes provisions that are more favorable for the consumer. The Proposal for a Directive of the European Parliament and of the Council on consumer rights[12] (hereinafter "Proposal for a new Directive") approved by the Council in January 25, 2011, which will replace the Directive 85/577/EEC on contracts negotiated away from business premises and Directive 97/7/EC on distance contracts, set up a minim general term of fourteen days (beginning from the day on which the consumer or a third party other than the carrier and indicated by consumer acquires the material possession of each of the goods ordered) to withdraw from a distance contract, without giving any reason.

In our opinion, the consumer may exert its right of withdrawing from the distance contract also between the date when the contract is concluded and the date when the legal 10 days term starts to flow, even if the goods are in transit or were not yet delivered. This interpretations has been supported by the customary law developed in electronic commerce field. Another interpretation would lead to the situation in which the consumer who did not received the goods, although it paid the price for them, is not entitled to withdraw from the contract and immediately recover the price it paid, but it must choose the rescissory and claims action.

The doctrine[13] was also supported the view that in case of the refusal of the good reception by the consumer or in case of the lack of good delivery by the trader, the distance selling contract is not validly concluded in the second stage of its structural (confirmation *in re* of the buyer's consent).

The anniversary of the 10 working days cooling off period leads to the loss of the consumer's right of withdrawing from the contract, without giving any reason, and to the retroactive consolidation of the contract, the consumer only preserving its right to claim the lack of conformity and flaws that the goods have within the terms stipulated by Law no. 449/2003.

3.c. *Absence of the sanction for withdrawal from a contract*

The *ad litteram* interpretation of the wording "*without penalties*", means that, if the consumer exerts its right of withdrawal, it may not be forced to pay any compensation for the prejudice caused to the trader as a consequence of its withdrawal from the contract. From this statutory provision can

[12]Access to European Union law, accessed February 19, 2011, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0614:FIN:EN:PDF

[13] J. Goicovici, *above n. 11*, 304

not be derogated from by agreement between the parties to the detriment of consumers, whereas under article 26 of the GO no. 130/2000, the consumer can not be deprived of his rights conferred by that Ordinance. The only costs that may be required are the direct costs of returning the goods, as we shall see below.

4. Effects of the withdrawal from the e-contracts.

In case of the termination of a contract which is to be executed starting on a particular date, as is the case of the sale-purchase e-contracts, the main effect of the resolutive condition (the manifestation of the consumer's will, in the sense of withdrawing from the contract) consists in the retroactive cancellation of the document. Consequently, the trader will refund the price and the consumer will return the goods.

4.a. *The trader's obligations*

According to art. 8 from GO no. 130/2000, if the consumer exerts its right of withdrawal, the supplier will reimburse the amounts paid by the consumer, within at most 30 days after the date of the consumer's withdrawal from the contract.

As far as the scope of the wording "*amounts paid by the consumer*" is concerned, in our opinion, the trader will reimburse to the consumer any amount paid by the consumer in relation to the contract, such as the full price of the goods and the price reimbursement expenses, including the bank commissions.

If, for the goods constituting the object of the distance contract, the trader credits the consumer directly or based on an agreement concluded between the trader and a third party, once with the consumer's withdrawal from the distance contract, the loan contract also terminates by law, without penalties for the consumer. Consequently, the trader must return any amount received until that moment either to the consumer, or to the financer.

If the consumer makes the payment by a credit card, a debit card or a shopping card, the contract between the consumer and the card issuer does not terminate, and the returned money will be transferred to the consumer's account.

The reimbursement of the amounts may not be conditioned by the consumer's obligation to first return the goods, because the consumer's right of withdrawing from the contract and having its amounts reimbursed, within at most 30 days since the date of its withdrawal from the contract is an unconditioned right, according to art. 8 from GO no. 130/2000. We believe that if the consumer refuses to return the goods, although the amounts it spent were reimbursed, the trader may take an action for the recovery of its possession against the consumer, in order to recover its goods. In the Proposal for a New Directive on consumer rights it is stipulated contrary: „For sales contracts, the trader may withhold the reimbursement until he has received or collected the goods back, or the consumer has supplied evidence of having sent back the goods, whichever is the earliest".

In order to establish a fair dividing of risks in case the buyer withdraws from the contract, and also not to discourage the consumer from using its right, the Community and the Romanian law giver stipulated a fair dividing of the costs incurred with the delivery of the goods from the trader to the consumer and their return to the trader. Thus, as per paragraph (1) art. 7 (thesis 2), if the consumer withdraws from the contract, the only costs it is responsible for are the direct expenses for returning the goods (transport expenses from consumer to trader), while the indirect cost of the distance trader (as would be, for example, a handling fee for checking the product, if it is damaged, or for repacking and shelving the product or for cancelling the invoice) and the expenses incurred with the delivery of the goods from trader to consumer will be borne by the trader, meaning it will not withhold them from the price of the goods[14].

[14] Siegfried, Fina. *The Consumer's Right of Withdrawal and Distance Selling in Europe, A Consumer Stronghold in European Distance Selling and E-Commerce*. Wien,

For this, the Court of Justice of the European Union has recently given a verdict in the C-511/08, Handelsgesellschaft Heinrich Heine trial:

„Article 6 paragraph (1) paragraph one, thesis two and paragraph (2) from Directive 97/7/CE of the European Parliament and of the Council from May 20th 1997 on the protection of consumers in respect of distance contracts must be interpreted as opposing to a national regulation which allows the supplier, in a distance contract, to ask the consumer to bear the goods delivery costs, if the latter exerts its right of withdrawal."[15]

4.b. *Consumer's obligations*

As an exception from the contract withdrawal retroactivity principle, the risk of the *pendente conditione* goods is borne by the buyer, as owner, under a resolutive condition. As a consequence, the consumer must behave like a good owner in relation to the goods.

If after the return of the goods, the trader ascertains that the goods were not returned in a good state of preservation, it may start an action for remedy against the consumer.

In our opinion, the wording "good state of preservation" may not be interpreted in the sense that the goods should not be unsealed, if the examination of the goods presupposes the unsealing and testing thereof.

The exception is represented by the goods which bear a seal for hygiene reasons and which can be examined without the removal of such seal. However, the trader may ask the consumer, based on certain contractual clauses, that, in case it withdraws from the contract, the consumer should return the goods in their original package, but not sealed.

Relative recently the European Court of Justice has confirmed that, unless limited exceptions, a consumer who exercises his right of withdrawal from a distance contract must not be obliged to compensate the trader for the use of the goods. In Pia Messner v Firma Stefan Kruger (Case C-489/07), European Court of Justice ruled that the provisions of the second sentence of Article 6(1) and Article 6(2) of Directive 97/7/EC must be interpreted as precluding a provision of national law which provides in general that, in case of withdrawal by a consumer within the withdrawal period, a seller may claim compensation for the value of the use of the consumer goods acquired under a distance contract. However, those provisions do not prevent the consumer from being required to pay compensation for the use of the goods in the case where he has made use of those goods in a manner incompatible with the principles of civil law, such as those of good faith or unjust enrichment, on condition that the purpose of that directive and, in particular, the functionality and efficacy of the right of withdrawal are not adversely affected, this being a matter for the national court to determine.[16]

If the trader sent gifts to the consumer together with the ordered goods, then we consider that the consumer's withdrawal from the contract has the following implications:

- If the contractual clauses stipulate the existence of a gift that is granted together with the ordered goods, then the consumer which exerted its right of withdrawing from the contract concerning the ordered goods must also return the gift.

- If the contractual clauses do not stipulate the existence of a gift that is granted together with the ordered goods, then the gift will have the legal regime of non-ordered goods, as stipulated in art. 14 from GO no. 130/2000, the consumer being entitled to keep it, without the obligation to make any counterperformance.

Accessed February 19, 2011,
http://unternehmensrecht.univie.ac.at/fileadmin/user_upload/privat_fina/Fina_Beitrag_FS_Zehetner.pdf

[15] Official Journal of the European Union from 05.06.2010, C 148/6

[16] Official Journal of the European Union from 24.01.2009, C 256/4, accessed February 19, 2011, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:256:0004:0004:EN:PDF

GO no. 130/2000 did not regulate the situation when the consumer paid the price or part of the price by offering a good in exchange.

In our opinion, and as a proposal for a *de lege ferenda*, we consider that in such situations, if the consumer exerts its right of withdrawal, the trader must return to the consumer the good received in exchange, in good state of preservation.

If, meanwhile, the trader alienated the good received in exchange from the consumer or can no longer return it in its original state, we consider that it should be forced to pay to the consumer an amount equal with the amount represented by the value of such good. The respective value can be determined in relation to the value of the trader's goods (the object of the exchange), because the parties, at the time of accepting the good, evaluated the goods as having the same value.

GO no. 130/2000 does not stipulate a period within the consumer is required to return the goods to trader. The Proposal for a new Directive requires the consumer to send back the goods or hand them over to the trader or to a person authorised by the trader to receive them, within fourteen days from the day on which he communicates his withdrawal to the trader, unless the trader has offered to collect the goods himself.

5. Form of exercising the right of withdrawal

GO no. 130/2000 does not provide any express form of exerting the right of withdrawal.

But, the proof of the exercising of the right of withdrawal is the consumer's task. In our opinion, we consider that the right of withdrawal is exercised, through an exteriorized manifestation of will, either by the non-acceptance or return of the goods, or by a written form of manifestation of the will, i.e. a letter, a facsimile, an e-mail. A part of the doctrine[17] considers that the withdrawal should be notified to the trader in writing. In Proposal for a New Directive, it is stipulated that, for a distance contracts concluded on the Internet, the consumer shall inform the trader of his decision to withdraw on a durable medium either in a statement addressed to the trader drafted in his own words or using the standard withdrawal form as set aut in the Annex I(B) to Directive. Also, the trader may, give the option to the consumer to electronically fill in and submit the standard withdrawal form on the trader's website. In that case the trader shall communicate to the consumer an acknowledgement of receipt of such a withdrawal by email without delay.

6. Field of application of the consumer's right of withdrawal from e-contracts

The consumer's right of withdrawal from e-contracts concluded between a trader and a consumer is applicable for all such contracts, except for those stipulated in art. 6, art. 10, art. 12 from GO no. 130/2000.

As it can be seen from the provisions of art. 6, GO no. 130/2000 excludes the following from its field of application:

a) distance contracts for financial services, as regulated by the Governmental Ordinance no. 85/2004 on the protection of consumers upon the conclusion and execution of distance contracts for financial services, as approved by Law no. 399/2004, with subsequent amendments and supplements.

b) contracts concluded via automatic distributing machines or in automatic commercial centers;

c) contracts concluded with telecommunication operators in the purpose of using public phones;

d) contracts concluded for the construction and sale of real estate goods or which make reference to other rights related to real estate goods, except for rental contracts;

e) contracts concluded during auction sales.

[17] Marcel Bocșa, "*Încheierea contractelor de comerț internațional prin mijloace electronice*" (Ph.D diss., Academy of Economic Studies Bucharest, 2009).

Given the extent and complexity of the conclusion of the e-sales by methods that are similar to or derived from the classic auction procedure, it is necessary to regulate the notion of auction, as stipulated in GO no. 130/2000. The problem of the absence of a legal definition of the notion of "online auction" in the context of contracts concluded on websites can be felt also at Community level, because the Member States gave a different definition of the notion of "on-line auction" which generates a different protection for consumers in the Member States. Thus, for example, in France, the e-Bay website or other similar ones are subject to the Directive 97/7/EC, the consumer being able to exert its right of withdrawal, while in the U.K. this is not the case.[18]

The Proposal for a New Directive define the "auction" as a method of sale where goods or services are offered by the trader through a competitive bidding procedure which may include the use of means of distance communication and where the highest bidder is bound to purchase the goods or the services. A transaction concluded on the basis of a fixed-price offer, despite the option given to the consumer to conclude it through a bidding procedure is not an auction.

According to art. 10 from GO no. 130/2000, the consumer may not withdraw from the following types of contracts, unless otherwise agreed by the parties:

a) service supply contracts whose execution started, with the consumer's approval, prior to the expiry of the 10 working days term;

b) contracts for the supply of products or services whose price depends on the fluctuations from the financial markets which the trader cannot control;

c) contracts for the supply of certain products executed according to the consumer's specifications or of certain distinctly customized products, as well as of those which, through their nature may not be returned or which can rapidly degrade or deteriorate;

d) contracts for the supply of audio, video or IT programs recordings, in case they were unsealed by the consumer;

e) contracts for the distribution of newspapers, reviews, magazine journals;

f) contracts for betting or lottery services.

In addition, according to art. 12 from GO 130/2000, the dispositions of art. 3 (prior informing), of art. 4 (additional informing), of art. 7-10 (withdrawal from the contract) and of art. 11 paragraph (1) (execution of the delivery obligation within 30 days) are not applicable to contracts regarding:

a) the sale of food products, beverages or of household products of current use, delivered regularly by the trader to the domicile, residency or workplace of the consumer;

b) the supply of accommodation, transportation services, of culinary products, of leisure time products, when the trader undertakes in the contract to supply such services on a precise date or in a specified period; exceptionally, in the case of leisure activities organized outdoors, the trader may retain the right not to comply with the provisions of art. 11 paragraph (2), in specific circumstances.

7. Conclusions

The theoretical analysis of the consumer's right of withdrawing from an e-contract is important for determining the legal regime applicable to the sale-purchase e-contract.

Although, at first sight, the sale of products by electronic means looks similar to the sale of goods that you can try, the two types of sale are fundamentally different from one another from at least two points of view:

- In the case of the sale of goods that you can try, the contract is concluded under the condition precedent of trying the good[19], while in the case of the sale by electronic means, between a

[18] Chirstine Riefa, "The reform of electronic consumer contracts in Europe: towards an effective legal framework?", *Lex Electronica* 2 (2009), vol 14.

[19] Francisc Deak, *Tratat de drept civil. Contracte speciale* (Bucharest: Actami, 1998), 81

trader and a consumer, the contract is concluded under the resolutive condition of the consumer's changing its mind;

• In the case of the sale of goods that you can try, the buyer cannot refuse the conclusion of the contract for not liking the good, but only if the good is incompliant, while in the case of a sale by electronic means between a trader and a consumer, the consumer can refuse to conclude the contract without giving a reason for that, including for not liking the good.

The comparison with the sale of goods that you can taste does not need an analysis, because the consumer's right of withdrawing from the contract, stipulated in art. 7 from GO no. 130/2000 is not applicable to contracts having as object goods that are susceptible of make the object of a sale of goods that you can taste (art. 12 from GO no. 130/2000).

In conclusion, the consumer's right of withdrawing from e-contracts represents an legal exception from the contract irrevocability principle. Instead, the withdrawal term is a legal cooling off period, at the discretion of the consumer. Until the expiry of the withdrawal term, the sale-purchase e-contract is affected by a resolutive condition, that in base of the law regulations, is purely potestative from the consumer's part. In our opinion, the sale of products by electronic means between a trader and a consumer, as a sub-species of distance selling contracts, is a new and independent type of sale, with a specific legal regime.

This paper does not analyze the consumer's right of withdrawal from e-contracts concluded with businesses outside European Union, the subject being open to future research.

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LEGAL AID AS SEEN IN THE LIGHT OF THE LAW NO. 270/2010 REGARDING THE AMENDMENT AND THE COMPLETION OF THE LAW NO. 51/1995 FOR THE ORGANIZATION AND THE PRACTICE OF THE LAWYER'S PROFESSION

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Abstract

According to the explanatory memorandum of the Government as well as to the favorable opinion of the Legislative Council, the Law no. 270/2010 relate mainly to the correlation the OUG no. 51/2008 on legal aid in civil matters, by covering in detail the circumstances and the conditions for granting legal aid as well as the organization of the activity of granting such assistance. From the perspective of European law, the Legislative Council appreciated that the new law is placed within the sphere of the legislation as regulated at the European Union level, that are circumscribed to the European Area of freedom, security and justice, within the European legislation reserved to the judicial cooperation in civil matters.

In this material we will analyze the following issues: granting legal aid in criminal matters, in which defense is mandatory according to the dispositions in the Criminal Procedural Code; granting legal aid in any other causes except criminal ones, as modality to grant public legal aid, according to the law; legal aid throughout a lawyer, granted at the request of the organs of the local public administration; appointing the lawyer for legal aid; extra-judiciary legal aid; competences of the bars regarding legal aid; the department for the coordination of legal aid; services of legal aid; legal aid registry; payment for the activity of legal aid and extra-judiciary legal aid.

Key words: *the Law no. 270/2010; the lawyer's profession; legal aid in civil matters.*

I. Introduction

The adoption of the Law no. 270/2010[1] constitutes the delayed[2] materialization of an initiative of the Romanian Government meant to enhance the normative failure recorded by the Emergency Government's Ordinance (E.G.O.) no. 159/2008[3], ordinance that has been declared unconstitutional[4] and, subsequently, was rejected by law[5].

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[1] The Law no. 270/2010 for the amendment and the completion of the Law no. 51/1995 for the organization and the practice of the lawyer's profession was published in the Official Gazette no. 872 from December 28, 2010. The present study has in consideration the form of the Law no. 51/1995, right before republishing in the Official Gazette no. 98 from February 7, 2011.

[2] Although on May 19, 2010 the Government submitted to the Senate the project of the law in order for it to be adopted by an *emergency procedure* (according to the article 76 3rd paragraph form the Romania Constitution), the Senate adopted it in its séance from August 24, 2010and the Chamber of Deputies – decisional chamber – adopted it in its séance from December 7, 2010.

[3] The E.G.O. no. 159/2008 regarding the amendment and the completion of the Law no.51 /1995 for the organization and the practice of the lawyer's profession was published in the Official Gazette no. 792 from November 26, 2008 and then rectified by the Editorship "Official Gazette, Part I" in the Official Gazette no. 824 from December 8, 2008.

[4] By the Decision of the Constitutional Court no. 109 from February 9, 2010, published in the Official Gazette no. 175 from March, 18 2010.

[5] The Law no. 81/2010 for the dismissal of the E.G.O. no. 159/2008 regarding the amendment and the completion of the Law no. 51/1995 for the organization and the practice of the lawyer's profession, published in the Official Gazette no. 300 from May 10, 2010.

As shown in the explanatory memorandum regarding the issuance of the new piece of legislation, given the fact that the constitutional court criticized the promotion modality regarding the regulations on the organization and the practice of the lawyer's profession – throughout an emergency ordinance[6] -, and not their substance, as well as the fact that the reasons having determined their adoption maintain their relevance, the disposition of the Law no. 270/2010 are mainly assuming the solutions foreseen in the E.G.O. no. 159/2008.

II. Legal aid

1. Circumstances and conditions for granting legal aid

A. Circumstances (forms) of legal aid

According to article 68, 1st paragraph from the Law no. 51/1995, as amended by the Law no. 270/2010, the bars ensure the legal aid, in the following forms:

a). In the criminal cases, in which defense is mandatory according to the dispositions in the Criminal procedural code[7]

We remind that, in accordance with the article 171, 2nd paragraph from the Criminal procedural code, legal aid is mandatory when:

- the accused or the defendant is a minor, admitted to a rehabilitation center or a medical education institute;
- the accused or the defendant is detained or even arrested within another case;
- towards the accused or the defendant a safety measure was ordered for his/her admittance to a medical facility or for the obligation to assume medical treatment even within another case;
- the prosecution or the court considers that the accused or the defendant could not accomplish his/her defense by himself/herself;
- in any other circumstances as stipulated by the law[8].

b). In any other cases except the criminal cases, as means of granting the public legal aid, according to the law

Of course, in this situation, consideration must be given to the dispositions of the E.G.O no. 51/2008 regarding the public legal aid in civil matter[9], normative act in which, in the article 3, it is

[6] As grounds for the admission decision regarding the exception of unconstitutionality, the Constitutional Court invoked the failure of article 115 4th paragraph of the Romanian Constitution.

[7] According to the article 90 from the New Criminal procedural code (published in the Official Gazette no. 486 from July 15, 2010), the legal aid (terminology taken from the current Code) is mandatory:

a) when the accused or the defendant is a minor, admitted to a rehabilitation center or a medical education institute, when the accused or the defendant is detained or even arrested within another case, or when towards the accused or the defendant a safety measure was ordered for his/her admittance to a medical facility even within another case, as well as in any other cases as stipulated by the law;

b) when the prosecution or the court considers that the accused or the defendant could not accomplish his/her defense by himself/herself;

c) during the trial, in the circumstances in which the law stipulates, for the offense committed, the punishment of life imprisonment or the punishment of prison for a period longer than 5 years.

[8] In the 3rd paragraph of the same article in the Criminal procedural code it is stipulated that, during trial, legal aid is mandatory also in the circumstances in which the law stipulates, for the offense committed, the punishment of life imprisonment or the punishment of prison for 5 years or more.

[9] Published in the Official Gazette no. 327 from April 25, 2008, approved with modifications and amendments through the Law no. 193/2008 (published in the Official Gazette no. 723 from October 24, 2008). For the analysis of the legal regime regarding the public legal aid established through this ordinance, see also: I. Deleanu "*Public legal aid*". *European and Romanian legislation on this matter* in Dreptul no. 8/2008 pages 17-47; A. Tabacu, *Public legal aid*, in Romanian Magazine of Private Law no. 4/2008, pages 212-227; M. Tăbârcă, *Issues regarding the public legal aid in civil matters (The Government's Emergency Ordinance no. 51 from April 51, 2008)*, Publishing House Universul Juridic, Bucharest, 2010.

foreseen that the public legal aid is granted in civil, commercial, administrative, labor and social insurances cases, as well as in other cases, except for the criminal cases.

c). Legal assistance through the lawyer, granted at the request of the bodies of the local public administration

This hypothesis preexisted as well in the former wording[10], where the organs of the local public administration – as well as the courts or the prosecution's offices – were able to request the bar to ensure the legal assistance in the cases in which they appreciated that individuals were *facing the obvious inability to pay the retainer.*

Even if the current text no longer refers to the situation in which a body of the local public administration may request the legal assistance through a lawyer, we consider that the reason for the former regulation, namely *the obvious inability to pay the retainer*, continues to exist.

According to the article 68, 2nd paragraph from the Law no. 51/1995, such as it was modified through the Law no. 270/2010, in exceptional cases, if the rights of the person lacking material means would suffer prejudice from a delay, the dean (president) of the bar may approve the grant of legal assistance, for free. Comparing with the former wording[11], a sole intervention is noticeable, through which the term of "free legal assistance" is reformulated, the rest of the text as well as the substance of the regulation being maintained.

It is the place here to remind the fact that, regarding the protection of the crime victims *the free legal assistance*[12] was instituted and is granted, upon request – if the crime was committed on Romanian soil or, if the crime was committed outside Romanian soil, if the victim is a Romanian citizen or a foreign citizen that is legally residing in Romania, and the criminal trail takes place in Romania – to the following categories of victims (article 14, 1st and 2nd paragraph from the Law no. 211/2004):

- the individuals against whom was committed an attempt to murder, manslaughter and aggravated murder, a crime of serious body injury, an intentional crime which resulted in serious body injury for the victim, an offense of rape, sexual intercourse with a minor and sexual perversion;

- the spouse, the children and the dependants of the deceased, following the crimes of murder, manslaughter and aggravated murder, as well as the intentional crimes that resulted in the death of the person[13].

B. The conditions for granting legal aid

a). Appointing the lawyer to provide public legal aid [article 68/1, article 68/2, article 68/3 paragraphs (5) and (6) and article 68/7 letter c) newly introduced in the Law no. 51/1995 throughout the Law no. 270/2010]

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[10] In the previous regulation the E.G.O. no. 159/2008, paragraph (1) of article 68 of Law no. 51/1995 had the following content: "The Bar association provides legal assistance in all cases where protection is required by law, as well as at the request of the courts, the prosecution or *the public local administration* in the cases in which the latter appreciate that the individuals are *facing the obvious inability to pay the retainer.* (our emphasis)".

[11] In its previous wording the E.G.O. no. 159/2008, paragraph (2) of article 68 of the Law no. 51/1995 had the following content "In exceptional cases, if the rights of the individual lacking financial means would be prejudiced by the delay, the dean (president) of the bar association may approve *free legal aid*. (our emphasis)".

[12] Through Chapter IV ("Free legal aid of victims of crimes") from the Law no. 211/2004 regarding some measures to ensure the protection of victims of crimes, published in the Official Gazette no. 505 from June 4, 2004. For a presentation of this regulation, see also M. Catea, *Free legal aid granted to victims of* crimes, in the Bulletin of the National Institute for the Training and the Improvement of Lawyers, nr. 2/2006, pages 118-121.

[13] According to article 15 from the Law no. 211/2004, free legal aid is granted, upon request, to the victims of other crimes than the ones mentioned in article 14, paragraph (1), with the observance of the conditions established in the article 14 paragraph (2), if the monthly income per family member of a victim shall not exceed the minimum gross wage in the country, as established for the year in which the victim submitted the application for free legal aid.

If there application for public legal aid was approved under the form of assistance through a lawyer[14], then, the application together with the approval minutes are immediately sent to the dean (president) of the bar association of the respective district court. Upon receipt of the two documents, the dean (president) or the lawyer he delegates appoints within 3 days a lawyers registered in the legal aid Registry[15], to whom he/she transmits, together with the notification regarding the appointment, the approval minutes. The dean (president) has also the obligation to communicate the name of the appointed lawyer to the person benefiting from public legal aid, this one having the possibility to request the appointment of another lawyer, of course with the consent of the latter.

The appointment is made considering the lawyer's professional experience and qualification, as well as the nature and the complexity of the case, the lawyer's other appointments and commitment degree. The criteria regarding *the professional experience* must be though related to the stipulation in the By-laws of the lawyer's profession[16] [article 217 paragraph (1) second thesis) according to which the cases on legal aid[17] mandatory and/or free are distributed *predominantly to trainee lawyers and young (definitive) lawyers*, of course, with the compliance of the professional competency stipulated by the law. The distribution of these cases towards *young lawyers (trainees or definitive)* results also from the dispositions of the article 55, article 73 and article 98 from the current General Regulations for the organization of the bar associations' legal aid offices[18], adopted by the Decision no. 419/2008 issued by the UNBR Council, in the context of the entry into force of the E.G.O. no. 51/2008. According to the article 112 from the same General regulation, the repartition of cases pending in *courts of first instance* is made predominantly towards *trainee* lawyers, disposition that correlates with article 22 paragraph (1) from the Law no. 51/1995, in accordance to which the trainee lawyer can draw conclusions only in front of courts of first instance. We also observe the following relevant dispositions existent in the above mentioned General Regulation:

- the lawyer having provided legal aid ex officio during the criminal pursuit phase will ensure as well the assistance in front of courts competent with the solution of the case, when he/she obtained and certified the special agreement of the beneficiary (article 40);

- the ex officio lawyer appointed for one phase of the judicial inquiry will be appointed to assist the party as well during appeal against conclusions that might be appealed separately, if he/she obtained and certified the special agreement of the party (article 45);

- the cases having as object the challenge on enforcement or changes in the enforcement of certain decision will be distributed with priority to the ex officio lawyer that provided legal assistance in the last phase of the judicial inquiry, if he/she obtained and certified the special agreement of the party (article 49);

- mandatory legal aid (ex officio) will be ensured only following the prior appointment by the Office of legal aid, according to the criteria regarding the compatibility, specialization, and with the application of the of the principle of co-fraternity (article 105);

- in the situation in which the ex officio designated lawyer chooses not to provide legal assistance under the principle of continuity, the cases will be redistributed to lawyers appointed according to the criteria adopted throughout methodological norms (article 108).

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[14] In the conditions stipulated in Chapter III ("Competencies and procedures for granting public legal aid"), Section 1 ("Common provisions"), articles 11-19, from the E.G.O no. 51/2008.

[15] See *infra*, point II.2, letter D.

[16] Published in the Official Gazette no. 45 from January 13, 2005, with subsequent amendments and supplements.

[17] In the mentioned text the phrase "legal aid" is used.

[18] Published on **www.unbr ro** website and entered into force at October 15, 2008, therefore previous to the publishing in the Official Gazette of the E.G.O. no. 159/2008. According to the final dispositions of the Law no. 270/2010 (article II 2nd paragraph), within 60 days from the entering into force of this law, the Council of the National Association of the Romanian Bars (U.N.B.R.) has to adopt – in fact, to revise – The general Regulation for the organization of the services of legal aid.

In terms of *extra-judiciary* assistance[19], based on the decision for granting such type of assistance, the dean (president) of the competent bar association appoints a lawyer from the legal aid Registry of the bar association. Depending on the actual possibilities, the dean (president) may approve the granting of extra-judiciary assistant by a lawyer chosen by the beneficiary[20].

The lawyer being appointed to provide public legal aid cannot refuse this professional task unless a conflict of interest appears or for other justified reasons. If the appointed lawyer refuses, inexcusably, to take over the case or to continue the work is committing a disciplinary misbehavior.[21]

On the other side, if the beneficiary of the public legal aid refuses, in an unjustified manner, or renounces unilaterally and unjustified the assistance provided by the appointed lawyer, the public legal aid under the form of assistance through a lawyer ceases.

b). The extra-judiciary assistance (article 68/3 newly introduced in the Law no. 51/1995 throughout the Law no. 270/2010)

According to article 35 paragraph (1) of E.G.O. no. 51/2008, the assistance through a lawyer may be as well extra-judiciary, consisting in: providing advice; making applications, petitions, complaints, initiation of other legal proceedings; representation in front of public authorities or institutions, other than judiciary or with jurisdiction ones, in pursuit of rights or legitimate interests.

The purpose of extra-judiciary assistance envisaged by the legislator lies in providing clear and accessible information to the applicant, in accordance with legal provisions in force regarding the competent institutions, and, if possible, the conditions, the limits and the procedures prescribed by law for the recognition, the grant or the accomplishment of the right or interest claimed by the applicant.

The extra-judiciary assistance is granted by the legal aid Office[22] constituted at the level of each bar association, upon request[23], by attaching documents proving the income of the applicant and his family's, as well as evidence regarding the obligation for maintenance (care) or payment.[24] The application shall be accompanied by an applicant's affidavit, in the sense of making specifications if

[19] See forthwith *infra*, letter b).

[20] Wrongly, in the article 68/3 paragraph (6) from the Law no. 51/1995 reference is made to "the individual to whom legal aid is granted", although the text regulates the extra-judiciary assistance. A similar mistake taken, as this one, from the E.G.O no. 159/2008, has slipped in the text of the paragraph (4) of the article 68/3 from the same law (see *infra*, fn. no. 28).

[21] These provisions are correlated with the current provisions of the By-laws of the lawyer's profession, according to which the unjustified refuse to provide free legal aid constitutes disciplinary misbehavior [article 217 paragraph (1) third thesis, introduced by the Decision of the lawyers' Congress no. 6/2008].

[22] See *infra*, point II.2, letter C.

[23] The standard form of the application is approved by the Department for the coordination of the legal aid (see also *infra*, point II, letter B). The application will include references regarding the purpose and nature of the request for assistance, the identity, the social security number, the address and the financial condition of the applicant and his/her family.

[24] The proof of the applicant's financial situation is made mainly with the following documents: certificate issued by the competent authorities or by the employer, as appropriate, showing the applicant's professional income and the income of the other family members, subjected, according to the law, to income tax, revenue that is made within the period stipulated by the legislation on public legal aid or the amounts received as pension, unemployment benefit or social security and others, also received for the same period; the family book and, where appropriate, the children's birth certificates; the certificate attesting a disability of the applicant or of his/her child, where appropriate; affidavit showing that the applicant and other family members have no other income; affidavit on the patrimonial situation of the applicant and his family; affidavit showing that the applicant and / or the other natural or adoptive parent or, where appropriate, any other person entrusted with the child for adoption or having the child in placement or in emergency placement or has been appointed as trustee is handling the child's care and growth and that child is not entrusted to or in placement of any authorized private body or authorized public service or any legal person; evidence issued by the competent authorities regarding taxable goods of the applicant or, where appropriate, of other family members; other documents required to establish the right to legal aid, according to the law.

during the last 12 months he/she did benefit from public legal aid, under what form, for what case, as well as the amount for this aid.

The application for having granted the extra-judiciary assistance is settled no later than 15 working days from the date of registration, throughout an approval decision[25] or a rejection decision, where appropriate.

The decision regarding the grant of extra-judiciary assistance is communicated to the applicant within 5 working days from its issuance date. If the application for granting extra-judiciary assistance was rejected, then the applicant can challenge the decision at bar association's council, within 5 days from its communication, the challenge will be dealt with urgency, in the first session of the bar association's council. We observe that, unlike the term established for the communication of the decision, in the case of the *challenging* term for the decision of rejection it is not stipulated that the 5 days are working days, therefore they will be considered as *calendar* days.

We notice that according to article 65 from the current General Regulation for the organization of the bar association's legal aid offices, adopted by the Decision no. 419/2008 of the Council of UNBR, the lawyer having ensured the extra-judiciary assistance becomes *incompatible* with providing legal aid.

2. Organization of the activity of legal aid

A. Attributions of the bar association (article 68/7 newly introduced in the Law no. 51/1995 through the Law no. 270/2010)

The organization of legal aid was widely reformed in comparison to the former legislation, namely the E.G.O. no. 159/2008, when the Law no. 51/1995 consecrated to this aspect one sole paragraph[26].

Throughout the Law no. 270/2010, the attributions of the bar associations, taking into consideration the organization of legal aid, were substantially increased, as follows: they organize the offices (services) for legal aid[27] both at the premises of each bar association as at the premises of each court; they organize and update the legal aid Registry of each bar association, based on the requests of the lawyers, approved by the bar association's council; they appoint the lawyers registered with the legal aid Registry to provide legal aid;[28] they operate control on how legal aid is provided by lawyers registered with the bar associations; they organize and execute programs to promote the legal aid system; they accomplish any other attribution as stipulated by the law or by the General Regulation for the organization of the legal aid offices (services).

B. The Department for the coordination of the legal aid (article 68/5 and article 68/6 newly introduced in the Law no. 51/1995 by the Law no. 270/2010)

[25] Should the application for extra-judiciary assistance be approved, the decision on the extra-judiciary assistance (not legal, as wrongly appears in the wording of paragraph 4 of article 68/3 from the Law no. 511995, the mistake being taken from the E.G.O no. 159/2008) will include the following: the name of the document; the name of the issuer; the legal and factual basis for issuing the decision; the person to whom extra-judiciary assistance is provided; the type or the form of the extra-judiciary assistance granted; the date of issuance; the title and the signature of the person that issued that respective document.

[26] We are taking into consideration the paragraph (3) of the article 68 from the Law no. 51/1995, text that had the following wording: "The bar association organizes, at the premises of all county courts, the offices for legal aid, making legal aid also available at local prosecution's offices, offices that are managed by a definitive lawyer, appointed by the bar association's council and coordinated by a member of the council".

[27] See *infra*, point II.2, letter C.

[28] See *supra*, point II.1, letter B.

This department was regulated as novelty regarding the organization of the lawyer's profession throughout the E.G.O. no. 159/2008, within the National Association of the Romanian Bars, as organ with permanent activity, coordinated by one of the UNBR vice-presidents.[29]

The main attributions of the department are as follows: it runs the methodological management of the activity of granting legal aid; it elaborates the project of the General Regulation for the organization of the legal aid offices (services); it proposes, or, where appropriate, it endorses the project of memorandums that are to be concluded with competent public authorities in order to obtain financial means to organize the services of legal aid; it organizes the national Registry of legal aid, based on the registries prepared by the bar associations; it organizes and coordinates the payment methodology of the retainers for the provided legal aid; it runs the control on the legal aid provided; it prepares projects of legislation in the area of legal aid, that it submits to the Ministry of Justice, in order for them to be promoted; it establishes, in conjunction with the Ministry of Justice, the statistical indexes, it keeps the statistical evidence of the legal aid system and it analyses the information required by the planning and the proper coordination of the legal aid system; it cooperates with the Ministry of Justice for the good functioning and planning, including from the budgetary point of view, of the legal aid system; it promotes the legal aid system; it establishes the forms that are to be used by the bar associations for the organization of the activity of legal aid and of the extra-judiciary assistance, according to the law; it represents UNBR in the field of legal aid, within international cooperation in the area, according to the law or the By-laws of the lawyer's profession.

C. The legal aid offices (services) (article 36 modified, article 68/8 and article 68/13 newly introduced in the Law no. 51/1995 through the Law no. 270/2010)

The statutory regarding the legal aid offices (services) has undergone the fewest changes, being maintained, in essence, on the coordinates of the former article 68 paragraph (3) from the Law no. 51/1995[30]. Thus, as we showed during the presentation of the bar associations' attributions[31], in the area of the organization of the legal aid offices (services), the bar association organizes[32] the legal aid offices (service) under the management of a definitive lawyer appointed by the council of the bar association and are being coordinated by a member of this council.

The activity of the legal aid offices (services) is deployed at the premises of all county courts, in spaces exclusively destined to this purpose, that are made available by the Ministry of Justice, or, where appropriate, by the authorities of the local public administration, freely, and – supplementary stipulation contained by the Law no. 270/2010 in comparison with the provisions in the E.G.O. no. 159/2008 – *mandatory*. Besides, according to the article 36 from the Law no. 51/1995, such as it was modified through the Law no. 270/2010 – modification that was not operated through the E.G.O no. 159/2008 –, the Ministry of Justice *is obligated to ensure* the proper spaces for the activities of the lawyers within the premises of the courts, disposition that strengthens the preexistent[33] necessity held to the Government. These dispositions are to be correlated with the provisions of the article 68/13 from the Law no. 51/1995, according to which UNBR and the bar association are working together with the Ministry of Justice, the Superior Council of Magistracy, the courts, as well as the prosecutors' offices near the courts, in order to perform in proper conditions the activity of providing legal aid.

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[29] The organizational structure of this department is established through a decision of the Standing Committee of the UNBR.

[30] See *supra*, fn. no. 29.

[31] See *supra*, point II.2, letter A.

[32] The organization, the functioning and the attributions of the offices for legal aid are accomplished according to the regulations approved by the bar association's council, based on the general regulations for the organizations of the offices of legal aid, as approved by the UNBR Council.

[33] In the previous wording of the article 36 from the Law no. 51/1995 it was stipulated that the "Ministry of Justice *ensures* the spaces (…) (our emphasis)".

D. The legal aid Registry (article 68/9 newly introduced in the Law no. 51/1995 through the Law no. 270/2010)

a). The legal aid Registry of the bar association

It is organized at the level of each bar association and it includes the lawyers that are able to be appointed to provide public legal aid under the form of legal aid and extra-judiciary assistance.

This Registry is updated, for the next calendar year, until the end of September of the previous calendar year, with the possibility, in exceptional cases, to operate modifications during the year.

The Registry has a public characteristic[34] and is kept both on paper as on electronic support.

b). The legal aid national Registry

It is organized at the level of the National Association of the Romanian Bars, being constituted from the legal aid registries of all bar associations from the country.

This registry has as well a public characteristic[35] and is updated, automatically, together with the update of the bar associations' legal aid registries.

c). Registration with the legal aid Registry and radiation

It is operated throughout a decision of the council of the bar association of which the solicitant lawyer is member, based on an application completed according to the form approved by the Department for the coordination of legal aid.

The lawyer's registration with the Registry may be denied by the council of the bar association, grounded, in the following cases: if the solicitant lawyer suffered a disciplinary sanction; if the solicitant lawyer is accused of having committed a crime; if an ascertainment was made towards the solicitant lawyer regarding his/her repeated of the Law no. 51/1995 or regarding the inferior quality of his legal aid being provided.

The decision through which the council of the bar association refuses the registration with the Registry can be challenged according to the procedure stipulated for the disciplinary liability[36]. This being said, we remember here the competency of:

- The Central Commission for Discipline that judges, in appeal, with a panel of 5 members, the appeals formulated by the interested lawyer, the dean of the bar association and the President of UNBR against the decisions pronounced by the Discipline Commissions of the bar associations and the conclusions throughout which against the lawyer was taken the measure of suspension of the practice of the profession, until the final settlement of the case, in case of obvious and serious misbehavior. Against the decisions of the Central Commission for Discipline, in appeal, the interested party can declare appeal at the contentious section of the Court of Appeal of Bucharest, its decision being definitive and irrevocable.

- the Council of UNBR, constituted as disciplinary court, in its plenary, except for the person involved, that judges the appeals formulated against the sentences pronounced by the Central Commission for Discipline, as court of first instance, and also that judges the appeals formulated against the conclusion throughout which against the lawyer was taken the measure of suspension of the practice of the profession until the final settlement of the case, in case of obvious and serious misbehavior. The rulings pronounced by the Council of UNBR, in the appeal stage formulated against the disciplinary decision of the Central Commission for Discipline (as court of first instance), can be challenged by the interested party with appeal at the contentious section of the Court of Appeal of Bucharest, its decision being definitive and irrevocable.

The situation due to which the refusal to register the lawyer the registry occurs may lead to the lawyer's radiation from the same Registry, for a period of one year, and if an assessment is made

[34] To be published on each bar association's webpage.

[35] To be published on UNBR's webpage.

[36] See article 72 and article 74 from the Law no. 51/1995 corroborated with article 260 and article 262 from the By-laws of the lawyer's profession.

regarding the consecutive committing of three or more misconducts in relation to the obligations stipulated in the Law no. 51/1995, the radiation may be ordered for a period up to three years. The decision of radiation is made public on the internet website of the bar association and of UNBR and may be challenged, according to the procedure that is applicable to the challenge of the bar associations' refusal to have the lawyer registered with the Registry.

With regard to the radiation measure, we consider it being improperly regulated, by reference to the effects it produces and being specific to the *suspension* institution. This is because the effects of the "radiation" for a period from one year up to three years are *temporary*; or, it is widely known the fact that the radiation has a *definitive*[37] characteristic.

E. Remuneration of the activities of legal aid and extra-judiciary assistance (article 68/4, article 68/11, article 68/12 newly introduced in the Law no. 51/1995 and article 69 modified through the Law no. 270/2010)

Although the assistance through the lawyer is a form of the public legal aid, this does not mean that the lawyer providing assistance does it *pro bono*. According to the article 30 paragraph (1) from the Law no. 51/1995 corroborated with the article 132 paragraph (1) from the By-laws of the lawyer's profession, for his/her professional activity the lawyer has the right to a retainer and to coverage of all expenses made in the procedural interest of the client.

Therefore, as same as the E.G.O. no. 159/2008, the Law no. 270/2010 stipulated that, for the legal aid provided, the appointed lawyer has the right to a retainer established by the judiciary organ, based on the nature and the volume of the activity deployed, but within the limits of the amounts agreed through the memorandum concluded between UNBR and the Ministry of Justice. The funds necessary for the payment of those retainers are ensured according to the provision of the article 26 paragraph (1), letter a) from the Law no. 146/1997 regarding the court fees.[38] As element of difference compared to the E.G.O. no. 159/2008[39], according to the Law no. 270/2010 the expenditures required by the functioning of the legal aid offices (services) within the bar associations are ensured from the approved and actually transferred amounts[40] allocated to the retainers due for the legal aid, out of which each bar holds 1% at the actual moment of payment of the retainer to the entitled lawyer[41].

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[37] For exemplification, we remind that, from the date of cancellation, the legal personality of the commercial company *ceases*, with all consequences arising from this fact (see also St.D. Cărpenaru, *Romanian trade law*, 6th edition, revised and enlarged, Publishing House Universul Juridic, Bucharest, 2007, page 294).

[38] According to the article 26 paragraph (1) letter a) from the Law no. 146/1997 (published in the Official gazette no. 173 from July 29, 1997, with subsequent amendment and supplements), a quota of 75% from the amounts from the taxes collected from the retainers of lawyers, public notaries and of judicial executor, constitutes incomes to the state budget and is included distinctly in the income and expenditure budgets of the Ministry of Justice and Civil Liberties, of the Superior Council of Magistracy, of the High Court of Cassation and Justice, respectively of the Prosecutor of the High Court of Cassation and Justice, as follows: a 70% quota will be included in the income and expenditure budgets of the Ministry of Justice and Civil Liberties, out of which 50% shall be used to finance the public legal aid system and the legal aid system, and 20% will have as destination expenditure with investments and current expenditures.

[39] According to the article 69 paragraph (3) from the Law no. 51/1995, in the form modified by the E.G.O. no. 159/2008, it was stipulated that the funds necessary to the organization and the functioning of the offices of legal aid within the bar associations are covered from the amounts allocated for the financing of the public legal aid system and of the legal aid system, according to article 26 paragraph (1) from the Law 146/1997, with subsequent amendments and supplements, based on the proposals transmitted on a yearly basis by UNBR to the Ministry of Justice, at the drawing time of the project of the state budget, and the release of the amount approved would be accomplished according to the procedure established throughout a order (decision) of the Minister of Justice.

[40] The amount necessary to pay the retainers or, where appropriate, the remunerations for legal aid, are transferred, monthly, according to the law, in a separate account, opened by each bar association. The compliance by the bars of the destination for the funds thus transferred is making the object of the UNBR control.

[41] The payment of the retainer for the legal aid provided is made on a monthly basis, based on reimbursement documents.

With regard to the legal aid provided at the request of the organs of the local public authorities, the retainers are paid from the funds of those respective organs, within the limits of the amounts established throughout the memorandum concluded with them by each bar association, and in the lack of such a memorandum, within the limits of the amounts established by the memorandum concluded between UN BR and the Ministry of Justice. Otherwise, the article 69 paragraph (1) in the Law no. 51/1995, such it was modified, stipulates, *as general*, that the retainers for the legal aid granted in *any of its forms*[42] are established throughout this memorandum.

In fact, the payment of the retainer due to the lawyer appointed to provide legal aid is preceded by the following phases:

a). through the approving act of granting legal aid, the judiciary organ establishes a *provisional* retainer;

b). after the legal aid is provided, the lawyer prepares a *written report (memoir)*[43] regarding the effective performance;

c). the report (memoir) is subjected to the *confirmation of the judiciary organ*, which, based on the volume and the complexity of the activity deployed by the lawyer, as well as based on the length, the type and the particularities of the case, may order *the maintenance or the increase* of the initial established retainer;

d). the report (memoir) being confirmed by the judiciary organ is forwarded to the bar association in order for it to carry on *the payment formalities* of the retainer.

According to the article 42 in the current General Regulations for the organization of the bar associations' legal aid offices (services), adopted by the Decision no. 419/2008 issued by the UNBR Council, in the hypothesis in which the mandate of the ex officio lawyer being appointed is ceasing throughout the assurance of legal aid by a chosen lawyer, the lawyer shall make mentions in his/her report about the activities deployed, he/she shall submit the report to the file of the case and in copy to the file compiled by the legal aid office (service), and the competent organ shall decide over the amount of the retainer due to the ex officio lawyer for the assistance being already provided.

Although the E.G.O no. 159/2008 established in article 68/13 the issue regarding the remuneration of the *extra-judiciary* assistance, the Chamber of Deputies decided, inexplicably from our point of view, to eliminate those dispositions[44]. Or, the legal regime ruled for the remuneration of legal aid *cannot be applied by analogy* in relation to the extra-judiciary assistance. This is because, by hypothesis, the judiciary organ which, as shown, plays an important role in establishing the retainer for the legal aid, does not have the competence with regard to the remuneration of the extra-judiciary assistance.

Thus being said, there is en error in the provision in the current General Regulations for the organization of the bar associations' legal aid offices (services), adopted by the Decision no. 419/2008 issued by the UNBR Council, according to which, in the article 69, the payment of the retainers due to lawyers providing extra-judiciary assistance in accordance with the approval of the dean (president) is ordered by *the competent court throughout the conclusions that admit the legal*

[42] See *supra*, point II.1, letter A.

[43] According to the form approved by the Department for the coordination of legal aid (see *supra*, point II.2, letter B).

[44] The article 68/13 from the E.G.O no. 159/2008 had the following wording: "(1) For the extra-judiciary assistance provided, the designated (appointed) lawyer has the right to a retainer established according to the nature, the complexity and the volume of activity deployed, as certified throughout a written memoir of the lawyer, according the reimbursement form, as approved by the Department for the coordination of legal aid within UNBR.

(2) For the appointed lawyers, the coordinator of the Office for legal assistance (*legal aid* – our emphasis) of the bar association verifies and approves the report (*the memoir* – our emphasis) of the lawyer that provided extra-judiciary assistance and proposes to the bar association's council the amount of the remuneration, base don the particularities of the case, its type, work volume deployed and the quality of the assistance provided, within the limits established by the Memorandum concluded between UNBR and the Ministry of Justice".

aid, since the judiciary authorities or with judicial attributions[45] are excluded from the area of application of the extra-judiciary assistance.

Quite the contrary, we appreciate that the legal regime applicable to the remuneration of the extra-judiciary assistance, that is to be regulated in the By-laws of the lawyer profession[46], as well as in the new General Regulation for the organization of the bar associations' legal aid offices (services) must take into account the stipulations of the former article 68/13 from the E.G.O no. 159/2008.

Specifically, the payment of the retainer due to the lawyer that has been appointed to provide extra-judiciary assistance would be preceded by the following steps:

a). after having provided the extra-judiciary assistance, the lawyer prepares a *written report (memoir)*[47] regarding the services being effectively provided;

b). the report is subject *to verification and approval of the coordinator of the bar association's legal aid office (service)*, who, depending on the particularities of the case, the volume of work being deployed and the quality of the assistance provided, *proposes* to the council of the bar association the amount of the remuneration.

c). based on the proposal of the coordinator of the legal aid office (service), *the council of the bar association establishes the final amount* of the remuneration and proceeds with the retainer's *payment formalities*.

If against the lawyer a disciplinary sanction was taken, he/she will not be entitled to receive the retainer for the legal aid provided in the case for which he/she was appointed.[48] Although the legal stipulation is not explicit, obviously, the disciplinary misconduct must have a *relation* with the activity of providing legal aid in that respective case, in order to have the lawyer being denied his/her due retainer. Thus, according to the current General Regulations for the organization of the bar associations' legal aid offices (services), adopted by the Decision no. 419/2008 issued by the UNBR Council, the disciplinary misconducts may concern:

- the delayed accomplishment of the obligation to ensure the ex officio legal aid, the extra-judiciary assistance or the legal aid *stricto sensu* committed in mad faith or gross negligence (specific offense; if the delay caused serious consequences for the proper conduct of the case or the court hearing, it constitutes serious disciplinary misconduct);

- the failure in bad faith or negligence of the obligation to notify the legal aid office (service) and the competent court regarding the impossibility to attend or to secure replacement where the regulation allows it (specific serious misconduct);

- the failure of the obligation to provide the ex officio legal aid or the extra-judiciary assistance or the legal aid *stricto sensu*, without priory requiring the legal aid office (service) for his/her substitution and without communicating that fact to the competent body (specific serious misconduct in ideal concurrence with serious disciplinary misconduct);

- to provide the extra-judiciary assistance, the legal aid *stricto sensu* or the ex officio assistance without appointment through the prior issuance of the delegation by the legal aid office (service) (specific serious misconduct ideal concurrence with serious disciplinary misconduct);

- the unmotivated refusal to provide the ex officio legal aid or the extra-judiciary assistance or legal aid *stricto sensu* within the activity area for which an option was made (specific serious misconduct);

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[45] See *supra*, point II.1, letter B.

[46] According to article II paragraph (1) from the Law no. 270/2010, within a 60 days period starting with the entry into force of this law, the By-laws of the lawyer's profession must be modified accordingly.

[47] In accordance with the reimbursement form approved by the Department for the coordination of legal aid (see *supra*, point II.2, letter B).

[48] In comparison with the E.G.O. no. 159/2008, in which reference was made to "the retainer for the particular case or for the activity deployed", in the Law no. 270/2010 the following phrase remains: „the retainer for ensuring the legal aid for which he/she was appointed, for that case".

- the omission to justify in writing the refusal to provide free or ex officio legal aid (specific offense);

- the omission to notify the legal aid office (service) regarding the change of the contact details or their malfunctioning (specific offense)

- the repeated refusal during a calendar month to provide assistance as a result of the appointment, even motivated (specific offense);

- the omission of the appointed lawyer to notify the legal aid office (service) within five days, regarding the change of the grounds that led to the admission or approval of the application for extra-judiciary assistance or for legal aid (specific serious misconduct);

- the failure to comply with the deadline for the submission of the report (specific offense; failure to comply with the deadline for the submission of the report resulting in influencing the repartition of the cases constitutes specific serious misconduct);

- the belated formulation, in bad faith, of a complaint, with less than 10 days before the deadline given in the case concerned with the complaint, when the deadline given in the case allows this (specific offense);

- the failure in bad faith of the obligation to prepare the written report requested, stated 10 days after the expiry of the deadline (specific serious misconduct).

According to the article 159 – correlated with the articles 80 and 92 – from the General Regulations for the organization of the bar associations' legal aid offices (services), adopted by the Decision no. 419/2008 issued by the UNBR Council, the lawyers have the obligation to return portions of the retainer, proportionally with the activity being deployed, to fellow lawyers substituting them or whom they substitute, the litigations in this respect being submitted to the arbitration of the dean (president) of the bar association.

Finally, we mention that, according to the article 68/4 from the Law no. 51/1995, the lawyer providing legal aid does not have the right to receive form the client or from the person he defends *any whatsoever remuneration or any other means of reward*, not even as expenses' coverage. As far as the reference to costs, of course that consideration was made towards the expenses advanced by the lawyer in the procedural interest of his/her client.[49] Although the legislator instituted this interdiction by referring only to the legal aid, we consider that it also applies – for the same reasons – to the extra-judiciary[50] assistance. Indeed, in agreement with the terminology used in the E.G.O. no. 51/2008 – "assistance through a lawyer", that may be legal aid or extra-judiciary assistance –, the legislator should have make reference either to "assistance", or to "legal aid or extra-judiciary assistance" and not exclusively to "legal aid".

III. Conclusions

The Law no. 270/2010 targets mainly to the correlate with the E.G.O. no. 51/2008 on public legal aid in civil matters, by regulating in detail the circumstances and the conditions for granting legal aid, as well as the organization of the activity of providing such assistance. From the perspective of the EC law, the new legislative act is to be placed within the sphere of regulations

[49] See article 28 paragraph (2) second thesis and article 30 from the Law no. 51/1995.

[50] Besides, according to article 157 of the General Regulation for the organization of the bar association's offices for legal aid adopted by the Decision no. 419/2008 of the UNBR Council, the lawyer providing legal aid, *extra-judiciary* assistance, special or ex officio, is not entitled to receive from the person being assisted or represented a remuneration or any other means to cover the costs, *except* the situation when a contract for *legal assistance* was agreed, with the notification of the Office for legal aid.

ruled at the European Union level, subsumed to the European Space for Freedom, Security and Justice, within the European legislation section reserved to the judiciary cooperation in civil matters.

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ROMAN MARKS TO EUROPEAN LAW OF THE CONTRACTS GOOD – FAITH

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Abstract

Beyond its political destinations, Europe is a civilization that each of its constituent parts has contributed its genius, over time. Or Rome, its original matrix, has sent her fundamental right. To what extent can it be another tool for reflection, for mutual understanding, sometimes of harmony, here's what seems to be necessarily raised, albeit briefly, by this favored means of communication and exchange, that it has always been the contract.

Since then the issue is explained by the need to have a contractual law in the middle of this community adapted to the needs of this new burning community, in Europe of the beginning of the third millennium. In fact, market opening has led to considerable development of trade between the EU-counties and this is exactly cross-border flow through contracts.

In this context we aimed to determine the role that it has one of the most important and current principles of law, that of good - faith in European contract law building.

It is known that good - faith is experiencing a very special embodiment in the contract, where it assumes many functions. She is the subject of many studies and analysis and is likely to grow rapidly in national and supranational rights.

Although contract law has evolved considerably, the theme is present and justified, under conditions which the Roman foundations remain. European contractual universe and its possible developments do not exclude but require an approach in terms of Roman law.

Methodologically, the paper is structured as follows: good - faith in contracts, the birth and evolution of the concept (ancient Rome, Middle Ages, modern and contemporary) and contemporary applications - abuse of right, information requirements, hardship principle.

Key words: *obligation, the consumer, unfair terms, abuse of rights, autonomy of will.*

1. Introduction

Roman private law is the most powerful element, because it was mostly applied, especially the law of obligations and contracts. Pragmatism has known the most beautiful success in contracting, indispensable to the development of trade in the bosom of a mosaic of communities that had, first of all its members to facilitate exchanges.

Today, in Europe at the beginning of the third millennium, the varieties of rights appears as an obstacle against trade and develop economic wealth. Multiple objects of creation and adjustments, contract law has evolved considerably, however, divergences between national laws impede the functioning of the internal market of contracts. To meet these needs are known actions to develop a European code of contracts, actions based on co-creation of a common legal culture.

The importance of our study is that it explains to what extent the roman legal approach still deserves to be considered in context with a profound mutation and the phenomenon of acculturation seems inevitable.

In this sense we proposed to determine the role that has one of the most important and actually principles of law, the principle of the good faith, in building the European contract law, knowing that good faith assumes more functions in contractual positions.

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Interpretation may have a role completely, modifying or extinguishing, merging these various issues sometimes. This could qualify for „good - faith chameleon".[1]

A significant part of work regards good - faith approach in historical perspective, especially since the concept is subject to all current attentions and is likely to grow quickly in the national and supranational rights.

The idea of this paper was born from the work of the „European contract law Committee" chaired by Ole Lando, which drafted the *European law principles of contract*, result of a concerted European action, if not common in this area

The project consists in presenting the „reflection of a pool of solutions to the problems of contract law" and a simple glance at the headings of *Principles* makes it possible to find a number of familiar concepts, existing already before our époque to the attention of magistrates and lawyers in Rome as well: good faith, consent, error, coercion, fraud, price, assignment of receivables, etc. penalty for failure, etc.

The structure and content of work is consistent with the theoretical requirements of the problem, but taking into account the practical realities of business

It is also in line with recent and intensive doctrinal, legal and jurisprudence perspectives concerns on accomplished actions and perspectives for developing an European code of contracts.

2. Paper content.

2.1. Good - faith in contracts

Cicero defined *as honesty in words* (*veritas) and fidelity (Constantia)* in commitments[2], good - faith is found in the various fields of private law, which reserves for it the specific rules that can be invoked and can produce legal effects[3].

However, it is recognized that good - faith experiences a very special embodiment in the contract. And more, good - faith meets new significance in the recent developments in contract law, presenting new situations of the old principles of law.

Good - faith in contracts is as objective behavior rule: not to harm the other party. In this sense be interpreted as art. 970 par. (a) of the Civil Code [Art. 1134 par. (3) Civil Code fr.] that: *agreements to be executed in good faith.*

The code meaning that the authors have given to the legal text, these provisions require the implementation of the contract in accordance with the commitments made under contract or under the given word. Although conflicting interests, with the finalized agreement, the parties have created a common law, which dictates a behavior consistent with the honesty required in good faith.

Fidelity task execution and contracting parties to cooperate are depicted as two aspects of good faith to enforce contracts[4].

But, invested in solving the cases regarding the sanctions of the behavior of the contracting parts, the courts appealed to this statutory text to interpret the behavior of the contracting parties during pre-contractual period of time.

In this context, most often based on lack of clarity artifice of the moment that separates the contract signing from the contract's execution, judge imposed contractual penalties in case of pre-

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[1] Y. Loussouarn, *Rapport de synthèse*, in *La bonne foi (journées louisianaises)*, Travaux de l´association Henri Capitant, (Paris: Litec, 1992, tome 43), 14., apud René – Marie Rampelberg, *Repères romains pour le droi européen des contrats*, (Paris: L.G.D.J. – Montchrestien, 2005), 43.

[2] Marcus Tullius Cicero, *De officiis*, L I, §.7., apud. Dimitrie Gherasim, *Good faith in civil legal relations*, (Bucureşti: Academy Publishing House of the Socialist Republic of Romania, 1981), 7.

[3] It is also the case for many applications of good faith in relation to real rights (subjekt of this study). See also, Felician Sergiu Cotea, *Good - faith. Implications of ownership*, (Bucureşti: Hamangiu Publishing House, 2007), 20-7.

[4] Dimitrie Gherasim, *op.cit.*, 78.

contractual breach of good faith or contrary, non-contractual penalties have been applied to stage an event of default of obligations during the contract[5].

However, while decisions take her into account, the lack of autonomy of good faith does not ensure full effectiveness[6].

Therefore, under the pressure of new social and economic phenomena that requires balancing the demands of fairness and legal certainty, the principle of autonomy with its subspecies: freedom to contract, the binding force of contract and relative effect of contract, is redesigned, it talks about becoming more than a new culture of contract[7].

Coupled with another concept of maximum generality, this also justifies the intervention on the contract, namely: public order, good - faith proves its effectiveness. As a rule it limits freedom of contract and autonomy of will by default.

2.2. The birth and evolution of the concept

2.2.1. Rome

At Rome, until around the third century before Christ, in an era of change less frequently, it was necessary to conclude the contract, to respect the solemn forms, verbal or written. With time, geographical and demographic expansion of the Roman Empire is increasing a disorder in his law, especially in the field of contract.

Relations with the peoples with different traditions, not Roman citizenship status, could not be conducted in the *ius civile*, the privilege of citizens to the third century after Christ, when by an edict of Emperor Caracalla, seems to grant citizenship to all free peoples of the Empire; this makes it indispensable rules for all. All of them are *ius gentium*, less formalistic, no way religious.

In the context of trade with the pilgrims, rapidly growing, area of business is preferred. Generated by practice, this right is reinforced by the edicts of praetorians and provincial governors, the imperial constitutions and jurisprudence.

Emergence of the concept of good - faith is the essential foundation and Greek thought influence its consecration[8]. In fact, philosophical thought practiced by Greek allows Romans to reach the fundamental concepts and introducing the notion of good - faith in relationships of obligation and other innovations of classical Roman law, which remain the basis for modern legal systems, would undoubtedly have been possible without the Greek inspiration.

This new conception opens the contractual system to ethics of fair and equitable contract, the latter after Cicero's dream, linking all people, citizens or pilgrims, in the *boni viri* universal society, appertaining to the people well intended.

Bona fides obliges the judge to decide who should answer each other and on this basis, *ius gentium* introduces a fundamental principle in contractual matters: consensualism.

Thus, the contract is distinguished from consensual agreement as strictly as is sanctioned by an act of „good - faith", allowing discretion of the judge unknown until then[9].

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[5] Varied in this respect is the French law regarding penalties for fraud and hidden defects in material or means available to the debtor's fingertips - the victim of lack of information. For more, see: Y. – M. Serinet, *Erreur et vice caché : variations sur le même thème,* in *Le contrat au début du XX – e siècle, Études offertes à Jacques Ghestin,* (Paris: L.G.D.J., 2001), 789; M. Fabre – Magnan, *De l´obligation d´information dans les contrats, Essai d´une théorie,* (Paris: L.G.D.J., 1992), 425.

[6] J. Calais – Auloy, F. Steinmetz, *Droit de la consommation,* 4e éd., (Paris: Dalloz, 1996), 161.

[7] For more, see Tekla Tibád, „Findings unfair clauses to consumer contract", in *Romanian Journal of Business Law* (4/2005), 39 – 45. C. Prieto, *Une culture contractuelle commune en Europe,* (Droit 21, 2002), 4 apud René – Marie Rampelberg, *op.cit.,* 9.

[8] S. Kerneis, *Fides en droit romain. Aux origines de l´obligation juridique,* Confèrence à l´École doctorale des Sciences juridiques du 25 avril 2001, apud René – Marie Rampelberg, *op.cit.,* 44.

[9] Emil Molcuț *Roman Private Law,* Revised and enlarged edition, (Bucureşti: "Universul" Legal Publishing House, 2004), 77-8.

In such an action formula it is prescribing to the judge to seek - to assess the value of the conviction, all it has to give and accomplish as good - faith; whether it allows to know if the behavior of one of the parties is disproportionate to the attitude of a „loyal man". Moreover, good - faith is a means to temper the rigidity of contractual terms, the judge, in his interpretive mission, also using equity.

To illustrate the importance of the concept in Rome as well as its limitations, we created the site as a reference base of information, misuse of law and improvidence.

For the first issue, the example of the sale contract, the archetype of consensual contract of good - faith can better outline the proper function of good - faith in the Roman law, and in particular its completive role. The safeguards put into account of the seller, the Roman law required it to inform the buyer of any event that could disrupt its newly acquired right.

Abuse of law draws attention, as some of the most important roman provisions were almost taken by some major legal systems, such as the German system. Thus:

- a party can not acquire a right through dishonest conduct;
- loses its right - is German *Verwirkung* - if it does not run his own service, etc.

In connection with improvidence, Roman law has not established that such lack of foresight theory. Few passages of lawyers, such as Ulpianus, refer to it. However, certain writings of Cicero, Seneca and St. Augustine testify the existence of Rome, in the absence of specific clauses, recognition of the principle of *rebus sic stantibus*.

For example, the guarantee against eviction arises from simple contract term value. Parties are free to use it or not. However, classical jurists admit appeal to the action of "good - faith" open automatically to the purchaser, if the seller has volunteer sold a thing whose property or free and undisturbed possession by the buyer may be disturbed, because there is violation of good – faith obligations[10]. Therefore, the action can be exercised whenever the seller will refuse to insert into a contract stipulation regarding the guarantee of eviction. It is true also for the guarantee against hidden defects. Admitted first in the archaic *mancipatio*, she current becomes a current clause in the sales contract in the classical age. The action exercised by the buyer is admissible whenever the action does not meet the specifications announced by the vendor[11].

His defraud is similar to a fraudulent action, but buyer must demonstrate his bad faith.

Thus, with the edicts issued by edili curuli (*aediles curules*) in the II-I centuries before JC, it has the means of action designed to push the pressure to compel the seller to accept a contractual guarantee clause of hidden defects.

2.2.2. Middle ages

Jurists of the XII-XIV century perceive the concept of good - faith after three different approaches. First, I see him linked to the given word covenant. Force of the given word is explained by appealing to the concept of natural obligation that exceeds the requirements of the law. On the other hand, good - faith and fairness seem to oppose such lawyers, as in Rome, fraud and injustice. Finally, they consider that the first may involve unforeseen obligations in the contract, but an honest man respects it when concluding an agreement.

For a long time, the authors have never made the connection between nature and substance of the contract, on the one hand and good - faith and fairness on the other[12]. They study good - faith in terms of morality. Being „right rules of conscious life"[13] it is inherent to acts done in society, particularly in the contract; thus concluded that all contracts are good - faith, but this approach

[10] Emil Molcuț, *op.cit.*, 293-4.
[11] Emil Molcuț, *op.cit.*, 295.
[12] R.Zimmermann et S. Whittaker, *Good Faith in European Contract Law*, (Cambridge, 2000), 105.
[13] René – Marie Rampelberg, *op.cit.*, 48.

reaches prohibit enrichment without cause or deception arising from endangering natural law and equity, as was the case in Rome.

Actual efforts of lawyers to systematize the concept good - faith in terms of enrichment without cause, have strongly contributed to the spread in different legal systems.

2.2.3. Modern times and modern ages

French Civil Code of 1804, greatly influenced by the roman concepts and techniques, did not give a true devotion to the good – faith[14]. The abandonment of the good – faith necessity strongly influenced the doctrine that has almost forgotten the concept. It is clear that the drafters of the Civil Code did not want to make this a general principle, beyond contractual matters. Article 1134 has only one interpretative purpose of the conventions and is merely a tool in the hands of judges[18]. Its importance is therefore limited.

This preference is mostly given to the principle of autonomy of the will which includes strong legal thinking in the nineteenth century and first half of the twentieth century[15].

Involving the binding force of contract and its intangibility, it leaves little place for the good - faith as a principle of law correction.

The Civil Code interpretative doctrine in the nineteenth century refers to three main ideas on the good - faith.

The first is the rejection of the Roman distinction between strictly law contracts and agreements as good – faith.

The second idea links the good - faith with the equity, that should dominate the in the interpretation of contracts.

A third idea: good - faith can allow the judge to make a value-judgment on the parties' conduct.

Between the two wars, authors such as Demogue or Ripert, begins its return to the contractual sphere[16].

According Demogue she serves as the foundation for the cooperation obligation imposed on each party, which should aim to achieve contract purpose as well[17].

Ripert believes that the reference to the good - faith is the means used by the French law to include a moral rule in the contractual relationship[18].

In *usus modernus pandectarum*, German law continues to distinguish between agreements as strictly law and contracts of good - faith.

This dichotomy will remain until age of Pandects School in the late nineteenth century.

Contracts for good - faith were considered more flexible, the judge having a broad discretion for interpretation here.

Based on the roman concept of *bona fides*, German doctrine of the last century has developed its own theory about the good – faith.

The German authors have proposed for good - believe two terms, namely: *Treu und Glauben* - meaning loyalty and trust as required in legal acts and *guter Glaube* with the meaning of as wrong and excusable faith, protected as such, equivalent to a right[19].

Under these two forms good faith is founded on fair and honest intention.

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[14] J.-P. Chazal, *De la signification du mot loi dans l´article 1134 alinéa 1 er du code civil*,(RTDciv 2001) 263, apud Tekla Tibád, *op.cit.*, 44.

[15] Tekla Tibád, *op.cit.*, 30-31.

[16] P. Stoffel – Munk, *L´abus dans le contrat, essai d´une théorie*, (Paris: LGDJ, 2000), 70.

[17] R. Demogue, *De la déclaration de volonté*, (Pichon, 1902), 351 apud. Tekla Tibád, *op.cit.*, 40.

[18] G. Ripert, *La règle morale dans les obligations civile*, (Paris: LGDJ, 3e éd., 1935, nr. 6) 11, apud. Tekla Tibád, *op.cit.*, 40.

[19] Dimitrie Gherasim, *op.cit.*, 26.

Going further than his French counterpart, the German Civil Code, BGB, reappraise, at § 138, the notion of contractual morality, resumed from the Roman conceptions. Under its provisions, is void "any legal act contrary to morality".

In particular is invalid any legal act whereby a person, exploiting the need, ease or other non experience, promises or grants, either to himself or another person in return for such a benefit, of economic benefits exceeding the value of the benefit to a point as well - taking into account the circumstances - these economic benefits are disproportionate to the benefit of a shocking manners[20].

Cicero's vision is clear here. Also, under § 157 and 242: "Contracts must be interpreted as required by good - faith, considered permitted uses in business" and "the debtor must provide services as required by good – faith considered permitted uses in business".

These rules allow the judge to guide the interpretation of the contract as required by good – faith *(Treu und Glauben)*, but also to revise or to rebalance the name of fairness[21].

German law has remained more pragmatic than the French law, its more objective approach requires Parties to behave honestly, whether a failure or an action.

But here the emphasis is on the declared will of contractors, contrary to French law, seeking their real intention, uploading in this way the good - faith with a dose of subjectivity.

Whatever the system, contemporary judge may, as in Rome, to interpret the contract using the good - faith to determine the content or complete it.

It is a proof of the continuity of Roman law because „the idea of creative and corrective function of the *bona fides* remained vital and operated in used German law"[22].

German doctrine has influenced many legal systems, such as Austria, Switzerland, Holland or Portugal.

Dutch Civil Code in 1992 goes away as good - faith not only completed the obligations arising from the contract here, it may also modify and extinguish them[23].

The principle of good faith does not receive equivalent recognition in *common law* systems. Moreover, in English, *good faith* only denotes a state of mind: will to act honestly and fairly. It is a subjective concept: a person should not exercise a way of knowing she would have neither a benefit only with the intent to harm the other party.

In retaliation, *fair dealing* means that to act with loyalty is an objective criterion[24].

It should be noted that in the *common law*, the existence of a right is intimately linked to that of a procedure as in Roman law: "*there is a right if there Is a Remedy*": absence of good - faith is penalized by the denial of appeal as discretion doctrine of *estoppel*[25].

In Romanian law, the Civil Code does not contain a definition of good - faith but attached it to various forms of manifestation in the legal relations

According to art. 970 par. (1) of the Romanian Civil Code (precise transposition of the art. 1134 par. (3) of the French Civil Code), the good - faith means the obligation of loyalty and cooperation that requires the parties to the contract execution[26].

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[20] René – Marie Rampelberg, *op.cit*, 50.

[21] R. Zimmermann, S. Whittaker, *op.cit.*, 30.

[22] F. Ranieri, „Bonne foi et exercice du droit dans la tradition de la civil Law", *Revue international de droit comparé*, (1998), 1072.

[23] René – Marie Rampelberg, *op.cit*, 51.

[24] For a comparative approach to the good - faith and its possible functions in a future European Civil Code, see M. Hesselink, *Good Faith*, (Toward a European Civil Code, Ars Aequi Libri, Kluwer Law Internacional, 1998), 285 – 310.

[25] Rule of consistency. Fore more, see K.R. Abbolt, N. Pendlebury, *Business Law*, ed. a VI –a, (Londra: DP Publications, 1993), 72; A. Levasseur, *Les contrats en droit américain*,(Paris: Dalloz, 1996), 47 – 9.

[26] Liviu Pop, *Romanian Civil Law. The general theory of obligations*, (Bucureşti: Lumina Lex Publishing, 1998), 62-3; Ion Turcu, Liviu Pop, *Commercial contracts. Training and Enforcement*, vol.II, (Bucureşti: Lumina Lex Publishing, 1997), 33.

The New Civil Code expressly includes a text of good faith. Thus, according to art. 14 par. (1): „Natural and legal persons involved in civil legal relations must exercise their rights and perform its obligations in good faith, in accordance with public order and morals".

UNIDROIT[27] Principles and the Lando Commission[28] recognize the interpretative function good - faith. Rules of interpretation refer to this latter but also to other concepts, such as the common intention of the parties, uses, and their behavior. It also takes into account their legitimate expectation. However, research of the real will of the parties is less marked here than in some national legal systems. The concept is still larger than each of its applications.

Its purpose is to promote collective standards of correction, loyalty and reasonable in economic transactions. It complements the special provisions of the Principles and even get ahead of them when a limited application would lead to an unjust manifested result.

2.3. Contemporary illustrations

2.3.1. Abuse of law

Expansion of the role of good faith regarding the limiting of a right is observed mainly by the concept of abuse of rights whose applications multiply.

Many legal systems recognize that, using a contractual provision to its foreign purpose or its economy, the lender commits an abuse of law[29]. But bad faith may also result from the way that you use the law, for example, by malice or bad will.

Finally, the abuses can be found as a result of the use of law can achieve, especially when it involves a very large imbalance between rights and obligations of the parties.

In French law, based on doctrine and jurisprudence hesitations, is difficult to draw a clear border between the abuse of law and good - faith, undoubtedly related, first because hardly seems to be only a special application of more general principle of good - faith, even if it has acquired a certain autonomy.

In Germany, the right of a party may be limited, even off, if its performance is analyzed in an abuse, which was recognized in the assumptions, all inspired by Roman law.

Thus BGH, the German Federal Court of Appeal, vigorously interpreting § 138 of BGB, allows to revise the „continuing contract produce results intolerable, incompatible with the law and justice".

Anglo Saxon technique, of the *estoppel* prohibits to a person, who by his statements, his actions or his attitude, has led another to change its position to its detriment or benefit of the first one, to profit of own contradictions at the expense of other parties[30].

A person may be proud with a right for a valid reason: but this right should be protected in court if its foundation is questionable, *fortiori* if no reason justified it. Resumed by the international law, the concept of *estoppel* is the mark idea of a good - faith.

In the Roman doctrine it holds that the abuse of rights may include a very wide range of acts committed in the exercise of civil rights being contrary to good faith.

Thus: „... the exercise of a right is not abused when it is based on good faith; breach of good faith in this area means abuse of law".[31]

At the normative level, the New Civil Code provides in art. 15 that: „No rights can be exercised in order to harm or injure another or in an excessive and unreasonable, contrary to good faith", abuse of law involving such breach of good faith requirements.

[27] Capitolul 4 relating to interpretation – art. 4.8.

[28] Capitolul 5 relating to interpretation – art. 5. 102.

[29] Ph. Stoffel – Munk, *op.cit.,* 61.

[30] C. Cam Quyen Truong, *Les différends liés à la rupture des contrats internationaux de distribution dans les sentences arbitrales CCI,* (Paris: Litec, 2002), 245.

[31] D. Gherasim, *op.cit.,* 114.

In this area, Lando Principles repeated a number of current provisions implemented in various European rights.

So, the good - faith leads to interdict the forced execution of a contractual obligation, if includes unreasonable effort or expense for the debtor[32].

The principle of good - faith also applies to situations where one party creates complications for no reason.

Also, as in Rome, if someone has made statements or demonstrated behavior which acted on the basis of the contractual partner, is deprived of his right, if then take a position inconsistent with his past conduct[33].

2.3.2. Information

Rights enshrines the current legal framework, for example, guarantees completing the roman sale contract, above mentioned, developing more precise information obligation incumbent on the parties, based generally on the principle of good - faith.

This contract allows either complete or significantly change of its contents.

Thus, in the French law, the completive function in the strict sense [*stricto senso*] is lightened by doctrine and jurisprudence.

The judge has full power to impose contract obligations as the information, justified his approach by the principle of good – faith[34]. Even has the possibility to use the concept of equity to compel a party to provide information.

Some authors see, in addition, the guarantee against hidden defects, a consecration of the obligation to clarify the contractor on the not apparent defects of item[35].

Under German law, the buyer, properly informed - and it especially focused, but not limited to consumers - they can decide whether they want to acquire goods, even if there not in the best condition.

Contractors can not negotiate price but only as subject to a very precise and detailed information on the characteristics of the respective goods. The good - faith serves to judge also to define additional modalities of contract performance; so it may require from a party the information obligation (Aufklarungspflicht) when it was not expressly provided for by the parties[36]. In this area, the impact of the BGB reform in 2002, widely attributed to a willingness to conform to the spirit of European directives, had a special weight, as evidenced in particular the right of sale. Indeed, agreement on the quality of goods sold consists among others in information of the buyer about their characteristics. Also, the *common law*, as under French law, parties are required to change any information likely to influence their consent, but this is tempered by the fact of mutual obligation, to inform.

Finally if it is reasonably possible to obtain the information requested, the need of information doesn't provide the right to passivity.

Pre-phase fault information is often considered a vice of consent, meaning a reluctance fraudulent[37]. English law doesn't know the general need for information, only as statutory exception. The position was recently confirmed by the House of Lords refusing to admit a pre- contractual information requirement.

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[32] Art. 9. 102.

[33] Art. 2. 202 (3), 2. 105 (4), 2. 106 (2), 3. 201 (3), 4. 105 (1), 4. 109 (3).

[34] Court of Cassation, Civil Division, 28 February 1989, *Revue trimestrielle de droit civil*, (1990), 651.

[35] Under the French Civil Code Article 1641, M. Fabre – Magnan, *op.cit.*, 215.

[36] H. Shulte – Nölke, *The New German Law of Obligations : an Introduction*, apud René – Marie Rampelberg, *op.cit*, 57- 58.

[37] H. Mazeaud, L. Mazeaud, J. Mazeaud, *Leçons de droit civil*, tome II, vol. I, (Paris: Montchrestien, 1963), 154. For Roman law, see: D. Cosma, *General Theory of the juridical act*, (Bucureşti: Scientific Publishing, 1969), 167.

The duty to inform gained importance[38] in the Romanian law, finding a maximum application to the area of consumer protection.

It is found not only in regulating framework established O.U.G. no. 21/1992 on consumer protection[39], but also in various sector regulations such as those relating to contracts concluded away from business premises[40], the distance contract[41], insurance[42], credit for consumption[43] or tourism[44], etc.

European principles developed by the Lando neclect not more completive function of good - faith, and Article 4107, relating to fraud, provides a special obligation to information arising from this.

2.3.3. Lack of foresight

The systems that allowed a good general principle of good - faith, present throughout the contractual process, supports today the lack of foresight; Judges can then consider that a contractor of good - faith is committed under such circumstances, but it would not be done in other.

In contrast, rights hostile of recognition of general principle values of good - faith refuses to devote revising the contract for lack of foresight, in the name of respect for the binding force of conventions.

However, this objection must be refined by other techniques, the judges, particularly French judges, acknowledge implicitly the theory of the lack of provision.

Taking into account the theory of lack of provision in the contractual matter is due, in part, to the German doctrine and jurisprudence.

Under inflation that followed after the First World War, judges have wade interpreted the general concept of force majeure to include that of „economic impossibility" to free the debtor of commitments.

In addition, there is a school of thought, where the debtor is subject to benefit only in the limits of the good - faith, thus reviving the medieval jurists information.

Jurisprudential consecration of unpredictable theory, founded on the principle of good - faith, is maintained up to the reform of the BGB in 2002.

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[38] For more, see Ionuț - Florin Popa, „Undue influence and reciprocal obligations required information in contracts", *Dreptul review* (7/2002), 62 – 81.

[39] Republished under the provisions of art. V of Law no. 476/2006 amending and supplementing O.G. no. 21/1992 on consumer protection, published in Official Gazette no. 1018 of December 21, 2006.

[40] O.G. no. 106/1999 Contracts concluded away from business premises, republished under the provisions of art. V point. c) of Title III of Law no. 363/2007 on combating unfair practices of traders with customers and harmonizing regulations with European legislation on consumer protection, published in Official Gazette no. 899 of December 28, 2007.

[41] O.G. no. 130/2000 regarding protection of the consumer to sign and execute contracts away, republished under the provisions of art. V point. c) of Title III of Law no. 363/2007 on combating unfair practices of traders with customers and harmonizing regulations with European legislation on consumer protection, published in Official Gazette no. 899 of 28 December 2007.

[42] Law no. 136/1995 on insurance and reinsurance in Romania, published in the Official Gazette. no. 303 of 30 December 1995 was supplemented and amended successively by: GO no. 27/1997, Law no. 172/2004 (Official Gazette No. 473 of May 26, 2004), O.U.G. no. 61/2005 (Official Gazette No. 562 of June 30, 2005), Law no. 283/2005 (Official Gazette No. 897 of 7 October 2005), Law no. 113/2006 (Official Gazette No. 421 of 16 May 2006), Law no. 172/2006 (Official Gazette No. 436 of 19 May 2006), Law no. 180/2007 (Official Gazette No. 413 of June 20, 2007). On topic, see Irina Sferdian, *Insurance Law*, (Bucureşti: CHBeck Publishing, 2007), 81-6.

[43] O.G. nr. 50/2010 on credit agreements for consumers, published in the Official Gazette. no. 389 of 11 June 2010.

[44] O.G. no. 107/1999 on the marketing of travel packages, republished in the Official Gazette no. 387 of 7 June 2007. On topic, see Emilia Mihai, „About the contract for the sale of tourist services", *Romanian Pandects* (5/2007), 40-2.

Currently, to revise the contract if circumstances change is legally permissible, regarding to § 313 BGB to disturbances on contractual basis.

German conception regarding the theory of lack of foresight has influenced many countries like the Netherlands, Portugal and Italy.

In the French civil law was developed the concept according to which the judge is entitled to amend the contract and in some cases unforeseen by the law, if during the execution of the agreement under certain unpredictable circumstances which broke the balance of the successive regular benefits, obligations of either party becomes very burdensome[45].

One of the first decision of the Commercial Court of Cassation Chamber of 3 November 1992 establishes indirectly an obligation to renegotiation of the contract when it became disadvantageous to one party from unforeseen economic circumstances[46].

Resorting to the notion of good - faith, the French judges accept the default theory of lack of foresight.

English law doesn't know the theory of unpredictability.

However, other means, admits that a change of unforeseen circumstances beyond the control of the contractual parties may amend the content of the contract at the point of making impossible his execution.

Founded on the notion of *frustration of the contract* contained an implied term, cancellation of the contract in case of impossibility of performance under a change of circumstances is justified by reference to the reasonable man.

English law also enshrines a notion that is no stranger to the idea of good - faith. Among other things, it grants the termination of the contract, requested by one party, in case of *economic duress*.

In Romanian law, the rule is binding power of the contract under Art. 969 par. (1) Civil Code: „legal agreements have the force of law between contracting parties". Excepting the principle of binding force of contract the doctrine accepted the revision of the legal act due to the breaking of the contractual balance as a result of changing of the circumstances agreed by the parties at the conclusion of the legal act[47].

The New Civil Code expressly states hardship principle in art. 1271.

Under these provisions the parties are obliged to negotiate in order to adapt the contract or its termination if enforcement becomes excessively onerous for one party because of a change in circumstances.

Then the text gives the possibility to the judge to adapt the contract to distribute the benefits equitably between the parties and losses resulting from changing circumstances, if the parties do not agree in a reasonable time [art. 1271 par. (3) letter a)].

Lando principles provide, in Article 6111 that the parties are obliged to fulfill obligations and to renegotiate „to adapt or end their contract if the performance becomes onerous for one of them by virtue of a change of circumstances."

Thus, we can say that the theory of unpredictability admitted by *Lando principles* bears the imprint of the good - faith.

3. Conclusions

Most contemporary authors refused to define the good - faith.

Finally, its ability to adapt to different situations is difficult to reconcile with an acceptance that limits it to a more rigid frame. In addition such a definition would limit excessive the scope.

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[45] G.Ripert, *La règle morale dans les obligations civiles*, 3 e, éd. (Paris: LGDJ, 1935),152 and following, apud Paul Mircea Cosmovici, *Civil law. Real rights. Obligations. Legislation.*, (Bucureşti: ALL Publishing House, 1994), 133-4.

[46] J. Mestre, *Revue trimestrielle de droit civil*, (1992), 760 - 1.

[47] Aspazia Cojocaru, *Civil Law, General Part* (Bucureşti: Lumina Lex Publishing House, 2000), 255 – 6; Sache Neculaescu, Civil Law, Introduction to Civil Law., (Bucureşti: Hamangiu Publishing House, 2008, 174 – 5.

Therefore, we have to return to Rome and Cicero's broad conception.

However, the polymorphism of good - faith compelled the doctrine, accusing finally this ancient concept because too moralistic approach, the other terms used to better identify the realities they cover.

Its use, combined with the equity, is surprising a little, regarding to the Roman and medieval history, because the two concepts are undeniably common foundations and frequently overlap, as already pointed out for Rome.

Still other elements were juxtaposed to the good – faith.

It is proposed triptych loyalty, solidarity and fraternity, they relied on the principle of proportionality or equilibrium contract[48].

But the base remains the more general concept of good - faith, often enshrined in the texts, on which resolves the question whether all other subdivisions of doctrine evolved, just as good - faith integrates these different aspects.

Obviously, *Bona fides* of the Romans is an open content; she always carried a correction effect of rigidity of the legal and contractual rules.

Its use today as over two thousand years is proving its full contribution.

It thus appears as a fundamental concept and we believe that the future research will have to deepen this topic. As well *UNIDROIT* and the *Lando Principles* give an exceptional imperative value. Moreover, its consecration dominants the European plan making the good – faith one of constitutive element of eventually *ius commune*.

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[48] D. Mazeaud, *Loyauté, solidarité, fraternité : la nouvelle devise contractuelle?,* in L´avenir du droit. Mélanges en hommage à François Terré, (Dalloz, PUF, Éditions du Juris - Classeur, 1999), 603 and following; Ch. Jamin, *Playdoierpour Le solidarisme contractuel,* in Le contrat au début du XXIe siècle, Études offertes à Jacques Ghestin, (Paris: LGDJ, 2001), 441 and following.

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JURISDICTION RULES APPLICABLE TO CONTRACTS CONCLUDED BY ELECTRONIC MEANS

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Abstract

The purpose of this paper is to analyse the legislation, doctrinal opinions and relevant case law regarding the rules of jurisdiction applicable to the cases arising from contracts concluded by electronic means (e-contracts). Considering the elements of foreign origin that often affect this type of contracts, and the lack of a global agreement regarding international jurisdiction and recognition and enforcement of judgements, the objectives pursued by the author are:

- identification of rules of jurisdiction applicable to the cases arising from e-contracts,

- identification of problems that could arise from law's interpretation,

- issuing of the de lege ferenda proposals.

At European Union level, according to the provisions of Brussels I Regulation, as a general rule, actions against a person domiciled in a Member State shall be brought to the courts of that State.

According to the same Regulation, cases resulting from a contractual relationship may be decided by the courts of the place of performance of the contractual obligation. In lack of specific jurisdictional rules, the above rules apply to B2B e-contracts. In the case of B2C e-contracts, the consumer can bring proceedings either before the courts of the Member State of his domicile or before the courts of the Member State of the defendant's domicile. The consumer can only be sued in the Member State of his domicile. The rules protecting the consumer apply if the trader 'directs its activities' to the Member State in which the consumer is domiciled.

If the defendant is not domiciled in a Member State, the international jurisdiction is determined, in each Member State, according to its national rules of international private laws.

Key words: *jurisdiction, choice of law forum, international private law, business to business contract, consumer to business contract*

1. Introduction

This paper analyses the jurisdiction rules applicable to e-contracts, where no express choice of forum is stipulated in the contract. Additionally, the paper identifies the limits within which parties can agree upon the jurisdiction applicable in case of a dispute. The paper focuses on the jurisdiction rules applicable to both business to business (B2B) and business to consumer (B2C) trade relations.

We can identify two categories of electronic commerce: on the one hand, we talk about trade in goods and services and, on the other hand, we talk about selling electronic materials (software, images, voice, text, etc.).

In the first case, the Internet is used as a medium for communication and sometimes as location of concluding the contract, while in the second case the Internet is also the place where the contract takes place. In other words, while in the first case the contract is concluded by electronic means, although the execution takes place outside the electronic environment, in the latter case the entire transaction, from the moment an offer is made and until the obligation in question is executed, is located on the same network.

The importance of the theme results from the difficulties to establish the "place" on Internet, in absence of an express choice of jurisdiction by the parties. The subject of the paper is important both from the perspective of scientific research and from a practical perspective, as the global

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Internet enabled markets have gradually expanded, amounting today to a significant share of total world's trade.

The research method starts from analyzing comparatively the legal provisions, relevant case law and doctrine in this field in Romania, EU, and USA. It further outlines the particularities of how the "*Bruxelles I Regulation*" could be applied in Romania, and describes the status of research in the field in in Romania. Based on this foundation, the paper provides analyses and conclusions of the author which are meant to cover the missing parts in the current Romanian doctrine.

2. Determining jurisdiction in absence of choice of jurisdiction clause - contractual relationships of type B2B

Jurisdiction in international private law is the ability conferred by law to the court of a State, in rapport with the courts from other States, to solve the civil law suit with an extraterritorial element[2].

Traditional international private law takes into consideration the geographically factor when determining the jurisdiction. If one party wants to sue the other party would check where the defendant is domiciled or where it is its place of establishment.

2.a Romania – Member State of the European Union

At the European Union level, there is a constant process of regulation in order to harmonize the national provisions of Member States on the rules of jurisdiction and simplify the recognition and enforcement of judgments in civil and commercial matters.

In 1968, the Member States ratified the Brussels Convention regarding jurisdiction and enforcement of judgments in civil and commercial matters[3].

Later, in 1988, the Member States together with the AELS States signed the Lugano[4] Convention, based on the Brussels Convention.

In 2000, Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and the enforcement of judgments in civil and commercial matters was adopted, and entered into force on the 1st of March 2002 (Brussels I Regulation)[5]. Brussels I Regulation is the matrix of European judicial cooperation in civil and commercial matters. It lays down uniform rules to settle conflicts of jurisdiction and facilitate the free circulation of judgments, court settlements and authentic instruments in the European Union[6]. It replaced the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, as amended by several conventions on the accession of new Member States to that Convention.

EU regulations are binding as adopted, without needing their implementation by Member States.

The Brussels I Regulation is directly applicable throughout the European Union except for Denmark. The European Union and Denmark signed an agreement on jurisdiction, recognition and enforcement of judgements in civil and commercial matters which ensures that the provisions of the Brussels Regulation are enforced in Denmark as of the 1st of July 2007[7]. The Lugano Convention of

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[2] Dan Lupaşcu, *Drept Privat Internațional* (Bucharest: Universul Juridic, 2008), 229

[3] Curia Europa, accessed February 20, 2011
http://curia.europa.eu/common/recdoc/convention/en/c-textes/brux-idx htm

[4] Curia Europa, accessed February 20, 2100
http://curia.europa.eu/common/recdoc/convention/en/c-textes/lug-idx htm

[5] JO L 12, 16.1.2001, p.1.

[6] Commission of the European Communities, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee* (Brussels: 2009), accessed February 19, 2011,
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0174:FIN:EN:PDF

[7] JO L 299, 16.11.2005, p. 62.

1988, which regulates the same field, is mandatory for the Member States, including Denmark, on the one hand, and Iceland, Norway and Switzerland, on the other side. This Convention shall be replaced in the near future with an agreement concluded by the European Union, Denmark and the states mentioned above8.

The Brussels I Regulation applies in civil and commercial matters irrespective of the level of the court.

The provisions of the Brussels I Regulation identify only the Member State in which the courts have jurisdiction. The specific court in its territory is to be subsequently determined by the national procedural law of that Member State.

In the absence of a choice of jurisdiction clause, Article 2 of the Brussels I Regulation states *a fundamental rule* according to which persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State: *the courts of the defendant's domicile have international jurisdiction*.

From this fundamental rule there are some exceptions: rules of special jurisdiction (alternative grounds of jurisdiction – Article 5; derived jurisdiction – Article 6; protective jurisdiction in matters relating to insurance contracts, consumer contracts and individual employment contracts – Articles 8-21), rules of exclusive jurisdiction (Article 22) and the rules on prorogation of jurisdiction (Article 23-24).[9]

In order to determine whether a party is domiciled in the Member State whose courts are seised of a matter, the court shall apply its internal law. If a party is not domiciled in the Member State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Member State, the court shall apply the law of that Member State (*Article 59 of the Brussels I Regulation*).

But, in e-contracts, often happened that the trader is an association of persons, even if not legally established.

For defendants who are company or other legal person or *association of natural or legal persons*, courts determine the domicile of the defendant by applying the provisions on *Article 60 of the Brussels I Regulation*, which stipulates that a corporation or other legal person is domiciled at the place where it has is:

(a) statutory seat, or

(b) central administration, or

(c) principal place of business.

In the United Kingdom and Ireland "statutory seat" means the registered office or, where there is no such office anywhere, *the place of incorporation* or, where there is no such place anywhere, the place under the law of which the *formation* took place.

To determine whether *a trust* is domiciled in the Member State whose courts are seised of the matter, the court shall apply its rules of private international law.

From this perspective, most of the jurisdiction rules of the Brussels I Regulation applies only when the defendant is domiciled in a Member State. If the defendant is not domiciled in a Member State, the Brussels I Regulation refers to national law (subsidiary jurisdiction), except for the cases where the courts of a Member State have exclusive jurisdiction in accordance with Articles 22 or 23 of the Brussels I Regulation or in the case of certain types of disputes on specific areas (e.g., Community trademarks).

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[8] JO L 339, 21.12.2007, p. 1.

[9] Decebal Adrian Ghinoiu, *General rules of jurisdiction under the Brussels I Regulation* (Romania: Wolters Kluwer, 2009), Studii şi Cercetări Juridice Europene, Volumul Conferinței Internaționale a Doctoranzilor în Drept organizată de Facultatea de Drept şi Ştiințe Administrative din cadrul Universității de Vest din Timişoara şi Centrul European de Studii şi Cercetări Juridice Timişoara 16-18 iulie 2009, 13

In *Group Josi Reinsurance Company SA v Universal General Insurance Company* (Case 412/98), the European Court of Justice ruled that the jurisdiction rules of the Convention are in principle applicable where the defendant has its domicile or seat in a Contracting State, even if the plaintiff is domiciled in a non-member country. It would be otherwise only in exceptional cases where an express provision of that convention provides that the application of the rule of jurisdiction which it sets out is dependent on the plaintiff's domicile being in a Contracting State.[10]

In *Andrew Owusu v N.B Jackson* (Case C-281/02), the European Court of Justice held that the designation of the court of a Contracting State as the court having jurisdiction on the ground of the defendant's domicile in that State, even in proceedings which are, at least in part, connected, because of their subject-matter or the claimant's domicile, with a non-Contracting State, is not such as to impose an obligation on that State so that the principle of the relative effect of treaties is not affected[11].

As we mentioned above, the Brussels I Regulation establishes a number of special jurisdiction situations, some of them being relevant to e-contracts concluded B2B.

Thus, according to Article 5 of Brussels I Regulation, a person domiciled in a Member State may, in another Member State, be sued:

(1) *In matters related to a contract* – in the courts for place of performance of the obligation in question (*Article 5.1 a*). In *SPRL Arcado v SA Haviland* (Case 9/87), European Court of justice has been retain in the grounds: "as the court held in its judgment of 22 march 1983 in case 34/82 (martin peters bauunternehmung gmbh v zuid nederlandse aannemers vereniging ((1983)) ecr 987) the concept of "matters relating to a contract" serves as a criterion to define the scope of one of the rules of special jurisdiction available to the plaintiff . Having regard to the objective and the general scheme of the convention, it is important that, in order to ensure as far as possible the equality and uniformity of the rights and obligations arising out of the convention for the contracting states and the persons concerned, that concept should not be interpreted simply as referring to the national law of one or other of the states concerned. Consequently, the concept of "matters relating to a contract" is to be regarded as an independent concept which, for the purpose of the application of the convention, must be interpreted by reference principally to the system and objectives of the convention in order to ensure that it is fully effective ." [12]

Unless otherwise agreed, the place of performance shall be:

(a) In the case of a sale of goods, the place in a Member State where, according to the contract, the goods were or should have been delivered;

(b) In the case of services, the place in a Member State where, according to the contract, the services were provided or should have been provided. If subparagrapf (b) is not applicable, then subparagraph (a) would be.

The practical application of these provisions in sale-purchase e-contracts or licensing of intangible products (e.g., software) concluded by electronic means may encounter several difficulties, in absence of a legal definition for goods and services.

(2) *With regard to a dispute arising out of the operations of a branch, agency or other establishment* – in the courts for the place in which the branch, agency or other establishment is situated (*Article 5 point 5*)

(3) A person domiciled in a Member State may also be sued (*Article 6*):

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[10] Eur-lex Europa, Accessed February 19, 2011, http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=698J0412&lg=en

[11] Eur-lex Europa, Accessed February 19, 2011, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002J0281:EN:HTML

[12] Eur-lex, accessed February 19, 2011, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61987J0009:EN:HTML

• where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

• as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;

• on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending;

• in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights *in rem* in immovable property, in the court of the Member State in which the property is situated.

In case of special jurisdictions, only the plaintiff can choose the special jurisdiction of the court. In the same sense ruled the Cour de Cassation in *Codevlanes v. Caruel Case*[13].

2.b Romania - Outside the European Union

In international private relations, outside the European Union, Law no. 105/1992 on the regulation of private international law, as well as the international conventions still apply.

As a consequence of Romania's accession to the European Union, the national rules on international jurisdiction (Articles 148-157 of Law no. 105/1992) – containing "exorbitant" grounds of jurisdiction – will determine the international jurisdiction of the Romanian courts, on one hand, *ratione personae*, in cases where the defendant is not domiciled in a Member State – save in cases of exclusive jurisdiction and prorogation of jurisdiction provided for by the Brussels I Regulation -, and, on the other hand, *ratione materiae*, in cases involving matters which are not subject to uniform rules on jurisdiction provided for by the Brussels I Regulation or by other Community regulation enacted in the field of private international law[14].

According to Law no. 105/1992, the Romanian courts are competent to solve the processes between a Romanian party and a foreign party, or only between foreign parties, be they natural or legal persons. The meaning of term "foreign", will be established by Romanian national law (Urgent Governance Ordinance 194/2002).

The Law no. 105/1992 listed some situations in which the competence of the Romanian courts are exclusive, none of them being relevant to jurisdiction rules applicable to e-contract. In other raports with element of extraneity, the competence of Romanian courts are alternative, that means that a court from other country could be competent at the same time. Some exemples of alternative competence of Romanian courts relevant to e-contracts are:

• The defendant or one of the defendants has his domicile, residence or goodwill in Romania. If the foreign defendant has no known address, the request will be submitted to courts from the plaintiff's domicile or residence in Romania;

• The headquarters of the defendant, a registered legal entity, is in Romania. To the purpose of this article, any foreign legal person is deemed as established in Romania if it has in Romania a branch, a subsidiary, an agency or a representative;

• The place where an obligation stemming from a contract has been formed or has to be executed, even in part, is in Romania;

• Lawsuits between foreigners as if they have expressly agreed, and legal relations concerning the rights they may have in connection with property or interests of the people from Romania;

[13] Curia Europa, accessed February 19, 2011, http://curia.europa.eu/common/recdoc/convention/gemdoc2005/pdf/36-u-fr-05.pdf

[14] Decebal Adrian Ghinoiu, *above 11*, 22

• Any other lawsuits stipulated by law.

Also, the Article 153 of Law no. 105/1992, established a *subsidiary competence* of the Romanian courts: if a foreign court declines its jurisdiction over an action brought to it by a Romanian citizen, then it can be brought to the court in Romania which shows the tightest relations with the process.

If, by agreement, the parties have submitted the dispute between them to a certain court of law, the chose court will be vested with competent jurisdiction, unless:

• The court is a foreign court and the dispute falls under the exclusive jurisdiction of a Romanian court;

• The court is a Romanian court and one of the parties makes evident that a foreign court shall have exclusive jurisdiction.

If multiple Romanian courts have jurisdiction under the provisions of Law No. 105/1992 and it cannot be determined which of them is entitled to solve the case, the action shall be directed according to the rules of material competence to the District 1 Court from Bucharest or the Municipal Court of Bucharest.

Competence of the Romanian courts established under Art. 148–152 of Law No. 105/1992 is not invalidated by the fact that the same case or a related case was submitted in front of a foreign court.

The Romanian seised court checks if it has jurisdiction to solve the case. If it finds that another Romanian court has jurisdiction, it decline its jurisdiction in favour of the Romanian court which have jurisdiction. If it finds that the case is of a foreign court jurisdiction, it rejects the claim on grounds of lack of jurisdiction of the Romanian courts.

2.c Comparative law - USA

In United States of America, there are two types of personal jurisdiction: general personal jurisdiction and special personal jurisdiction.

General jurisdiction is when contacts of a defendant with a state are continuous and systematic, enough that the defendant might reasonably anticipate defending any type of claim there. Under such circumstances, the court shall have jurisdiction in disputes including those involving acts taking place outside the state constituting the forum.

Special jurisdiction is when a forum has jurisdiction over a defendant whose contacts with the forum relate to the particular dispute in issue. The personal jurisdiction over a non-resident defendant by a forum state requires only that he have certain minimum contacts with it, such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. The "minimum contacts" may be determine if: (1) the defendant must purposefully direct his activities or consummate some transaction with the forum state or a resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum and thereby invokes the benefits and protections of its laws; (2) the claim must be one arising out of or relating to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with "fair play and substantial justice".[15]

A defendant meeting the above conditions may be subject to special personal jurisdiction even if he or she has never crossed the territory of that state. Even one single contact with the state is enough for qualifying for personal jurisdiction.

As far as e-contracts are concerned, jurisdiction is judged by means of analysing the connection between the website of the defendant (irrespective of whether the website, its holder or the business behind it is located in the US or not, and the forum state.

[15] Denis T. Rice. "Jurisdiction and E-commerce disputes in the United States and Europe". Paper presented by Committee on Cyberspace Law of the Business Law Section at the Annual Meeting of the California State Bar, Monterey, October 12, 2002

Faced with such cases, the courts have tried to adapt jurisprudence in cases of standard special personal jurisdiction to the activities on the Internet.

For example, the evolution of the case law in the United States of America started with the Inset Case[16], when, although the defendant Instruction Set had no assets in Connecticut and was not physically transacting business there, the Connecticut court claimed jurisdiction only on the basis of the Instruction Set's use of a toll-free telephone number and the fact that there were at the time 10,000 Internet users in Connecticut, all of whom had th ability to access the website. Under the court's line of reasoning, any website would be subject to jurisdiction everywhere just by virtue of being on the Internet.[17]

Then, in 1996, a federal court delivered the first decision that include an overall analytical framework to test specific personal jurisdiction based on Internet activity. In Zippo Manufacturing Co. v. Zippo Dot Com, Inc. [18], the plaintiff Zippo Manufacturing, the Pennsylvania-based manufacturer of "Zippo" lighters sued the defendant Zippo Dot Com, a California-based newspaper and website editor, under the jurisdiction of the State of Pennsylvania for "Zippo" trademark infringement by registering domain names such as "zippo.com", "zippo net" and "zipponews.com".

Zippo Dot Com claimed a case of non-jurisdiction. However, the court decided that Zippo Dot Com has established contact with the state of Pennsylvania exclusively *via* the Internet.

The Zippo case has been the first to use criteria for establishing special personal jurisdiction for Internet-based activities. Such criteria have been divided into three categories depending on the type of activity pursued over the Internet.

The first category involves an defendant who "obviously pursues activity on the Internet", and contacts deliberately the state constituting forum by sending files. Under such circumstances, the court in the forum state has special personal jurisdiction over the cases involving such activities.

As opposed to the first category, the second category involves a passive website belonging to the defendant, namely, a website containing information accessible to visitors. Under such circumstances, the court has no special personal jurisdiction.

The third category lies somewhere in between the first two and needs special consideration.

When the website of the defendant is neither strongly interactive, nor totally passive, personal jurisdiction takes effect by "examining the level of interactivity and the nature of commercial information exchanged via the website".

The same criteria have been used by United States courts also in international cases although many courts requested "something extra"; for example, the fact that "the sales of the defendant were deliberately sent to the respective state" and have not been the result of isolated or fortuitous incidents.

The sending-to-a-forum-state condition is judged against the following criteria: the defendant sends electronically the result of his activity to a forum state, the defendant intends doing business or other interactions in the forum state, the defendent is involved in an activity creating a potential cause of action under the law in the forum state, with regard to a person in the forum state.

As evidence for sending-to-a-forum-state activity may be considered repeated business trips, telephone or fax communications, sale-purchase contracts signed with residents, contracts subject to the forum state's law, advertising in local newspapers, marketing strategies and business plans with regard to the forum state, etc.

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[16] Cyber law, accessed February 20, 2011
http://cyber.law harvard.edu/property00/jurisdiction/insetsum html

[17] Denis T. Rice, *above 12*, 27

[18] Find Law, accessed February 20, 2011, http://caselaw findlaw.com/us-9th-circuit/1136902 html

3. Determining jurisdiction in absence of choice of jurisdiction clause - contractual relationships of type B2C

Consumers must have access to adequate redress if problems arise after buying goods and services on the Internet. Given the "virtualization" and "de-territorialisation" of electronic commerce (e-commerce), new complex questions arise as to which courts should apply to the transactions.

If consumers have to go to court in case of a problem they must have the right to take action before their own national courts. Depriving consumers of access to their own courts in practice is denying them their right to redress.

In most e-commerce transactions, consumers already bear a disproportionate risk because business requires pre-payment (for example by credit cards). The supplier will therefore rarely have any reason to want to sue the consumer[19].

The recommendations for principles on jurisdiction on consumer cross-border contracts in ecommerce issued by Trans Atlantic Consumer Dialogue at February, 2000 was:

· The consumer is entitled to bring an action against business before a court in the consumer's home country;

· The consumer can only be pursued before a court in the consumer's home country;

· A choice of forum clause in a consumer contract is not enforceable;

· Execution of a judgement rendered in a foreign country

· Acknowledgement and effective enforcement of foreign judgements which have been rendered in the consumer's home country must be guaranteed;

· The costs and the time involved for cross-border execution must be reduce

3.a. Romania – Member State of the European Union

Section 4 of the Brussels I Regulation regulates the legal regime of jurisdiction in relation to *contracts concluded with consumers*.

The concept of "consumer contract" is a contract concluded between a person, not acting in the course of business, but acquiring goods or services for his own private consumption, from a supplier acting in the course of a business.

Article 15 of the Regulation sets *the subject of the jurisdiction rules* in contracts concluded with consumers.

By comparing the provisions in Art. 13 of the Brussels Convention with those in Art. 15 of the Brussels I Regulation, results that the Brussels I Regulation maintains the legal regime applicable to consumer protection, introducing also some changes in the scope of application. Specifically, the Brussels I Regulation has retained the first two categories of contracts {(a) a contract for the sale of goods on instalment credit terms, or (b) a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods} and amended the third.

Thus, the third category of contracts involving a consumer and subject to the Bruxels I Regulation is as follows:

"(c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities".

In the previous Convention, the third category of contracts, meant to fall under consumer protection regime, was as follows: " any other contract for the supply of goods or a contract for the supply of services, and

[19] Transatlantic Consumer Dialogue, *Jurisdiction on cross-border consumer contracts*, 2000, Doc No. Ecom-15-00, accessed February 19, 2011 http://tacd.org/index2.php?option=com_docman&task= doc_view&gid= 140&Itemid=

(a) in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising; and

(b) the consumer took in that State the steps necessary for the conclusion of the contract."

As results from a comparison of the two provisions, the concepts of "contract of sale of goods" and "service contract" have been replaced by the expression "in any other cases".

Hence, digital goods also fall clearly into this category.

Amending the third category of contracts subject to the Brussels I Regulation, in the sense that a person's activity should be directed to the Member State and not to the consumer, puts end to any doctrine talks concerning consumer qualifying as being active or passive in order to determine whether the legal regime of consumer protection applies or not.

One of the drawbacks of the Brussels I Regulation as well as the Convention is that the Community legislature has not provided a definition for the verb "to direct".

In the proposal for the Brussels I Regulation[20], the Community legislature states that the notion of "directed to a Member State" was meant to clarify the fact that the provisions in subparagraph c at Article 15 apply to contracts concluded with consumers via interactive websites accessible in the state of the consumer's domicile.

Thus, two conditions become clear regarding the question whether a website redirects its activity to the Member State where the consumer is domiciled: (1) the website should be interactive, (2) the website should be accessible in the Member State.

The notion of "interactive" has no legal definition, but it can be agreed that a website posting information of commercial nature, although being passive - there is no possibility of concluding an online contract -, falls within the definition of "interactive".

As for the notion of "accessible" in the Member State of the consumer's domicile, in the statement no. 13 of the original proposal of the Commission is maintained that "electronic commerce in goods and services by a means accessible in another Member State constitutes an activity directed to that state". The European Parliament considered this criterion as being insufficient and proposed amending the statement no. 13 as follows:

"electronic commerce in goods or services by a means accessible in a Member State constitutes an activity directed to that State if the online trading site is an active site to the effect that that trader redirects deliberately and substantially its activity to the other State."

Moreover, Parliament proposed also amending Article 15 with the following paragraph:

"The notion of 'directing the activity' shall mean when a trader redirects substantially its activity to the other Member State or to some other countries including Member States. In determining whether a trader has redirected its activity in this way, the court shall consider all the circumstances, including the trader's attempts to limit its trading activity in its transactions with consumers domiciled in a particular Member State."

The Commission rejected the Parliament's amending proposal and ruled that:

"Parliament has proposed a new paragraph to define the notion of activities directed to one or more Member States, and took into account as a criterion any attempt by the operator to limit its business to transactions with consumers domiciled in certain Member States. The Commission cannot accept such a change that contradicts the principles of these provisions. The definition is based on the American perception of a commercial activity as a factor in determining competence, while the concept is almost alien to the approaches in the Regulation. Moreover, the existence of a dispute with a consumer requires the existence of a contract with the consumer. However, the existence of such a contract will be a clear indication that the seller of goods or services directed its

[20] EC OJ 28 December 1999, C376 E/1

activity to the state in which the consumer is domiciled. Finally, the definition is not necessary since it generates market fragmentation within the European Community."[21]

This viewpoint was supported by the EU Council and reflected in the joint Statement of these institutions on Articles 15 and 73:

"The Council and the Commission point out in this connection that for Article 15(1)(c) to be applicable it is not sufficient for an undertaking to target its activities at the Member State of the consumer's residence, or at a number of Member States including that Member State; a contract must also be concluded within the framework of its activities. This provision relates to a number of marketing methods, including contracts concluded at a distance through the Internet.

In this context, the Council and the Commission stress that the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor."[22]

Relative recently, Oberster Gerichtshof (Supreme Court, Austria) was referred to two cases involving the establishment of jurisdiction in disputes with consumers:

Case C-585/08

Mr Pammer, domiciled in Austria, intended to travel on board a cargo ship from Trieste (Italy) to the Far East. Therefore, he booked a trip with the German company Reederei Karl Schlüter through a German travel agency specializing in online sales of travel by cargo ship. Mr Pammer refused boarding on the grounds that, in his opinion, the conditions on board the cargo did not meet the description he had received from the agency and requested reimbursement of the price he had paid for the journey. As Reederei Karl Schlüter has reimbursed only a fraction of the price, Mr Pammer has notified the Austrian courts before which the German company has raised an objection of lack of jurisdiction citing the fact that the Company does not perform any professional or commercial activity in Austria.

Case C-144/09

Mr Heller, with residence in Germany, booked several rooms for a period of one week at Hotel Alpenhof, a hotel located in Austria. This reservation was made by email to the address indicated on the website of the hotel Mr Heller had consulted. Mr Heller impugned the services of the hotel and left it without paying the bill. The hotel has introduced, therefore, an Austrian court action to obtain payment for the invoice. Mr Heller has raised the objection of lack of jurisdiction, maintaining that, as a consumer residing in Germany, he cannot be sued but in the courts of Germany.

Oberster Gerichtshof (Supreme Court, Austria) addressed European Court of Justice two preliminary questions in order to determine whether the fact that a company based in a Member State offers online services presumes the fact that they "are directed" also to other Member States. Thus, if so, consumers who reside in these latter countries and have used such services could also benefit, in the event of a dispute with the trader, of the more favourable rules of jurisdiction stipulated in the Regulation.

In the judgments in Joined Cases C-585/08 and C-144/09[23], European Court of Justice found that simply using a website by a trader in order to do business does not imply that its activity is

[21] Commission of the European Communities. Amended proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM (2000) 689 final, EC Official Journal 27 February 2001, C 62 E/243

[22] Europa, accessed February 19, 2011, http://ec.europa.eu/civiljustice/homepage/homepage_ec_en_declaration.pdf

[23] Eur-lex, accessed February 19, 2011, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0585:EN:NOT

"directed to" other Member States, which would trigger the protective jurisdiction rules laid down by the Regulation. The Court considered that, for these rules to be applicable to all consumers in the other Member States, the trader must have demonstrated intent to enter into business relationships with them.

In this context, the Court seeks the clues that allow it to prove that the trader would intend to enter into business relationships with consumers domiciled in other Member States. Some of these signs are the unambiguous expressions of intent on the part of the trader to attract such consumers, for example, when the trader provides services or goods in several Member States designated by name, or when it pays for an online referencing service to the operator of a search engine to facilitate the access of consumers residing in these various Member States to its website.

However, other less obvious clues, possibly a combination thereof, are also likely to prove the existence of an activity "directed to" the Member State where the consumer is domiciled. This is especially the case with the international nature of the activity in question, such as certain tour operator activities, mention of international phone dialling prefixes, use of a top-level domain name, other than the Member State where the headquarters of the trader are located, for example: *.de,* or use of neutral top-level domain names such as: *.com* or *.eu,* description of routes starting from one or more Member States to the place of service, as well as mentioning an international clientele consisting of customers residing in different Member States, especially by presenting impressions of such clients. Also, if the website allows consumers to use a different language or currency other than those normally used in the Member State of the trader, such items may in turn serve as evidence for the latter's cross-border activity.

In contrast, there is no such evidence in mentioning the email or geographic address of the dealer on a website, as neither is the indication of its phone dialling coordinates without any international phone dialling prefixes, since such information shows no indication that the merchant directs its activity to one or many other Member States.

The Court concludes that, considering the evidence, the Austrian Court must determine whether the website and the global business and trade of the traders show that they intended to enter into business relationships with Austrian consumers (Case C-585/08) or German consumers (Case C-144/09) to the effect that they were willing to enter a contract with them.

The main rule of jurisdiction is stipulated at Paragraph (1) of Article 16 in Brussels I Regulation (Article 14 of Conventions) lays down the jurisdiction of courts in actions brought by consumers:

" Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled."

Instead, a consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled.

As consumer has the possibility to bring proceedings in the courts of his domiciled, the problem of determination of the trader's domicile could be avoided.

Where the trader has an online presence and conducts business through a website by, for example, selling goods or providing services online, then the trader would be considered to be an information society services provider falling within the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce")[24]. The trader, as a service provider, is obliged under Article 5(1) of the Directive to provide easy, direct and permanent access to recipients of its services and competent authorities of, inter alia, its name and the geographic address at which it is established.

[24] Eur-lex, accessed February 19, 2011, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:en:NOT

Therefore, where the trader is an information society service provider in terms of the Electronic Commerce Directive, the aforementioned information that must be provided to its customers will assist such customers to identify at least one possible place where to sue, i.e. the country where it states that it is established.[25]

3.b. Romania - Outside the European Union

The Law no. 105/1992 on the regulation of private international law does not contain special consumer protection provisions.

3.c. The comparative law - USA

Traditionally, U.S. courts have sought to ensure a balance between consumer protection and encouraging small and medium enterprises development.

Generally, the United States, in the absence of a contractual clause designating the jurisdiction, the jurisdiction in disputes involving consumers is determined by analyzing special personal jurisdiction of traders in the countries where they direct or sell their goods and services. Some American courts have declared illegal contractual clauses designating the jurisdiction in contracts involving consumers, on grounds of their being unjust and unreasonable.

In general, American courts have held that consumer protection authorities are competent as far as jurisdiction is concerned to act against the traders outside the U.S. who prejudice American consumers.

4. Choice of forum.

Taking into consideration the difficulties in determination of the defendant's domicile or the place of performance in Internet international private law, it is recommended that the parties should have express exclusive jurisdiction clauses in agreements.

At the European Union level, the provisions of the Section 4 "Jurisdiction over consumer contracts" from Brussels I Regulation may be departed from only by an agreement:

1. which is entered into after the dispute has arisen; or

2. which allows the consumer to bring proceedings in courts other than those indicated in this Section; or

3. which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.

The general conditions on the validity of choice of jurisdiction clauses are stipulated at Article 23 of Brussels I Regulation.

According to paragraph (1) of this Article, if the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing; or

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to,

[25] Universitet I Loslo, accessed February 19, 2011, http://folk.uio no/emilyw/documents/S01_p04_ Weitzenboeck.pdf

and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

In accordance with Paragraph (2), any communication by electronic means which provides a durable record of the agreement shall be equivalent to writing.

Where such an agreement is concluded by parties, none of whom is domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settler, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved.

Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 13, 17 or 21, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22.

The validity of the agreement between the parties will be analyse according to national law. Recently, in *VB Penzugyi Lizing Zrt. v Ferenc Schneider Case*[26], the European Court of Justice has conform this interpretation ruling:

"The national court must investigate of its own motion whether a term conferring exclusive territorial jurisdiction in a contract concluded between a seller or supplier and a consumer, which is the subject of a dispute before it, falls within the scope of Directive 93/13 and, if it does, assess of its own motion whether such a term is unfair."

This situation produces undesirable consequences, in that a choice of court agreement can be considered valid in one state and invalid in another Member State. For example, in the grounds of the Case no. 2279/2007[27], the Romanian Supreme Court qualify valid an "click-wrap" agreement ("I agree with the Rules RoTLD").

According to Article 27 of Brussels I Regulation, where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

That means that one party to a choice of court agreements could seizes the courts of a Member State in violation of the choice of court agreement, thereby obstructing proceedings before the chosen court insofar as the latter are brought subsequently to the first proceedings.

The European Court of Justice, in Erich Gasser GmbH v Misat srl (Case C-116/02)[28], has confirmed that the lis pendens rules of the Brussels I Regulation requires the court second seized to suspend proceeding until the court first seized has established or declined jurisdiction.

In *Gregory Paul Turner v Felix Fareed Ismail Grovit* (Case C-159/02)[29], the European Court of Justice further confirmed that procedural devices which exist under national law and which may strengthen the effect of choice of court agreements (such as anti-suit injunctions) are incompatible with the Brussels I Regulation if they unduly interfere with the determination by the courts of other Member States of their jurisdiction under the Regulation.

The Commission has proposed to sign the Convention on choice of court agreements that was concluded on 30 June 2005 under the auspices of the Hague Conference on Private International

[26] Curia Europa, accesed February 20, 2011, http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?lang=en&num=79898890C19080137&doc=T&ouvert=T&seance=ARRET&where=()

[27] Legi-internet, accessed February 20, 2011, http://www.legi-internet ro/index.php?id=287

[28] Curia Europa, accessed February 19, 2011 http://curia.europa.eu/common/recdoc/convention/gemdoc2004/pdf/Z_en_01.pdf

[29] Eur-lex, accessed at February 19, 2011 http://eur-lex.europa.eu/Notice.do?val=287586:cs&lang=ga&list=287586:cs,&pos=1&page=1&nbl=1&pgs=10&hwords=&checktexte=checkbox&visu=

Law. The Convention will apply in all cases where at least one of the parties resides in a Contracting State other than an EU Member State, whereas the Regulation applies where at least one party is domiciled in a Member State. As a result, a coherent application of the rules of the Convention and those of the Regulation should be ensured.

In international rapports outside European Community, the choice of forum clauses will be analysed in Romania in base of Law. no. 105/1992. This clause is known in Romanian doctrine[30] as a "convention of jurisdiction prorogation", which could be valid unless: the proceedings are in exclusive jurisdiction of Romanian courts, but parties chose an foreign court; or, the parties chose a Romanian court, but one of the party invoke the exclusive jurisdiction of a foreign court.

In USA, the clause of a choice of forum is generally uncontroversial and enforced, if the parties to the contract are presumed to have equal bargaining power and, therefore, an equal ability to accept or reject such clauses.

The e-contracts frequently provide choice of forum clause. The problems that could arise are the validity of the conclusion of an contract by electronic means.

For example, a "click-wrap" choice of forum could be valid if the user has a reasonable opportunity to access the terms and conditions an review them before being bound, the terms and conditions should be sufficiently conspicuous and readable, there is a clear and unambiguous manifestation of assent to the terms and conditions.

5. Conclusions

In the absence of a valid "choice of forum" clause, the jurisdiction rules that apply to international proceedings arising from e-contracts depend on the type of transaction concluded, and on the domicile of the defendant.

After Romania's accession to the European Union, as a general rule, actions against a person domiciled in a Member State shall be brought to the courts of that State. According to the special jurisdiction regulated by Brussels I Regulation, cases resulting from a e-contracts may be decided by the courts of the place of performance of the contractual obligation, *except for the business to consumer (B2C) e-contracts*. In the case of B2C e-contracts, the consumer can bring proceedings either before the courts of the Member State of his domicile or before the courts of the Member State of the defendant's domicile. The consumer can only be sued in the Member State of his domicile. The rules protecting the consumer apply if the trader "*directs its activities*" to the Member State in which the consumer is domiciled.

If the defendant is not domiciled in a Member State, the international jurisdiction is determined, in each Member State, according to their national rules of international private laws (Law no. 105/1992, in Romania).

The *choice of forum clause* determines the court of jurisdiction chosen by parties, but the court seseised by the plaintiff must determine the validity of the *choice of forum clause* according to the internal law.

The online disputes resolution clauses are not treated by the present paper, being open for future research.

References:

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CONSIDERATIONS REGARDING THE DIVORCE BY AGREEMENT OF THE SPOUSES, ACCORDING TO THE NOTARY PROCEDURE

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Abstract
By amending the Family Code according to the provisions of the Law no. 202/2010 regarding some measures in order to speed the solving of processes ("Law of small reform"), representing the introduction to the New Civil Code adopted by the Law no. 287/2009, published in the Official Gazette no. 511 of July 24, 2009, being to become effective, is inserted for the first time the possibility to end the marital relations also before the registrar of births, marriages and deaths or notary public, in strict terms of law. For instance, if there was an agreement between the spouses, without minor children, born during the marriage or adopted, the legislator sets up the possibility to evade the contentious proceeding before the common law courts and allows the spouses to choose between the administrative procedure and the notary procedure in order to dissolve the marriage.
In other words, is legislated the possibility of spouses to cease the marital relations also by mutual agreement, like at the time of their marriage, ascertained by the registrar of births, marriages and deaths or notary public. Therefore, on the one hand, is expressed the principle of legal symmetry in this matter, in terms of recognition regarding the ascertaining of the existence of mutual agreement, without the intervention of the magistrate, according to the maxim "mutuus consensus, mutuus dissensus". On the other hand, legitimately, the legislator has in view to eliminate the settlement of the applications for divorce by the courts, given that there is the convergence of spouses' will and no minor child, for the purpose of relieving the courts, a solution that seems quite logical considering that the settlement of such case does not require the jurisdictional work.
As a conclusion, an analysis of the new vision of the legislator as regards the settlement of divorce by notary non-contentious procedure is absolutely necessary given that the New Civil Code reintegrates the provisions of the Family Code in the spirit of the unitary conception of the Romanian pre-war private law school.

Key words: *divorce, agreement, notary, conclusion, certificate*

Introduction

This paper approaches a very topical subject, which represents an element of novelty, already with great practical application having in view that the legal regulation governing this procedure is in force since a too short time: Divorce by notary procedure.

The divorce procedure has known over the time a series of changes designed to simplify and accelerate the regulation of relations between spouses when the marriage cannot continue and they intend to terminate the marriage by agreement without being necessary to disclose the reasons which led to this decision. The Law no. 59/1993 which also amended the provisions of article 38 of the Family Code[1] introduced for the first time the possibility for the court to pronounce the divorce and only by agreement of both spouses, given the previous legislation in this field of the Family Code that not only did not allow the divorce by mutual consent of the spouses but has attributed to the

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[1] Family Code-Law no. 4 of January 4, 1954 which entered into force on February 1, 1954, amended by Law no. 4 of April 4, 1956 and republished in the Official Gazette, Part I, no. 13 of April 18, 1956, further amended, the last change being made by Law no. 202 of October 25, 2010 regarding some measures to accelerate the settlement of the cases, published in the Official Gazette of Romania, Part I, no. 714 of October 26, 2010 which entered into force on December 27, 2010

dissolution of marriage (by divorce) an exceptional character[2]. Until the amendment of the Family Code by Law no. 202/2010 the divorce by agreement of the spouses could be pronounced only by the court in case of the cumulative fulfillment of two requirements: a) before the application for divorce must have passed at least one year after the marriage conclusion and b) there are no minor children as a result of that marriage. According to the current regulation of the Family Code, as amended by Law no. 202/2010, the procedure of divorce by agreement of the spouses has been simplified more and more and the jurisdiction for settlement was assigned also in the task of other authorities than the court: the notary public and the civil status registrar. Thus, the court may pronounce the divorce by agreement of the spouses regardless the period of marriage and regardless if there are minor children as a result of that marriage, being removed the both requirements from the old regulation of article 38 of the Family Code, the notary public or the civil status registrar being allowed to find the dissolution of marriage by agreement of the spouses by issuing a certificate of divorce to that effect, if the spouses have no minor children, born during the marriage or adopted, according to the new introduced articles 38^1-38^4 of the Family Code.

By introducing the divorce proceedings by notary procedure the legislator succeeded both to relieve the courts of a number of additional cases, but also to ensure the parties, for the case when there is an agreement as regards the dissolution of marriage and the legal conditions are met, for achieving a competent procedure by an expert of law who will keep watch that their rights and interests to be observed, as well as the subsequent direct access to the conventional procedure of partition to be carried on before the same authority.

Jurisdiction

According to article 38^1 of the Family Code and article 87^1, the Regulation implementing the Law of notaries public and notary activity no. 36/1995, as amended and supplemented, the jurisdiction in the field of divorce by agreement of the spouses by notary procedure belongs to the notary public having the office located in the district of the court in whose territorial jurisdiction is the place of the marriage conclusion or the last common residence of the spouses[3]. For Bucharest, the jurisdiction belongs to any of the notaries public who perform their activity in the territorial district of the Tribunal of Bucharest, properly applying the provisions of article 114 of Law of the notaries public and notary activity no. 36/1995, as amended and supplemented[4]. In order to establish the territorial jurisdiction, the public notary will check if the above mentioned condition is fulfilled and if the spouses have not previously appealed to another public notary.

The proof of the place of marriage conclusion (city in which is located the town hall or the civil status office where the marriage was celebrated or the certificate of marriage was transcribed) will be done with the certificate of marriage attached to the application. If the marriage was concluded at the diplomatic missions or at the consular offices, the territorial jurisdiction belong to the notary public of Bucharest, because the place of marriage conclusion is considered the Town Hall of sector 1 in whose civil status register are recorded the certificates of marriages issued by the diplomatic missions or by the consular offices.

The proof of the last common residence is made, where appropriate, with the identity card, if it was the residence of one spouse, or with the document proving the ownership or the use holding (sale-purchase contract, donation, lease, free loan etc.). If the spouses have lived together in a house

[2] Ion P. Filipescu, *Tratat de dreptul familiei ("Treaty of Family Law"), the 5th* edition, revised and supplemented (Bucharest:All Beck, 2000), 200-201

[3] Article 375 (1) of the New Civil Code provides the compliance with the same requirements in order to determine the territorial and material jurisdiction of the notary public in the field of divorce

[4] Law of the notaries public and notary activity no. 36/1995 of May 12, 1995 was published in the Official Gazette of Romania, Part I, no. 92 of May 16, 1995, as amended and supplemented

for which they have no title, the proof is made by authentic statement of both spouses given on their own responsibility, being recorded both in the application for divorce and in the admission conclusion based on which the certificate of divorce will be issued.

At the same time, the notary public will establish also the material jurisdiction, checking if both spouses are present before him, if they signed the application for divorce before him and if they stated in the application for divorce that: a) they agree the divorce, b) they have no minor children born or adopted during the marriage, c) they have agreed on the name that each of them will have after the divorce, respectively the name had on before the marriage or during the marriage, d) none of the spouses is laid under interdiction.

Application for divorce

In order that the notary public may check the fulfillment of the above mentioned requirements, he must be, first of all, informed by the spouses by submitting an application which, as I stated above, shall be made in writing and signed personally before the notary public to whom the application is submitted by both spouses. By derogation from the provisions of article 614 of the Code of Civil Procedure in the field of divorce by the notary procedure, the conventional representation of the spouses is not allowed, without any exception, as foreseen in the provisions of article $87^{1}(7)$ of the Regulation implementing the Law of notaries public and notary activity no. 36/1995, so that the spouses will personally appear before the notary public intimated both for the submission of the application for divorce and at the term allowed for the dissolution of marriage[5]. Therefore, the notary public will not authenticate powers of attorney of representation in case of divorce by the notary or the administrative procedure (before the civil status registrar), excepting those required for the representation in case of divorce before the court, under the article 614 of the Code of Civil Procedure.

With the submission of the application for divorce, the spouses will submit to the notary public the certificate of marriage issued by the Romanian authorities, in original and certified copy, the certified copy is to be attached to the application for divorce and the original will be kept by the notary public until the issuing of the certificate of divorce. The application for divorce will be accompanied by photocopies of the spouses' certificates of birth and of their identity documents.

By derogation from the provisions of Law of the notaries public and notary activity no. 36/1995 and the Regulation implementing the Law of the notaries public and notary activity no. 36/1995 regarding the identification of the parties, within the divorce proceedings, the identification of the spouses will be made by the notary public only based on the identity documents submitted by both spouses when filing the application for divorce. Thus, the proof of identity could be made by the spouses with one of the following documents: a) for Romanian citizens: the identity card, the temporary identity card, the ID, according to the provisions of article 11 of the Emergency Ordinance no. 97/2005 regarding the records, the domicile, the residence and the identity documents of the Romanian citizens, as amended and supplemented, and in case of Romanian citizens residing abroad, the passport in which is provided the domicile, as allowed by the provisions of Law no. 248/2005 regarding the regime of free movement of the Romanian citizens abroad, as amended and supplemented, the passport to be within the validity period, both at the time of application and at the issuing date of the certificate of divorce; b) for citizens of the European Union or European Economic Area: the identity document or the passport issued by the state to which belongs; c) for stateless: the passport issued under the Convention regarding the Status of Stateless Persons of the year 1954, accompanied by the temporary or permanent residence permit, as appropriate; d) for foreign citizens from third states: the passport issued by the state whose citizens they are, in which to

[5] According to article 376 (1) of the New Civil Code, the application for divorce is filed by the spouses together

be applied the visa for entry into the territory of Romania that must be valid both at the time of application for divorce and at the issuing date of the certificate of divorce; e) for foreigners who were granted a form of protection in Romania: the travel document issued under the Convention of Geneva of the year 1951 or, as appropriate, the travel document for the foreigners who obtained a subsidiary protection - conditioned humanitarian protection; f) for the applicants foreign citizens for asylum in Romania: the passport issued by the state whose citizens they are, accompanied by the temporary identity document.

The provisions of Law of the notaries public and notary activity no. 36/1995 and the Regulation implementing the Law of the notaries public and notary activity no. 36/1995 regarding the taking of consent at the conclusion of the notary documents and proceedings if one spouse or both of them are deaf, dumb, deaf and dumb, blind or non-connoisseur of the Romanian language, as well as at the conclusion of the notary documents and proceedings outside the notary office are accordingly applied. In such situations, the interpreter, by who is taken the consent, will sign the application for divorce, alongside the spouses, and the conclusion of acceptance or rejection of the application for divorce, alongside the notary public. If one spouse is illiterate, he/she will sign the application for divorce, the conclusion and the other procedural acts by applying the footprint of the forefinger on his left hand.

In accordance with article 871 (2) of the Regulation implementing the Law of the notaries public and notary activity no. 36/1995, upon receipt of request, the notary public verifies in advance the territorial jurisdiction. If, upon verification, is established that the divorce is in the jurisdiction of another notary office, he will direct the parties to address to the competent notary public, giving the application back to the spouses together with its appendixes, without recording in the register of divorces[6]. The same solution will be adopted also if the other conditions for the registration of the application for divorce are not fulfilled, and the parties insist to register the application, in which case the notary public will proceed to the registration of the application in the register of divorces, only if the spouses have paid the fee, and will issue a conclusion of rejection, motivated in fact and in law. The conclusion of rejection is not subject to any appeal.

If more notary offices are competent, the competence for fulfillment the divorce proceedings will belong to the first intimated office.

Before checking the territorial jurisdiction, the notary public will verify that, as regards the dissolution of marriage, there are foreign elements and will proceed according to the legal provisions governing the dissolution of marriage where there are legal relations with foreign elements[7].

After checking the material and territorial jurisdiction and all the conditions foreseen in article 38^2 of the Family Code, as amended and supplemented, and by the Regulation implementing the Law of the notaries public and notary activity no. 36/1995 (including the identity of the spouses and if the data entered in the application for divorce correspond to the information contained in the documents attached to the application), as well as after the payment of the notary's fee, the notary public will proceed, at the date of receipt of the application, to the registration of the application in the register of divorces kept by the notary office and the communication to the National Register of records of the applications for divorce[8], managed by Infonot Systems SRL[9] of the request for the registration of the

[6] The Order of the Minister of Justice no. 81/C/2011 published in the Official Gazette of Romania, Part I, no. 59 of January 24, 2011 regarding the supplement of the Regulation implementing the Law of the notaries public and notary activity no. 36/1995 following the amendments in the Family Code by Law no. 202/2010, introduces two new letters in the article 40 paragraph (1), after the letter l): m) the register of divorces; n) the index of the register of divorces

[7] Article 87^1 paragraph (5) of the Regulation implementing the Law of the notaries public and notary activity no. 36/1995, as amended

[8] National Register of records of the applications for divorce aims the keeping, at national level, of the records of the applications for divorce addressed to the notaries public in order to avoid the double registration of the applications for divorce, as well as the records of the solutions given by the notaries public

application for divorce. The application for divorce will be registered in this register if, following the verifications made by Infonot Systems S.R.L., is found that there is no other application for divorce registered by the spouses. If, following the verifications, is found that the spouses did not appeal to another notary public, Infonot Systems S.R.L. will register the application on behalf of notary office where the applicant notary unfolds his activity and will issue to him a certificate attesting the number under which the application was registered in the National Register of records of the applications for divorce and that the application for divorce is found at the notary office in order to be settled. If, following the verifications, is found that the spouses have addressed a similar application to another notary public, the registration number being already assigned for a certificate of divorce issued to the same spouses, Infonot Systems S.R.L. will issue a certificate and the notary public will reject the application and will guide the spouses to address to the first intimated notary, without being bound to refund the fee charged when submitting the application.

The Term

Receiving the certificate, the notary public will proceed to the registration of its number in the register of divorces and setting the term for the dissolution of marriage, which occasion the spouses will have to personally appear. In the absence of the certificate issued by Infonot Systems S.R.L., the notary public cannot establish a term for the dissolution of marriage.

In accordance with article 38^2 of the Family Code, the term set by the notary public for the possible withdrawal of the application for divorce is of 30 (calendar) days[10]. The term may not be shorter, it may not be extended by granting a new term and it will be recorded by the notary public both in the application for divorce and in the register of divorces. The notary public will also take into account, when granting the term of 30 days, whether term will expire in a day in which the notary office is closed for justifiable reasons (non-working days, legal holidays, rest leave), in which case the term may be extended until the first working day. For the calculation of the term of 30 days, will be applied the provisions of article 101 and the following of the Code of Civil Procedure in the field of calculation of the procedural terms. The notary public will have in view also the availability of spouses to be present at date to be determined, in which case he may, if one spouse requests and the other agrees or both of them request, to set a term longer than 30 days.

The notary public will set just one term, which he will orally notify to the parties, specifying the date (day, month, year) and the hour when they must personally appear at the notary office. If, at the determined term, the notary public may not be present for justified reasons, to settle the application for divorce, he will notify the Chamber of the Notaries Public in order to delegate another notary public to the notary office, to settle the application.

Admission/rejection conclusion of the application for divorce

At the expiry of the determined term, the notary public verifies if: a) both spouses are personally present, b) insist on the application for divorce, c) agree the name they will have after the divorce, d) maintain the other statements given when submitting the application of divorce, e) can express their free and uncorrupted consent, f) none of the spouses is laid under interdiction, g) the

[9] Infonot Systems S.R.L. is the administrator of the National Registers of computerized records of some notary acts and procedures foreseen in article 56^1 of the Regulation implementing the Law of the notaries public and notary activity no. 36/1995. By the Order of the Minister of Justice no. 81/C/2011, in the article 56^1 after letter d) was introduced a new letter, the letter e): National Register of records of the applications for divorce (NRRAD) in which are registered the applications for divorce by the notary procedure

[10] The term of 30 days for the possible withdrawal of the application for divorce is also governed by article 376 (1) of the New Civil Code

birth or the adoption of a child has not occurred until the set term. The persistence or the lack of persistence of each of the spouses is found in the conclusion of admission, respectively of rejection of the application for divorce in accordance with article 87^3 paragraph (5) of the Regulation implementing the Law of the notaries public and notary activity no. 36/1995. If, following the verifications, the notary public finds that the above requirements are met and, simultaneously, the other conditions foreseen in the Family Code and in the Regulation implementing the Law of the notaries public and notary activity no. 36/1995, will proceed to the drawing up of the conclusion of acceptance of the application for divorce in which he will ascertain the dissolution of marriage and will dispose the issuing of the certificate of divorce. The conclusion of admission will be signed both by the notary public and by both spouses and, as appropriate, by an interpreter. If, following the verifications, the notary public finds that have occurred new elements leading to a cumulative non-fulfillment of the above conditions, he will proceed to the drawing up of the conclusion of rejection in which he will dispose the rejection of the application for divorce. The conclusion of rejection will be sent the same day, electronically, to Infonot Systems S.R.L. to make the appropriate mentions in the National Register of records of the applications for divorce.

Against the conclusion of rejection there is no appeal, but the spouses may address the application for divorce to the court for the dissolution of marriage by agreement or for other reason foreseen by law. Either spouse may apply, by separate proceedings, to the competent court to repair the damage caused by the abusive refusal of the notary public to ascertain the dissolution of marriage by agreement of the spouses and to issue the certificate of divorce (article 38^4 of the Family Code).

The application for divorce, the conclusion of admission/rejection of the application for divorce has the same number as the number of the file of divorce in the register of divorces kept by each notary office.

If, after the registration of the application for divorce in the National Register of records of the applications for divorce have passed 60 days and during this period the notary office has not requested a number of certificate, the register operator will proceed to the closing of the mention in this register, in which case a new application for divorce of the same spouses may be registered. Where, in the range between 30 and 60 days after the submission of the application, another notary office asks the registration, the operator of the National Register of records of the applications for divorce will inform the notary, upon the issuing of the certificate, that the notary office which received the application has not requested a number of certificate of divorce, with possibility that the application be rejected[11].

Certificate of divorce

In case of finding the divorce by the notary public, he will issue the certificate of divorce, immediately submitting a certified copy thereof to the town hall of the place where the marriage was concluded, in order to make mention in the marriage act, in accordance with the provisions of article 38^3 of the Family Code.

Before the issuing of the certificate of divorce, the notary public will require, through Infonot Systems S.R.L., the assignment of the number of the divorce certificate from the Sole Register of certificates of divorce kept by the Ministry of Administration and Interior, and the number assigned in this register shall be written down by the notary public in the certificate of divorce. If, following the submitted application, is found that in this register is already assigned the registration number for

[11] Article 7 of the Methodological Norms regarding the organization and operation of the National Register of records of the applications for divorce (NRRAD), approved by the Decision no. 4/January 14, 2011, adopted by the Executive Office of the Council of the National Union of the Notaries Public in Romania

a certificate of divorce issued to the same spouses, the applicant notary public will dispose, by conclusion, the rejection of the application for divorce, as having no object, according to the provisions of article 87^6 paragraph (2) of the Regulation implementing the Law of the notaries public and notary activity no. 36/1995, making the appropriate mention both in the register of divorces and in the National Register of records of the applications for divorce.

The drawing up and signing of the conclusion of admission by all the parties, the obtaining of the number of the divorce certificate and the drawing up and issuing of the divorce certificate will take place at the same day, respectively at the term granted for the dissolution of marriage.

The certificate of divorce will record the dissolution of marriage by agreement of the spouses before the notary public and the surname that the former spouses will have after the divorce.

As noted above, after the issuing of the certificate of divorce, the notary public shall immediately send a copy thereof to the town hall of the place where the marriage was concluded or the place where the certificate of marriage issued in another state was transcribed, in order to make mention about the divorce in the marriage act and an original copy to the civil status register kept by the people record department of that county or of Bucharest.

Once with the issuing of the certificate of divorce, the notary public gives back to the spouses the certificate of marriage on which he will mention: "Dissolution of marriage under the certificate of divorce no. ..../...".

According to the article 39 of the Family Code, the marriage is dissolved on the date of issuing of the divorce certificate. In relation to third parties, the patrimonial effects of marriage shall cease on the date of mention about the certificate of divorce on the edge of the marriage act or the date on which they have been informed about the divorce in another way. According to article 385 of the New Civil Code, the matrimonial regime (article 312 (1) of the New Civil Code provides that the future spouses can choose as matrimonial regime: lawful community, separation of goods or conventional community) ceases between the spouses on the date of introduction of the application for divorce, but the spouses may require together to the notary public to find that the matrimonial regime ceased on the date of separation in fact. The legal matrimonial regime applies whenever the future spouses have not concluded a matrimonial convention[12].

Conclusions

According to the current regulations, the procedure of divorce by agreement of the spouses may be accomplished not only by the court, but also by non-contentious procedure performed by the notary public or by the civil status registrar. When the spouses choose the notary procedure, fulfilling the conditions foreseen by law, the term for the settlement of the application for divorce is very short (30 days), at the end of which, if they insist in the dissolution of marriage, obtain the certificate of divorce which opens the way towards solving the other effects of marriage which are not in the jurisdiction of the notary public or the cessation of common property through judicial or conventional partition, in a shorter time and enjoying a considerably increased comfort than when this procedure was in the exclusive jurisdiction of the courts.

The current regulations are in full compliance with the ones of the New Civil Code to meet the needs of a rapidly and continuous changing society, to which the old regulations, inspired from the date they were adopted, could no longer meet the need to have options with multiple settlement alternatives.

[12] Marieta Avram and Cristina Nicolescu, *Regimuri matrimoniale (Matrimonial regimes)* (Bucharest: Hamangiu, 2010), 28

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INVESTING FORMULA ENFORCEABLE BILL OF EXCHANGE, PROMISSORY NOTES AND CHECK

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Abstract
Right bills constituted a proper, solemn and formal training both bills of exchange, promissory notes or checks, but also in terms of bills receivable realization and autonomy is manifested in the sphere of application, and in priority and exclusivity of its incidence from common law, namely the Civil Procedure Code. Legal rules relating to bills of rights realization is a perfect rigorous regime. The special regime, derogating governing procedure execution quality bills is justified and bills of exchange, promissory note and check to be instruments of scriptural money, qualified as a legal system requires great rigor. The procedural and enforcement proceedings taken by the legislature to ensure fulfillment of trade are much stricter in the right bills to go faster and safer way to realization of rights emerge. Debt securities notes (bills of exchange, promissory notes and check), by their specificity, have boosted the feature of incorporating the right way, so the title itself forms a unit with built right, subject as such forms and rules special, simple operation, formation, movement and recovery, and their binding force is a substantial, not procedural, as the essence of such securities, as their constitution and other necessary items.

Key words: *bill of exchange, promissory notes, checks, appended to the binding, securities.*

General considerations

According to article 374 of the Civil Procedure Code, "the judicial decision or any another title is executed only if it is invested with executory clause stipulated by article 269 paragraph 1, except the provisional executory closures and other decisions or documents which are executed without executory clause.[1]

The investiture of the decisions with executory clause is made by the court of justice.

The consent of the forced execution in Romania of the decisions pronounced in foreign countries is done according to the special law."

It can be thus noticed that the text has the significance of specifying that the formality of the investiture with executory clause is required for any title that is executed, whether it is a court order or another document ascertaining the claim.

But, as it can be seen, certain exceptions were established from this rule relating to the executory closures, interim executory orders, as well as other decisions or documents specified by law.

As a consequence of their executoy character set by law, these documents are executed without investiture with executory clause.

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[1] Article 269 of the Civil Procedure Code

Court orders will be invested with executory clause, if the law does not provide otherwise. The executory clause has the following content:

"We, the President of Romania"

(Here is the wording of the decision).

"We authorize and order the execution bodies to implement this decision. We order the public force officials to support the execution of this decision, and the prosecutors to insist on carrying it, according to the law. To faith, this decision was signed by ..... (Followed by the signatures of the President and of the clerk of court)."

The decision invested will be given only to the party who won or to his/her representative.

Under the provisions of article 376 of the Civil Procedure Code, "the decisions which remained definitive or became irrevocable, as well as any other decisions or documents are invested with the executory clause stipulated by article 269 paragraph 1 so that they become executory in cases specifically provided by law.[2]

The documents authenticated by a diplomatic or consular representation of Romania will be invested with executory clause by the court of justice of the residence of one of the parties taking part to the authentic document.

If none of the parties has the known residence in the country, the investiture with executory clause is done at the District III Court of justice of Romanian's capital city."

At the same time, these legal provisions should be corroborated with the ones in article 374^1, where the legislator expressly stipulates that: "the documents to which the law recognizes the character of writ of execution are executed without the investiture with executory clause."

This text establishes that all documents to which the law gives the character of writ of execution are fructified without further imposing the formality of the investiture with executory clause.

Concerning the interpretation and application of the provisions of article 374^1 of the Civil Procedure Code, according to which, the documents to which the law recognizes the character of writ of execution are executed without the investiture with executory clause, reported to the provisions of article 61 of Law no. 58/1934 on the bill of exchange and the promissory note, and of article 53 of Law no. 59/1934 on the cheque, on the investiture with executory clause of the bill of exchange, the promissory note and the cheque.[3] Both laws have largely taken over the solutions adopted by the Geneva Convention of June 7, 1930 on the Uniform Law on bills of exchange and promissory notes and the Geneva Convention of March 10, 1931 on the Uniform Law on cheques.[4]

Thus, according to article 61 paragraph 1 of Law no. 58/1934 on the bill of exchange and the promissory note, "the bill of exchange has the writ of execution for the capital and accessories, established according to article 53, 54 and 57."

According to article 53 of Law no. 58/1934, the holder may ask on grounds on non-payment:

C:\Documents and Settings\Dan\Local Settings\Sintact 2.0\cache\Legislatie\temp\00000002.HTML - #1. The amount shown in the unsupported or unpaid bill of exchange, with the interest, if it has been stipulated.

C:\Documents and Settings\Dan\Local Settings\Sintact 2.0\cache\Legislatie\temp\00000002.HTML - #2. The legal interest calculated starting with maturity.

3. The protest expenses, those of the notifications made, as well as other justified expenses.

If the non-payment (regression) is exercised before maturity, a discount will be deducted from the amount shown on the bill of exchange. This discount will be calculated according to the National Bank discount rate in force at the time of the non-payment, at the owner's residence.

The person who has paid the bill of exchange by regression may require from his endorsers:

- C:\Documents and Settings\Dan\Local Settings\Sintact 2.0\cache\Legislatie\temp\00000002.HTML - #The total amount paid.

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[2] V.M.Ciobanu, G.Boroi – Drept procesual civil (Civil procedural law), Ed.All Beck, 2005. p. 513.

[3] Law no.58/1934 on the bill of exchange and the promissory note, published in the Official Gazette no.100/01.05.1934, amended by GO no.39/2008 published in the Official Gazette no.284/11.04.2008.

Law no.59/1934 on the cheque, published in the Official Gazette no.100/01.05.1934, amended by GO no. 38/2008 published in the Official Gazette no.284/11.04.2008.

[4] O.Căpăţînă – Legislaţia cambială (Bills legislation), Ed.Lumina Lex, Bucureşti, 1994, p.75-111.

- C:\Documents and Settings\Dan\Local Settings\Sintact 2.0\cache\Legislatie\temp\00000002.HTML - #The legal interest on this amount, calculated effect from the day he paid the sum.
- C:\Documents and Settings\Dan\Local Settings\Sintact 2.0\cache\Legislatie\temp\00000002.HTML - #The costs.

Any person, being entitled to exercise the non-payment, maybe if not otherwise stipulated, to compensate oneself through a new bill of exchange (a counter bill of exchange) drawn at sight on to one of his endorsers and payable at his residence.

The counter bill of exchange comprises, in addition to the amounts shown in articles 53 and 54, as a right to brokerage and stamp duty for it.

If the counter bill of exchange is drawn by the owner, the amount is fixed by the course of a sight bill, drawn from the place where the original bill is payable on the place of residence of the endorser. If the counter bill of exchange is drawn by an endorser, the amount is fixed by the course of a sight bill, drawn from the place where the drawer of the counter bill of exchange resides on the place of residence of the endorser.

At the same time, through article 106 from this normative act, this character is attributed equally to the promissory note, to which the stipulations relating to the bill of exchange are applicable to the extent that they are not incompatible with its nature.

Therefore, article 61 paragraph 1 of Law no. 58/1934 recognizes the character of writ of execution of both the bill of exchange and the promissory note.

At the same time, the character of writ of execution is recognized for the cheque through article 53 paragraph 1 of Law no. 59/1934, as further amended, which states that: "The cheque has value of writ of execution for the capital and accessories, established according to articles 48 and 49."

The stipulations of article 320 letter a from the Framework rule no. 6 / 1994 are similar concerning the trade made by the banking companies and other crediting companies, with bills of exchange and promissory notes, based on Law no. 58/1934 on the bill of exchange and the promissory note, according to which "The bill of exchange has value of writ of execution for the amount of money written on the writ together with the interest (if it was stipulated), for the legal interest calculated starting with the maturity for the expenses of protest and the notification costs, as well as for other justified expenses".[5]

The Code of Civil Procedure through article 376 no longer lists among decisions the documents subject to the investiture with executory clause, since, by ascertaining certain and liquid claims they have the power of a writ of execution on their chargeability, so that these writs do not have to be invested with executory clause.[6]

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[5] BNR (NBR) – FRAMEWORK RULES no. 6 from 8 March 1994 on trade made by the banking companies and other crediting companies, with bills of exchange and promissory notes, based on Law no.58/1934 on the bill of exchange and the promissory note, as amended by GO No.11/1993, approved and amended by Law no.83/1994, published in the Official Gazette no.119 bis/14.06.1995.

The rule no.11/2008 to amend the Framework-rules no.6/1994 on trade made by banking companies and the other crediting companies, with bills of exchange and promissory notes.

Rule no.7/2008 for the amendment and completion of the Framework rules of the National Bank of Romania (BNR) no. 6/1994 on trade made by the banking companies and the other crediting companies, with bills of exchange and promissory notes, based on Law no. 58/1934 on the bill of exchange and the promissory note, amended by GO no. 11/1993, approved and amended by Law no. 83/1994.

Rule no.2/2009 on the completion of the rule of the National Bank of Romania no. 7/2008 for the amendment and completion of the Rule of NBR no. 6/1994 on trade made by the crediting institutions with bills of exchange and promissory notes.

[6] Article 66 of Law no.36/1995of public notaries and the notarial activity, published in the Official Gazette no.92/16.05.1995.

Therefore, the documents listed, which ascertain a definite, liquid and claimable monetary obligation, are executed by force by the request directly addressed to the bailiff, without being necessary to undergo the non-contentious judicial procedure of investiture with executory clause.

Nevertheless, in practice of the courts of law it has been ascertained that there is no unitary viewpoint concerning the interpretation and application of the stipulations of article 374^1 of the Civil Procedure Code compared to the stipulations of article 61 of Law no. 58/1934 on the bill of exchange and the promissory note, and of article 53 of Law no. 59/1934 on the cheque, concerning the investiture with executory clause of the bill of exchange, promissory note and cheque.

Thus, some courts of justice have considered unnecessary the investiture with executory clause of the bill of exchange, promissory note and cheque, on the ground that article374^1 of the Civil Procedure Code specifically stipulates that "the documents to which the law recognizes their character of writ of execution are executed without investiture with executory clause."

Other courts of justice, on the contrary, have pronounced in the sense that in order to be executed, these instruments of payment, even if the law recognizes their nature of writs of execution, must be invested with the executory clause stipulated by article 269 paragraph 1 of the Civil Procedure Code.

The motivating this solution it was noted that executing the securities from the category to which the bill of exchange, the promissory note and the cheque belong is governed by special rules, which, by waiver from the provisions of article 374^1 of the Civil Procedure Code require their investiture with executory clause.

The issue of law that was required to be settled by appeal in the interest of the law by the High Court of Cassation and Justice, aims at interpreting the above-mentioned stipulations, in the meaning or the applicability or non-applicability of the stipulations of article374^1 of the Civil Procedure Code, to the bill, promissory note and cheque which have value of writ of execution for the capital and accessories, according to article 61 paragraph 1 of Law no. 58/1934, respectively article 53 paragraph 1 of Law no. 59/1934, and it discusses the relationship between the general rule and the special rule in the field of bills execution.

In accordance with the stipulations of article 374^1 of the Civil Procedure Code, "the documents to which the law recognizes the nature of writ of execution are executed without the investiture with executory clause".[7]

According to article 61 paragraph 1 of Law no. 58/1934 with the subsequent amendments, "the bill of exchange has the value of writ of execution for the capital and the accessories established according to articles 53, 54 and 57," and by paragraph 3 of the same article the court of justice is assigned the competence to invest the bill of exchange with executory clause.

Article 106 paragraph 1 of the same Law stipulates that "the dispositions relating to the bill of exchange are applicable to the promissory note, to the extent to which they are not incompatible with the nature of this writ."

Regarding the cheque, in article 53 paragraph 1 of Law no. 59/1934, it is stated that it "has the value of writ of execution for the capital and the accessories established according to articles 48 and 49," and according to paragraph 3 of the same article "the court of justice has jurisdiction to invest the cheque with executory clause."

The procedure of bills execution, established by laws no. 58/1934 and no. 59/1934, imposed a precondition for investing the bill of exchange, the promissory note or the cheque with executory clause, also maintained by the regulations currently applicable.

The act authenticated by the public notary, which ascertains a certain and liquid claim has power of writ of execution on its chargeability. In the absence of the original act, the writ of execution may be constituted by the duplicate or legal copy of the copy from the public notary's archive.

[7] Mihaela Tăbârcă – Drept procesual civil (Civil procedural law), Ed.Universul Juridic, 2008, p.724-727.

The legislator has considered useful the investiture of the bill of exchange, promissory note or cheque with executory clause, although these bill-related documents have value of writs of execution, to enable the judge to examine the fulfilment of the formal conditions of their validity.

Only by the investiture with executory clause the bill of exchange, the promissory note and the cheque actually become writs of execution for the amount stated on them and for the accessories determined according to the legal provisions that have been mentioned.

Thus, although the law recognizes the value of writ of execution to the respective payment instruments, their execution is conditioned by the application of the executory clause.

To think this way is to ignore the will of the legislator who, in the same text (article 61 of Law no. 58/1934 and article 53 of Law no. 59/1934) establishes the value of writ of execution of the bill of exchange, promissory note, and cheque, but at the same time it also refers to the request of investiture with executory clause of these debt securities by the competent court of justice.

It results that the investiture with executory clause of the bill of exchange, promissory note or cheque, forming the object of regulation of some specific rules, cannot be subject to the regulation contained in the general rule, represented by article $374^1$of the Civil Procedure Code, since it is a stage in the procedure of the bill-related execution which must be seen as a whole, being impossible that this stage be subject to the rules of common law, and the remaining of the stages of this procedure to be performed according to the special regulations contained in the above-mentioned laws.

The exclusive character, derogatory and special of the bill-related law towards common law, namely article 374^1 of the Civil Procedure Code, requires the application of the "specialia generalibus derogant" principle, taking into consideration that the priority of the incidence of the bill-related law is strictly subject to the fulfilment of some specific formalities for the fructification of the securities and that the bills execution is a unitary executory system, proper to the bill-related law, the investiture with executory clause in the court of law figuring among its conditions and formalities.

The High Court of Cassation and Justice has held that the provisions of article 374^1 of the Civil Procedure Code related to article 61 of Law no. 58/1934, and respectively to article 53 of Law no. 59/1934, shall be construed in the sense that the promissory note, the bill of exchange and the cheque are invested with executory clause in order to be executed.[8]

In the requests that stem from a bill of exchange, cheque or promissory note on the grounds of article 10 item 3 of the Civil Procedure Code, the jurisdiction is alternative between the court from the defendant's residence and the court from the place of payment.

When the investing entity has chosen the investiture with executory clause of the promissory note, according to the stipulations of article 10 item 3 in favour of the court from the place of payment, stipulated in the promissory note, this court of law was bound to observe the principle of availability found in the option right of the crediting company.[9]

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[8] ÎCCJ (HCCJ) United departments, Decision no.4/2009 published in the Official Gazette no.381/04.06.2009
[9] ÎCCJ (HCCJ) Civil and intellectual property department, Decision no.1301/27.02.2008.

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DIVORCE PROCEEDINGS, IN LIGHT OF THE NEW PROVISIONS OF LAW NO. 202/2010 REGARDING SOME MEASURES FOR ACCELERATING THE RESOLUTION PROCESS

IOANA PĂDURARIU[*]

Abstract:
Law no. 202/2010 regarding some measures for accelerating the resolution process establishes procedural rules with immediate effect, meant to streamline judicial procedures, and to expeditiously resolve processes, regulating specific legislative measures, which aim mainly to simplify solving cases.
In matters of divorce, a first change is that, unlike the previous situation, the divorce case by agreement will be judged in the council chamber. Also, according to the above mentioned law, if the conditions for dissolution by agreement are accomplished, we can divorce not only in front of the court, but also to the notary public or officer of civil status, opportunity that did not existed in past. Another novelty is the express possibility to demand resolution through mediation for divorce, specifying that the parties can not only refuse the judge's recommendation to seek mediation, but that the parties can refuse mediation session even after information. Regarding mediation, the law brings news on divorce. Under that legislation, divorce can be made by the parties even when the couple has minor children and agree to the mediation process.

Key words: *divorce by agreement, family mediation, divorce to the public notary, divorce in front of the civil state officer, Law no. 202/2010*

Introduction:

The Law regarding some measures for accelerating the resolution process, so-called "Law of the small reform in justice's domain"[1] came into force in two steps. So, excepting the provisions regarding the divorce in front of the civil state officer and to the public notary (provisions which came into force in 60 days from the date when this law was published in the Romanian Official Monitor, first part), the above mentioned law has to be applied even from the end of November, 2010.

By this law it has been introduced new juridical institutions and the legislator had intervened on so-called procedures of prevarication of the judicial act.

Therefore, in the domain of divorce, we are talking about setting up new possibilities for dissolution of marriage (divorce by agreement to the public notary or in front of the civil state office, mediation in divorce proceedings, as we will detail below) or by changing certain aspects of the development process of divorce by agreement before the court (proceedings in closed session, the acceptability of divorce even if there are minor children resulted from marriage).

The new provisions will first try to answer the organizational needs of the overcrowded courts, but also to promote the idea that the divorce should be seen not as a war but as an expression of reciprocal enforcement *"mutuus consensus, mutuus dissensus"*.

Thus, it seems that the establishment of divorce by agreement - administrative or notary way - could answer the real need for those who want an easier and faster divorce. On the other hand, in fact, the new law states also the stimulation of the parties to settle their conflicts outside the judiciary way, many of the processes aiming the collapse of families being "pushed" into a mediation process, possible or not, as we see in the following.

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[1] Law no. 202/2010, published in Romanian Official Monitor, first part, no. 714/26 october 2010.

Paper content:

I. Divorce by agreement - changes and new institutions

In matters of divorce, a first change from the Law no. 202/2010 is that, unlike the previous situation, the divorce case by agreement will be judged in the council chamber (article 613^1 paragraph 2 of the Romanian Civil Procedure Code, modified by the Law no. 202/2010). Spouses may use the path to divorce by agreement in front of the court, regardless of the duration of their marriage and whether or not there are minor children resulting from the marriage (article 38 paragraph 1 of the Romanian Family Code, as it was amended by Law no. 202/2010); it is required that the court determine whether the consent of each spouse is free and uncorrupted. However, divorce by agreement between the spouses can not be accepted if one spouse is put under ban (see Romanian Family Code, article 38, paragraph 2).

If we are make a comparative analysis for *the mutual consent divorce in France*, we will see that this type of divorce proceedings is available for couples who consent to divorce and who are also agreeable as to the separation and settlement terms (child custody, financial matters, property and so on). A single court appearance is required to obtain this type of divorce. The acting lawyer(s) file a divorce petition at the clerk's office of the Higher District court. The couple will be then be summonsed to appear before the Family Affairs Judge of the Higher District Court of their place of residence. At this time, the couple will submit their written agreement settling all practical and financial issues regarding themselves and their children, for review by the court. The judge will grant the divorce immediately, if he approves the agreement. However, if the judge considers that the agreement does not protect the children's interests sufficiently, or that of either spouse, a second hearing will be required to examine a new settlement.

Also, returning to the Romanian law, according to the above mentioned act (Law no. 202/2010), if the conditions for dissolution by agreement are accomplished, we can divorce not only in front of the court, but also to the public notary or civil state officer, opportunity that did not existed in past.

But, in these both cases, the civil state officer or the public notary at the marriage place or at the last common house of the spouses may divorce them by consent only if they haven't any minor children born naturally from marriage or adopted (article 38^1 from the Romanian Family Code, introduced by the Law no. 202/2010).

Divorce application is filed by the spouses together. Civil state officer or public notary registers the request and grant a period of 30 days for the eventual withdrawal of an application for divorce. Thereafter, the civil state officer or, where appropriate, the public notary verifies that the spouses insist on divorce and whether, in this sense, their consent is free and uncorrupted. If the spouses continue in divorce, civil state officer or, where appropriate, the public notary gives them a certificate of divorce without making any mention of the guilty of the spouses. Also in the case of divorce by agreement in front of the court, the judge does not make any mention regarding the guilty of one or another husband. If spouses can not agree on the family name to wear after the divorce, the civil state officer or, where appropriate, notary public releases a disposition to reject the application for divorce and spouses are guided to address to the court. Also, for the resolution of any other effects of divorce, on which the spouses do not understand, court will have jurisdiction.

When the divorce application is filed to the hall where the marriage took place, the civil state officer, after releasing the certificate of divorce, makes a proper mention in the act of marriage.

If the application is made to the municipality in whose jurisdiction the last dwelling spouses were common, civil state officer releases the certificate of divorce and forward forthwith a certified copy thereof to the municipality where the marriage took place, to be made the mention in the act of marriage.

In case of divorce by notary public, it shall release the divorce certificate and forward immediately a certified copy thereof to the municipality where the marriage took place, due to be mentioned in the act of marriage.

II. Mediation in divorce proceedings

It is well known that divorce mediation is a dispute resolution process in which, as an alternative to judicial or administrative decision-making, the spouses are assisted by an impartial and neutral professional (the mediator or mediators) in order to analyse the situation arising from the spouses' wish to be divorced and to try to reach their own agreement with regard to some or all the matters under dispute. [2]

Mediation and the processes of negotiation or arbitration. Mediation has the common characteristic of resolving disputes between spouses or among family members without a judge's order after an adversarial trial. However, by contrast with negotiation, where the parties or their representatives try to seek a resolution to their dispute through direct discussions, in mediation the dispute resolution process is facilitated by a third party, neutral and impartial. Comparative to arbitration, where the parties delegate, by mutual agreement, the power to decide to a third party, in mediation this third party does not have the power to decide the dispute and his purpose is to help the parties to reach to their own decision.

The European Union promote actively methods of an alternative solution of the conflicts, among them mediation. Directive 2008/52/EC regarding mediation[3] applies to cross-border disputes in civil and commercial matters. This refers to disputes in which at least one party is domiciled in a member State other than that of any other party to the date on which the parties agree to use mediation or the date on which a court decides the use of mediation. The main objective of this legal instrument is to encourage the use of mediation in the Member States. In this respect, the directive includes five basic rules:

• requires to the Member States to encourage training of mediators and to ensure high quality of mediation;

• provides for any individual judges the right to invite parties in conflict to use mediation first if deemed advisable, given the circumstances of the case;

• provides that agreements resulting from mediation can become effective if both parties request that; this can be achieved, for example, through an approval by a court or authentification by a public notary;

• ensures that mediation takes place in an atmosphere of confidentiality; that is why the mediator can not be required to provide evidence in court about what happened during mediation in a further dispute between parties to that mediation;

• guarantees that the parties do not lose their right to address to the court as a result of the mediation period running: time limits for bringing an action in court are suspended during mediation.

Mediation is a natural response to the evolution of society, serving to produce social ties and affirmation of values such as autonomy, responsibility, adapting to new circumstances, solidarity and agreement. Also, mediation is a process of creation and management of social life, which allows either restoring the social connection, either preventing or resolving conflicts due to the intervention of a third party, impartial and free of power decision, which guarantees communication between partners.[4]

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[2] See M.M. Casals, *Divorce mediation in Europe: An Introductory Outline*, E.J.C.L., Vol. 9.2 July 2005, on http://www.ejcl.org/92/art92-2.html.

[3] The Directive was published in the EU Official Journal on 24 May 2008. Member States must comply with this Directive by 21 May 2011.

[4] M. Sassier, *Construire la médiation familiale*, ed. Dunod, Paris, 2001, p. 10.

The definition of mediation should not be limited to that of an alternative model of conflict resolution. Thus, it can prevent conflicts, fix and restore the social and cultural ties, it is important to be seen not as a procedure, but rather as a process. This is because a process is adaptive, while a procedure involves constraints, pre-establish stages, precisely determined. Although based on specific rules and steps are inevitable, the process of mediation does not follow a procedural logic, the mediator mastering the process and having the ability to adapt it, depending on the situation.

In family law, mediation scope is various: the separation of spouses, the divorce, the children's custody, the division of goods or some behavioural problems in the family. Written contract of mediation is a condition *ad validitatem*; article 45 paragraph h) of the Act[5] draws attention to the condition of multiple copies for the approval by which a settlement is achieved (separate from the mediation agreement), if agreed to be in written form, that is to be drawn in as many copies as are parts (in accordance with the provisions of the Romanian Civil Code, article 1179).

The paradox of the mediator's neutrality[6] is that it stops where begins the debate of mediation philosophy. In this case it is not neutrality, but a commitment from the mediator that a conflict can be solved otherwise than by force report. Neutrality gets, in mediation context, a different meaning than the traditional, defined in public international law. It no longer appears as a state or attitude of non-involvement in the strained relations that exist between states, but as an active manifestation of the mediator to facilitate resolution of a conflict without a specific interest in the solutions. Also, the neutrality translates into a lack of quality for the mediator to represent the parties or to be their warrant.[7]

On the other hand, it must not understand that the neutrality of the mediator excludes its commitment and responsibility. The mediator must be neutral towards the parties, not toward the human relationships, since the conflict resolution through mediation is a choice freely consented.

Resolving conflicts through mediation, the parties make an appropriate response to the conflict, by focusing on the interests at stake. If the traditional conflict resolution is focused mainly on the legal aspects of the dispute, the mediation's aim (in accordance with the law) is to find a realistic and convenient solution for both sides in the conflict.

Thus, the mediation process, in comparison with the classic justice, does not have the purpose to establish guilt or innocence of the parts. The mediator has no power of decision, but provides procedural information, stimulates dialogue, facilitates the exchange of views and information between the parties, helps parties to clarify their needs and interests, to overcome barriers in communication and to resolve disputes through an advantageous solution for both parties.

Family mediation, like other forms of mediation, is divided between different visions of what it should be, what is its purpose and how does she evolve.[8]

Many authors and practitioners define mediation as a practical, specifically concept: a way of resolving conflicts, which allow finding solutions for situations of disagreement, tension, even outrage among people, channelled, more or less, to a concrete goal of reorganization of family life.

Mediation is a way to better manage conflicts[9] and is based on the principle of dialogue, listening and construction of the agreement, not on that of confrontation which would involve the

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[5] Law no. 192/2006 regarding mediation and the profession of mediator, published in Romanian Official Monitor, first part, no. 441/22 mai 2006, modified by Law no. 370/2009, published in Romanian Official Monitor, first part, no. 831/3 december 2009.

[6] J.M. Lascoux, *Pratique de la médiation (Une méthode alternative à la resolution des conflits)*, ed. ESF, Issy-les-Moulineaux, 2004.

[7] D.A.P. Florescu, A. Bordea, *Medierea*, Ed. Universul Juridic, Bucuresti, 2010, p. 54-55.

[8] L. Dumoulin, *La médiation familiale: entre institutionnalisation et recherche de son public*, Recherches et prévisions 70 (2002), p. 6.

[9] M. David-Jougneau, *La médiation familiale: un art de la dialectique*, in A. Babu (et al.), *Médiation familiale. Regards croisés et perspectives*, Paris, Eres, coll. „Trajets", 1997, p. 21-22.

dichotomy winner / loser. It will require techniques thanks to which the mediator helps the parties to resolve the conflict between them. About the voluntary, consensual nature of the mediation, we note the absence of any obligations of the parties to participate in such proceedings. In terms of a conflict of private law, the possibility of amicable settlement is available to the parties directly involved, rather as an opportunity to slow, rigid and costly mechanism court proceedings, and whether the arbitration. None of the special laws, without violating fundamental human rights, will not be able to regulate the requirement of an institution designed to address, through a third party, by way of negotiations between the parties, their conflict. Because, therefore, it would be create an obligation for the parties from a conflicting report to address, contractually, to a third person that facilitate their settlement. [10] And, more of this, we must make a grammatical interpretation of the article 43 from Law no. 196/2006 (above-mentioned), who provide that the parties in a conflict *may presents* together in front of a mediator.

Mediation can occur by an independent manner, at the initiative of the parties and outside of any legal proceedings when the parties feel that certain difficulties arise. But the mediation can be used also when the dispute is already in front of the court. Thus we are talking about "judicial mediation"[11] and his complementarities to the judicial proceedings. This other form of justice, a gentle justice, joins the traditional one, filling it by proposing different ways to see and resolve conflict. When the judge recomands mediation and the parties accept it, the parties should go in front of one mediator, for information regarding the advantages of the mediation. After this session of information, the parties decide if they are going to proceed in accepting or not resolving their divorce through mediation.[12]

We also have to avoid some myths about family mediation, like: the mediator gives legal advice (the fact is that the mediator does not give legal advice to the parents, he may only suggest possible best or worst case scenarios and this is done only to help the parents to think about what might happen); mediation is similar to going through counselling services (the mediation is not counselling or therapy; the mediator focuses the parents on future goals to help avoid future disputes); family mediation requires compromise (we must take into consideration that the goal of mediation is an agreement that everyone can accept, but it does not always require a compromise, it does just require that each person listen to each other and be flexible); the family mediator makes the decision for the parties (never a family mediator does not make decisions); if we mediate, we must come to an agreement (no, the parties do not have to come to an agreement and they should not feel pressured to agree to anything; if one party or another does not agree the mediation the court will decide); courts are more qualified to reach a fair decision (only the spouses know their needs and wants better than the court, so they are in a better position to reach an acceptable agreement).

Conclusions:

Regarding divorce by agreement, it is undeniable that the Law no. 202/2010 intended to streamline divorce proceedings. However, leaving aside the necessity to relieving the courts of the many processes of divorce, we must not forget that although we have the possibility to divorce in front of a public notary, some issues concerning property division between husbands will be solve nevertheless in front of the court because the non-agreement between the parties in this regard (and they are many cases of). This is regrettable if we take into consideration that the main purpose of these provisions is that they would have to be a helping hand to the courts. So, whether we like it or not, we do not think that the courts will actually be relieved considerably from their cases.

[10] D.A.P. Florescu, A. Bordea, *Medierea, op. cit.*, p. 47.

[11] P. Bonnoure-Aufiere, *Médiation familiale et la loi: regards d'une avocate, médiatrice familiale*, in A. Babu (et al.), *Médiation familiale, op. cit.*, p. 162.

[12] See art. 614^1 from the Romanian Procedure Civil Code, introduced by the Law no. 202/2010.

Regarding mediation, it is good that we should not see this exclusively in his peaceful image, as if it will be enough for the individuals to enter into such a process for the inequalities and differences of opinions and interests to be subdued.

Most conflicts end up in court because the individual believes the court ruling is the sole and only way which can be set right. Mediation is a new liberal profession, in the pioneering stage, appeared recently in Romania and therefore, that any new institution, it is harder understood and accepted by Romanian citizens.

It may be good that between justice / judges and mediation / mediators it will be establish a fully functional collaborative partnership, justice being the ultimate solution to the serious conflicts that could not be resolved through mediation.

Basically, by signing such of cooperation protocols can be brought to the attention of potential justice seekers information regarding: the advantages of mediation, the mediation service procedure, the role of the mediator in resolving disputes amicably, mediators and the parties' right to choose their own mediator.

Family mediation (not only this form, but the mediation, in general) remains a practical as confidential, so little known in society. The absences of an information, accurate and complete (if possible), which must be released in the juridical literature or in practice, produce a utopia effect on individuals, depriving the real impact of the necessity of such institutions.

But to what extent the regulation of the profession of mediator will become compatible with its conceptual and philosophical foundations, and the social realities, it remains to be seen.

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„STABILITY AND GROWTH PACT, COMMUNITY DOCUMENT „REVIVED" IN THE CURRENT GLOBAL ECONOMIC CRISIS"

ROXANA-DANIELA PĂUN*

Abstract:
The article proposes to make a reasoned radiography Stability and Growth Pact, EU document revived therefore need to strengthen financial discipline and budget 6 to 7 September 2010 meeting of the Economic and Financial Affairs Council (ECOFIN). He talked about the introduction of the Stability and Growth in a 'European quarter' which will be monitored in structural and fiscal policies of the Member States. He also held a first exchange of views about the possible introduction of a levy on banks and a tax on financial transactions. Thus, the European Union has moved to create the world's first supranational system of control over the financial markets, particularly in order to reduce the risk of global financial crisis. The system will act in early 2011. For the first time in history, European financial control agencies will have more seats than national governments. In addition, the European Central Bank will see a branch that will track the emergence of crisis risk.
The financial crisis has diminished the EU's growth potential, and made it clear just how interdependent its members' economies are, particularly inside the eurozone.
The most important priority now is to restore growth and create effective mechanisms for regulating financial markets - in Europe and internationally.
In strengthening its system of economic governance, Europe must learn from previous shortcomings which have put the financial stability of the whole eurozone at risk:

- *poor observance of the EU's sound rules and procedures for economic policy coordination*
- *insufficient reduction in public debt during the good times – with peer pressure proving an adequate incentive*
- *failure to deal effectively with the build-up of macroeconomic imbalances - despite the Commission's warnings – resulting in high current account deficits, large external indebtedness and high public debt levels in a number of countries (above the official 60% limit for eurozone countries).*

Greater economic policy coordination in the EU will be achieved by tools designed to:

- *strengthen the preventive and corrective arms of the Stability & Growth Pact*
- *address imbalances through stronger macroeconomic surveillance, including alert and sanction mechanisms*
- *set out effective enforcement mechanisms to ensure that member countries will act in compliance with the EU framework they have agreed.*

Key words: *Stability and Growth Pact, enforcement mechanisms, current account deficits, large external indebtedness, high public debt levels, structural and fiscal policies, the risk of global financial crisis*

1. Introductory remarks:

Stability and Growth Pact (SGP) is a regulatory framework for coordinating national tax policies in the Economic and Monetary Union (EMU), designed to ensure the stability of public finances, an important requirement for the proper functioning of EMU.

Pact includes a component of preventive and corrective component. For EMU to function smoothly, Member States must avoid excessive budgetary deficits. In accordance with the provisions of the Stability and Growth Pact, Member States agreed to meet two criteria: a deficit-GDP ratio not exceeding 3% and a debt-GDP ratio exceeding 60%.[1]

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[1] See: http://ec.europa.eu/economy_finance/sgp/deficit/index_ro htm

While this document is important for the proper functioning of the euro area, due to the historical moment we live is marked by global economic crisis and the difficulties of every European country covered in a separate development, the subject is not considered in the literature. (Maybe because it is constantly moving and controversy at all meetings of the Council of Finance Ministers of the Member States and of the European Councils).

This topic is of particular importance, both from theoretical perspective, legal, given that there is a procedure for sanctioning of Member States that violate the Stability and Growth Pact, but for any case unfinished state), but mostly practice.

A practical component is essential to optimize the effects, especially as the recasting of the measures discussed at the European level, can have positive effects on economies and the growing trend of European finance.

2. Principles underlying the achievement of Economic and Monetary Union. (EMU)

EMU is based on three principles: the principle of the single currency convergence principle and the principle of irreversibility in three-stage process of monetary unification.

The principle of the single currency issue involves a monetary unit equal power movement and the disappearance of national currencies. Therefore there will be no national monetary policy, quotes of various community currencies in the currency markets, but a single currency for all EU countries.

The principle of convergence can be summarized in three stages caledarului presentation introducing the euro, which is in fact the achievement of monetary integration.

The principle of irreversibility of the process of monetary unification is in meeting the five criteria of convergence:

1. Price stability is expressed by an inflation rate of max.1, 5% of the most well-located three countries in this regard;
2. Interest rate on term loans under 2% of average interest rates ranked top three but not more than 8.5%;
3. **The budget deficit must not exceed 3% of GDP;**
4. **Public debt below 60% of GDP;**
5. Stability of course, that the national currency exchange rate over the past two years have maintained the margin of fluctuation of exchange rates agreed by the mechanism of the EMS (2.25%), not to proceed with the realignments.

The convergence criteria are set out in the Treaty on European Union (TEU) also known as the Maastricht Treaty. After the changeover, with waiver of national currencies in favor of adopting the euro by the Member States met the convergence criteria established by the Treaty, began to experience problems even for countries that adopted the single currency at the wrong time, having regard to Community-frequent violations of overcoming that deficit ceiling of 3% and 60% threshold for public debt.

Thus, there was the Stability and Growth Pact, a document which establishes a procedure for penalizing Member States which do not meet two of the five criteria set by the Treaty of Masstricht.

3. Introductory aspects of the Stability and Growth Pact before installing the global economic crisis.

Stability and Growth Pact (SGP) is a regulatory framework for the coordination of national fiscal policies in economic and monetary union (EMU). The pact was designed to ensure the stability

of public finances, an important requirement for the proper functioning of EMU. Pact includes a component of preventive and corrective component. [2]

The preventive component

Under the preventive provisions, Member States must submit annual stability programs (convergence) to show how they intend to perform or provide stable medium-term fiscal positions, taking into account the immediate impact that aging will have on the budget . These programs are evaluated by the Commission and Council shall advise each of them.

Preventive component includes two policy tools that can be used to avoid deficits "excessive."

▪ Based on a proposal from the Commission, the Council may trigger an **early warning procedure** to prevent an excessive deficit.

▪ By the **early warning system**, the Commission may recommend that a Member State to comply with the obligations of the Stability and Growth Pact.

Corrective component

▪ Corrective pact component governing the excessive deficit procedure (EDP). This is triggered when the budget deficit threshold of 3% of GDP in the Treaty. If it is concluded that the deficit is excessive under the Treaty, the Council shall issue recommendations to the Member States concerned to correct the excessive deficit and set a deadline for it. Nerespectarea recomandărilor conduce la declanşarea următoarelor etape ale procedurii, inclusiv la posibilitatea sancționării statelor membre din zona euro. Failure to recommendations leading to trigger the next steps of the procedure, including the possible sanctions in the euro area Member States.

Long-term sustainability of public finances

Given that Europe's aging population as people live longer and have fewer children, the EU Member States face the challenge of ensuring long term sustainability of public finances, given the impact this phenomenon will have on the budget. To meet this challenge and given special attention paid to long-term viability of the revised version of the Pact in 2005, are compiled shared long-term budget forecasts at EU level and monitor and evaluate the individual situation of the Member States. Complete analysis can be found in the report on its viability. Long-term sustainability of public finances is taken into account when assessing the stability and convergence programs.

Proceedings against Member States which have exceeded the budget deficit and government debt documents required by legislation in force.

Stability and Growth Pact, a document must be respected in the euro area [3]:

■* EURO area Member States undertake to respect strict rules on budget deficit and public debt levels.

■* for violating these rules will state that they support the EU imposed sanctions for failure to recommendations to avoid or correct excessive budget deficits.

Stability and Growth Pact-exceptions-

■ An excess of more than 3% of GDP budget deficit is allowed in two situations:

1) when determined by an unforeseeable event beyond the control of the Member State;

2) when the result of a severe economic drop, at least 2% respectively, calculated at the actual level of GDP.

[2] According: http://ec.europa.eu/economy_finance/sgp/index_ro htm

[3] See: Păun Roxana-Daniela, „"Community law", Ed of Tomorrow Foundation Romania, Bucharest, 2009, Chapter VII, p.151-157

Sanctioning procedure prescribed by the Stability and Growth Pact:

■State States penalize procedure that has an excessive budget deficit, imposed by the Council of Ministers of Finance and Economy:

✓ *Issue a recommendation by the State concerned to correct excessive budget deficit, with the application within four months;

✓ * If the time limit are not taken corrective measures, the Council makes public its recommendation;

✓ * If after one month are not taken effective corrective measures, the Council shall notify the Member State to take appropriate action;

✓ * In more than two months, the Council may decide on sanctions, if the State continues to be "insensitive" to the measures recommended!

■**Size deposit =**

■ **0.2% of GDP (fixed component) +**

■ **one tenth of the difference between the deficit as a percentage of GDP this year it was described as excessive, and the reference value of 3% of GDP (variable component).**

The penalty may be enhanced by the formation of new deposits.

■The total size of the deposits made by a Member State may not exceed 0.5% of GDP.

■The Council may terminate the sanctions if the Member State has corrected this deficiency.

■Penalty imposed can not be undone.

■Interest on deposits and revenues from fines are distributed to Member States without excessive deficits, in proportion to their share of their combined GDP. **The procedure can be accelerated if the excessive deficit situation deliberately planned to apply the sanction.**

Types of programs developed by Member States:

■Member States are required to develop and implement programs for Stability (euro area member states), and where appropriate, Convergence Programs (Member States outside the euro area).

Although the Stability and Growth Pact (SGP) provides preventive component includes two elements proactive avoidance of excessive deficits in an early stage that the procedure for early warning and early recommendation, in practice almost all Member States have exceeded these values.

Early warning procedure

According to a Commission recommendation, the Council can issue an "early warning" by a State prior to the occurrence of an excessive deficit.

Council acts in this way if it finds a significant deviation from the medium-term budgetary objective (MTO) or the adjustment strategy for achieving the MTO, to prevent an excessive deficit. The recommendation calls for early warning of the Member State concerned shall take the necessary adjustment measures to prevent such a situation.

Early Recommendation

As another element of proactive, can make early recommendations, where appropriate, to advise a Member State to comply with PSC requirements may petition the call when considering political stability and convergence programs**.**

A **first attempt to reform the SGP** took place at the **European Council on the Stability and Convergence, 22-23 March 2005.**

Summarizing the discussions and solutions,

■The Council adopted opinions on the stability and convergence program for 2005 set by Cyprus, Spain, Latvia, Lithuania, Hungary, Slovenia and United Kingdom.

■ Council approved a recommendation to the Hungarian budget deficit caused by excessive.

■Although the provisions relating to public deficit and public debt profile have remained unchanged,

■It was decided a "flexibility" in the application of the pact more

■The new Member States where pension reform has increased the public deficit, will have a grace period of five years, allowing them to more easily introduce the euro. (As a concession to the Poland and Hungary)

■New EU members such as Hungary and Poland, requested to be excluded costs from the calculation of pension reform budget deficit to meet the requirements for entry to the eurozone.

■Great Britain won that governments no longer have to reduce their deficits by 0.5 percentage points in years of robust economic growth

In an attempt to unblock the application of the SGP have accepted some exemptions to exclude certain expenses from the calculation of budget deficit reforms, reforms which allow Member States to justify exceeding the deficit limit:

■Supported reforms whose costs have been excluded from the calculation of the budget deficit were:

■**1. development aid (France)**

■**2. public investment (Italy)**

■**3. Research and development expenses, plus structural reforms of the pension and investment for 'achieving European policy goals'.**

In conclusion, among the 12 states that had adopted the euro in 2005 (France, Germany, Italy, Spain, Portugal, Holland, Belgium, Luxembourg, Ireland, Austria, Finland and Greece) - 10 of them violated the Stability and Growth Pact. Most violations were: excessive budget deficit: highest = 6% Greece, the largest public debt = 100% Italy.

4. Stability and Growth Pact after the global economic crisis.

Poland, Sweden, Czech Republic, Hungary, Slovakia, Romania, Bulgaria, Lithuania and Latvia in August 2010 asked to be allowed to exclude costs of pensions reform representing public debt and deficit amounts to avoid corrective action of the EU.

In response, the Commission has offered five years of transition, the budget deficits to exceed 3% of GDP ceiling and / or debt to exceed 60% of GDP.

Poland, Slovakia and other countries, however, said the proposal is not appropriate and have raised the issue again at the summit of 28-29 October 2010. But the Commission has maintained the position, saying 'not possible' to agree with such a requirement, under current rules.

Summit conclusions are merely to invite the Council of Ministers to expedite work on the integration of pension reforms in the revised Stability and Growth Pact.

Prior to the summit of 16-17 December, where he had to agree on revising the EU's economic governance, including the penalties for those who violate budget rules, reiterated the importance of systemic reforms recognizing that pensions should be provided equal rules Stability and Growth Pact. If the Euro area Member States violated the Stability and Growth Pact even before the outbreak and spread of the current global economic crisis, now in crisis conditions, is even harder to comply with the Maastricht Treaty on inflation and budget deficit. Paradoxically, the solutions are expected from Germany, financial and budgetary discipline model for other European countries.

At the last European Council (4 February 2011), Chancellor Angela Merkel came up with a proposal called "Stability Pact" in the euro area. Thus, Member States would be unable to score in their Constitution exceeded a certain threshold of budget deficit and public debt. Working time should be standardized, as well as retirement age, which would be 67 years. Also, Germany wants

the legislation states that the automatic indexation of wages to waive this provision. There are also proposals for the harmonization of tax legislation.

"If this proposal is a strong will to coordinate and monitor economic policies in the euro area, I will strongly support, as is consistent with what the ECB Governing Council has repeatedly claimed. We see the results of consultations undertaken by the EU Council President, Herman van Rompuy, "said President of the European Central Bank (ECB), Jean Claude Trichet.

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„Our message is very clear: we call on all concerned to exercise responsibility. And not by words but by deeds. Therefore, our strong message is that monetary union based on the euro, it works. Coin is reliable and has proved able to maintain price stability. Now is the time for economic union to work just as well, "said ECB president.

At the same time raising salaries in the countries of the euro area would be "a foolish measure" to the States out of recession, while the monetary union increase inflationary pressures.

European authorities should make every effort to avoid raising other prices above the levels set by the ECB definition of price stability.

As can be seen easily, the series of measures prescribed by the Stability and Growth Pact can not be analyzed only in the context of global economic and financial. Thus, the budget deficit and inflation threshold set by the Maastricht Treaty (below 3%) becomes a challenge for European countries in the euro area, ruled by an unshakeable political will, catalysed around France and Germany, seeking solutions viable exit from recession, to position their economies back on an upward trend of growth, not least by strengthening Eurozone.

5. Conclusions:

Currently, European economies are facing a classic problem of too much indulgence. A state spends more than people can pay and short-term benefits generated domestically. But long-term costs are transferred to all other members of the euro area are suffering because of rising interest rates.

Bigger deficits are covered with a capital that would otherwise be invested in the private sector, which raises interest rates. The economic situation in Greece is living proof of the failure of a State to manage its own economy and financial difficulties, but those who are charged to their European partners.

But other major European countries faced with the prospect of growing budget deficits because of their generous social insurance programs and the continually aging population. Thus, Spain, France, Germany, Portugal, Italy and other EU nations should introduce fiscal measures, primarily to reduce spending on pensions and health insurance, as European tax rates are already high.

Without adjustments, rising budget deficits would cause higher risks of inflation and would erode the euro as a safe image. A country with a less gradualist monetary policy, the euro and the monetary policy of the European Central Bank (ECB) implies that a recession becomes too restrictive monetary policy, while in periods of "boom" is too lax.[4]

To maintain the credibility of the euro on international markets, the EU needs a common tax plan long term, which would generate the necessary budgetary savings.

All EU members should take part in a coordinated process of consolidating budgets, regardless of their economic positions. Consolidation should be subject to demographic profiles,

[4] Opinion expressed by Caraiani Petre in „Models of monetary policy. Applications for Romania, Ed Wolters Kluwer, 2009, p.148."

budget structures, financial vulnerabilities and capacities to produce revenues to the budget of each state.

An attempt to control the financial and fiscal policy coordination of Member States is also a goal of specialists, since all the current difficulties arise amid internal imbalances of the national budget, affecting European finances. Mutual aid system is designed to save states in the threshold of entry into default, but the system can not work of carrying long. To paraphrase, no European country that fall within the targets set by the Maastricht Treaty can not accept failure than a solution, temporary, substantial financial support granted to a state in domestic politics does not prove serious economic and financial-monetary.

Although there have been personalities who have harshly criticized the Stability and Growth Pact, it can be observed under normal conditions, but the economic crisis. Thus, during favorable budget balance should be maintained, in which the pact appears to be flexible ("flexibility" that I argued it in Section 3. Introductory aspects of the Stability and Growth Pact before the onset of economic crisis). This "flexibility" is the Covenant to be "questionable" in the binding character of the fines, which raised the political struggle in the Council discussion

We share views on the pact that removes threats to maintaining a policy of debt, use more debt means higher inflation, higher taxes ... that reduces investment.[5]"

A policy of borrowing money means lack of investment, only winners are the banks. "But this is not about the European notion of social market economy" [6].

Certainly, the future will demonstrate the political will of European leaders in saving the "Euro Zone" and the Stability and Growth Pact is one of the instruments can do this!

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[5] Idem 7, p. 80

[6] HG Pöttering, From vision to reality. On the way to Unite Europe, Ed Day, Bucharest, 2007, p. 251

DAMAGE – CONSTITUTIVE ELEMENT OF TORT LIABILITY IN ENVIRONMENTAL LAW

ANDRADA TRUŞCĂ*

Abstract:
In order to discuss about tort liability, several conditions need to exist: the illicit act, damage, causal link between the illicit act and damage, and last but not least, illicit offender fault. Thus, the damage is a sine qua non condition of tort liability, the illicit act being necessary but insufficient for its employment. Damage was defined as the harmful result, with a patrimonial or a non patrimonial nature, a result of violations of subjective rights and legitimate interests of an individual. It is known that the patrimonial damage does not present special discussions, but in terms of non patrimonial damage is required to be made a few observations. In the expression of environmental damage caused by pollution, it is used phrases like "environmental damage" or "environmental prejudice" including both the damages suffered by the natural environment through pollution as well as those incurred by the person or property, other than those in natural environment. In this paper we propose to analyze the environmental damage with special attention on the non patrimonial damage, both theoretically, but also in terms of jurisprudence.

Key-words: *damage, tort liability, environment, patrimonial, non-patrimonial.*

1. Introduction

Damage is the sine qua non condition for tort liability[1]; the unlawful act is necessary, but insufficient for its involvement[2].

Thus, damage was defined as the damaging result, of pecuniary or non-pecuniary nature, a result of violations of subjective rights and legitimate interests of an individual[3].

There are several types of damage, their classification being made according to several criteria[4]. With regard to the first criterion, *after the intrinsic nature of loss*, losses are divided into pecuniary and non-pecuniary. *The pecuniary loss (material)* is the most common and can be measured in money, such as: destruction of property, killing an animal, a person's health injury followed by decrease or loss of the working capacity etc. *The non-pecuniary loss (moral)* can not be measured in money, resulting from prejudices and violations of non-pecuniary rights: death, physical and mental pain, harm caused to the physical harmony or appearance of a person, reducing the human being's possibilities to enjoy life's pleasures and joys etc.

The second criterion for classification is *after the way an injury can affect the human being or just his assets. Injuries caused directly to the human person* are also classified, after the human personality criterion, as it follows: bodily injury, caused to the physical personality: physical and psychological pain (the monetary compensation for such harm is also called *pretium doloris*), recreational injury (consisting of the loss or restriction of the human being's opportunities to enjoy the normal joys and pleasures of life), aesthetic injury – damage done to the physical harmony and

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[1] Ion Dogaru, Pompil Draghici, *Romanian Civil Law. Treaty. Vol. III. The general theory of obligations*, (Brasov: Omnia UNI S.A.S.T. Publishing House, 1998), p. 193.

[2] Ernest Lupan, *Civil Liability*, (Cluj-Napoca: Accent Publishing House, 2003), p. 72.

[3] Ioan Albu, Victor Ursa, *Civil liability for moral damages*, (Cluj-Napoca: Dacia Publishing House, 1979), p. 29.

[4] Ernest Lupan, *Civil liability* ..., p. 73-76; Ion Dogaru, Pompil Draghici, *op. cit.*, p. 196-197.

appearance caused to a person (the compensation is called *price of beauty*[5]); damage to the affective personality: the death of a close relative, death of an animal, etc., damage caused to the social personality: honour, dignity etc. *The damage caused directly to assets* may appear under two forms: damage caused to public property, damage caused to private property.

The third criterion is *related to the possibility of predicting the moment of damage*, and they are divided into predictable and unpredictable. *The predictable damages* are those harmful consequences that could have been foreseen at the moment of committing the illegal act. *The unpredictable damages* could not have been foreseen at the moment of committing the illegal act.

Finally, the last criterion for classification is related *to their occurrence length* and distinguishes between instant damages and successive damages. *The instant damages* are harmful consequences that occur suddenly or in a very short period of time. *The successive damages* occur continuously or in a long period of time.

Going back to the first criterion for classification, it is known that the pecuniary loss does not involve particular aspects; on the other hand, a few observations are required to be made on the non-pecuniary loss. According to the specialized literature[6], the tort liability for non-pecuniary loss has existed since the Roman law when the victim of the crime of writing and saying outrageous words, or of gestures and actions defamatory or contrary to morality was provided by law with her own action, *actio iniuriaro.*

The modern civil law settles in a differential manner, the tort liability for non- pecuniary losses: *Swiss and German law* recognizes tort liability for non-pecuniary losses only in cases provided by law; in the *common law* system, the law does not cover such liability, but it is widely accepted judicially; *in French and Romanian law*, the tort liability for non-pecuniary losses was judicially admitted due to some express legal texts[7].

Regarding the expression for environmental damage caused by pollution, phrases like "environmental damage" or "ecological damage" are being used, and they include both damages suffered by the natural environment, through pollution as well as those damages incurred by the person or property, other than those from the natural environment. The term of "environmental damage" was first used by Michel Despaux to reveal the particular features of indirect damages resulting from harming the environmental quality, especially if it envisages that the damage caused to some of the environment natural components spreads and influences other environmental components[8].

A controversy was born on the question who is the victim of ecological damage? The environment or the man? Most authors say it is about people and property damage caused by the environment, in which they are located, and other authors, who are fewer, state that environmental damage can only be considered the harm caused by man, to the environment.

In this regard, a clarification initially made by other specialists in the field[9], to which we join, should be made, namely, the emergence of damage represents the general foundation for the right to compensation of the holder of environmental factor, namely the polluter's obligation to pay compensation for environmental damage caused by pollution.

Regarding the definition of environmental damage, it should be noted that a complete and accurate definition of this notion is missing from traditional environment sources. Romanian legislature has attempted a definition which, unfortunately, as we shall see below, does not actually cover all the damage caused by environmental pollution, in general.

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[5] Ernest Lupan, *Civil liability* ..., p. 75-76

[6] Ion Dogaru, Pompil Draghici, *op. cit.*, p. 197-198.

[7] *Idem.*

[8] Ernest Lupan, "On the legal concept of environmental damage", "Dreptul" Review, no. 3 (2003), p. 78.

[9] *Idem*, p. 78-79; Ernest Lupan, "The pollution victim's right to compensation", "Dreptul" Review, no. 9 (2002), p. 69 et seq.

Thus, Environmental Protection Law no. 137/1995 was the first legal text that defined the environmental damage as "the measurable effect in cost of damage on human health, property or environment caused by pollutants, harmful activities or disasters", in Annex nr. 1. Subsequently, Government Emergency Ordinance no. 195/2005 resumed in art. 1, the definition of environmental damage without any improvement. *In this respect, we believe that the suggestion of ferenda law of an addition, in a future regulation, to the definition of environmental damage, in order to eliminate the existing confusion in theory and in practice is entitled.*

We detach the following characteristics from the definition given by the legislation in force[10]: it is about expressing the value of consequences of damages caused; damage can be done to human health, goods of any kind or to the environment; damages are the negative consequences of pollutants, harmful activities or disasters.

An observation[11] is required to be made: the effect of the value of environmental damage is indeed measurable, but this measurement is not always real, knowing the fact that the damage dimension does not come to light immediately.

Before further analysis of the environmental damages, a comparison between the notion of "civil damage" and "environmental damage" is required to be made:

- first, the civil law protects the subjective rights of individuals; the environment can not be protected by civil means. A form of protection is, however, ensured, most negative effects on the environment resulting in violations of civil rights, such as the right to property or the right to health;
- the task of civil law is to restore the situation previous to causing the damage, focusing rather on *restitutio* than on prevention, which characterizes environmental law;
- in environmental law, the categories of *damnum emergens* (Latin expression that means an element of the prejudice, the actual damage. In its totality, the damage includes both the actual loss, but also the lack of gain or benefit that the creditor of the obligation or the injured person would have achieved if no illegal act had occurred) and of *lucrum cessans* (Latin expression used to designate part of the prejudice which consists of the legitimate gain or benefit unrealized by a person as a result of failure or improper fulfilment of obligations assumed by another person or of the committing, by that person, of illegal acts. According to a fundamental principle from the civil liability field, compensation should cover the actual damage, damnum emergens and lucrum cessans) are not sufficient to determine the concept of damage, knowing that the environmental damage can be the outcome of a long process and can occur immediately and permanently or irreparably or only in the future.

2. Categories of environmental damages

The environmental damage consists of damage of primary origin or damage of secondary origin[12]. Thus, *the damage of primary origin* is the one caused to material values, having a real character (it prejudices the pecuniary interests of persons and may consist of losses in the agricultural production, the death of animals for production, destruction of plantations, etc.). *The damage of secondary origin* is the result of primary damage caused to the environment, appearing as losses of physiological, moral, genetic nature etc.

With regard to environmental damage, in Romanian environmental law, one can distinguish the following categories: environmental damage assessed and repaired; predictable environmental damage and acceptable or permitted environmental damage.

[10] Ernest Lupan, *On the legal ...*, p. 79.
[11] *Idem*, p. 79-80.
[12] Ernest Lupan, On *the legal ...*, p. 85-86.

3. Conditions for the pecuniary loss

Regarding the first condition, in environmental law, just as in civil law, the damage must be *certain*, its existence must be beyond doubt and it must be evaluated at present. Certain are, however, not only *the actual damages, but also the future ones*, if there is certainty that they will occur and if there are the necessary elements to determine their dimension.

If the whole extent of the damage can not be know (which happens most often when it comes to environmental pollution or its components), the court order will be limited only to the repair of the damage found with certainty; the Court can also subsequently go back on the order and give the entire reparation for all damage arising after the ruling, under the only condition to prove that it comes from the same act. The natural or legal person responsible for the damage will be compelled to repair it and to pay the costs of removing its consequences in order to restore the previous situation[13].

The second condition for pecuniary damage is for it *not to be repaired*, because otherwise, the civil liability ceases.

Finally, the third condition is for the damage to be direct, occurring as a direct consequence of the act by which is connected through a causal relation; otherwise, the damage goes outside the scope of tort liability[14].

4. The repair of environmental damages

The repair of environmental damages is driven by a set of principles, as it follows[15]:

The first principle concerns the *polluter's legal obligation to pay compensation* for covering the environmental damage caused, and is accomplished through the "polluter pays" principle, and if the polluter is not a person, compensation expenses are paid of funds specially created for this purpose, at national level.

The second principle refers to the *total compensation for the environmental damage caused* by using different methods to assess the damage (the judicial evaluation, the legal contractual evaluation, the administrative evaluation)[16].

The joint compensation in case of multiple authors of the damage is the third principle.

The fourth principle according to which *the environmental damage is repaired regardless of the polluter's fault*, ensures and guarantees the obligation of any natural or legal person, guilty or not to restore the polluted environment, not only in the case of damage caused by high-risk sources.

5. The repair of non- pecuniary losses from the environment field

It is known the fact that environmental degradation through pollution may be the source of pecuniary losses, but also of non-pecuniary losses resulting from the breach of the right to privacy[17].

Thus, the European Convention on Human Rights (adopted at Rome on the 4th of November 1950, and entered into force in September 1953, document through which the first steps were taken in order to ensure the guarantee of some of the rights enumerated in the Universal Declaration of Human Rights from December 1948) indirectly guarantees the right to a healthy environment. This

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[13] Daniela Marinescu, *Environmental Law Treaty*, Third Edition revised and enlarged, (Bucharest: Universul Juridic Publishing House, 2008), p. 657.

[14] Ion Dogaru, Pompil Draghici, *op. cit.*, p. 208.

[15] Ernest Lupan, *On the legal ...*, p. 86-87.

[16] For more details on damage assessment, see Simona Maya Teodoroiu, *The law of the environment and of sustainable development*, (Bucharest: Universul Juridic Publishing House, 2009), p. 205-208.

[17] Cãlina Jugastru, *The repair of non-pecuniary losses*, (Bucharest: Lumina Lex Publishing House, 2001), p.289.

right is considered, by a part of the legal specialized literature, as part of the third generation of human rights, called solidarity rights, next to the right to peace, the right to development etc.[18] , which however does not enjoy of an express dedication in the Convention. Given the importance of this right, the European Court of Human Rights has used the technique of "indirect protection" that has allowed the extension of the protection of some rights guaranteed by the Convention to rights which are not contained therein. Thus, through a broad interpretation of the scope of rights expressly stipulated by the Convention, the right to a healthy environment has been put next to the right to privacy, being considered a component of this right, leading, thus to the indirect protection of the right to environment.

The European Convention on Human Rights (the Convention) does not include in its articles or Protocols, the phrase "environment" or "right to a healthy environment". But, looking back at the moment of adopting the Convention (Rome, 1950), environmental issues were not a significant concern and industrial development did not pose serious problems for the environment. Under these conditions, the right to environment might be considered as not being part of the category of rights and freedoms guaranteed by the Convention[19].

According to theorists[20], the Convention was created as a result of atrocities committed during the Second World War, in an attempt to ensure human dignity and to support a true European Constitutional Charter, formulating in its content, individual rights to protect man's moral and physical integrity and freedoms; for this reason, the Convention editors were not concerned about the environment, at that time.

The interest in environmental issues emerged much later, namely, in 1972 during the first United Nations World Conference held in Stockholm. This was the first global environmental conference, attended by delegates from 114 countries. As it is known[21], the most important document adopted at the Conference is the "Declaration on the environment" in which 26 principles on states rights and obligations in that area and developing means of international cooperation were established. The importance of the document is that it explicitly stated for the first time, the connection between environmental protection and human rights. Thus, Principle 1 of the document states that: *"The man has the fundamental right to freedom, equality and satisfactory living conditions in a quality environment, which allows him to live with dignity and prosperity. He has the sacred duty to protect and improve the environment for present and future generations (…)"*[22]. But as stated above, the document establishes a relation between human rights and environmental protection, the quality of the latter being a key factor to ensure satisfactory living conditions, but, nevertheless, does not recognize directly a right to environment. Another novelty is that through this document, the grounds for the development of international environmental law have been set up.

After two decades from the first global environmental conference, despite the results achieved in terms of international cooperation, the planet's environment continued to deteriorate in a general manner[23], requiring a new measure, namely, the second United Nations Conference on Environment and Development held in Rio de Janeiro, in 1992 (during the second United Nations Conference on Environment and Development, a series of documents have been adopted, such as : the Rio Declaration on Environment and Development (Earth Charter), Agenda 21, the Convention on

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[18] Corneliu Bîrsan, *The European Convention on Human Rights. Comment on articles*, Volume I: *Rights and Liberties*, (Bucharest: All Beck Publishing House, 2005), p. 32.

[19] Doinița-Luminița Nițu, "The right to environment", "Themis" Magazine - Magazine of the National Institute of Magistracy no. 3 (2005), p. 47.

[20] Corneliu Bîrsan, *The protection of the right to private and family life, home and correspondence in the European Convention on Human Rights*, "Romanian Pandects" magazine no. 1 (2003), p. 28.

[21] Daniela Marinescu, *op. cit.*, p. 18.

[22] Dumitra Popescu, Mircea I. Popescu, *Environmental Law. Documents and international treaties*, Vol I, (Bucharest: Artprint Publishing House, 2002), p. 62.

[23] Mircea Duțu, *International Environmental Law*, (Bucharest: Economic Publishing House, 2004), p. 59.

Climate Change, the Convention on Biological Diversity and the Declaration of Principles on the conservation and exploitation of forests).

Although, through the Rio Declaration, no progress was made in the recognition of the material right to a healthy environment, the document is important because its provisions enshrine a number of procedural rights that are considered derived from the material right to environment: the right to access to environmental information, the public participation in the decision-making process and the access to justice in environmental matters[24].

However, the first international legal instrument specifically consecrating the right to environment was adopted during the Conference of the Organization of African Unity (now African Union, successor of the Organization of African Unity, founded in July 2002. The African Union is modelled after the European Union, its purposes being to promote democracy, human rights and development on the African continent), as "the African Charter on Human and Peoples Rights, a regional document, which in art. 24 provided that *"all peoples have the right to a general environment, satisfactory and favourable to their development"*. The document is especially important since it comes from a cooperative structure belonging to third world countries which, due to socio-economic difficulties do not give priority to environmental concerns[25].

Continuing the regional line of adopting some legal instruments enshrining the right to environment, we focus our attention on the "Additional Protocol" of the American Convention on Human Rights, adopted at San Salvador on the 17th of November 1998, on economic, social and cultural rights, which in art. 11, para. 1 recognizes the right to a healthy environment adding that *"everyone has the right to live in a healthy environment and to benefit from essential public services* (art. 11, para. 2)", but also states the obligation to *"promote the protection, preservation and improvement of the environment"* (art. 11, para. 2).

The Convention on the access to information, public participation in the decision- making process and the access to justice in environmental matters, signed at Aarhus on the 25th of June 1998 (ratified by Romania, by Law nr. 86 of May 10, 2000) brings an important contribution to affirming the legitimacy of the right to a healthy environment at European level[26], being particularly important due to the fact that it recognizes even from the preamble that *"everyone has the right to live in an environment adequate to his health and welfare* (…)[27]" and believes *"that to be (...) able to maintain this right, citizens must have access to information, be entitled to participate to the decision- making process and to have access to justice in environmental matters* (...)[28]. Also, the Convention believes that a better access to information contributes to public awareness of environmental issues.

As for the scope of legitimacy of the right to a healthy environment, three such situations are provided in the contents of the Convention, more specifically in article 9 (Access to justice): the access to justice in order to ensure procedural access to information, the access to justice for ensuring public participation in environmental decisions and the access to administrative or judicial procedures to challenge acts or omissions of private persons and public authorities which contravene to provisions of the national legislation on the environment.

Because after the first UN Conference held in Stockholm in 1972, to which we referred at the beginning of the chapter, the procedural guarantee of the right to a healthy environment and its recognition as independent right has penetrated the common constitutional traditions, from that moment on, all European constitutions have undergone reviews or have been replaced, by the insertion of provisions relating to that right considered of new generation; we consider of utmost

[24] Doinița-Luminia Nițu, *op. cit*., p. 45.
[25] Daniela Marinescu, *op. cit.*, p. 393.
[26] Mircea Duțu, *Treaty of Environmental Law*, 3rd Edition, (Bucharest: C.H. Beck Publishing House, 2007), p. 327.
[27] Dumitra Popescu, Mircea I. Popescu, *op. cit.*, p. 121.
[28] *Ibidem.*

importance also Community provisions of the Treaty of Maastricht from 1995, which states that *"The Union recognizes the fundamental human rights, as guaranteed by the European Convention of Rome (1950), and resulting from the constitutional traditions common to Member States, as well as from the general principles of Community law"* recognizing, by indirect reference, the fundamental right to environment within human rights recognized and guaranteed in the Community judicial order[29].

As a conclusion to the above, we agree with the assessment of authors of the specialized literature[30] who consider that, in virtue of the fact that there is no legal document in the European Community, to enshrine and guarantee the fundamental right to environment, this right receives, however, the status of an essential component of the constitutional traditions of European countries.

Below, we shall present some decisions that concern the violation of article 8 of the Convention, and hence of the fundamental human right to a healthy environment.

The first case to which we shall make reference is Moreno Gomez v. Spain[31] (2004). The plaintiff has been living since 1970 in a residential area in Valencia. From 1974, Valencia City Council has granted authorizations for the opening of bars, pubs and discos in the neighbourhood where the applicant resides, making it impossible for the inhabitants of that neighbourhood to sleep. The first complaint of neighbourhood residents was related to vandalism and noise, before 1980. With regard to the problem caused by noise, in 1983, Valencia City Council took the decision to grant no more authorizations for opening new nightclubs in the area. However, the measure was never implemented, and new authorizations are still being released. In settling the case, the Court finds that the exceeding of the maximum level of noise in the area has been found several times by the municipal services, so it does not consider necessary to claim an inhabitant of the area to prove what is already officially known by the mayor. Given the intensity of noise, beyond the level permitted at night, as well as the fact that this state has been repeatedly happening for several years, the Court concludes that there has been a breach of rights protected by art. 8. The administration has adopted general measures, but tolerated the infringement of rules imposed; the plaintiff has suffered a serious violation of her right to respect for home, because of local government passivity to nocturnal noises. For this reason, the Court finds that the respondent State did not fulfil its positive obligation to ensure the plaintiff's right to respect for home and private life, therefore, art. 8 of the Convention has been violated[32].

The second case is represented by Giacomelli v. Italy[33] (2006). The plaintiff has been living since 1950 near a factory that has as activity object, the storage and treatment of "special waste", variously described as either toxic or non-toxic. The factory started its activity in 1982. Since then, the plaintiff has requested several times to the Court to reconsider the authorization given to the factory. Even the Ministry of Environment found, in 2000 and 2001 that the factory functioning endangered the health of people who lived in the nearby. Other competent authorities reached the same conclusions. In December 2002, the local council moved temporarily the plaintiff's family together with other families, until the end of the lawsuit in which the factory was involved. In 2003, at the plaintiff's request, the administrative Court ruled that the decision to reopen the factory activity was illegal and must be cancelled, sentencing at the same time the temporary suspension of the factory activity. However, the decision was never implemented, and in 2004 the Ministry of Environment issued a favourable assent for further work in the factory, on the condition that it changed its operating conditions, under the control and supervision of the Court. However, only after

[29] Daniela Marinescu, *op. cit*., p. 394.

[30] Ioana Dragomir, George Augustin Dragomir, "The Right to a healthy environment as general principle of Community law", "Public Law" Magazine, no. 3 (2006), p. 135.

[31] ECHR, Decision of November 16, 2004, application no. 4143/02, available on site. www.echr.coe.int

[32] Corneliu-Liviu Popescu, *The Jurisprudence of European Court of Human Rights 2004*, (Bucharest: C.H. Beck Publishing House, 2006), p. 92.

[33] ECHR, Decision of November 2nd, 2006, application no. 59909/00, available on site. www.echr.coe.int

14 years since the factory started its activity and seven years after it began to detoxify industrial waste, the Ministry requested a report on the impact of the factory activity on the environment. Consequently, the Court considers that public authorities have not fulfilled the obligations imposed by internal law and have ignored court orders establishing that the activity of the factory was illegal. Also, the Court stated that, even assuming that since 2004, the factory activity had no longer been dangerous for the lives of local people, in previous years, the state failed to fulfil its obligation to guarantee them the respect for private and family life. Therefore, the Court concludes that article 8 has been violated[34].

In its jurisprudence, the ECHR, in addition to having recognized the right to a healthy environment through the broad interpretation of the right to privacy, family and home, it has also shown that the right to an environment of a certain quality can be related to the respect for property. Thus, chronologically, in terms of material right, the issue was raised for the first time in the case Arrondelle v. England[35] (1980). In fact, the plaintiff, the owner of a pavilion situated at the extremity of the flight and landing runways of London Gatwick airport and near a highway, complained about the noise that violated her right to privacy, but also her right to respect for property, the pollution contributing to the reduction of the visiting value of her house. In this case, the Commission admitted that complaints suffered by the plaintiff were related to art. 8 of the Convention and art. 1 of Protocol nr. 1 regarding the property. In this case, the admissibility decision focuses on the individual situation of the plaintiff "whose property is so close to the airport runway, that the airplanes noise submits her, according to an inspection report of 1976, to an intolerable stress. It seems that the noise of highway M23 aggravates this situation"[36].

In the case of Baggs v. England[37] (1985) the plaintiff, Frederick William Baggs, who lived with his family in a house situated in the surroundings of London's Heathrow airport, complained of noise pollution caused by airport runways extension, which put that family in an unbearable situation, the house being located in an area of 72.5 NNI (noise metric). It should be noted that if the index exceeds 60 NNI, the administration does not issue building permits. However, the town planning service refused the plaintiff's application to classify his property as for "commercial use" in order to be able to sell it more easily and then to buy another property in a quieter area. The complaint was declared admissible, the Commission finding that, according to an official report, the situation that family Baggs had to endure was "truly deplorable and outrageous"[38].

We agree with the doctrine[39] that states that within the European system of judicial protection of human rights, the damage caused to the environment and, therefore, to individual human rights must be proved in order for them to be covered by the Convention guarantees. In other words, individuals must provide, at least a piece of evidence to support their claims, without which they could not "pretend", in terms of the Convention, to be victims of a violation of rights and freedoms guaranteed by this text.

In this regard, we focus our attention on the case Tauira v. France[40] (1995), referring to an alleged harm done to the environment, caused by the resumption of French nuclear experiments in the Pacific, in 1995. The Commission stated, among others, that the plaintiffs had not provided any document related to their health. As a result for not having any proof to support their claims, they could not pretend to be victims of any violation of the Convention. According to the Commission,

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[34] Radu Chirita, *The European Court of Human Rights. Reports of Decisions 2006*, (Bucharest: C.H. Beck Publishing House, 2007), p. 333.

[35] ECHR, Decision of July 15, 1980, application no. 7889/77, available on site. www.echr.coe.int

[36] Michelle de Salvia, "Environment and the European Convention on Human Rights", "Romanian Pandects" Magazine, no. 6 (2003), p. 164.

[37] ECHR, Decision of October 16, 1985, application no. 9310/81, available on site. www.echr.coe.int

[38] Ioana Dragomir, George Augustin Dragomir, *op. cit*., p.137

[39] Michelle Salvia, *op. cit*., p. 163.

[40] ECHR, Decision of December 4, 1995, application no. 28204/95, available on site. www.echr.coe.int

the mere invocation of inherent risks in the use of nuclear energy is not sufficient to allow plaintiffs to pretend that they are victims of any violation of the Convention, since a significant number of human activities are risks generators. At the same time, plaintiffs must be able to support, in a reasoned and circumstantial manner, that in the absence of adequate preventive measures taken by authorities, the degree of probability of damage occurrence is high enough to be considered as generating a violation of the right, on the condition that the criticized act does not have repercussions too distant in time[41].

6. Conclusions

We can say that the main differences between civil and environmental damage can be highlighted by the following criteria[42]: from the point of view of *the protected interest by applying the repair rules*: by repairing *the civil damage*, private rights and interests of individuals are being protected, and by repairing *the environmental damage*, the public interests of the entire society, including of persons are being protected; as for *rules by which the damage is repaired*, *the civil damage* can be recovered only upon the notification of the person suffering the injury, under the regulations on civil liability, while *the environmental damage* can be recovered after the procedure and rules of environmental law, conceived outside the idea of liability, at the request of the holder of environmental factor, non-governmental organizations, or at the request of specialized state bodies; depending on *the position of parties in the legal relations for repairing the damage, in civil law*, the parties' position is of legal equality, and *in environmental law*, the position is of subordination; as for *the possibility to renounce at the recovery of damages, in civil law*, the one who suffered the damage may not claim for damage recovery, but *in environmental law*, the owner of the polluted factor can not waive the recovery of the polluted environment, because this is a legal obligation; *depending on the possibility of negotiating the amount of damage caused*, as for *the civil damage*, parties are offered the possibility to negotiate the size of the damage to be repaired, while in the case of *environmental damage*, negotiating is excluded, the damage must be entirely repaired, the polluter is compelled to bear the cost of damage repair and to remove the consequences of pollution; he must also restore as much as possible, the conditions prior to the damage.

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[41] Michelle de Salvia, *op. cit*., p. 163.
[42] Ernest Lupan, *On the legal*…., p. 87-88.

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THE OPTIONAL INSTRUMENT OF EUROPEAN CONTRACTS LAW

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Abstract
The pragmatic approach of the European contracts lawissueimposes the conceptualization and the execution of a form to materialize it accordingly, thus as to meet the legal, economic, socialand political realitiesexisting at the level of the European Union.The actual harmonization of the European private law and, implicitly, the instrument by which it can be accomplished, represents the current concern of the European specialists, but also of the European competent bodies in the legislative process.This work analyzes and supports the need to harmonize the European private law under the form of a regulation for creating a European contracts law optional instrument, conceived as "the 28th regime" or "the second regime" in each member state, offering the parties an option to choose between the two regimes of contracts domestic law.

Key words: *European contracts law, harmonization, regulation, directive, legal nature, optional instrument*

I. Introduction

The European Commission and the European Parliament have taken the first major steps in the direction of harmonizing the European private law and, to this end, by its resolutions, in the 1989 and 1994, the European Parliament has made an invitation to initiate the work on a European private law common Code.

At its turn, the European Commission has launched in 2001 a debate on the European contracts law, to which have been participating the European Parliament, the Council and different interested parties: enterprises, scholars, law practitioners, a.s.o.

In the current context of the single market and, especially, the one forecasted for the next decade through the Commission Communication "Europe 2020 – an European strategy for smart, sustainable and inclusive growth"[1], the economic and legal surveys, but also the political positions of the member states of the European Union, reveal the need to adopt an instrument for European contracts law.

It is obvious that, amongst the barriers of powerful and intelligent development of the single market, the existing differences and disputes existent at the level of the domestic laws in contractual matter play a major role.

The main problems of the current stage of regulation of the contractual matter at the EU level consider the costs the enterprises and the consumers have to incur upon concluding the contracts with their EU states partners and, in particular, the fact that the policing differences among the member states prevent or render difficult the commercial transactions regulated by the matter of consumers protection law, partially harmonized at the level of the European Law.

In this sense, the constant example is the one provided by the rule under the art.6 of the Roma I Regulation protecting the consumers, but, for the enterprises, this rule means that, when selling their goods or services beyond the borders of their country of origin, the contracts concluded with the consumers are regulated by the rules applicable in the countries where they are residents, regardless if they choose or not the law applicable to the contract thus concluded. The enterprise must comply with the provisions of a foreign law, which might entail the possibility to confront with very high costs for the cross-border transactions performance. This situation represents a contractual

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[1] COM (2010) 2020, 3.3.2010;

uncertainty for the enterprise and, sometimes, it even blocks the cross-border commerce performance.

Due to such reason, according to the European Economic and Social Committee, "61% of the cross-border sales fail to complete, as the traders refuse to make deliveries to the country the consumer is residing. This is mainly because of the legislative barriers and uncertainty regarding the applicable rules "[2]. The consumers in Romania and in other member states of the European Union, often must face the situation pointed out by the European authorities that is, they are in the position of being denied the execution of the cross-borders transactions, and especially the e-commerce transactions, being blocked in the country and deprived of the possibility of benefiting of more offers and lower prices existing on the Domestic Market. There are numerous the cases when the website of a seller can be accessed by the consumers in all member states of the EU, including Romania, but after ordering a product, the seller refuses to conclude the contracts with the consumers residing in these states, due to the high costs and due risks, motivating its refusal on the fact that the products cannot be delivered in that member state or the unavailability of the ordered products.

In the current context, the potential offered by the electronic commerce remains insufficiently exploited, for the disadvantage of the enterprises and of the consumers.

The performance of the classic commercial transactions and of the ones carried out electronically would be significantly encouraged by the existence of a European legal space harmonized in the contractual matter and even more completely harmonized in the matter of consumers protection.

Last, but not least, the contractual relations between enterprises would be much safer, more quick and more efficient, if there would be European common legal instruments in the contractual matter.

For all these general observations, we fully agree with the Commission's opinion, according to which the states must take the necessary actions for finalizing the European domestic market also under the aspect of the European contracts law and also with the proposition that, by 2012, there must be drafted an optional instrument related to contracts law, which should complete the directive on the consumers rights, for remedying the contracts law, including the online environment.

II. The instrument for European contracts law

The development of the single market of the European Union, weaken by the current economic crisis, can be powerfully boosted through eliminating the legislative obstacle materialized in the shape of policing differences at the level of the member states in the matter of contract law and consumers protection, grounds of internal and cross-border transactions.

The desideratum for contract law coherence can be accomplished by creating an optional law, "the 28thregime", a solution frequently discussed upon within the documents of the European Commission and European Parliament, even when talking about major fields, as indicated also in the Final notice of the European Economic and Social Committee[3]on the Green Book of the Commissionon the policy options in the perspective of a European contract law for consumers and enterprises[4], the harmonization at the European level seemed difficult to achieve, if not even impossible.

Undoubtedly, the harmonization of the laws in the matter of contracts must be achieved step by step, but in a steady, complete, safe manner and, most importantly, by means of an instrument that is provided free of charge and directly accessible to the enterprises and to the consumers.

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[2] The EESC notice on January 5th 2011, INT/524 -CESE 1474/2010 fin (IT) CBERB/GBAR/dg;

[3] INT/524 -CESE 1474/2010 fin (IT) CBERB/GBAR/dg;

[4] COM (2010) 348 final, Bruxelles, 1.7.2010;

< http://ec.europa.eu/justice/news/consulting_public/0052/consultation_questionaire_ro.pdf> (last view on January 23rd2011);

Although it has been constantly considered that the observance of the subsidiary and proportionality principles is mainly ensured by means of directives, in some fields, such as the field of consumers protection, this instrument for legislative harmonization has proved to be insufficient for the single market' needs.

Considering this reality, the European Commission has assessed, within its Communication, "Europe 2020 - an European strategy for smart, sustainable and inclusive growth ",that: "for eliminating the existing blockages, in reference to the single market what is needed is: the continuation of works under the agenda for an intelligent regulation, examining, among others, the possibility to rather favour the use of regulations than directives".

From this perspective, the most suitable is the variant of a regulation that would create an optional instrument of European contract law, conceived as a "second regime" in each member state, offering the parties an option to choose between the two regimes of contracts domestic law, regimes applicable to both domestic and cross-border transactions. In this sense, Mario Monti, ex commissioner for the domestic and competition market, in his Report on the single market, published on May 9th, 2010, has pointed out the advantages offered by the optional "28th regime" to the enterprises and consumers, mentioning that:"In other instances, where upfront harmonisation is not the solution, it is worthwhile exploring the idea of a 28th regime, a EU framework alternative to but not replacing national rules. The advantage of the 28th regime is to expand options for business and citizens operating in the single market: if the single market is their main horizon, they can opt for a standard and single legal framework valid across Member States; if they move in a predominantly national setting, they will remain under the national regime. An additional benefit of this model is that it provides a reference point and an incentive for the convergence of national regimes. So far, the 28th regime model received little attention except for the European Company Statute. It should be examined further for expatriate workers or in the area of commercial contracts where a reference framework for commercial contracts could remove obstacles to cross-border transactions. "[5].

Moreover, under the aspect of the e-commerce transactions, the Digital Agenda for Europe[6], presented by the European Commission on May 19th, 2010, indicates as necessary action for building the single and dynamic market, the strengthening of trust in the digital environment including by proposing an instrument on contract law that would complete the project of the directive on consumers' rights.

Such an optional instrument would facilitate both the domestic and the cross-border transactions offering sufficient advantages and additional value by reference to the classical system, to both enterprisers and consumers.

As far as the scope and substance of the optional instrument shall reflect a fair balance between the interest of the involved parties and a high level of consumers' protection, the offered advantages shall determine its use on a large scale.

Thus, as an alternative to the plurality of the existing regimes in contractual matter, the optional instrument shall eliminate, in a large extent, the adverse effects felt at the level of the domestic market, generated by the legislative fragmenting at the European Union level; it shall

[5] Report of Mario Monti to the President of the European Commission: "A New Strategy for the Single Market", May 9th, 2010, available on < http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf> (last view on January 23rd, 2011);

[6]Digital Agenda for Europe Communication, available at:<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010DC0245(01):EN:NOT>, (last view at 24 January 2011); The Digital Agenda is built upon wide consultations, in particular on inputs from the Digital Competitiveness Report 2009 - COM(2009) 390; the Commission's 2009 public consultation on future ICT priorities; the Conclusions of the TTE Council of December 2009, the Europe 2020 consultation and strategy; and the ICT Industry Partnership Contribution to the Spanish Presidency Digital Europe Strategy:, the own-initiative report of the European Parliament on 2015.eu and the Declaration agreed at the informal Ministerial meeting in Granada in April 2010. All these are available at:

http://ec.europa.eu/information_society/eeurope/i2010/index_en htm.

eliminate the conflicts of laws and, especially, the legal insecurity mainly manifested, in the matter of consumers' rights. The set of standards applicable in contractual matter shall be easily accessible in all the languages of the member states, thus eliminating the costs entailed by the diversity of the regulations.

By its recent recommendation contained in the Notice on the Green Chart of the Commission on the policy options in the perspective of a European law of contracts for consumers and enterprises adopted on January 19th, 2011[7], the European Economic and Social Committee has, mainly, the same opinion ; however it limits, without any grounds, the scope of an optional instrument of European contract law and recommends in the perspective of an European contracts law, "a mixed solution, that would consider the decrease of the costs and the legal security, by means of:

– a „set of instruments", which would establish a common reference framework that the parties can use for drafting transnational contracts, accompanied by

- an optional regulatory regime that would allow the parties to start from more advantageous grounds, thanks to a „new advanced optional regime", to be used within the transnational contractual relations, as an alternative to the national laws, save that both the „set", and the regulation to be available in all the EU member states languages and to provide legal security based on the most advanced protection formula for citizens and enterprises. Such a regulatory regime shall not prevent the member states from maintaining or establishing more strict protective measures for the consumers "[8].

In its turn, the European Parliament has adopted resolutions on the possibility of harmonizing the material private law, first in certain sectors of the private law, as an essential condition for completing the domestic market.

In the direction of the two main aspects of these issue related to the legal nature of the European instrument and its structure, the European Commission has also set up a group of experts[9]for studying the feasibility of an instrument of European contract law and for assisting the Commission in the activity for selecting the parties in the Principles, Definitions and Model Rules of European Private Law (PCCR)[10]that are directly or indirectly applicable to the contracts law, as well as the restructuring, review, and completion of the topics selected from the draft common frame of reference, considering also other research works in the field, as well as the EU Acquis Communautaire. The CoPECLnetwork - Common Principles of European Contract Law, has completed and submitted to the European Commission the Draft Common Frame of Reference.

The Draft Common Frame of Reference (DCFR)[11]has been published at the begging of 2008, but in a first edition, DCFR did not contain any reference to DCFR[12], which was surprising[13] -

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[7] See the notice of EESC INT/524, rapporteur M. PEZZINI, available on http://www.eesc.europa.eu;

[8] Idem.;

[9] The Commission's Resolution on April 26th2010 setting up the Expert Group on a Common Frame of Reference in the area of European contract law, published in the O J L 105, 27.4.2010, p.109, available on < http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:105:0109:0111:RO:PDF> (last view January 23rd, 2011);

[10] Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), outline edition, Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), Based in part on a revised version of the Principles of European Contract Law, Edited by Christian von Bar, Eric Clive and Hans Schulte-Nölke and Hugh Beale, Johnny Herre, JérômeHuet, Matthias Storme, Stephen Swann, Paul Varul, Anna Veneziano and FryderykZoll , 2009, Sellier. european law publishers GmbH, Munich., available at: <http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf>, (last view – January 24th, 2011);

[11] Details in L.-M. Vîtcă, Proiectul Cadrului comun de referință în material dreptului privat european: baza de pornire a viitorului Cod civil european (The Draft Common Frame of Reference in the matter of European private law: the starting point for the future European Civil Code), în Buletin de informare legislativă nr. 2/2009, p. 3 and following.

[12] See also Ch. von Bar, E. Clive, H. Schulte-Nölkeș.a., Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR) Outline Edition, Sellier. European Law Publishers, München, 2009;

considering that one of the main purposes of DCFR was to represent an instrument for the Commission, in order to review the Acquis Communautaire in the field of contractual law.

The authors of the CRF Project specify that the project can be used as "grounds for one or several optional instruments". For this purpose, in the EESC opinion, "the proposition could be also applied in a restrictive manner, by introducing the general dispositions provided by the CRF project in an optional instrument that would apply only in certain specific fields of the contracts. This would contribute to avoiding the legislative gaps that would most certainly occur upon the adoption of some provisions specific to certain types of contracts"[14].

In fact, such a solution would eliminate the current legislative obstacles of cross-border trade, which represents *per se* a great benefit for the participants to the commercial activity on the domestic market and, in addition, could significantly improve the quality of the national transactions. The enterprises shall be strongly motivated to apply a set of uniform standards in contractual matter, both in the enterprises-consumers relations, but also in the enterprises-enterprises relations designed as an optional instrument set up as "the second regime" in each member state.

Following the same direction of the advantages offered by this option, the practitioners in the field of law, magistrates and lawyers, would be able to refer to a single set of legal provisions applicable in the contracts matter and, thus, the administrative tasks of the judiciary systems would be diminished.

In the same time, by choosing the optional regulation as an instrument of European contract law, in any of the assigned official names and/or doctrinaire names: "the 28thregime" or "the second regime", such will be part of the domestic laws of the member states, with all favourable consequences deriving from this statute. We hereby mention in this sense, the possibility of using the procedure applicable to the preliminary decisions provided under the art.267 TFEU and, implicitly, the guarantee for a correct and uniform interpretation of the provisions of the regulation by the European Union Court of Justice.

We are of the opinion that such an optional instrument in the matter of European contracts law shall not pointlessly over-charge the national legal framework, considering that, as far as it shall represent a preferable and more adaptive option to the needs of the domestic market, the disadvantage of the over-charge shall be practically annulled and, in time, the national laws in this matter shall harmonize with the provisions of the European instrument provisions, eliminating the duality thus created.

From the political point of view, Romania has partly expressed its option, under the aspect of the legal nature of the instrument in the contracts matter. Thus, the politically agreed option is to draft a regulation for the setting up of an European contract law that would replace the diversity of domestic laws with a uniform set of rules applicable at European level[15].

Beyond the maximum efficiency of such a solution, it must be related to the current European stage of economic and political views and to the fact that, as indicated in the Green Chart of the Commission, the major disadvantage of this option consists in the fact that such a solution might raise delicate issues on the failure to comply with the principles of subsidiary and proportionality as,

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[13] See also N. Jansen, R. Zimmermann, Restating the Acquis Communautaire ?A Critical Examination of the Principles of the existing EC Contract Law, in The Modern Law Review n. 4/2008, vol. 71, p. 508; M. Hesselink, The Consumer Rights Directive and the CFR: two worlds apart? Informative note for the Commission for legal affairs, February 2009, PE 410.674, available on:

http://www.europarl.europa.eu/activities/committees/studies.do?language=EN.;J. Fazekas, Connection between the CFR and a possible horizontal instrument of consumer law, in Common Frame of Reference and Existing EC Contract Law, Sellier. European Law Publishers, München, 2008, p. 297;

[14] Ibidem.

[15] Romanian Parliament, Resolution of the Senate no.40/17.12.2010 on the Green Chart of the Commission on the policy options in the perspective of an European contract law for consumers and enterprises COM (2010) 348 final, Of. M., Part I no.890/30.12.2010, p.6;

the replacement of the domestic laws with a single set of rules in the contracts matter could be considered a disproportionate measure for eliminating the barriers against the commerce on the domestic market.

III. Conclusions

An European regulation that creates an optional instrument of European contracts law presents the parties with the possibility to choose between two regimes of domestic contract law, applicable to both national and cross-border transactions, and, as it provides an European legal statute in the matter of civil and commercial contracts, it is relatively easy to accept by the member states and by the European organisms, it complies with the principles of subsidiary and proportionality, it leads to the achievement of the objectives proposed by the experts and by the European Commission, and (optionally) it eliminates the national legislative differences, it can be a complete instrument regarding the essential aspects in the contractual matter and, in time, it shall represent, by the legal safety it offers and by the frequency of its use, a model for the national legislators, a major step on the path of European legislation harmonization in the matter of contracts law.

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THE LETTER OF GUARANTEE FROM THE PERSPECTIVE OF THE NEW CIVIL CODE

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Abstract:
The letter of guarantee is frequently used in the domestic and international commercial activity, first of all, for the safety offered for securing the contractual obligations without blocking the pecuniary funds and, second of all, due to the existing uniform international regulations that correspond to the needs supporting the occurrence of these types of autonomous securities.
In Romania, the lack of legal policing of the letter of guarantee has created practical difficulties and offered judges the possibility to "make the law" in the litigations generated by the enforcement or by the suspension of enforcement of these contractual securities.
This work analysis the regulation of the letter of guarantee provided in the New Civil Code from the perspective of its harmonization with the Uniform Rules of the International Chamber of Commerce in Paris and with the Draft Common Frame of Reference in the matter of the European private law.

Key words: *letter of guarantee, autonomous guarantees, personal securities, New Civil Code, demand guarantees*

I. Introduction

Undoubtedly, the international trade activity and the banking practice represented, along the time, the main engines for the modernization of commercial legislation.

On the other hand, it is axiomatic that commercial activity is accomplished almost exclusively on the basis of contracts and, in this matter, contract guarantees are essential, as strongest and most inexpensive guarantees are needed.

In this context, the codification and standardization by the International Chamber of Commerce of Paris of international commercial usual practices having as object the various forms of contract guarantees had a primordial role internationally.

In the first instance, we are considering The Uniform Customs and Practice for Documentary Credits (UCP) whose utilization was generated by The New York Bankers, and which have been regulated in the form of UCP in 1933, with the last revision of July 1st, 2007 – UCP 600.

Secondly, we are considering the demand bank guarantees – The ICC Uniform Rules for Demand Guarantees (URDG) adopted in 1992 and successively revised until reaching the latest form entered in force on the date of July 1st, 2010 – URDG 758 and the contract guarantees – The ICC Uniform Rules for Contract Guarantees – ICC Publication no. 325, which have not been revised since 1978 and became almost obsolete after almost one decade of non-use in the banking practice.

At the European Union level, the contract guarantees issue is included in the experts' and European organisms' concerns as part of the extensive and ambitious project of the Common Frame of Reference for European Private Law (CFR).

Thus, the European Commission financed through a research grant the activity of an academic international network which performed preliminary legal research in view to adopting CFR. The research activity has been completed at the end of 2008 and lead to publishing the Draft Common Frame of Reference (DCFR) – Principles, Definitions and Model Rules of European

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Private Law. Draft Common Frame of Reference (DCFR)[1]. The objective of this project is to provide a uniform contract law to the European internal market. This is due to the fact that various international and regional organizations admitted that the legislative differences in the law of contracts create barriers in the international trade.

Within the DCFR, contract guarantees are assigned three chapters with general provisions in Part G – Personal Security of Book IV – Specific contracts and the rights and obligations arising from them (IV-G1:101 – IV-G-3:109).

The Romanian legislator, proving an illaudable consistency, did not understand to answer coherently and rapidly to the essential requirements of the commercial activity, therefore our legislation does not regulate up to now any of the modern guarantees of extensive use in the national and international commercial practice.

In this context, the New Civil Code of Romania, adopted by Law no.287/July 17th, 2009[2] and foreseen to enter into force on July 27th, 2011 fills in this long-time gap of the Romanian law.

In this work, we shall analyze and determine the legal regime of the letter of guarantee from the perspective of the New Civil Code and, not in the last resort, how much appropriate and adjusted the Romanian regulation is to the most modern approaches of this form of guarantee.

II. Personal securities

Traditionally, the regulatory Romanian private law comprises a single form of personal security: the surety. For this reason, the autonomous conditional securities have been sometimes assimilated to this type of guarantees[3].

It was inevitable and necessary to complete the category of personal securities with other forms existing in other domestic regulations and in the commercial practice, respectively to regulate expressly the autonomous guarantees and to generally indicate any other types of personal guarantees that may be provided by law, without other such guarantees to be regulated, up to this moment, by the Romanian law.

Thus, according to article 2.279 of the New Civil Code: "The personal securities are the surety, the autonomous guarantees, as well as other guarantees expressly provided by law".

Analyzing the trends of the European private law, as recently illustrated in Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR), we believe that creating a clearer and more simple dichotomy by regulating the dependent and independent securities as main categories which would include expressly or by qualification the concrete types of guarantees would have been more adequate.

Thus, according to DCFR, the personal securities are either dependent or independent securities, the distinction being taken into consideration especially from the perspective of the conditional or unconditional nature of the way in which the guarantor personally undertakes.

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[1] Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), outline edition, Prepared Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), Based in part on a revised version of the Principles of European Contract Law, Edited by Christian von Bar, Eric Clive and Hans Schulte-Nölke and Hugh Beale, Johnny Herre, JérômeHuet, Matthias Storme, Stephen Swann, Paul Varul, Anna Veneziano and FryderykZoll , 2009, Sellier. european law publishers GmbH, Munich., available at:

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[2] Law no.287/July 17th, 2009 on the Civil Code, published in the Official journal Part I, no.511/July 24th, 2009;

[3] Classical Approaches of the Autonomous Guarantees in: Octavian Capatina, Brandusa Stefanescu, International Trade Law Treaty, Vol.II, Special Part, Ed. Academiei, Bucharest, 1987, page 113; Ion Turcu, Liviu Pop, Commercial Contracts. Conclusion and Performance. Introduction to the Theory and Practice of the Special Commercial Contracts Law, Vol.I, Ed. Lumina Lex, Bucharest, 1997, page 202; I. Rucareanu, Victor Babiuc, The Legal Regime of the Bank Guarantees, World Economy Institute, Bucharest, 1980;

In DCFR, the independent personal security is regulated as an obligation a guarantor provides to a creditor with the purpose of guaranteeing a right to execute an actual or future obligation of a debtor to a creditor, execution which is incumbent only if and to the extent that the obligation execution is due by the latter – art.IV.G.-1:101: Definition (a) – DCFR[4].

The second main type of personal securities – the independent security is considered to be an obligation undertaken by a guarantor in behalf of a creditor for the purpose of guaranteeing and which is expressly or impliedly declared as not depending on the obligations undertaken by another person towards the creditor – art.IV.G.-1:101:Definition(b) – DCFR.

In DCFR's vision, the personal securities category includes any type of guarantee undertaken voluntarily, including the letters of comfort (a form of conditional – dependent personal securities) and the stand-by letters of credit (a form of unconditional – independent securities) and it creates the presumption of the dependent character of all personal securities, except where the creditor indicates it has been agreed otherwise.

Accordingly, it has been opted in DCFR for a less rigid regulation and classification of the personal securities, the legal bond between the guaranteed obligation and the security being determinative for distinguishing between the dependent and the independent securities, not in an abstract but in anactual manner, in particular regarding the way the guarantor undertakes towards the creditor.

It is relevant from this perspective to mention that the independence of the security is not affected a by a simple general reference to a basic obligation (including to a personal security).

ICC Publication no.325 regarding the contract guarantees represented an unsuccess from the perspective of using these rules in the banking practice, probably due to the conditional character of the obligation undertaken by the personal guarantor.

Thus, The Uniform Rules for Contract Guarantees – ICC Publication no.325[5] are applied to the guarantees granted to some natural and legal persons for participating to tenders, for guaranteeing contract obligations performance and for guaranteeing the repayment of the advance payment given, any bails, insurances or similar commitment, whatever their name or description may be, which indicate it is submitted to the ICC Uniform Rules for tender bonds, performance guarantees and repayment guarantee – Publication no.325, all these guaranteed obligations arising from supply, service and works execution contracts.

The capacity of guarantor may be held by banks, insurance companies and any natural or legal persons, but in the domestic and international banking practice the guarantees granted by banks in the form of the letters of credit imposed.

From the perspective of ICC Publication no.325, the autonomous guarantee issued in the form of a letter of guarantee is the title on whose grounds a bank, an insurance company or any natural or legal person (guarantor) undertakes to pay, based on the instructions of a person called originator, an amount of money inscribed in the title to another person called beneficiary, upon this one's request, in case that the originator fails to fulfill his obligations to the beneficiaryarising from participating to the tenders organized by the beneficiary or from the supply, service or works contracts concluded between the originator and the beneficiary.

In order to prevent the fraudulent use of contract guarantees, ICC Publication no.325 rules the principle of justifying any letter of guarantee execution demand.

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[4] Distinction is made in DCFR between the obligation and its performance (<<"Obligation" -An obligation is a duty to perform which one party to a legal relationship, the debtor, owes to another party, the creditor. art. III. –1:101(1) - DCFR si, "Performance", in relation to an obligation, is the doing by the debtor of what is to be done under the obligation or the not doing by the debtor of what is not to be done.- art. III. – 1:101(2) DCFR>>);

[5] International Commercial Law, Source Materials, Selected by Willem J.H.Wiggers, Kluwer Law International, Hague, 2001;

Thus, the conditional character of a demand guarantee means that the execution of the guarantee is conditioned by the proof or the justification of failure to fulfill the contract obligations by the originator in the base contract.

The guarantor must comply with the obligation of paying the amount of money inscribed in the guarantee text only in case of failure to fulfill or inadequate fulfillment of the obligations by the originator in the base contract concluded with the beneficiary of the guarantee, failure to fulfill or inadequate fulfillment which must be duly proved or at least justified by the beneficiary.

It is obvious that, in case that the originator dully fulfilled the obligations undertaken in the base contract, the beneficiary has no right to request and receive the payment of the demand guarantee, as he cannot present justifying documents for his guarantee payment request neither can he justify this non-execution by statement, and the Guarantor shall thus refuse the payment according to ICC Paris Publication no.325.

It results from the short analysis of the contract guarantees regulated by ICC Publication no.325 that the main characteristics of this form of guarantee: the dependent and conditional character of the obligation undertaken by the guarantor have lead to avoiding them in the commercial and banking practice, creditors being much more interested in much safer autonomous guarantees, in unconditional or independent autonomous securities on first demand.

In this sense, ICC Publication no.325 on the demand guarantees, recently revised in the form of URDG 758[6] met exactly the creditors' needs, and we shall present these independent personal demand guarantees in the section dedicated to the letter of guarantee.

This last statement might be contradicted by a short glimpse to the United Nations Convention on independent guarantees and stand-by letters of credit of 1995[7], a regulation not very successful itself in the banking activity despite the fact that it regulates, as the very name of this international act indicates, the independent guarantees[8].

III. The letter of guarantee in the New Civil Code

The Romanian New Civil Code regulates the letter of guarantee as following: "The letter of guarantee is the irrevocable and unconditional commitment by which the guarantor undertakes, upon the demand of a person called originator, in the consideration of a pre-existing obligational relationship, but independently of it, to pay an amount of money to a third-person called beneficiary, according to the terms of the undertaken commitment" – art.2.321 paragraph 1 of the New Civil Code.

It is, undoubtedly, the only general definition that could have been given to this form of autonomous guarantee. It lacks any connection to the ICC Publication no.325 on contract guarantees and it corresponds to the similar concept regulated by URDG 758.

But by acting in this manner the Romanian legislator decides not to regulate the conditional personal securities. A counter-argument would be that surety is already regulated and it is a

[6] ICC Uniform Rules of Demand Guarantees Including Model Forms, 2010 Revision, Implementation Date July 1, 2010, ICC Publication No.758, ICC Services Publications, Paris, 2010;

[7] United Nations Convention on independent guarantees and stand-by letters of credit, adopted by the Resolution 50/48 ofn December 11th, 1995 at New York, entered into force on January 1st, 2000, not ratified by Romania,available at: <http://www.uncitral.org/pdf/english/texts/payments/guarantees/guarantees.pdf>, the last view at february 19, 2011;

[8] In art.3 al United Nations Convention on independent guarantees and stand-by letters of credit, the independence of the guarantee is defined as folows: "For the purposes of this Convention, an undertaking is independent where the guarantor/issuer's obligation to the beneficiary is not: (a) Dependent upon the existence or validity of any underlying transaction, or upon any other undertaking (including stand-by letters of credit or independent guarantees to which confirmations or counter-guarantees relate); or (b) Subject to any term or condition not appearing in the undertaking, or to any future, uncertain act or event except presentation of documents or another such act or event within a guarantor/ issuer's sphere of operations.";

conditional personal security, but, no doubt, it is a species and not a specific institution, and not in the last instance, the regulation of the letter of comfort as an implicitly conditional autonomous security.

In our opinion, it would have been much more necessary to distinctly regulate the conditional and unconditional personal securities[9] as general tools which would have included several expressly or impliedly indicated species, following the DCFR model for example.

In such a context, letters of guarantee could have been, as case may be, either conditional or unconditional, according to the terms of the commitment undertaken to the creditor[10].

Thus, from the perspective of the New Civil Code, the letter of guarantee is an autonomous guarantee, independent of the pre-existing legal relationship which generated the issuing of the guarantee, independently strengthened by its unconditional character.

Similarly to URDG 758, the guarantee is, by its nature, independent of the pre-existing relationships and the guarantor is not preoccupied of these ones at all. The references in the guarantee text to the pre-existing legal relationships made with identification purpose do not change the independent nature of the letter of guarantee.

In the same direction, an interesting aspect is seen in the French law, which did not include until by 2006[11] an express provisions on the letter of guarantee so that the literature assimilated it to a form of simple or imperfect delegation, qualified as an abstract act and ruled by the principle of unenforceability of exceptions: the initial debtor cannot elude the execution of his obligation to the assigning debtor by invoking an exception (nullity, termination, non-fulfillment exception) extracted from his relationships with his assigning debtor or from the relationship of the assigning debtor with the assigning creditor[12].

In these conditions, according to the provisions of art. 2.321 paragraph 2 of the new civil code, the guarantor must execute the obligation undertaken in the letter of guarantee upon the first and simple demand of the beneficiary if the text of the letter does not provide otherwise.

This superficial disposal is to be completed by the doctrine and especially by the jurisprudence, considering that, even in the case of the demand guarantees regulated by URDG 758, it is necessary, as a "formal" condition for the execution of the demand security, that the beneficiary's demand, based on the security, to be accompanied by a beneficiary's statement indicating the grounds on which the applicant (the originator) is found to be in default of fulfilling his obligations arising from the subsidiary relations (the pre-existing legal relationships). This statement may be included in the text of the demand based on the guarantee or in a separate document. The condition regarding this statement can only be superseded by express exclusion which would indicate that this condition is not required to be fulfilled. The exclusion formula is not sacramental, but it must be express and explicit in its essence, being necessary to mention that the guarantee execution demand justification statement is excluded.

The beneficiary's justifying statement is indicated in all modern regulations of the letter of guarantee and it is based on maintaining a balance between parties' interests and especially on the wish of demanding with good faith the execution of the letters of guarantee.

Accepting the possibility to derogate by the text of the letter of guarantee from the rule of executing it upon the beneficiary's first and simple demand provided for by art.2.321 paragr. 2 of the new civil code may be understood either in the sense of imposing by convention the formal condition

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[9] In the same sense: Pierre-Alain Gourion, GeogesPeyrard, Nicolas Soubeyrand, Droit du commerce international, 4e edition, L.G.D.J., Paris, 2008, p.267;J.P. Mattout, Droitbancaire international, Ed.Banque Paris, 1995, p.145; Ana-Maria Lupulescu, Autonomous Bank Guarantees, Romanian Review of Private Law no.6/2008, p.126;

[10] Detailes about this destinction: Mariana Negrus, Platisigarantiiinternationale, Ed.aIIIa, Ed.C.H.Beck, 2006, p.342-343;

[11] The Ordonance from 23 martie 2006 has been included the art.2321 in French Civil Code about personal securities; for detailes: Alain Cerles, Le cautionnement et la banque, 2e edition, Revue Banque, Paris, 2008, p.33;

[12] Philippe Malaurie, Laurent Aynes, Philippe Stoffel-Munck, Civil Law, The Obligations, Ed.Wolters Kluwer, Bucharest, 2010, page 831;

having as object the above-presented justifying statement, or in the sense of imposing a real condition which may be connected even with the modality of execution of the obligations arising from the pre-existing legal relationship which justified the issuing of the letter of guarantee. Such a last meaning of the legal phrase "if the text of the letter of guarantee does not provide otherwise" would lead to the conventional transformation of the letter of guarantee from unconditional to conditional, which would mean that, in the new civil code's conception, the conditional character is of the letter of guarantee's nature and not of its essence.

In the actual configuration of the new civil code, this one does not indicate either the period of time within which the guarantor must execute his obligation to the beneficiary nor the form that the execution demand must have. For this reason, the parties will probably refer to the provisions of URDG 758 as specific usual practices in this field. According to URDG 758, the guarantor must examine the beneficiary's demand and to determine if this one meets the requirements for being qualified as an execution demand within 5 business days from the date of being presented. When the guarantor determines that the beneficiary's demand is a consistent letter of guarantee execution demand, the guarantor must make the payment in the currency indicated in the guarantee, at the place of payment (art.20 and art.21 of URDG 758).

Due to the autonomy of the letter of guarantee by reference to the pre-existing legal relationship, the new civil code grants a special statute to unenforceability and, in this sense, the guarantor cannot oppose to the beneficiary the exceptions based on the obligational relation pre-existing to the commitment undertaken by the letter of guarantee[13] and he cannot be oblige bound to pay in case of abuse or evident fraud (art.2.321 paragraph 3 of the new civil code).

The Romanian doctrine and more rarely the jurisprudence admitted beneficiary's abuse or fraud as reasons for refusing to execute the letter of guarantee even when missing a legal definition of these manifestations.

The New Civil Code does not entirely cover this old gap of the Romanian private law and we do not believe that the practice can suitably apply these non-execution exceptions, still preferring to reject the demands for the suspension of bank letters of guarantee execution based on the fraud of the beneficiary's payment demand.

Thus, we shall be in the presence of abuse of rights by the letter of guarantee's beneficiary any time when his demand is made with the purpose to injure or prejudice the originator or it is excessive and unreasonable, contrary to the good-faith (art.15 of the New Civil Code).

The beneficiary's abuse or fraud is referred to the pre-existing legal relationship, more precisely to the beneficiary's demand's justified or unjustified character. Inasmuch as the letter of guarantee's originator, having pre-existing legal relationships with the beneficiary, has fulfilled all the obligations undertaken, the beneficiary cannot place the execution demand unless by abuse or fraud.

Certainly, the guarantor who made the payment had the right of recourse against the originator of the letter of guarantee[14]; otherwise the originator would record an unjust enrichment of his patrimony.

In practice, the bank issuing the letter of guarantee requests a collateral deposit, that is debited after enforcing the letter of guarantee. Another frequently used option for the guarantor is to credit the originator based on the terms established upon accepting the guarantee. In default of a contrary convention, the letter of guarantee is not transmittable together with the transmission of the rights and/or obligations arising from the pre-existing obligation relationship.

The letters of guarantee are usually not transferable but, by means of exception, the beneficiary may transfer the right to claim the payment under the letter of guarantee, if such

[13] Detailes in: Jean-Michel Jacquet, Philippe Delebecque, Droit du commerce international, 2e edition, Dalloz, Paris, 2000, p. 245;

[14] Jacques Beguin, Michel Menjucq, Droit du commerce international, LexisNexis, Litec, Paris 2005, p.562;

possibility is expressly stipulated within the text of the letter of guarantee. Thus, the letters of guarantee can be "transferable" only by means of an express statement in this sense provided in its text. A similar provision in provided by art.33 of URDG 758, with an additional mention regarding the non-transferable nature of the couter-guarantee.

Obviously, if the letter of guarantee's text does not provide otherwise, the letter will produce effects from the issue date and will *de jure* cease to be valid upon the expiration of the stipulated period, regardless of the delivery of the original letter of guarantee.

The New Civil Code, by its sole article on the letter of guarantee, composed of 7 (seven) paragraphs, obviously cannot even sketch properly the structure of this guarantee.

IV. Conclusions

This analysis of the letter of guarantee from the perspective of the New Civil Code, referred to the newest and most modern approaches in definitive or provisory regulations, respectively the ICC Uniform Rules for Demand Guarantee URDG 758 and the Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR) reveals essential aspects of the letter of guarantee taken into consideration in the new civil code.

We are considering the definitions of the parties involved in the issuing and execution of the guarantee, some terms interpretation, non-documentary conditions of the letter of guarantee, the contents of the instructions, modifications and completions of the letter of guarantee, the extension of the guarantor's responsibility, the presentation of the letter of guarantee, the enforcement application, including partial and multiple demands, the examination of the beneficiary's demand, etc.

We cannot consider acceptable such an option of regulating the letter of guarantee even if considering the provisions of art.10 paragraph 1 line 1 of the new civil code according to which in all these cases which are not provided by the new civil code usual practices and respectively, in our case the URDG 758, may be applied.

From this perspective, the reserve we have in based firstly on the provisions of art.10 paragraph 2 of the New Civil Code: "In the matters regulated by law, the usual practices are effective only inasmuch as they are recognized and expressly admitted by law". Or, the matter of the letter of guarantee is regulated by the New Civil Code, which does not recognize nor expressly admit the applicability of URDG 758 or of other usual practices.

As far as art. 10 paragraph 2 of the New Civil Code will be interpreted in the sense of applying the usual practices to the aspects and not to the matters which are not regulated by the law, we may have a more favorable attitude towards the legislator's option of regulating the letter of guarantee in a minimalist manner, outlining of the legal regime of these guarantees in a simple way.

Undoubtedly, the importance and the frequency of the practical use of the letters of guarantee would have justified a better legal regulation in accordance with the most modern European and international approaches.

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THE UNPREDICTABILITY THEORY AND THE CONTRACTUAL LIABILITY

CRISTINA ZAMSA[*]

Abstract:
The purpose of the present study is to establish a relationship between the unpredictability theory and the contractual liability, from both theoretical and practical point of view. Usually, the unpredictability is invoked by way of defense by the debtor, refusing to perform the excessively onerous obligation. However the unpredictability theory shall apply also to the hypothesis of a performed obligation, by way of main action, depending on more factors: the nature of the agreement, investigating the attitude of the party affected by the unpredictability. Observing the conditions and the effects of these two ways of invoking the unpredictability will form the objectives of the present study.
The debtor of the excessively onerous, in order to avoid the contractual liability, shall nevertheless perform such obligation, by carrying along some additional costs. If subsequently, the creditor shall refuse to revise the agreement and implicitly, to reimburse the exorbitant costs, the debtor will have to raise the unpredictability by way of action, in order to recover the exorbitant costs in performing the obligation. In such case, the unpredictability is accompanied by another legal issue: the contractual liability of the co-contractor of the party affected by unpredictability.

Key words: *liability, obligation, onerousity, performance, unpredictability*

Introduction

Analyzing the relationship between the unpredictability theory and the contractual liability represents a new approach in the field of the civil and commercial obligations. The unpredictability theory raises the question of an excessive onerousity of the obligation which, even if not impossible to be performed, can expose the co-contractor to a very difficult economic position, even to bankruptcy, in the context of the occurrence of a very enhanced unbalance of the value of the reciprocal performances of the parties to the agreement.

De lege lata, the Romanian law does not stipulate an express provision, which should define and regulate the applicability conditions of the unpredictability theory. The current Civil Code - in force since 1864 - does not contain any reference to unpredictability. The Romanian legislation provides solely special dispositions of the unpredictability theory, such as: art. 43 par (3) of the Law no. 8/1996 on copyright,[1] art. 54 of Emergency Ordinance no. 54/2006 regarding the regime of the concession agreements of public property assets,[2] art.14 of the Law no.195/2001 on voluntary activity.[3]

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[1] Art. 43 par (3) of Law no. 8/1996 on copyright, as subsequently amended and completed: *"In case of an obvious disproportion between the remuneration of the author and the benefits of the entity that obtained the assignment of the monetary rights, the author may request the competent jurisdictional bodies the revision of the agreement or the convenient increase of such remuneration."*

[2] Art. 54 par (1) of the Emergency Ordinance no. 54/2006 *regarding the regime of the concession agreements of public property assets*, as subsequently amended and completed: *"The contractual relationships between the grantor and grantee are based on the financial balance principle of the concession among the rights granted to the grantee and the obligations imposed thereto*."

[3] Art. 14 of Law no. 195/2001 on the voluntary activity, republished: *"Upon occurrence of a situation that renders difficult the fulfillment of volunteer's obligations beyond the parties' control, during the performance term of*

In the future Romanian Civil Code, the unpredictability theory shall be expressly regulated by art.1271, called *„The unpredictability"*.[4] Regulating the unpredictability by the future Civil Code represents a confirmation of the opinions expressed by the representative, classical and current doctrine and by the Romanian jurisprudence in favor of the acknowledgment and application of the unpredictability theory in the Romanian law.

The present study shall demonstrate that the unpredictability theory may be applied also to the hypothesis of a performed obligation, while the issue of contractual liability of the parties may arise. In this respect, it is important to settle the legal basis of the unpredictability, to analyze its conditions, by taking into considerations the rules and the exceptions in this matter. The opinions expressed in the present study are mostly based on the Romanian jurisprudence and they are totally or partially confirmed by the Romanian, French and Belgian doctrine on this topic.

The unpredictability theory in the case law of the Romanian courts of law and arbitration courts

The current Romanian jurisprudence admits the unpredictability in two fields: the rent increases in relation to the lease agreements and updating of the price of certain goods delivered and not paid. However, the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania has admitted in principle this theory without any limitation or discrimination in respect to the application fields.

The Supreme Court of Justice, the Decision of the commercial division no. 21/1994, statuated: "*In this case, the plaintiff leased to the defendant the disputed premises for a 5-year period, there being determined through the lease agreement a monthly rent of ROL 1441.20, on September 13, 1990. In consideration of the liberalization or prices and increase of the inflation rate registered after September 13, 1990, the plaintiff is entitled to claim a higher rent, even if there is no such clause provided in the agreement.In this respect, there are considered the provisions of art. 970 of the Civil Code according to which the agreements are binding not solely for what is expressly provided thereon, but also for all consequences given to the obligation by equity, custom or law, according to the nature thereof. ....Otherwise, one could face the unnatural and inequitable situation that the performance of an obligation assumed through the agreement by the plaintiff ...becomes very onerous, which is inadmissible (art. 1042. item 2 of the Civil Code). In consideration of the foregoing, it is necessary that the court of remand determines, based on an expert report, the amount of the rent for the disputed premises and if the defendant does not agree with such payment, the court is entitled to order the cancelation of the agreement between the parties.*[5]

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the agreement, the agreement shall be renegotiated and in case such situation renders impossible further performance of the agreement, it shall be lawfully terminated."

[4] Art. 1271 of the future Civil Code, as approved by Law no. 287/2009:

"(1) The Parties shall be bound to fulfill their obligations, even it such fulfillment became more onerous.

(2) In spite of the foregoing, the parties shall be bound to conduct negotiations for adaptation or termination purpose of the agreement, in case the performance thereof becomes excessively onerous for any of the parties due to the change of circumstances:

a) that occurred after the conclusion of the agreement;

b) that could not be reasonably provided upon the conclusion of the agreement;

c) and for which the prejudiced party must not run the risk of the change occurrence.

(3) Upon the parties' failure to come to an agreement within a reasonable time, the court may order:

(a) the adaptation of the agreement for an equitable distribution between the parties of the losses and benefits arising out of the change of the circumstances;

(b) the termination of the agreement at the time and under the conditions provided thereby. ."

[5] Constantin Crisu, *Repertoire of Romanian doctrine and jurisprudence*, tome I, Bucharest Argessis, 1995, 211.

The Supreme Court of Justice (the decision of the commercial division no. 4456/1999) as regards the contractual liability for non-payment of updated price, combined the unpredictability rules with those of the contractual liability:

- "*According to art. 970 and 981 of the Civil Code, the ordinary clauses are implied in an agreement, although such clauses are not expressly provided therein, and the agreements are binding not solely upon those expressly provided thereon, but also upon all consequences given to the obligation by equity, custom or law, according to the nature thereof. According to art. 1084 of the Civil Code, the damages generally include the loss incurred by the creditor and the benefit it has been deprived of. Therefore, the lack of a contractual clause regarding the price updating according to the inflation rate is irrelevant, such clause is implied, as it is not required to expressly provide the creditor's right to obtain full remedy for the damage caused by non-payment of the price on the maturity date*"[6]

- The Supreme Court of Justice, the decision of the commercial division no. 347/2000: "*The contractual balance of the agreement has no longer been kept, due to price non- payment by the debtor on the maturity date thereof, the creditor being harmed by the devaluation of the national currency, according to the inflation rate. In reality, there is no question about the application of a sanction for non-performance of a contractual obligation … but about updating of the price agreed upon the conclusion of the agreement, by the determination of the value of plaintiff's obligations on the effective payment date by the defendant, in order to reestablish the contractual balance."* [7]

Further, the jurisprudence of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania has issued relatively recently its opinion concerning the admission in principle of the unpredictability theory in the Romanian law system, in its Decision no. 208/2005: "*The defense of the defendant raises two questions, one of principle, regarding the admissibility of the unpredictability theory in the Romanian commercial law, particularly if the parties did not agree anything in this respect and the second one, in case of affirmative response to the first question, if the conditions related to the applicability to the case of the unpredictability are fulfilled.*

As regards the first issue, it should be held that the unpredictability theory entitles the parties to a long-term agreement to request the re-adaptation thereof, in case the initial circumstances, based on which the agreement has been concluded under a certain configuration, have so seriously affected the balance that one of the parties, although she could perform the assumed obligations, the performance would be excessively onerous. The Romanian law, unlike other law systems, did not provide legislatively such possibility. On the contrary, the judicial doctrine and practice (including arbitration), particularly in the last 15 years are prone to the application of such re-balancing solution of the agreement, including when the contracting parties did not agree to such effect as in this case (…). Consequently, it is held that the unpredictability theory can find its application, in principle, if the applicability conditions are fulfilled, in a specific case.

As regards the second issue - if the conditions for the application of the unpredictability theory are fulfilled - the following should be held:

Apart from the fact that the agreement - or other related evidence - does not reveal that the parties contemplated, upon the conclusion of the agreement, a certain development of the national ferrous metallurgy industry and a certain situation concerning the raw material for this industry, it should be considered that the parties to the case have concluded a share sale-purchase agreement …

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[6] C. Bădoiu, C.Haraga, *Commercial obligations. Judicial practice*, Bucharest, Hamangiu Publishing House, 2006, 200.

[7] C.Bădoiu,C. Haraga, *Commercial obligations. Judicial practice*, Bucharest, Hamangiu Publishing House, 2006, 202.

In consideration of the foregoing, there is no question about the impairment of the contractual balance that might raise for discussion the unpredictability theory, so that this defense of the defendant is to be set aside."

It is important to notice that Decision no. 208/2005 acknowledges the applicability of the unpredictability theory, based on the principle of the contractual balance, for an unpredictability cause other than the financial or monetary fluctuations - the development of the national ferrous metallurgy industry - even if in this case, the requirements of the unpredictability have not been actually deemed as fulfilled.

The basis of the unpredictability theory

The primary basis of unpredictability retained by the Romanian jurisprudence and doctrine is art. 970 of the Civil Code, which regulates the principle of good faith fulfillment of the obligations (art. 970 par 1 of the Civil Code: *"The agreements must be performed in good faith")*, and the equity principle (art. 970 par 2 Civil Code: *"They oblige not solely to what is expressly included thereon, but also to all consequences granted by equity, custom or law to the obligation, according to the nature thereof."*Thus, the Supreme Court of Justice of Romania applied art. 970 of the Civil Code (sometimes together with art. 981 or art. 1084 of the Civil Code) in the unpredictability admission decisions related to the lease agreements and to contractual liability for non-payment of updated price.

It results that the Romanian doctrine - inspired from the French doctrine and practice - deduced two obligations derived from the principle of good faith performance of the agreements (art. 970 par 1 Civil Code): of fidelity and cooperation in the performance of the agreement. Non-observance of these obligations could entail the contractual liability of the party in default based on art. 970 par 1 of the Civil Code. These obligations are also falling under the unpredictability legal provisions, with the consequences set forth in the aforementioned quote.

Other basis of the contractual unpredictability, the contractual balance principle, has been upheld by the Romanian jurisprudence in the following decisions:

- The Supreme Court of Justice, the decision of the commercial division no. 347/2000 claimed the principle of contractual balance for justifying the agreement's price updating by the inflation rate, inflation which represents a situation with unpredictable effects on the agreement and determines, in the opinion of the court, the impairment of the contractual balance;
- The Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, in its decision no. 208/2005, admitted, as principle, the application of unpredictability based on the contractual balance principle, even if, as a practical matter, in this case, the unpredictability conditions had not been verified.

The conditions of unpredictability theory and the impact upon the contractual liability

a) The unpredictability: occurrence of an unpredictable event or with unpredictable effects

In my work drafted in 2006, I wrote about this condition the following: *"it is a question that bears on the fact that the unpredictability and the economic-financial issue – which should characterize the effect on the agreement - should be referred not solely to the nature or cause of the event - as we would be tempted to think starting from the name of the theory itself - but particularly to the effects thereof on the fulfillment of the contractual obligations.(...) In case the unpredictability refers not to the situation itself, but to the effects thereof, there shall remain valid the requirement related to the ascertainment of the disturbance of the contractual economy for the purpose of applying the unpredictability mechanism. It remains to be considered whether a predictable feature of the event would constitute an impediment against the application of the unpredictability theory.*

The response is negative, provided that the predictability of the event is "absorbed" by the unpredictability of the effects thereof on the agreement."[8]

Further, most of the French doctrine refers to a large and unlimited sphere of the situations constituting unpredictability, which should include, besides the economic-financial circumstances, those situations (for example: natural facts, human facts etc.) which have a disturbing effect over the agreement.[9]

It is important to underline that the future Romanian Civil Code makes no distinction between the sphere or nature of the situations that trigger the unpredictability, or, more correctly, that trigger the excessive onerousness. It means that, according to the syntagm *ubi lex non distinguit nec nos distinguere debemus,* legally, there are no circumstances or situations apriori producers of excessive onerousness or unpredictability. The future Civil Code regulates the so-called *large vision* over the sphere of the events constituting unpredictability.

Unpredictable effect over the agreement or unpredictable situation? Most of the classical and modern French doctrine particularly concludes the unpredictability as attribute of the effect caused to the agreement, not as attribute of the causing event itself. In 1994, Ph.Stoffel-Munck considered that: "*The focus is generally on the event causing the imbalance. It is this event that must have an unpredictable character or be unpredictable. But we can see such issue in more simple terms and at the same time we can directly consider the imbalance."*[10]

More radically, the famous French jurist Jean Ghestin considered that the unpredictability requirement would no longer be necessary, there being emphasized the effect triggered over the agreement - the imbalance of the obligations: "*In fact, for the positive law, the unpredictability is not itself a condition for revise or for the termination* [of the agreement] *due to a cause other than the one representing the force majeure. … This is the objective imbalance of obligations, occurred after the event, which brings into question the fully preserving or revising of the agreement and not the occurrence of a new an unpredictable event."*[11] In this opinion, it would be sufficient to ascertain together with the imbalance of the obligations that the affected party cannot be held responsible for the occurrence of the event or for the effect thereof on the agreement.

b) The time of the occurrence of the change of circumstances or of the ascertainment of the effect thereon

In my work drafted in 2006 I wrote about this condition the following: *"As regards the contractual unpredictability, two moments are interesting, due to the effects they trigger: a) the first moment refers to occurrence of the unpredictable event or to the effect thereof on the agreement; b) the second moment refers to the ascertainment of the disturbance of the contractual economy and to the application of the unpredictability mechanism, through the revision or adaptation of the agreement (…)Another relevant stage consists in the performance of the agreement, so that from the conjugation of two stages, it results that:*

- the moment of the occurrence of the situation or unpredictable effect should be placed in time after the execution of the agreement and prior to the fulfillment of the obligation; because in the hypothesis according to which the negative effect of an exceptional situation would have existed from

[8] Cristina Zamşa, *Unpredictability theory. Doctrine and jurisprudence study*, Bucharest, Hamangiu Publishing House, 2006, 104-105.

[9] D.M.Philippe, *Change of circumstances and upheaval of the contractual economy*, Bruxelles, Etablissements Emile Bruylant, 1986, 625; Y.Picod, *The duty of loyalty in the performance of the agreement*, these, Paris, LGDJ, 1989,224; C.Chabas, *Lawful non-performance of the agreement*, Paris, LGDJ, 2002, 422.

[10] Ph. Stoffel-Munck, *Considerations on the theory of unpredictability*, Marseille, Presses Universitaires D'Aix-Marseille, 1994, 117.

[11] J.Ghestin, C.Jamin, M.Billiau, *Treaty of Civil Law. Effects of agreement*, vol.I, Paris, LGDJ, 2001, 395.

the very moment of the contracting, the legal issue of mistake in which the contractor was is raised, not the issue of unpredictability;

- the application of the unpredictability mechanism for an obligation already performed cannot be requested, since the fact of the performance thereof by the debtor demonstrates that it could fulfill its obligation from economic point of view.(…)"[12]

This condition has been specified above, in principle; however, it should be shaded depending on certain particular situations. The unpredictability theory shall apply, inclusively, in the hypothesis under which, although existent the situation – objectively - at the agreement execution, the exteriorization of the situation or of the effect thereof is placed in time after the execution of the agreement, on the occasion of its performance. The temporal condition should be consistent with the unpredictability condition of the situation or effect thereof on the agreement: what it really matters with respect to the economy of the unpredictability conditions is the verification of the unpredictability upon contracting, upon the party affected by such unpredictability.

Further, the temporal condition should also be consistent with the condition of non-assuming the risk occurred: upon contracting, the party assumed those risks she could reasonably foresee. The Belgian doctrine specified, to the same effect, that "*the contractor must bear the burden resulting from a change of circumstances it could assess at execution of agreement* . [13]

Finally, the temporal condition should be regarded by virtue of the unpredictability, as shown above; the unpredictability is, first of all, an attribute of the effect caused to the agreement, not an attribute of the causing event itself. That is why I showed in the work drafted in 2006 that the time of the occurrence of the unpredictable situation or effect should be placed in time after the execution of the agreement.

Therefore, it is not necessarily required that the unpredictable situation occurs prior to the execution of the agreement, but it can pre-exist or it can be concomitant with the execution of the agreement, but the effects of such situation could be always produced after the execution of the agreement.

Usually, the unpredictability is invoked by way of defense by the debtor, refusing to perform the excessively onerous obligation. However the unpredictability theory shall apply also to the hypothesis of a performed obligation, by way of main action, depending on more factors: the nature of the agreement, investigating the attitude of the party affected by the unpredictability. Therefore, the debtor of the excessively onerous, in order to avoid the contractual liability, shall nevertheless perform such obligation, by carrying along some additional costs, notifying the creditor about the occurrence of such a situation or of the unpredictable effect. Notifying the creditor is a requisite that must be fulfilled to evidence a correct and non-imputable attitude of the debtor.

If subsequently, the creditor shall refuse to revise the agreement and implicitly, to reimburse the exorbitant costs, the debtor will have to raise the unpredictability by way of action, in order to recover the exorbitant costs in performing the obligation. In such case, the unpredictability is accompanied by another legal issue: the contractual liability of the co-contractor of the party affected by unpredictability.

The aforementioned solutions inferable by way of logics may be supported by the French case law, as it was summarized by D.M.Philippe: "As of the occurrence of new circumstances, the debtor must inform the creditor about its intentions regarding the follow-up of the contract's execution. *(…) …the debtor must justify its unilateral initiative establishing the refusal of the creditor to accept the reasonable proposals that were brought to his knowledge."*[14]

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[12] Cristina Zamşa, *Unpredictability theory. Doctrine and jurisprudence study*, Bucharest, Hamangiu Publishing House, 2006, 119-120.

[13] D.M.Philippe, *Change of circumstances and upheaval of the contractual economy*, Bruxelles, Etablissements Emile Bruylant, 1986, 632.

[14] D.M.Philippe, *Change of circumstances and upheaval of the contractual economy*, Bruxelles, Etablissements Emile Bruylant, 1986, 648-649.

In the current French legal writings, Jean Ghestin, while analyzing this condition, also states in principle that: *"the unpredictability must in principle be quantified upon performance of the agreement"*. Furthermore, as a particular case, the famous French jurist admits that depending on circumstances, the unpredictability can also be quantified upon signing the agreement: *"The moment of quantifying the unpredictability sometimes depends on the circumstances that accompany the agreement's formation."* [15]

c) The effect produced on the agreement

The effect produced by an unpredictable situation on the agreement is the practical, economic argument that has in fact imposed the creation of the entire theory of unpredictability. The law cases as summarized by the doctrine propose more objective criteria for measuring the effect produced on the agreement:

a) *the percentage of 50%* for increasing the value of the debtor's obligation, respectively of reducing the value of the counter-obligation received by the creditor [16];

b) *doubling* the value of the performance the debtor is obligated to[17];

c) *the percentage of 30%* for increasing the debtor's obligation has been recently proposed by an author, by analogy to a solution regulated by a special French law (art.L.131-5 of the Intellectual Property Code)[18].

d) The risk determined by an unpredictable situation not falling under the category of contractual risks

The existence in the agreement of an adjustment clause or a clause of assuming the risk (occurred) does not exclude the application of unpredictability, as one should have in view both the condition of unpredictability and the condition of excessive onerousness. There is interference among the unpredictability's conditions, laying stress on the situations' unpredictability and on the effect of such situation as well as on the ascertainment of the excessive onerousness. Moreover, the French jurist Jean Ghestin considers that what matters is only the lack of balance of the obligations by minimizing the role of the unpredictable situation: *"It is the objective imbalance of obligations, occurred after the event, which raises the question of full maintain or of agreement's revision and not the emergence of a new and unpredictable circumstance."*[19] In other words, "even the adjustment clause may be adjusted" in case the imbalance created by the occurrence of an unpredictable situation is so great that the parties turn aside from what they could agree at the execution of the agreement, considering the reasonably predictable circumstances of that point.

Thus, the work of 2006 distinguishes between two situations:

"a) *the presence of an express contractual clause whereby the parties undertake any risk determined by the changing of the contractual circumstances;*

b) the occurred major risk arises of the agreement's nature.

…In terms of legal nature, the respective clause of assigning the risks shall not be confused with an aggravation of the debtor's liability in case of non-performance, as the risk is undertaken by him regardless of the liability issue, being determined by an objective circumstance. Remaining in the area of contractual freedom exercise, we can notice that we can go back to the issue regarding the application of the unpredictability for the hypothesis of the inefficiency of the agreement's clause

[15] J.Ghestin, C.Jamin, M.Billiau, *Treaty of civil law. The effects of agreement*, vol. I, Paris, LGDJ, 2001, 400.

[16] *Principles of European Contract Law*, Hague, Kluwer Law International, 2000, 321

[17] Alexandru Oteteleşeanu, *Study on the contingent case or force majeure or theory of unpredictability*, phd thesis, Bucharest, 1928, 194-196.

[18] Cecile Chabas, *Lawful non-performance of the agreement*, Paris, LGDJ, Bibliotheque de Droit Prive Tome 380, 2002, 423.

[19] J.Ghestin, C.Jamin, M.Billiau, *Treaty of civil law. The effects of agreement*, tome I, Paris, LGDJ, 2001, 395.

of adjustment…. It can be triggered that one may resort to the agreement's adjustment under the following situations, where the unpredictability's requirement is verified:

- the risk occurred following an unpredictable event is different in nature of the risk undertaken by the parties by the contractual clause;

- the risk occurred, although it makes the object of the clause for assigning liability to one of the parties, exceeds, by the spread of its effects, the parties' provision, causing the agreement's upheaval ….." [20]

In the French and Belgian legal writings, this condition is similarly analyzed, in relation to undertaking only the provided for/predictable risk upon the agreement's execution. Therefore, in 1986 D.M.Philippe stated: "*The contractor must bear the costs resulting from a modification of circumstance the impact of which it could evaluate upon the agreement's execution.*(...)... *the contractor must bear 10% of the new charges. It is difficult, even in case of a determined type of contract, to establish in advance a percentage of the costs representative for the undertaken contractual risk. (…) Often, the application of the standard clause or the legal provisions is dependent on the occurrence of unpredictable circumstances".* [21]

As regards such arguments, I consider that the existence of such a clause of adjustment of the agreement or of bearing the risks resulting from a possible unpredictable situation does not lead to the *„de plano*" impossibility to apply the theory of unpredictability. The competent jurisdictional body is fully entitled to analyze the effects of the respective clauses by referring to the actually occurred unpredictable situation.

The effects of unpredictability's application. The contractual liability of the party who refuses the application of unpredictability.

Admitting the unpredictability, the Romanian Supreme Court of Justice directly intervened in the agreement, ordering the updating of the price or of the rent (decision no. 21/1994, decision no. 4456/1999, decision no. 347/2000). It must be underlined that in the last two decisions, the Supreme Court of Justice applied art. 970 of the Civil Code (the good faith and equity in executing agreements), art.1084 Civil Code (complete remedy of the damage, as a measure of the contractual liability) and the contractual balance principle, ordering the update of the price for some merchandise with the inflation index. Therefore, both the rules of unpredictability and those of the contractual liability of the debtor of the obligation to pay the price have been applied.

In the work of 2006, I particularly analyzed the unpredictability's effects starting from the hypothesis of its pleading by way of defense, as means of defense of the debtor who informed the creditor that he would not perform the excessively onerous obligation. However, the unpredictability could be also invoked by way of action, in the sense of activating the contractual liability of the co-contractor who refuses the application of unpredictability, thus causing damages.

Therefore, the analyzed Romanian case law demonstrates that the unpredictability may be accompanied by the application of the rules of the contractual liability of the co-contractor who refuses to adjust the agreement to the new circumstances, by not paying the price or the rent much higher at the time of performance than upon the agreement's execution, due to the occurrence of a situation unpredictable or with unpredictable effects. Such cases imply the careful combining of the unpredictability rules with the contractual liability rules.

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[20] Cristina Zamșa, *Unpredictability theory. Doctrine and jurisprudence study*, Bucharest, Hamangiu Publishing House, 2006, 137-138.

[21] D.M.Philippe, *Change of circumstances and upheaval of the contractual economy*, Bruxelles, Etablissements Emile Bruylant, 1986, 632-635.

Thus, the party affected by the unpredictability must notify the co-contractor about the occurrence of the event unpredictable or with unpredictable effects. If the co-contractor, debtor of the price, refuses to adjust the agreement, the affected party shall take legal action whereby she will request the recovery of the damage incurred by putting upfront some exorbitant costs for the performance of the obligation, costs that imply the increase of the contractual price.

The cause of advancing of the exorbitant costs is objective, independent of the party's fault and represents an event unpredictable or with unpredictable effects. Such a legal action relies on two grounds: the first ground is represented by the theory of unpredictability (based on art. 970 Civil Code or the balance of obligations, according to the aforementioned decisions of the Supreme Court) and the second one is the contractual liability of the co-contractor who refuses to pay the price increased following the occurrence of an unpredictable situation (or with unpredictable effects), by virtue of art. 1084 of the Civil Code.[22]

In the mentioned decisions of the Supreme Court, the increase of price occurred as a result of inflation – unpredictable situation – however any unpredictable and objective event, independent of the will of the party affected by the unpredictability may trigger the recalculation of the agreement's price.

Conclusions

The conditions of the unpredictability theory must be globally acknowledged and verified. Therefore, the following issues are important both theoretically and practically:

- The condition of unpredictability shall be verified even if only the unpredictable effect has occurred after the agreement's performance, although such situation is existent before such performance;
- The consequence over the agreement is essential, produced by the unpredictable situation or by the unpredictable effect, namely: the contractual imbalance created by the excessive onerousness of one of the obligations;
- The scope of the situations unpredictable or with unpredictable effect does not limit to the financial or monetary phenomena but can also include natural phenomena, actions made by man, evolution of an industrial domain, etc.;
- The agreement's adjustment clauses or the risk allocation clauses do not impede the application of unpredictability, if the risk which occurred, although makes the object of a risk-allocation clause, exceeds, by the spread of its effects, the parties' provisions, determining the excessive onerousness of an obligation or if the risk which occurred as a result of an unpredictable event is different in nature of the risk undertaken by the contractual clause.

The unpredictability may be invoked not only as defense but also by way of action, for recovering the damage suffered following the performance of the excessively onerous obligation, in order to avoid the debtor's contractual liability (in this case, the condition of the lawful character of non-performance is not longer required). The party refusing to apply the unpredictability upon verifying its conditions may be subject to the contractual liability. There are no legal impediments for the Courts to reject such actions issued upon the performance of the excessively onerous obligation.

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[22] Art. 1084 of the Civil Code establishes the principle of full remedy of the damage in the contractual liability: "*The damages owed to the creditor generally include the loss suffered and the benefit it was deprived of, save for the exceptions and modifications mentioned below*."

- Cecile Chabas, *L'inexécution licite du contrat,* LGDJ, Bibliothèque de Droit Privé Tome 380 Paris, 2002
- Jean Ghestin, C. Jamin, M. Billiau, *Traite de droit civil. Les effets du contrat,* vol. I, Paris, 2001
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- D.M.Philippe, *Changement des circonstances et bouleversement de l'économie contractuelle,* Bruxelles, 1986
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- *Principles of European Contract Law,* Hague, Kluwer Law International, 2000

ACCEPTANCE OF THE INHERITANCE IN THE NEW CIVIL CODE REGULATION

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Abstract
The new regulation in civil matter, represented by Law no. 287/2009 regarding the Civil Code, whose date to entry in force has not been established yet, reconfigures quasi-totally the acceptance inheritance institution. In this paper we will analyze the acceptance of the inheritance issue under all its aspects, as a valence of the successional option right, in the light of the new Civil Code dispositions. We will thus be able to reveal the novelties brought by the new regulation and to appreciate its progressive nature. In the acceptance of the inheritance matter, the new Civil Code innovates, mainly as regards its forms (in the new Civil Code the acceptance under benefit of inventory is no more regulated), the effects of the acceptance (the heirs are responsible for the debts and for the delivers of the inheritance only with the assets from the successional patrimony) and the procedure that has to be performed in the case of inventory preparation and taking special measures for preserving the successional assets. We hope that through our approach, we enrol in the overall effort to make known and understood the disposition of the new Civil Code, until its entry in force.

Keywords*: express acceptance, tacit acceptance, forced acceptance, statement of unacceptance, presumption of waiver.*

1. Introduction

Our paper aims to analyze the problem of the inheritance acceptance, one of the valences of the successional option right, under all its aspects in the light of the new Civil Code.

Law no. 287/2009 regarding the Civil Code, published in the Official Gazette no. 511 from 24th of July 2009, but whose date of entry in force has not been established yet, provides to the acceptance of the inheritance a new configuration, reason for which we appreciate that the analysis of this institution of the successional right presents a particular up-to-date and utility. We also believe that making known and explaining the dispositions of the new Civil Code incidents in the acceptance of the inheritance matter, we bring our contribution to increase the justice quality, once this governmental decree comes into force.

Along with those who administer justice, are also interested in knowing the dispositions of the new Civil Code in inheritance acceptance matter equally the justice partners, law theorists, public notaries, civil servants with responsibilities in this area, Law and Public Administration specialization students. The legislator himself, always concerned with improving his legislative work, is interested by the *de lege ferenda* proposals formulated by the legal doctrine.

In the present paper we will analyze the problem of the inheritance acceptance under the following aspect: notion and legal regulation, ways (voluntary acceptance – express and tacit and forced acceptance), effects (general and special), inventory preparation and taking special measures to conserve the successional assets.

There have been written several studies, in the volumes of some conferences about the novelty elements brought by the new Civil Code, concerning the right to inherit in general since the date of the publishing of the law no. 287/2009 (2009, at the end of July). The inheritance acceptance

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This work was supported by CNCSIS-UEFISCSU, project number PN II-RU, code PD_139/2010, contract number 62/2010.

problem in the regulation of the new Civil Code has been approached, as far as we know, only in volume "Noul Cod civil. Comentarii", in the study "Continuitate şi discontinuitate în reglementarea opțiunii succesorale[1]", where the author realises a brief analysis of the legal institution, subjected to our analysis.

In respect with this study we analyze the acceptance of the inheritance in the light of the new Civil Code, in a didactically and complete manner.

Under these circumstances, we consider that the subject we have proposed is up-to-date, and our scientific approach is useful.

2. Content

2.1. The notion and the legal regulation of the acceptance of the inheritance

The acceptance of the inheritance is the act or the unilateral legal fact through which *erede*[2] definitely strengthens his heir quality of the deceased[3].

The new Civil Code mainly dedicates to the acceptance of the inheritance articles 1106-1119. Unlike the Civil Code in force, the new Civil Code does not regulate two forms of the inheritance acceptance, but, abandoning the distinction between the pure and simple acceptance and the acceptance under inventory benefit, it regulates only the inheritance acceptance.

2.2. The acceptance types

As a consequence of the inheritance acceptance, legal heirs and legatees general or with general title are responsible for the debts and tasks of the inheritance only with the assets from the successional patrimony, proportionally with each person's quote [article 1114 paragraph (2) N.C.C.], (meaning *intra vires hereditatis*). By accepting the inheritance, *erede* appropriates the quality of heir, strengthening the transmission of the inheritance fully achieved at the date of the death [article 1114 paragraph (1) N.C.C.].

Any *erede* can choose regarding the inheritance, in the acceptance sense, new Civil Code regulating, in the article 1106, the freedom principle of the inheritance acceptance. As a consequence, "Nobody is forced to accept an inheritance that is rightfully his".

Although the new Civil Code, in the article 1108, that bears the name "The acceptance types", states about the express acceptance and about the tacit acceptance, we consider that, in the light of this governmental decree we have to distinguish between the voluntary acceptance and the forced acceptance (new Civil Code regulates the latter one in the article 1119). In turn, the voluntary acceptance may be express tacit, too[4].

As a consequence, the inheritance acceptance may be: voluntary and forced.

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[1] Bogdan Pătrașcu, "Continuitate şi discontinuitate în reglementarea opțiunii succesorale" in *Noul Cod civil. Comentarii*, coordinator Marilena Uliescu (Bucharest: Universul Juridic Publishing House, 2010), 246-72.

[2] The latin term "*erede*" has been used for the Romanian term "succesibil" (from the French "succecible") due to the lack of the English term that denominates a person who receives or is expected to succeed or is in line to receive a heritage due to a hereditary rank.

[3] Francisc Deak, *Tratat de drept succesoral*, Second edition, updated and completed (Bucharest: Universul Juridic Publishing House, 2002), 411; Dan Chirică, *Drept civil. Succesiuni* (Bucharest: Lumina Lex Publishing House, 1996), 218; Alexandru Bacaci and Gheorghe Comăniță, *Drept civil. Succesiunile* (Bucharest: C.H. Beck Publishing House, 2006), 192; Liviu Stănciulescu, *Drept civil. Partea specială. Contracte şi succesiuni*, Third edition, revised and updated (Bucharest: Hamangiu Publishing House, 2006), 429; Ioan Adam and Adrian Rusu, *Drept civil. Succesiuni* (Bucharest: All Beck Publishing House, 2003), 394.

[4] Regarding the acceptance of the inheritance in the light of the new Civil Code in force, see also, as an example: Veronica Stoica, *Dreptul la moștenire* (Bucharest: Universul Juridic Publishing House, 2008), 286-96; Ioan Popa, *Curs de drept succesoral* (Bucharest: Universul Juridic Publishing House, 2008), 290-306; Ion Dogaru, and the others, *Bazele dreptului civil. Volumul V. Succesiuni* (Bucharest: C.H. Beck Publishing House, 2009), 285-99; Ilioara Genoiu, *Drept succesoral* (Bucharest: C.H. Beck Publishing House, 2008), 294-312.

2.2.1. The voluntary acceptance

Voluntary acceptance is the result of the *erede* free will. It may be: express and tacit.

A) The express voluntary acceptance

According to the dispositions of the article1108 paragraph (2) N.C.C., the inheritance acceptance is express when *erede* explicitly assimilates the title or the quality of heir thorough an authentic document or under private signature. So, in order to be in the presence of the express acceptance, the following conditions must be satisfied:

a) the *erede*'s willingness to accept the inheritance shall be evidenced by a document, whether it is under private signature or authentic;

Therefore, the explicit acceptance of the inheritance is a formal act, but not a solemn one. Consequently, the verbal statement of *erede*, towards the inheritance acceptance, doesn't have the value of an acceptance. The legislator gave an official character to the acceptance act of the inheritance, both to protect *erede*'s interests, who "is not bound up with a word spoken randomly and also to avoid the evidence given by witnesses to an acceptance by words"[5].

In the situation in which the acceptance is made by an authentic document, the acceptance declaration will be written, kept in electronic format, in the National Notary Register, according to law (article 1109 N.C.C). This condition is imposed by the legislator, for advertising reasons.

Regarding the document under private signature, where *erede*'s will to accept the inheritance is manifested, it must not contain sacramental formulas and must not be especially drawn up for this purpose. The express acceptance of the inheritance can result from a document, drawn up in another way than the inheritance option, such as a letter, as far as it has legal character (referring to matters that concern the inheritance) and it is not strictly confidential or does not contain different requests, addressed by *erede* to the court, to the public notary or to the public administration bodies, in order to solve some aspects related to the inheritance[6]. These documents, even if they are not exclusively drawn up with the purpose of the inheritance acceptance[7], must be accomplished by *erede*, respecting the legal rules regarding the capacity and must be within the one year prescription term.

The inheritance may be accepted by *erede* not only personally, but also through his legal representative (with the consent of the guardianship court) or through a representative, authorized in writing (as the mandate forms a total with the document for which it was given) and especially (as the successional option act is a disposal act) in this regard. In order to have the value of an acceptance, the assignee's will, expressed in the sense resulted from the received mandate, must be expressed in writing and within the legal term of option. The existence of the assignee's mandate of the inheritance acceptance, not followed by an acceptance under the law conditions, does not value as

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[5] Mihail Eliescu, *Moştenirea şi devoluţiunea ei în dreptul Republicii Socialiste România* (Bucharest: Academiei Publishing House, 1966), 122.

[6] Dimitrie Alexandresco, *Explicaţiunea teoretică şi practică a dreptului civil român*, vol. IV, second part (Bucharest: Socec & Co. Publishing House, 1912), 236; Ioan Rosetti-Bălănescu and Alexandru Băicoianu, *Drept civil român. Regimuri matrimoniale. Succesiuni. Donaţiuni. Testamente*, vol. III (Bucharest: Socec Publishing House, 1948), 287; Constantin Stătescu, *Drept civil. Contractul de transport. Drepturile de creaţie intelectuală. Succesiunile* (Bucharest: Didactică şi Pedagogică Publishing House, 1967), 219; Francisc Deak, *op. cit.*, 412; Dan Chirică, *op. cit.*, 219; Alexandru Bacaci and Gheorghe Comăniţă, *op. cit.*, 192-3.

[7] Entries like this are considered to be: the letter addressed to the creditors of the inheritance, containing an offer of giving in payment or through which is requested a payment term; deferment request of payment of the debt; the letter addressed to the co-heirs, containing an offer of voluntary division of the inheritance; the petition of heredity; opening request of the notary successional procedure, containing *erede* willingness to accept the inheritance; declaration given to the local council indicating the successional assets and heir quality, in order to submit the entry to the competent notary office responsible for the succession debate; the opposition formulated by *erede* against a forced sale of a successional tenement. On the contrary, it is considered that the appeal brought by an heir against a court decision, if its author was part of the process and then died, is not by itself an act of acceptance of the inheritance. See also, Alexandru Bacaci and Gheorghe Comăniţă, *op. cit.*, 193.

an acceptance of the inheritance, as the trust deed given to the assignee may be subsequently revoked by the mandatory. So, the mandate given to the assignee is revocable, but the acceptance that he is doing in the name and on behalf of the mandatory, is irrevocable. If the mandatory dies before the assignee applies the received trust deed, the latter may accept the inheritance, so that the delay does not cause damages to the heirs of the former[8].

According to the dispositions of the article 1107 N.C.C., the inheritance may be accepted also by the *erede*'s creditors, on oblique way, in the limit of their claim.

It obviously results that the act of accepting the inheritance, also like the successional option act generally, does not have an exclusive personal character.

b) From the acceptance act should directly result that *erede* had assimilated the title and the quality of heir[9]. The unequivocal nature of the *erede*'s is appreciated by the court, which will conduct an analysis of the actual contents of the document.

B) Voluntary tacit acceptance

According to the dispositions of the article 1108 paragraph (3) N.C.C., the acceptance is tacit when *erede* makes an act or a fact that he is allowed to do but only as an heir. So *erede* does not directly express his willingness to accept the inheritance, as in the case of the express acceptance, but this derives from the acts and facts that he commits.

In order to be in the presence of the tacit acceptance, the condition that, by the acts committed by *erede* should show unequivocally his willingness to accept the inheritance must be fulfilled[10].

Like the express acceptance, the tacit acceptance may be realised personally, through a representative, a legal or a conventional one or even through a business manager. The assignee must benefit of a special mandate and must realise the acts of the tacit acceptance of the inheritance in the one year prescription term. Even a co-heir can have the quality of *erede*'s assignee.

The tacit acceptance acts, made by the business manger, have the value of an inheritance acceptance, as far as *erede* ratifies the management, within the successional option term, transforming it in a mandate[11].

Both the legal and the testamentary inheritance may be tacitly accepted, since from the above mentioned dispositions it does not result the contrary. The legatee, no matter if he is general, with general or with particular title, may tacitly accept the legacy, but it is necessary to invoke in front of the interested persons the will that confers him vocation to inheritance and not to act occult[12].

The new Civil Code enumerates the acts with the value of a tacit inheritance acceptance. For this purpose, the legislator distinguishes between the acts of disposition, the administrative acts and the acts of conservation, which are related to a part or to all the rights on the inheritance.

In all cases, the acts made by *erede*, in order to be considered acts of tacit acceptance of the inheritance, must be made within the prescription term of the inheritance option right.

So, according to the dispositions of the article 1110 N.C.C., the following categories of acts *have value of tacit acceptance*:

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[8] Francisc Deak, *op. cit.*, 413.

[9] M.B. Cantacuzino, *Elementele dreptului civil* (Bucharest: All Educational Publishing House, 1998), 230; Stanciu Cărpenaru, "Dreptul de moştenire" in *Drept civil. Contracte speciale. Dreptul de autor. Dreptul de moştenire*, Francisc Deak and Stanciu Cărpenaru (Bucharest: University of Bucharest, 1983), 499-500, Fr. Deak, *op. cit*, 413.

[10] Mihail Eliescu, *op. cit.*, 122; Francisc Deak, *op. cit.*, 413; Supreme Court of Justice, civil division, decision no. 2193/1990, in *Deciziile Curţii Supreme de Justiţie pe anii 1990-1992*, 114-6; Supreme Court, the civil collective, decision no. 768/1963, in *Justiţia Nouă (*10/1964): 116.

[11] Mihail Eliescu, *op. cit.*, 123; Eugeniu Safta-Romano, *Dreptul de moştenire* (Iaşi: Grafix Publishing House, 1995), 97-8; Francisc Deak, *op. cit.*, 414; Supreme Court, the civil collective, decision no. 1411/1973, in *Culegere de decizii pe anul 1973*, 183.

[12] Gh.D. Dimitrescu, "Acceptarea tacită a succesiunii de către legatarul universal", in *Revista Română de Drept* (4/1972): 78-9; Eugeniu Safta-Romano, *op. cit.*, 101-2; Francisc Deak, *op. cit.*, 414; Dan Chirică, *op. cit.*, 225.

a) the legal disposition acts regarding a part or all the rights on the inheritance;

Included in this category, with limitative title, the following acts:

- the alienation, with free of onerous title, by *erede*, of the rights on the inheritance;

We are certainly referring to those acts made by *erede* for the rights on an open inheritance, so it is about those acts that were made by *erede* after the inheritance opening date.

- the renunciation, even the free one, in favour of one or more determined heirs (*in favorem* renunciation);

Thus we found the free title renunciation in favour of all the co-heirs or of the subsequent heirs (purely abdicative or impersonal renunciation) does not have the value of a tacit inheritance acceptance.

- the renunciation of the inheritance, with onerous title, even in the favour of all the co-heirs or of the subsequent heirs.

According to the legislator, the legal disposition acts, regarding a part or all the rights on the inheritance, attract the tacit inheritance acceptance. Therefore, in these cases, the inheritance acceptance operates by right, being excluded the appreciation of the court.

b) the disposition, the definitive administration or the usage acts of some assets from the inheritance.

The new Civil Code states in paragraph (2) of the article 1110 that these acts may have the value of the tacit inheritance acceptance. As a consequence, in this case, the court will appreciate, from case to case, if the disposition, the definitive administration or the usage acts represent inheritance acceptance acts. So, in this case, the inheritance acceptance does not operate by right.

Like in the light of the Civil Code in force, the acts related to the single successional assets may represent disposition acts as follows: the buying-selling contract, the exchange contract, the donation contract, the annuity contract, the maintenance contract etc., having as objects the successional assets, on matter if they are entered with a third party or with a co-heir: the dismemberments constitutional documents of the property right on the successional assets; acts through which successional assets are taxed; the renunciation to a right; entering a contract for exploitation of a copyright in respect of any literary, artistic or scientific work remaining from the deceased; entering a selling-buying pre-contract in respect of a successional building etc.

The acts of the successional assets regarded *ut singuli* can be used as examples of definitive administration: making some useful or for pleasure expenditure, that increase the value of the successional asset or that are realised for luxury or pleasure; the collection of some claims of the inheritance, which don't have the nature of some current incomes of the inheritance; long-term demurrage of the successional assets; significant pay debts of the deceased, as far as the paying *erede* does not have in the same time the quality of co-debtor; the payment of the taxes on lands, buildings or vehicles that are part of the inheritance mass, the payment of the taxes on the inheritances etc.

On the contrary, *it does not represent tacit inheritance acceptance acts*, in the light of the dispositions of the article 1110 paragraph (3) N.C.C., the acts of conservation, supervision and provisional administration if from the circumstances under which they were made it does not result that *erede* did not assimilate by them the status of heir. They are considered to be of provisional administration of the urgent nature acts whose fulfillment is necessary for the normal enhancement, on short-time, of the inheritance's assets [article 1110 paragraph (4) N.C.C.].

They may represent conservation acts of the inheritance's assets, for example: making the inventory, conducting emergency repairs; collection of some amounts due to the succession, the exercise of possessive actions in respect with a successional asset etc.

They may be qualified as provisional administration acts, for example: the payment of the funeral expenses; the debts resulting from the last illness of the deceased; the payment of the small debts of the deceased, made from considerations of respect for his memory etc.

In the context of the tacit acceptance of the inheritance, the new Civil Code regulates, in article 1111, *the non-acceptance declaration.* Therefore, *erede* who intend to commit an act which

may signify the inheritance acceptance, but who does not wish to be considered an acceptant, must give in this regard, previous to the fulfilment of the act, an authentic notarized declaration.

Therefore, the non-acceptance inheritance can be given by *erede* only in respect with the disposition acts, the definitive administration acts or the usage acts of some inheritance's assets, as only in their cases the acceptance does not operate by right and it can be ordered by the court. If *erede* enters the dispositions acts regarding a part or all the rights on the inheritance, he is considered by right an acceptant of the inheritance, and the non-acceptance declaration in such a hypothesis is not acceptable.

We also notice that the non-acceptance declaration, unlike the express acceptance of the inheritance, is a solemn act, the validity of the former being conditioned by its realisation in an authentic notarized form. On the contrary, the express acceptance of the inheritance must not be materialised in a genuine document, but it can be expressed in a document under private signature.

In conclusion, the new Civil Code regulates for the first time in our law system the non-acceptance declaration, a useful institution of the successional option, as we consider. The legislator's preoccupation to regulate in a complete manner a judicial institution, namely the inheritance acceptance, so that the letter of the law covers as much as possible from the practical situations can but be appreciated.

2.2.2. The forced acceptance

The notion of the forced acceptance and its legal regulation

The new Civil Code, in the article 1119, states that for *erede* who, in bad faith, defalcated or hidden assets from the successional patrimony or hide a donation subjected to the report or to reduction is considered to have accepted the inheritance, even if he previously rejected it. However he had no right on the defalcated or hidden assets, and, where appropriated, he is obliged to report or to reduce the hidden donation, without participating to the distribution of the donned asset. Moreover, the heir is the above descript situation is required to pay the debts and the duties of the inheritance, proportionally with his quote from inheritance, including his own assets.

So, the facts that attract the forced inheritance acceptance are the following:

- the defalcation or the hiding of some assets from the successional patrimony;
- the hiding of a donation subjected to the report;
- the hiding of a donation subjected to reduction.

Analysing the dispositions of the article 1119 N.C.C., we notice that this governmental decree innovates also in this regard. Although the Civil Code in force regulates the forced inheritance acceptance and assigns it, in principle, the same effects as the new Civil Code, the latter mainly innovates as regards the causes that attract this sanction. *De lege lata*, only the defalcation or the hiding of some assets from the successional patrimony attract the forced inheritance acceptance. The new Civil Code adds to this cause the hiding of a donation subjected to the report or to reduction.

Therefore, in the light of the dispositions of Law no. 287/2009, the forced acceptance represents the sanction applied to *erede* who, driven by a fraudulent intention, has hidden assets that were part of the inheritance mass or a donation subjected to the report or to reduction with the purpose to exclusively appropriate them, respectively to defalcate the donation that already was subjected to the report or to reduction and to damage the co-heirs and the successional creditors.

The forced acceptance of the inheritance, common in practice, represents an exception from the voluntary character of the successional option act[13] and it is applicable both for the legal and testamentary inheritance.

De lege lata, from their legal nature point of view, the defalcation or the hiding of successional assets are classified as unlawful legal facts, as civil offenses and not as successional

[13] Mihail Eliescu, *op. cit.,* 125; Francisc Deak, *op. cit.,* 423; Alexandru Bacaci and Gheorghe Comăniță, *op. cit.,* 200.

option acts, and the penalty that accompanies them represents a civil penalty[14]. The same opinion can be supported, in our opinion, and in light of the new Civil Code's dispositions.

The conditions of the forced acceptance

In order to be in the presence of the forced acceptance, there must be met the following conditions:

a) the existence of the objective element;

The objective element consists of giving away, hiding or the non-declaration from the inventory of some successional assets or of a donation subjected to the report or to reduction, by *erede*, alone or in equity. In the light of the dispositions of the Civil Code in force, the jurisprudence and the doctrine have given a very broad interpretation of the concepts of defalcation and hiding, their scope being circumscribed to any acts or deeds of any kind to reduce the assets, rather in the damage of the co-heirs and / or of the successional creditors and in the bad-faith *erede*'s benefit. Same orientation can be hold, in our opinion, also after the entry in force of the Law no. 287/2009.

Therefore, the material objective can represent both deeds, like the material hiding of some assets, the drawing up of a false will or of a proving document of an unreal claim for the succession, and also omitted facts, like the non-declaration of some assets for the completion of the successional inventory, the non-declaration of some *erede*'s debts to the succession, the non-declaration of a donation subjected to report or to reduction etc.[15]. In all the cases, the existence of the hiding or of the not declared assets in the successional patrimony must be proven[16].

Following the commission of such acts, there is operating a clandestine self possession of one co-heir the expense of the others[17]. The lack of clandestinity (co-heirs knew about the assets' existence) entails the inapplicability of the sanctions by the article 1119 N.C.C.

In the judicial practice and in the literature has acknowledged that the defalcation or the hiding entails the forced acceptance of the inheritance and also in the following assumptions:

- these are not only about the movable assets, but also about the immovable assets of the successional patrimony[18];

- they are committed not only before the inheritance opening, but even before that time, perhaps even with the complicity of the deceased[19];

- they are committed not only before exercising the successional option right, but even after that moment[20].

We consider that these hypotheses may attract the forced inheritance acceptance in the light of the new Civil Code.

b) the existence of the subjective element;

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[14] Mihail Eliescu, *op. cit.*, 130-1; Francisc Deak, *op. cit.*, 423; Supreme Court, the civil collective, decision no. 2520/1989, in *Dreptul* (8/1990): 79.

[15] Dimitrie Alexandresco, *op. cit.*, 325-7; Ioan Rosetti-Bălănescu and Alexandru Băicoianu, *op. cit.*, 291-2; Mihail Eliescu, *op. cit.*, 130; Francisc Deak, *op. cit.*, 424; Dan Chirică, *op. cit.*, 227; Alexandru Bacaci and Gheorghe Comăniță, *op. cit.*, 201; Supreme Court of Justice, civil division, decision no. 622/1990, in *Dreptul* (9-12/1990): 236-7.

[16] Supreme Court of Justice, civil division, decision no. 1979/1992, in *Deciziile Curții Supreme de Justiție pe anii 1990-1992*, 119-25.

[17] Dan Chirică, *op. cit.*, 227.

[18] Dimitrie Alexandresco, *op. cit.*, 326, footer note 1; Ioan Rosetti-Bălănescu and Alexandru Băicoianu, *op. cit.*, 292.

[19] It can be seen the complicity of the deceased, in the hypothesis in which he states in favour of one of the heirs, through a donation, disguised under the appearance of a sale, in order to avoid the excessive reduction of the liberality. Mihail Eliescu, *op. cit.*, 129; Francisc Deak, *op. cit.*, 424.

[20] Francisc Deak, *op. cit.*, 424.

The subjective element is represented by erede's intention to defraud the others co-heirs or the creditors of the inheritance[21].

In order to be in the first case (defraud of the co-heirs), there must be a plurality of heirs so that *erede* acts the fact to damage another or other co-heirs. *Erede* who committed the fact with this purpose is declined from the right to reject the inheritance and also from the right to receive his part from the subtracted assets.

For us to in the second case (defraud of the inheritance's creditors), the plurality of heirs is not necessary, being sufficient that the only deceased's *erede* to commit the fact with the purpose to damage the inheritance's creditors[22]. Being the only heir[23], he can be declined from his right to reject the inheritance but not from, his right to receive his part from the subtracted assets.

The non-declaration by *erede*, when the inventory is made, of some successional assets, by mistake or with the wrong belief that these assets are his, does not attract the application of the sanctions regulated by article 1119 N.C.C. For these sanctions to become applicable it is necessary that *erede* be conducted by a fraudulent intent. The *erede* bad-faith is not presumed, it must be proven by the one who invoke it (co-heir or creditor of the inheritance)[24].

If *erede* returns the hided assets on its own initiative, before this fact is discovered, the doctrine[25] considers that the provisions of the article 1119 N.C.C. are no longer applicable. But if *erede* who committed the act of concealment, dies before returning the hidden assets, his heirs will be punished in the sense that, for their part, the tacit acceptance of the inheritance operates, even if they return themselves these assets[26].

We believe that these views can be sustained also in light of the new Civil Code.

c) fraudulent facts are likely to damage other persons;

In order to attract the application of the sanctions of the article 1119 N.C.C., the fraudulent facts of *erede* must not harm the rights of other persons (co-heirs or successional creditors). This condition is not met, therefore the mentioned penalties are not available, in the following cases:

- *erede* has excusive rights on the inheritance[27];

- the surviving spouse, who comes to the inheritance of the deceased in contest with other heirs than the descendants of the latter, had stolen or concealed household items that have been affected to the common use of the spouses[28]. The household objects can be tracked by the creditors of the succession, only if their claims can not be met from other successional assets, including the surviving spouse part from these assets[29].

- the legatee with particular title has subtracted or concealed assets that are exclusively his, these assets not being subjected to any reduction[30].

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[21] Judicial practice and doctrine have acknowledged that *erede* fraudulent intent may be carried out and the creditors of the inheritance, not only the co-heirs. Supreme Court of Justice, civil division, decision no. 622/1990, in *Dreptul* (9-12/1990): 236-7; Francisc Deak, *op. cit.*, 425; Alexandru Bacaci and Gheorghe Comăniță, *op. cit.*, 201.

[22] Supreme Court of Justice, civil division, decision no. 622/1990, in *Dreptul* (9-12/1990): 236-7.

[23] Mihail Eliescu, *op. cit.*, 129. In the literature was sustained too the contrary opinion, according to which the applicability of the sanctions in question is conditioned by the existence of multiple heirs. Eugeniu Safta-Romano, *op. cit.*, 114.

[24] Supreme Court of Justice, civil division, decision no. 1979/1992, in *Deciziile CurțiiSupreme de Justiție pe anii 1990-1992*, 124.

[25] Mihail Eliescu, *op. cit.*, 131.

[26] Alexandru Bacaci and Gheorghe Comăniță, *op. cit.*, 202.

[27] Dimitrie Alexandresco, *op. cit.*, 329; Francisc Deak, *op. cit.*, 426; Dan Chirică, *op. cit.*, 229; Alexandru Bacaci and Gheorghe Comăniță, *op. cit.*, 202.

[28] Mihail Eliescu, *op. cit.*, 129; Supreme Court, the civil collective, decision no. 1349/1983, in *Culegere de decizii pe anul 1983*, 90-2.

[29] Francisc Deak, *op. cit.*, 426.

[30] Ibidem. The legatee with particular title is not responsible to the creditors of the inheritance, only if their claims can not be satisfied by the successors general and with general title from the value of the successional patrimony.

d) the author of the fact must have the quality of heir.

For the dispositions of the article 1119 N.C.C. to be applicable, it is necessary that the author of the fraudulent fact to have the quality of legal heir or general legatee or with general title. As we have shown before, for the legatee with particular title the discussed legal dispositions are not applicable, not in the case in which he concealed the assets that represented the object of his legacy and not in the case in which he concealed other assets. In the first case, the concealed assets are totally his, and in the second case he is in the situation of any third party. Correspondingly, the legatee with particular title is not entitled to seek the application of the forced inheritance acceptance sanction to the other heirs who have committed fraudulent acts provided by law[31].

In case in which *erede* who committed fraudulent acts provided by law dies before the liquidation of the inheritance, the transmission of his own successional rights to the own heirs operates, who are deemed to have accepted the retransmitted inheritance, not having the possibility to reject it.So, the sanction of the forced inheritance acceptance operates in the inheritance retransmission case.

It will bear the consequences of committing the fraudulent facts, to which the dispositions of the article 1119 N.C.C. refer, only *erede* with fraudulent capacity in their committing moment. Are relatively presumed[32] to have fraudulent capacity (have acted with discernment) persons who have aged 14 years and are not put under interdiction. With regard to incapacitated persons (those under 14 years and persons under interdiction), the existence of the discernment when the deed was committed must be proved. It is possible, therefore, that the minor placed under interdiction or the individual to be affected by the forced inheritance acceptance. The sanction of the forced inheritance acceptance is applicable for them in the hypothesis in which they committed with discernment the fraudulent facts foreseen by law.

In the hypothesis of committing the fraudulent facts by *erede* in participation, the consequences regulated by law will affect everybody, and in regards the restitution of the concealed assets to the inheritance, their responsibility will be in solidarity[33].

2.3. The effects of the inheritance acceptance

2.3.1. The general effects of the inheritance acceptance

The successional patrimony transference, which has operated provisionally since the inheritance opening, is strengthened, becoming final by accepting the inheritance. By accepting the inheritance, the heir title of *erede* is strengthened, but his right of successional option is definitely off, meaning *erede* decades of the right to reject inheritance.

The inheritance acceptance generates this effect, whether it was voluntary acceptance (whether express or tacit) or forced, or it was the result of inheritance rejection revocation. In all cases, the effect of acceptance rises over time until the date of the inheritance opening [article1114 paragraph (1) N.C.C.]. Therefore, although it is exercised after the opening of the inheritance, and within the prescription term of the successional option right, the inheritance acceptance produces retroactive effects. This effect is common to both valences of the successional option right, and thus to the rejection of the inheritance, too.

As a specific effect of the inheritance acceptance, however, the legal heirs and the general legatees and with general title are responsible for the debts and burdens of the inheritance only with the assets from the successional patrimony (*intra vires hereditatis*) proportionately to each quote.

Thus we identify, the major novelty brought by the Law no. 287/2009 in the matter of the successional option right, namely the ascribing of the acceptance under inventory benefit specific effects from the regulation in force, deriving from the inheritance acceptance.

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[31] Mihail Eliescu, *op. cit.*, 129; Francisc Deak, *op. cit.*, 427.
[32] Article 1366 N.C.C.
[33] Francisc Deak, *op. cit.*, 427.

Consequently, the inheritance acceptance generates the following specific effects:

A) separation of the patrimonies;

In accepting the inheritance case, the successional patrimony remains separate from the heir's personal patrimony. Therefore it operates under the provisions of the article 1114 paragraph (2) N.C.C., the separation of the patrimonies, as an exception to the principle of unity which patrimony entails.

The separation of patrimonies specific to the inheritance acceptance produces effects to all the successional creditors, including to the legatees with a particular title, as well as to the accepting heir and to his personal creditors.

The patrimonies' separation, resulting from the acceptance of the inheritance, leads to the following consequences:

a) the liabilities or claims of the accepting heir towards to *de cujus* are not extinguished by confusion. In contrast, the mutual claims (the claim that the heir has for his inheritance and *de cujus* claim towards the heir) can be compensated. Also, the confusion does not stop the real rights that the heir has on a successional asset, respectively the real rights that *de cujus* has on an asset from the heir's patrimony[34].

b) *erede* is considered third party against the successional patrimony so that he may become the contractor subject to some of the successional assets on sale at auction;

c) the heir may acquire new rights and obligations in respect with the successional patrimony;

d) third parties can not impose to the heir the personal exceptions, they could invoke against the *de cujus*, as the heir does not take place of the deceased, in the latter's contracted relationships with third parties[35];

e) from the price obtained from the sale of successional assets, the claims of the successional creditors and of the legatees will be satisfied preferentially, while the personal creditors of the heir claims will be fulfilled only from the remaining liabilities after liquidation.

B) the responsibility of the heir to the liabilities, only within the asset limit (*intra vires hereditatis*).

As for the responsibility for the liabilities, the new Civil Code regulates that the legal heirs and general legatees with general title are responsible for the debts and burdens of the inheritance only in proportion to each quote.

So, unlike the Civil Code in force, the new Civil Code no longer regulates the possibility of the heir to abandon the succession's assets in favor of creditors and legatees by particular title.

According to the dispositions of article 1114 paragraph (3) N.C.C., as a rule, the legatee with a particular title is not obliged to pay the debts and the inheritance duties. By exception, however, it responds for the liabilities, only with his asset or assets which form the object of the legacy and only in the following situations:

a) the testator had expressly disposed for this purpose;

b) the right left by legacy has as its object an universality, such as an inheritance collected by the testator and non-cleared yet;

c) the other assets of the inheritance are insufficient to pay the inheritance debts and the inheritance duties.

C) the assets entered into the successional patrimony after the inheritance opening, by effect of subrogation, may be affected to debt settlement and inheritance duties.

Thus, according to article 1114 paragraph (4) N.C.C, where alienation of assets after the inheritance opening, goods entered in the successional patrimony by the effect of subrogation may be affected to the debt and burdens of the inheritance extinguishment. From the expression of the

[34] Ididem, 445 and the footer note 2.
[35] Ibidem.

legislature, we can assume that these assets can be affected to the debt and burdens of the inheritance extinguishment only if the other successional assets do not appear to be sufficient.

2.3.2. The special effects of the inheritance acceptance

The general effects of acceptance (the strengthening of title of heir, the separation of patrimonies and damage to goods entered in the successional patrimony, by the effect of subrogation, to satisfy debts and inheritance duties) occur in both voluntary acceptance, and in forced acceptance. In addition, however, the forced acceptance of the inheritance generates, under the provisions of article 1119 N.C.C., the following specific effects:

a) forfeiture of the *erede* from the right of successional option, not being able to reject the inheritance;

If the heir had renounced his inheritance, before committing the act liable to attract the forced acceptance of the inheritance, he decays of the quitting quality, becoming thus acceptant of inheritance.

b) forfeiture of the *erede* from the successional rights on the assets stolen or hidden;

Erede who has stolen or hidden successional assets, is void of any right on these. These assets will revert to the statutory rates, to the co-heirs of the guilty party. It follows, therefore that the forfeiture of the successional right of stolen or hidden property occurs only in relation to fraud co-heirs[36].

c) the obligation of *erede* to report or to reduce the hidden donation, without participating in the distribution of donated asset;

d) although the guilty heir does not collect his share of the stolen or hidden assets, respectively from the reported or reduced donation, he will be bound to pay the duties and the succession burdens, in proportion to the quote of the inheritance due to him, including his own assets.

So, in the forced inheritance acceptance, the separation of patrimonies no longer operates, thus the guilty *erede* will incur debts and inheritance duties, which correspond to its quote of inheritance, in case of failure of successional assets, even with his own goods (*ultra vires hereditatis*).

2.4. Inventory and special measures to conserve the successional assets

2.4.1. Inventory of the successional assets

As for the inventory, the new Civil Code provides in article 1115 paragraph (1) that *erede*, the heritage creditors and anyone interested may require the empowered notary to have an inventory of the assets from the successional patrimony, expenses incurred by it being in charge of the inheritance.

Therefore, the inventory can be requested to any competent notary by any *erede* (with legal or testamentary vocation), by the inheritance creditors and even by any interested person, for the purpose of ascertaining the exact composition of the successional mass, so that the entitled one to exercise the successional option right should do so in full knowledge.

According to the dispositions of the paragraph (2) of the same law text, if *erede* or persons who hold assets from the successional patrimony object, the carrying out of the inventory is ordered by the court from the place of the inheritance opening. Consequently, regarding the inventory we may encounter two situations:

a) those who hold assets from the successional patrimony (whether or not they have the quality of *erede*) do not oppose the request of those entitled by law to make an inventory of the successional assets, in which case the public notary is empowered to dispose of inventory performance;

[36] Mihail Eliescu, *op. cit.*, 130.

b) those who hold assets from the successional patrimony (whether or not they have the status of *erede*) oppose the request of those entitled by law to make an inventory of the successional assets, case in which the inventory carrying can be ordered by the court from the opening place of the inheritance.

There are also two situations as far as the person who makes the inventory is concerned. Thus, according to the dispositions of the article 1115 paragraph (3) N.C.C., the inventory is made by the person designated by the *erede* and creditors' agreement, or failing such agreement, by the person designated by either the notary or, where appropriate, the competent court.

So the two situations that can be found regarding the person who will carry out the inventory are the following two:

- the person who will carry out the inventory is designated by *erede* and creditors;
- if there is no agreement between the *erede* and creditors, the person who will carry out the inventory will be designated either by the competent notary (in case those who have assets from the successional patrimony have no objection to achieve the inventory) or by the competent court (in case those who have assets from the successional patrimony have objection to achieve the inventory).

Inventory results will materialize in the power of the dispositions of the article 1116 N.C.C., in a report of inventory, which contains references to both the assets and the liabilities of the inheritance. As for the assets of the inheritance, goods of the inheritance whose ownership is contested must be shown separately.

For the inheritance assets whose ownership is not contested, the person conducting the inventory must distinguish between goods, that on the opening date of the inheritance, were in possession of the deceased and the goods that at the same date, were in possession of another person. The goods that were in possession of the deceased on the inheritance opening date will be listed, described and assessed provisionally, while the successional assets owned by other persons will be counted, stating the place where they are and why they are there.

Where, during the count a will left by the deceased will be found, it will be attested as unchanged and deposited in the public notary office [article 1116 paragraph (5) N.C.C.].

The inventory is signed by the person who carried it out, by *erede* who were there, and if they are absent or if they refuse to sign, the inventory will be signed by two witnesses [article1116 paragraph (6) N.C.C.].

The deadline to realize the inventory

As a consequence of the dispositions of article 1104 N.C.C. the inventory can be realized as it follows:

- prior exercising the successional option right, in which case the one-year option term will not be fulfilled before two months from the date on which the applicant *erede* shall be notified of the minutes inventory, in this case we are now extending the deadline of the successional option term;
- after exercising the option right, in which case the successional option term mustn't be extended.

During the realization of the inventory, *erede* can not be considered heir unless he has accepted the inheritance. So, only *erede* who commissioned the inventory of the successional assets, after accepting the inheritance, will be considered an heir. In other words, only the inheritance acceptance makes him heir, not the request to carry the inventory of the successional assets, this does not have the significance of the tacit inheritance acceptance.

2.4.2. Special conservation measures of the successional assets

The new Civil Code contains provisions relating to special measures and conservation of the assets. So, according to the article 1117 N.C.C., in case of danger of alienation, loss, substitution or destruction of the successional assets, the notary will be able to put them under seal and will submit them to a custodian.

Custodian may be appointed by agreement of the concerned parties or by failing such agreement, the custodian will be appointed by the public notary. In the first case, the custodian will be one of *erede* and in the second case he will be a third party.

From the mentioned legal dispositions, we conclude that the role of custodian is to conserve the successional assets, avoiding alienation, loss, substitution or destruction. Any storage costs will be contracted only with the approval of the notary.

The successional assets can also be transferred in administration to a special guardian appointed by the notary. Just like the custodian, the trustee may incur expenditure on the successional assets in order to preserve it, but only with the notary's approval.

In all cases, the assets are delivered protocol based, signed by both parties, by the public notary or by special guardian and custodian. If the delivery takes place in the same time with the inventory, the inventory report will be mentioned the delivering statement, a copy of the minute report in question being handed to the custodian or to the trustee.

The custodian or the curator is forced to return the assets and to account for them to the notary regarding the preserving or the administration expenses of these goods, when the successional procedure ends or when the notary sees it fit.

Regarding the sums of money, the bonds, the checks or any other values found when carrying out the inventory of the successional assets, the new Civil Code regulates special measures, in article 1118. They consist in submitting the values listed in the notary's store or in a specialized institution, mentioning this in the minute report of the inventory.

From the sums of money found in the inventory, will be left to the heirs or to those living with the deceased and that kept the household together with the amounts required for:

- the maintenance of the persons who were in charge of the deceased for up to 6 months;
- the payment of the amounts due under employment contracts or social insurance payments;
- the expenditure for conservation and management of heritage assets.

Entitled to receive such amounts, are therefore only:

- the heirs of the deceased, legal or testamentary (general or with general title);
- in the absence of the heirs of the deceased, the persons who lived with the deceased and who kept the household with him.

We consider that the new Civil Code, that contains references to the inventory and the preservation of the successional assets, registers another positive aspect.

Analyzing the dispositions of article 1115-1118 N.C.C., we identify the concern of the legislature to regulate in a more complete manner the acceptance of the inheritance problem.

3. Conclusions

After an analysis of the inheritance acceptance, we can appreciate that the new Civil Code assigns to this valence of the successional option right a new configuration. Law no. 287/2009 preserves from the regulation in force of the inheritance acceptance only items whose correctness and timeliness have not been denied by the literature and by the judicial practice, bringing many new elements imposed, however, by the new social realities.

As regards the acceptance of the inheritance, we reveal the following new aspects brought by Law no. 287/2009: it does not regulate anymore the acceptance under inventory benefit, form of the inheritance acceptance in the regulation of the Civil Code in force, but it contains dispositions only regarding the inheritance accepting, but to which it assigns the legal effects of the acceptance under inventory benefit from the regulation in force; it enumerates the acts with tacit acceptance value, respecting under this aspect the line of the Civil Code in force; it regulates for the first time in our law the non-acceptance declaration; adds new causes that attract the forced inheritance acceptance; it contains dispositions regarding the elaboration of the inventory and of the special measures of

conserving the successional assets; it regulates the possibility of extension of the option term, as a consequence of the inventory's elaboration, before exercising the successional option right.

In our opinion, all these aspects represent advantages of the new regulation in successional matter, constituting its strengths. We particularly highlight the new Civil Code's concern to ensure to the inheritance acceptance a regulation as complete as possible and assure protection for any acceptant *erede*, stating that the debts and inheritance duties shall be considered *intra vires hereditatis.*

We conclude therefore that the new Civil Code, using a modern specialized language, ensures to the inheritance acceptance a proper, complete, consistent and fair regulation.

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OVERVIEW OF OWNERSHIP AND ITS BORDERLINES WITH THE OBSERVANCE OF THE INJUNCTIONS RULED BY THE INTERNATIONAL COURT OF JUSTICE, THE EUROPEAN HUMAN RIGHTS COURT AND THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

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Abstract
Guaranteed for and preserved by many law abiding institutions and documents, starting with national ones, mentioning the regional treaties and completing with the universal deeds, the ownership seems to be detached from its classic conceit and appears as a common concept, but nevertheless with a variable content, based on a series of constant elements such as juridical tradition of different member states, their economical and social upraise and even historical and political implications. Ownership must be perceived as a double sided coin, its right side up being a country's normative system and the toss consisting of the international legal provisions that bring under regulation the most cherished material right of an individual. From time to time the coin lands on its brim, meaning that a conflict will be spawned between the two. It's not to be neglected that the international protection of this fundamental right can be achieved by subjecting it to a number of courts that created the Community acquis. Which of them had the most important contribution in establishing a guideline shall transpire from the pages of this article.

***Key words**: ownership deed, human rights, international courts, injunctions of the international judicial institutions referred to by Romanian courts, encroachment of a private property right*

Introduction

In spite of the fact that they have been functioning for quite a while, both the European Human Rights Court (Strasbourg) and the Court of Justice of the European Communities (Luxemburg) can't be perceived as anything more than dialogue mechanisms between the national courts. In order to invigorate this allegation, we should turn our attention at least to the sever injunctions of the romanian Constitutional Court that makes many refferals in its decisions to the rulings of the European Human Rights Court. In essence, this judicial institution upbraided the romanian state on the matter of inconsequence, incoherence and incapacity to frame a legal system that can be able to create a juridical security climate as well as for the numerous legislative gaps that can't be strewed in another way than by an autonomous approach of every judge in a litigation.

Out of the 47 signing states of the European Declaration of Human Rights, members of the European Council, Romania has the largest number of complaints registered when it comes down to laying the overall population over the number of offences claimed before the international institution, oscilating forwards and backwards between Rusia and Turkey. From 478 injunctions ruled by the European Human Rights Court, over half of them, 280 to be more precise, were given in relations to the encroachment of the ownership right, thus the interest that such a topic raises for a detailed analysis of the points made by the international courts when they enforced their decisions on the Romanian state.

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The article has been elaborated within Cerdoct Project – phd. grants for supporting the scientific research activities of phd. candidates in the technical or humane domains, environmental protection and health fields, national, european and worldwise legislation,with an eco-economical and socio-economical impact "CERDOCT" ID 79073.

A professional concern was put forth for this particular issue throughout the specialized literature, the subject being the main focus even for a phd. thesis. This fact underlines the timeliness of the item that makes the objective of the article that unfurls from here on.

In the paragraphs below I will give my best efforts in trying to capture the main particularities of the ownership right's borderlines in accordance with the conceit of the Strasbourg judges and he Luxemburg principal of proportions, in detecting the core of the private property concept and in shedding light on the institution of exerting use on assets in conformity with the general interest.

Overview of ownership and its borderlines with the observance of the injunctions ruled by The International Court of Justice, The European Human Rights Court and The Court Of Justice of the European Communities

The International Court of Justice had a diminished role in insuring the legal protection of ownership, mainly due to several circumstances like the fact that its organic writ (the Statute of the International Court of Justice[1]) invests the Court with resolving the judicial litigations solely on the basis of the member states'[2] consent and that the only parties that can raise an issue are the states themselves[3]. Qualified as the major juridical unit of the Organization, the International Court of Justice had insufficient means in order to proceed to offering an effective protection for the ownership right. Although the Statute is an almost universally signed treaty, so that at least in theory it had the ability to stress upon safeguarding the above mentioned right, it doesn't regulate any particular right, but nevertheless it accomplished heeding the interest of the international community over the necessity of vouching for human rights as well as for imanent personal rights, without segregating on cultural, ethnical or religious criteria. The Universal Declaration of Human Rights which can't be enforced on all of the member states, due to the fact that it hasn't a mandatary power is all the same the first international deed that incorporates a catalogue of the cardinal human rights and liberties. Art. 17 stipulates the private property ownership, concluding that every individual may detain one or several estates, on his own or alongside others and that no one shall be divested in an arbitrary manner of his property. Subsequently, two more treaties came into being (The International Pact for Civil and Political Rights; The International Pact for Economical, Cultural and Social Rights), but neither of them tied the ownership right to rules. All of these international documents were reunited under the generic denomination of The Human Rights Chart that may encompass the instrument referred to by the International Court of Justice when it tries a litigation. As I underlined anterior, the Chart is fairly irrelevant when it comes to conferring an international protection for the ownership right, this being the factor for which the regional systems that provide for the property right have an increased efficiency.

Since the international scene can't offer the solution for the moots that are brought before it, the interest for the matter grew on the European scale and on the Community level, the two proficient institutions in instrumenting the litigations concerning ownership being the European Human Rights Court and the Court of Justice of the European Communities.

In conformity with art. 1 of the First Protocol to the European Convention for the observance of human rights and fundamental liberties, denominated edgeways the Ownership Protocol, no private or juridical individual can be deprived of his property unless it is done for a public utility

[1] Art. 1 of the Statute stipulates that the International Court of Justice that was established by the United Nations Chart as the primary judicial unit of the Organization shall be encompassed and shall function in compliance with the provisions of this Statute.

[2] Art. 36 point 1 of the Statute postulates that the Court is competent to pass a judgment in the moots that the parties bring before it, as well as in all the others vexed questions that are listed by the United Nations Organization's Chart or that are referred to in the treaties and conventions effective at that certain time.

[3] Art. 34 of the Statute affirms that only the states are entitled to be parties in the issues that are brought before the Court; Ch. Domincé, L'émergence de l'individu en droit international public, in L'ordre juridiqe international entre tradition et innovation, Recueil d'études, PUF, Genève, 1997, 109.

cause and with the compliance to all the provisions and to all the general principals of the international law. These proclivities don't inflict upon the right of the states to carry out any of the deeds that are considered to be necessary for regulating total utility of the assets in accordance with the general interest or in order to insure the excise tax payment, of other contributions or of fines. As I have already shown, art. 1, paragraph 1, second thesis of the Protocol stipulates the abridgement of property for public utility on the groundmap of the legal dispositions and the principals of the international public law.

The notion of deprivement of ownership rights is equivalent with that of dispossessing the entitled person of the asset itself and of all the attributes that bestowed on it and transferring the right to another's patrimony (most of the times, the state's). The capital manners through which the action is enforced are: expropriation, nationalization and, in exceptional cases, requisition. Although requisition is mainly a temporary limitation of one's right to dispose at his own will of the good, sometimes it resembles expropriation, meaning that the transfer of the property right is definitive and is done with the payment of a retribution.

Expropriation, the most common way to dispossess someone of the ownership right, is considered acceptable if it obeys a set of rules: the deprivement shall be enforced by internal juridical norms by each state on its own[4]; the action against the title holder shall be justified by a public utility interest; the dispossessing shall be in conformity with the general principals on the international law. To these three legal postulates, the Court added another two jurisprudential ones: the divesting shall be done with the defray of a counterbalance sum; the existence of an equilibrium between the deprivation and the pursued aim of it.

Nationalization is a form of expropriation, that has a specific trate, that in its classical configuration engages the lack of retribution, the existence of arbitrary or political[5] reasons for which the divesting is taking place and the fact that it's endorsed maily upon enterprises and industrial branches. This issue and foremost the consequences of the nationalizations from the comunist period, as well as the annulment of the decisions to reinstaurate the former owners in their rights by granting the annulment appeals promoted by the Romanian General Prosecutor have been parameters for which Romania was convicted before The European Human Rights Court, on top of the list being inscribed the repercussive cause of Brumarescu vs. Romania (1999). Therefore, the idea of nationalization[6] is not in itself abhorrent to the ownership right as it is guaranteed for by the Convention, this being the reason for which the Court granted permission to nationalize the aeronautical and naval industry[7], but the arbitrary one tells against the private property.

Another restraint entailed on the ownership right, or more precise on one of its prerogatives, is, in conformity with art. 1 paragraph 2 of the Convention, the use exertion of assets in accordance wih the general interest. In comparison with the deprivement of the ownership right, this manner of limitation reverberates solely on the use, meaning that the asset will not be transferred from one title holder to another, instead the exercise of the use will be restricted by the existence of a general

[4] Proffesor Corneliu Bîrsan, representative of Romania at the European Human Rights Court, considers that the concept of internal juridical norms should be perceived in extenso, meaning that it also includes decrees, injunctions or other law enforcing deeds, even the jurisprudence of some courts when this is thought to be a legal spawning grownd. He explains himself by underlining that different states conduct by different legal systems, so we shouldn't misinterpret the will of the European Convention of Human Rights. Nevertheless, we appreciate that in the Romanian ownership right cocoon, the conceit of "law in the sense conferred by the Convention" shall be used in the perspective of art. 44 of the Romanian Constitution, corroborated with art. 73 letter m) and the Decision of the Court no. 6/1992, thus the restrictive interpretation of organic law.

[5] G. Peiser, Droit administrativ. Fonction publique de l'Etat, territoriale et hospitalière. Domain public. Expropriation, réquisitions. Travaux publics, 15e édition , Dalloz, Paris, 1999, 136.

[6] On the problem of masked nationalizations B. Selejan-Guțan, Excepția de neconstituționalitate, All Beck , Bucharest, 2005, 262-263.

[7] Lighgow vs United Kingdom and North Irland Cause.

interest which must be appeased and the observance of the ratio between the abridgement and the greatness of the general interest. The control of the usage may manifest itself through dictating some obligations or active conduct (the bondage to crop the land or to plant trees for the improvement of the ecosystem) or, on the contrary, through limiting the conduct of the owner or drawing directory lines (adopting rule catalogues for exerting some professions, establishing barrier prices for certain goods, setting roof type lease prices[8], prelonging the lease contracts over the term agreed to by the parties). The legal provision asserts that the states are entitled to adopt the necessary law abiding measures, but nevertheless they will be subjected to the ratio control test of the Court. It decided to appraise the equilibrium by ruling in a favorable way in the following situations: prohibiting the owner to use as residence a construction building rigged up in a protected area[9]; the obligation enforced on some woodland owners to plant trees of a particular essence that would favor the protection of the ecosystem and the production of timber[10]; forbidding the emplacement of a mechanical repair shop in a residential location[11]; appealing to an urban plan in order to limit the building of other types of estates than the ones approved in the plan[12]; instauring legal provisions that prohibit applying the succesoral sharing institution to an agricultural areal, in order to maintain its economical viability[13]; classing an agricultural terrain as a natural site permanently under protection and exploiting it only by obtaining an authorization[14].

A special kind of usage control, even if sometimes it is the equivalent of the dispossession[15], consists of confiscating the asset as a complementary punishment for committing a crime. The jurisprudence of the Court accounts that the confiscation measure is legitimate as long as the state obliges to the just equilibrium between its own interest and those of the owner and takes notice of the level of liability or the type of prudence needed in the circumstances that involve the case. For example, confiscation was ruled as legitimate when it referred to more immoral publications[16] or to a vehicle used to commit a crime for the purpose of impending the owner to continue with the misconduct[17].

The Court stated that they won't be perceived as overriding of art. 1 of the First Protocol of the European Human Rights Declaration the following: the legal provisions for declaring bankruptcy[18]; the recognizance of minoritary stake holders to sell their social parts for a price established by independent arbitrators, but preserving the right to buy them back, in the very same conditions[19]; the eviction of a person from a locative environment over which he didn't posses any right[20]; the adopting by the national authorities of a legislation that restrains the right of the owner to cancel the lease contract that is in the proceeding stage[21]; adopting legal measures that roof the lease prices which had been anterior free settled[22]; sentencing a contractual party to paying indemnities to the other[23].

[8] Mellacher vs. Austria Cause.
[9] Herrick vs. The United Kingdom and Norh Irland Cause.
[10] Denev vs. Sweden Cause.
[11] Charter vs. The United Kingdom and North Irland Cause.
[12] Jacobsson vs. Sweden Cause.
[13] Inze vs. Austria Cause.
[14] Oerlemans vs. Holland Cause.
[15] Raimondo vs. Italy Cause.
[16] X vs. The United Kingdom and North Irland Cause.
[17] Raimondo vs. Italy Cause.
[18] X vs. Belgium Cause.
[19] Bramelid and Malmstrom vs. Sweden Cause.
[20] X vs. The United Kingdom and North Irland Cause.
[21] X vs. Austria Cause.
[22] Mellacher vs. Austria Cause.
[23] X vs. The United Kingdom and North Irland Cause.

Despite the analysis that I carried out, on the 4th of March 2008, the Court of European Human Rights ruled against Romania in a litigation based on the infringement of art. 1 of The Protocol. In the Burzo vs. Romania cause, the Court exceeded its attributions and substituted the national legislative organ even though it states that "although the Court doesn't possess the proficiency to substitute the national courts in an act of offering an interpretation of the internal juridical proclivities, it ascertains that the Appellate Court omitted to take into account one of the motives that the plaintiff claimed in the eviction matter that he brought before the court, on the fundament of which the inferior courts had granted the action, in the same manner in which it overstepped other arguments of the plaintiff, thus making the conduct of the Appellate Court an encroachment of the equitable trial principal". Furthermore, the European Court finds that "the restrictions that the owner-plaintiff had to endure in favor of the tenants (payment of a minimal lease price, the degradation of the asset) on a regular basis for several years are clearly disproportionate by comparison with the level of general interest that represented the motive for which he was deprived of the asset's use". In closing arguments, the Court referred to its constant jurisprudence in the matter of art. 1 of the Protocol, underlining the fact that O.U.G. 40/1999, whose provisions have been used by the Appellate Court to maintain the tenants in the locative area, represents a settlement of the use exercion that pursues a general interest. At the same time, the European Court marked the fact that while the prerogatives of art. 13 of O.U.G. 40/1999 weren't fulfilled, the Appellate Court hasn't made any mention of art 14 paragraph 2 of the same normative deed which stipulates that tenants who delay on a systematic basis the payment of the rent are not entitled to the renewal of the lease contract. The Court appreciated that the restrictions enforced upon the owner-plaintiff in favor of the tenants (the minimal retribution, the degrading state of the asset) weren't affiliated to the observance of the just equilibrium between the protection of the plaintiff's ownership right and the exigency of the general interest, meaning that, in this particular cause, art.1 of The Protocol suffered an infringement.

The guarantee and defense of the fundamental individual rights is also being encompassed by the European Court of Justice (the former Court of Justice of the European Communities). If we would trace a time schedule for the evolution of the ownership's observance on the Community grounds, the best place to start is the analysis of one case that became the head stone in the matter of encroachment over the private property right. In the absence of a catalogue that would inscribe all he fundamental rights, the Court of Justice of the European Communities, with the aid of Hauer vs. Land Rheiland-Pfalz[24] case (1979), consacrated at that time a principal of general application that forced all of the others to respect the fundamental rights and liberties. The Court stated that "the ownership right is ensured for in the Community juridical order, in acceptance with the member states' Constitutional conceptions, as always, reflected by the first additional protocol of the European Human Rights Declaration…" In that particular case, the plaintiff was denied the release of an authorization for planting grapevine on a square surface over which the petitioner had an ownership right. The interdiction would have been for a 3 year long period, because of a Community regulation that stipulated that planting any crop would be contrary to hazard proclivities. The plaintiff made the allegation that his ownership right was struck by inefficiency and he was disallowed to practice his profession, in the manner that the fundamental German law should be interpreted. Ruling for the defendant, the Court declared that there was no infringement of the ownership right due to the fact that the provisions of the Regulation 1162/1976 weren't inflictive, instead they were a type of restrictions that was generally spread throughout the Community member states, thus trying to implement a general interest.

In the circumstances that even though the Community law is the beneficiary of spremacy in comparison with internal normative systems of the member states, at the same time that the first isn't to clear in regulating rights and liberties or it does it at a lower standard than the national law, the

[24] T. Ştefan, B. Andreşan-Grigoriu, Drept comunitar, C. H. Beck , Bucharest, 2007, 154-158.

cold shoulder of the German people and of the Italians raises the question of knowing which of the two will be declared as having priority. The answer came through a decision of the Federal Constitutional Court of Germany that, although it was very controversed at the beginning, proved its efficiency on the long run, being followed by a number of other injunctions ruled on a unitary practice trend. The Solange 1 cause became the means of asserting that "the national proclivities regarding the fundamental rights must be perceived as reference points for the Community law, at the times when community organs can't guarantee a protective cover for these rights at the same level as the national ones may do it"[25]. The Maastricht Decision concluded that "the German constitutional court grants protection for the fundamental rights in cooperation with the Court of Justice of the European Communities".

A new high point on the stage of the evolution of fundamental rights and liberties on a Community level was represented by the legitimize of art. 6 of the Treaty for establishment of the European Union, which conferred the Court of Justice of the European Union proficiency in this matter. However, since the Union is not a party to the European Declaration, the Court will apply this convention not as an enforceable deed, but more as a source of inspiration.

The private property right has been regulated two more times, in 2004 in the text of the Treaty for the constituence of the European Union and again in 2007 in that of the Lisbon Treaty. In both cases, the treaties came with attachments of the rights' catalogue from the European Union's Fundamental Rights Chart, because the signing of the conventions would have meant the rights themselves would have acquired juridical force. The rejection that the two treaties faced at the referendum that several member states organized put the objective on a waiting list. Therefore the ownership, aside from having an European dimension, it also has a Community aura, that has grown on its own, but not without establishing a conexion with the one that is mentioned by the First Protocol to the European Convention regarding the defence of the individual's fundamental rights and liberties and not without being tinted by the jurisprudence of the European Human Rights Court.

Conclusions

There are two proficient juridical organisms on the European continent that can be addressed to with the plea to solve litigations regarding the enroachment of fundamental rights, this situation being the origin of the well assumed risk of obtaining different injunctions in similar cases. The formality of the coexistence was accomplished with the aid of the European Union's Fundamental Rights Chart and of the European Social Chart, which have the role to create a catalogue of the preconsacrated rights, to try to uniform their interpretation in front of the two courts and most important of all, to make talk at art. 17 about the regulation and guarantee of the ownership right: "every person has the right to benefit from his legally acquired assets, to use and dispose of them, as well as leave them as heritage. No man can be deprived of his property, unless it's for a public utility cause, in the strict conditions mentioned by the law and with the receivance in a just amount of time of a just retribution for his loss. The usage of the assets can be regulated through law as long as the respective action is in the general interest." Article 17 makes transpire on one hand the partially borrowed expression from the European Declaration of Human Rights and on the other hand the numerous shades of the formulation that were entailed by the judicial practice of The European Human Rights Court, for example the express consacration of the retribution's just character and the necessity for it to be paid in a fair amount of time.

On the Community level, a strong German law influence made itself sensed by enforcing for the first time in 1979 the principal of proportions in the Hauer Cause stipulating that "in realizing the pursued objective, the restrictions mustn't be perceived as disproportionate and intolerable inflictions

[25] G. Gornig, I. E. Rusu, Dreptul Uniunii Europene, second edition, C. H. Beck, Bucharest, 2007; I. E. Rusu, Problema legăturii dintre dreptul național și dreptul comunitar în practica Curții Constituționale Federale din R. F. Germania cu privire la drepturile fundamentale, RRDC 1/2006, 55 and the next pages.

in the owner's prerogatives that bring contiguity to the very essence of the ownership right". In the twenty year younger Standley cause, the Court of Justice of the European Communities points out that "even the authorities of the member states are obliged, whenever they regulate limitations of the ownership right, to obey the principle of proportions. The owner shouldn't be forced to bear any duties that overcome the absolute necessary for the pursued objectives to become reality".

The preoccupation manifested by the Strasbourg judges for defining the borderlines of the private property right, places its jurisprudence on a privileged staircase, thus any interpretation of The European Human Rights Declaration must be done by directing it to the judicial practice of the European Human Rights Court. A chronological glance over the decisions ruled by this institution will shad light upon the pulsing mechanism of the Declaration, trate that confers it a great adaptability to the economical, social and political reality that permanently undergoes transformations and reinterpretations.

The ownership right was the beneficiary of an elliptical regulation in the Treaty establishing the European Community which only underlined that the European Community will not prejudice the property regimes that are effectual in member states[26]. In harsh conditions, the observance of the ownership right faced a brick path, its protection being realized in a praetorian manner and by being sustained by the common constitutional traditions of the member states[27]. Although the Luxemburg judges were assigned only to watch over the abiding by the European constitutive treaties, they became real challengers for the ones in Strasbourg, in the matter concerning the protection of human rights.

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ALTERNATIVE DISPUTE RESOLUTION – CREATING VALUE OUT OF CONFLICT

ADRIANA ALMASAN*

Abstract:
The paper is deemed to present the advantages of resolving a dispute or a potential dispute throughout negotiation. This alternative of dispute resolution to legal proceedings in front of the law court may be considered as more favorable to the parties in conflict, from an economical perspective. Therefore the scope of the paper herein is eventually to establish that a conflict may generate value by negotiation.
Further to the conclusion that by negotiation, a conflict may be solved more efficiently, the objectives of the paper are to identify (i) the role played by the legal counsel in identifying the values thereto and (ii) the mechanisms leading to such effect, as well as (iii) the intrinsic connection between law and economics in an adequate approach of the negotiation throughout a commercial dispute. Not lastly, the paper has as objective identifying the key elements of a settlement agreement that are reflecting the added value.

Key words: *negotiation, dispute, alternative, value, settlement*

Introduction

For obvious reasons, the dispute resolution is generally analyzed in relation with litigation. As lawyers are most of the times the designers of the entire dispute solution process, the most reachable instrument foreseen by them is the one allowing them control and the one mostly related to their command of law. Such approach may not be the most valuable to their clients that may lose by entering into conflict with the counterparty the personal interrelating enabling the further business relations.

Consequently, with the cope to achieve added value, the alternative dispute resolution approaches may be taken into account as well, assessing on a case by case basis which one would be most appropriate in each case.

The alternatives to dispute resolution are, in an order corresponding to their strength and enforceability, arbitration, mediation and negotiation. The Romanian Civil Procedure Code also provides the conciliation as a distinctive procedure to be followed prior to any litigation of commercial nature in certain cases that are brought to the attention of the ordinary commercial courts. Such conciliation procedure is not however a distinctive alternative *per se*, as it only indicates the necessity of an amicable resolution attempt from the claimant instead of providing the means that are availed to the parties in dispute. This means that both negotiation and mediation may be used in reaching the result and only the minimal formal proofs of summoning for a conciliation meeting is not equivalent of using the very means of alternative dispute resolution instruments.

Choosing the proper alternative in settling a dispute is also a key element in determining the resolution strategy. Sometimes the very alternative to litigation is not reasonably conceivable. Such are the situations in which at least one of the parties are mostly concerned to either clear its name (for an instance in an intellectual property infringement), or want to make a powerful statement prone to discourage other possible claims against the company that may cast an unfavorable light upon the company itself (such being the case for instance of the large multinational companies in a tort case).

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This work was supported by the strategic grant POSDRU/89/1.5/S/61968, Project ID61968(2009), co-financed by the European Social Fund within the Sectorial Operational Program Human Resources Development 2007-2013.

Other times, the arbitration is a proper instrument. Not only that sometimes the arbitration is mandatory due to an arbitration clause previously agreed upon by the parties in dispute, but the more facile and less complex in proceedings the process may be. In practice the arbitrators are retired judges that are reluctant to apply strict procedural rules in favor of a more substantial overview of the case. The time limitation also may help in electing this course.

Mediation is a process that implies, as well as arbitration, a third party in settling the matter. Mediation presents the undeniable advantage to enable an added value outcome in opposition to litigation. In principle is also less expensive than litigation, nevertheless it never provides an absolute solution to the dispute and there are no guarantees that a mediated conflict might not be eventually brought to the court by a discontent party.

Finally, the negotiation is the instrument more likely to bring to the parties the added value that is able not only to save money and time but also to enable the further continuation for business relations, not altered by resentments that always arise from litigation and arbitration.

Therefore, this extremely important issue of relating dispute resolution to the alternatives the parties may have in order to create value out of conflict and mitigate losses and even achieve gains is to be analyzed from an economic perspective: the paper present the key role of the legal counsel integrated in identifying the added value thereto and also the mechanisms leading to such effect. Such approach enabling the link between law and economics presents the manner of turning by negotiation a commercial dispute into a settlement agreement reflecting the added value.

Alternative Dispute Resolution – Creating Value Out Of Conflict

Legal disputes initiate with the grievance perception, sometimes with communications and end to a resolution that may be negotiated, mediated, arbitrated or litigated. There are of course the grievances that not necessarily lead to resolution due to the reluctances of the party that has suffered the nuisance to further pursue claims against the other. It is nevertheless almost certain that even not duly resolved, a dispute does not lack the capacity to generate added value but, most of the times, as the claiming party may want to discontinue the relations with the other, is event worse than the situation where satisfaction may be obtained by resolving the conflict[1].

For instance, in United States of America most cases settle[2] due to the fact that the lawyers are well trained in order to explain to their clients the risks and opportunities ensued by the dispute. A legal valuation is crucial to such purpose. Each lawyer assesses the chances to win the case and the assessment exercise may go further to the point that each piece of evidence is counted in; each element contributing to the success of its case is accounted for. Neither the assessment nor the other objective instruments availed to both the client and the lawyer are able to provide certainties, nevertheless, the result of valuation represents the grounds for the standpoint they are to assume and the election of a certain dispute resolution method.

The valuation in the settled cases results from certain elements that, combined, indicate the substantive endowments (i.e. the applicable laws and how they influence the value of the conflict by litigation), procedural endowments (what procedural incidents are applicable and how are likely to affect the value of litigation), transaction costs (the expenses incurred, including lawyers' fees and legal taxes), risk preference (how do the client's preference is likely to lean towards litigation or settlement)[3].

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[1] "Trying to Resolve a Dispute? Choose the Right Process" in *Negotiation, Helping You Build Successful Agreements and Partnerships*, Program on Negotiation at Harvard Law School, volume 12, no 8, August 2009, p. 5-6, "Negotiate or Litigate" by Deepak Malhotra in *The New Conflict Management: Strategies for Dealing with Tough Topics and Interpersonal Conflicts, Special Report*, Program on Negotiation at Harvard Law School, 2009, p. 1-4.

[2] Robert H. Mnookin, Scott P. Pepper, Andrew S. Tulomello, *Beyond Winning*, The Belknap Press of Harvard University Press, London, 2000, 101-107.

[3] Robert H. Mnookin, Scott P. Pepper, Andrew S. Tulomello, *Beyond Winning*, The Belknap Press of Harvard University Press, London, 2000, ibid.

Hence it results that all these elements, including some that are of subjective nature and imply a good knowledge of the client's decisional process and the emotional side of the case, are required in order to even consider the possibility of advising on the very matter of election.

Contrary to this hypothesis, the case where a party is forced not to settle takes into account the same principle and criteria as described in the prior situation, in a formula that is most likely to have a larger amount of uncertainty about the outcome of litigation. The distributive elements of the bargaining tend to split between the parties in conflict in the Zone of Possible Agreement (for instance arguments in the vicinity of "you have no actual case", "we can hurt you worse than you can hurt us" and, most of all, "we'll fight to the bitter end" may be decisive where the information about the substantial and procedural – still slight chance! – endowment are scarce and enable the perception influences alter the decision).

Moreover, the perception shifting by using of arguments such as "we'll see you in court" is less likely to lead to settlement, as both parties adopting extreme positions have unreasonable perception about the chances in court. Their antagonism may be avoided only by disclosing certain information, the risk exploitation being absolutely necessary for the benefit of an added value result.

In principal, a lawyer may advise its client that information disclosure is an expensive endeavor and presenting the information to the unlimited exploiting of the counterparty is necessary to be strictly monitored (e.g. the fact that the client may need in the future the similar service or goods that are currently provided by the counterparty is sensitive information that may be used prudently). Moreover, the lawyer depending on the fee that is agreed with the client, the lawyer may be inclined to protract the litigation.

The main challenge in alternative dispute by negotiation is how to transform the actual conflict into a settlement agreement that ideally includes an added value thereto. From this perspective, the negotiation of a dispute very much resembles to a contract negotiation as the final result of the bargaining is the settlement agreement, an agreement having certain particularities to the other contracts that may be commercially negotiated.

The litigation dynamics leading to settlement is explained by the fact that a settlement is more rapid than any litigation consequently reducing the expenses, and also by the fact that the litigation is not oriented towards adding value thereto. There is no contest to the fact that litigation may also bring to light certain advantages and value-creating opportunities. They are most of the times overlooked by the fact that the litigation is less conducted by the client, as during the negotiation are expected to lead, but by the lawyer whose litigation strategy even if submitted to the client for approval and input, most of the times is simply endorsed without actual censorship by its client.

Therefore, in such circumstances the lawyer's tendency to focus on the legal matters (over substance and procedure) as natural as it may be considering its formation as a legal counsel will leave little room to the business aspects that are overcome.

The system of legal negotiations involves multiple relations between each party and its lawyer as well as between the lawyers and clients in terms of legal culture (implicit expectations and impact at the bargaining table)[4].

Sometimes the negotiation itself is a target towards which the parties direct, and the subject of negotiations. The negotiation of how to negotiate is a common phenomenon for adversarial proceedings as well. Where a parallel scenario is depicted in order to emphasize the positive effects is effective to such scope. Most of the lawyers may be inclined to describe the alternative of opening proceedings in the court. Such mistake is often immediately sanctioned by retaliation or even civil action from the counterparty's lawyer.

A productive process of discussing the law is more efficient: as most of the times the process of negotiation is led by the lawyers as a veritable boxing match, by attacks, fight backs an retorts, the

[4] Robert H. Mnookin, Scott P. Pepper, Andrew S. Tulomello, *Beyond Winning*, The Belknap Press of Harvard University Press, London, 2000, 4-5.

dynamics of the negotiation, even if arguments well presented and explained, they are not likely to lead to a satisfying result. The unlikely situation where one lawyer simply assumes the other party's lawyer position is not to be accounted for.

It is then self evident that the lawyer are influencing the negotiation process to a degree sufficient to obviate the essential in negotiations, that is identification and putting into effect the value that would lack in a litigation. As a related observation, it becomes that wherever the legal discussion are extended to a degree that indicates the business issues are overwhelmed by the legal approach, no swift efficient solution is on its way. Consequently, the legal added value may be of use solely provided that a reasonable ratio is maintained within the equation. I estimate that negotiations where legal issues exceed 50% of the issues in discussion are to be subject to drastic re-evaluation in order to design a new path enabling the business elements to intervene and generate the additional value.

When proceeding to negotiation, some assumptions are limiting and lead to less value, others are more helpful. Also, sometimes the mere discussion of benefits and costs of the alternative approaches is recommended in order to identify the added value in the transaction. If the most efficient solution may be reached by negotiation, however the counterparty is reluctant to proceed to negotiations due to various reasons it has to be made a distinction between the case in which they provide the grounds for denying bargaining, and the case where such reason is presented. Adopting a problem-solving attitude towards the resolution process is not only the key to the success but also makes possible the disclosure from the other party and therefore establishes a process that supports the problem solving approach[5].

The value creating opportunities reside in reducing the transactional costs and trading on differences, as shall be presented hereinafter[6].

The sources of value in a conflict may be either: differences between the parties, noncompetitive similarities, economies of scale and scope. The conflicting parties are individually interested to identify such elements that may be used as a golden bridge towards the other, as follows.

Differences are often expressed in different resources of reciprocal interest, different relative valuation (what is most important to one of them is of less relevance to the other) – nevertheless such difference may not be induced by manipulation or similar as it would become of no effect to the added value concept -, different forecasts, different risk preferences (the risk intolerant party may always lose gains counterpart to predictability comfort), different time preferences and so on.

Also, from the distribution of noncompetitive similarities (such as a common interest) added value may be found. This may result of the basic lower interest to increased legal costs entailed by the litigation to more complex issues. Either production or consumption can create value, as well as the effect obtained by the same elements to achieve a different scope, as further explained by Mnookin, Pepper and Tulomello.[7]

Moreover, the negotiation indicates how the added value may be distributed between the two parties. The added value consists not only in reducing the costs of dissolving the conflict but most of the times is also in the form of the proceeds of a new venture of the parties equilibrating the possible gains of one in constructed gain of the other. At the basic level, the distribution of the gains starts from a simple formula. For instance, if A claims 1000 and expects to win in a percentage of 90%, B is willing to pay 100 and estimates it has 10% chances to win the dispute in court, than the formula

[5] Michael L. Moffit and Robert C. Bordone, *The Handbook of Dispute Resolution*, Cap. 18: Negotiation, p. 279-303, Jossey Bass, 2005.

[6] Robert C. Bordone and Gillien S. Todd, "Create Value out of Conflict" in *Negotiation, Decision-Making and Communication Strategies That Deliver Results*, Newsletter from the Harvard Business School Publishing, 2005.

[7] Robert H. Mnookin, Scott P. Pepper, Andrew S. Tulomello, *Beyond Winning*, The Belknap Press of Harvard University Press, London, 2000, 13-18.

takes into account their Reservation Value, that is their Best Alternative to a Negotiated Agreement[8] by considering the alternatives, in such a value. The calculation enables a Zone of Possible Agreement that is in the range of the two Reservation Values. That zone may be divided between the two of them into identifying a solution.

Obviously, the techniques that may include asymmetric information, strategic opportunism and hard bargaining tactics are as well utilized during the course of negotiation, in order to maximize profit.

However, the largest source of value is always ensued by mitigating the transaction costs in both time and money and dampening the strategic opportunism. There is a classic negotiation example in which an intellectual property infringement regarding a software product expedited the settlement proceedings as the claimant realized that not only a long litigation but also protracted bargaining may render the intellectual property solution that was making the object of dispute irrelevant in the perspective of the technology advance. In such a process, there are taken into account the so-called "lemon" problems where one party knows the value of the settled issue whereas the other party is not aware in terms of precision and also the moral hazard resulted from the asymmetric information in the possession of the two participants to the settlement.

Another issue that has to be solved in an adversarial commercial negotiation is managing the tension, a particularity source of difference in relation to the other contract negotiation situations.

In strict relation thereto, there is the possible case where the counterparty is not willing to identify a value during negotiations, acting as a tough negotiator holding strictly a certain position, in which case various techniques may be used in order to alter such approach towards the value finding perspective[9]. One solution resides in the extended effort of identifying value and advantage not only form the self perspective but also from the perspective of the counterparty.

It has to be stressed out that although a win-win negotiation, the negotiation regarding a settlement agreement holds the intrinsic fear that the object of bargaining is a problem that may not be resolved. Such approach, besides being one not aimed to succeed and provide the added value both parties should be looking for, it is also less likely to save time and money. It is a case that may never occur if the parties properly prepare negotiations offering BATNA (i.e. Best Alternative to a Negotiated Agreement) to the other in a reasonable fashion. The apparently counterproductive time spent in identifying the opportunities the other side afforded on the occasion of preparing the negotiations could be proven eventually as time well spent: from the other party interests' may result most of the solutions in negotiation. Knowing and improving ones BATNA is however mandatory for a result that allows satisfaction throughout the process. So are interests, resources and capabilities.

An instrument that may be always useful in identifying the adequate solution for achieving value is that any decision may be taken only further to realistic assessment and constructing a joint decision tree[10]. In fact this renders necessary an in depth analysis from the legal and economical perspective where all the hypotheses are properly developed so the risk level may be mitigated to a degree enabling a decision in knowledge.

Also, as the new research has pointed out[11], a well constructed apology is underrated in adversarial negotiations. The mediation also may be designed using not only some of the most common negotiation techniques but the strategic steps to be followed.

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[8] Roger Fisher, Bill Ury, Bruce Patton, *Getting to Yes: Negotiation Agreement without Giving in*, 2nd Ed. 1991, 100.

[9] "What do I do when they Don't Want to Create Value" in *Negotiation, Helping You Build Successful Agreements and Partnerships*, Program on Negotiation at Harvard Law School, volume 13, no 3, March 2010, p. 8; E. Wendy Trachte-Huber, Stephen K. Huber, *Alternative Dispute Resolution, Strategies for Law and Business*, 1996, 51-67.

[10] Robert H. Mnookin, Scott P. Pepper, Andrew S. Tulomello, *Beyond Winning*, The Belknap Press of Harvard University Press, London, 2000, 233-240.

[11] "Why Your Lawyer Could Be Wrong, Avoid Lawsuits with Apologies" in *Negotiation, Helping You Build Successful Agreements and Partnerships*, Program on Negotiation at Harvard Law School, volume 13, no 6, June 2010,

Eventually, the value is created by the parties alongside the bargaining process, solutions being available by any techniques, including brainstorming, that include sharing of information, lacks ownership and valuation of the idea emerged. When the solution is difficult to be found, setting a principle (e.g. it is equitable to consider the problem rather a risk to be split than a liability to be solved by one of the parties) is a useful tool. Equally, establishing norms to be followed or simply changing the game may be of aid.

Nevertheless, it has to be equally pointed out that the most powerful incentive for the two parties in conflict to achieve an added value transaction is the possibility acknowledged by the both to carry on the trading relations. Where by circumstantial coercion the most favorable situation for them is to resume or continue business added value is rendered inherent. Such conduct of negotiations allows a good grasp of reality and mitigates the possibility that the aspiration level is out of frame of actual possibilities.

Also, it is possible to combine the alternatives at hand. As explained in the literature[12], the combination mediation and arbitration allows a practical approach to have the best effect. In principle, parties commence mediation that is non binding and gives the liberty to expedite the process and find the added value maximizing the result. If the parties observe such a first step without the foreseeable success within a short timeframe, they may address the arbitrator/s with the scope to have a mandatory solution that is less controlled by them and more influenced by rules. As arbitration is more formal, its best usage is considered to have occurred where the lack of restraint in procedure has lead to failure.

One question that has recorded various solutions is whether the very bringing of a lawyer at the mediation table (and the arguments is equally valid for the negotiations as well) might hamper the mediation process. As it results from the recent literature[13], the presence of lawyers may contribute to the success of the mediation as the key legal elements are used as a rule during the caucuses and their structuring is crucial for an expedited process.

The early settlement should be the parties' primarily goal, the odd case of failure not being able to be taken into account seriously. However, challenges to the early settlement may always occur where the parties have established different dispute resolution strategies with their lawyers and, sometimes, different retribution systems. The key in such situation is that the client must have the decisional string available (in opposition with the litigations where the lawyers traditionally hold the decisional string). The common fear of the business people that the lawyers "kill" the business may be applied *mutatis mutandis* to the dispute resolution negotiations as well, having as link the fact that in both cases there is an added value to be pursued and protected.

The settlement agreement is the final objective where a dispute is resolved. The alternative of holding fruitful negotiations that may even lead to a new agreement without addressing the initial dispute is not desirable at all. The actual resolution of a dispute, regardless the alternative elected has to include a release of liability, indemnification or similar, depending on the nature of the issue in dispute. In the absence of this cornerstone of the adversarial negotiations, the new structure that is build will lack the foundation and the former nuisances may be reactivated, provided that the statute of limitation may not interfere with the claim.

Consequently, the key elements for the final document concluded by the parties in the course of negotiating throughout a dispute are the ones necessary for such document to be considered a binding settlement agreement.

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p.4; *Mediation Secrets for Better Business Negotiations*, Top Techniques from Mediation Training Experts, Special Report, Program on Negotiation at Harvard Law School, 2010, p. 4.

[12] "Resolve Disputes with <med-arb>, Consider a Practical Approach" *in Negotiation, Helping You Build Successful Agreements and Partnerships*, Program on Negotiation at Harvard Law School, volume 12, no 11, November 2009, p. 6; "Make Most of Mediation" in *Negotiation, Helping You Build Successful Agreements and Partnerships*, Program on Negotiation at Harvard Law School, volume 12, no 10, October 2009, p. 1-4.

[13] "New Findings on Creativity, Mediation and Emotion" in *Negotiation, Helping You Build Successful Agreements and Partnerships*, Program on Negotiation at Harvard Law School, volume 13, no 4, April 2010, p. 4

Conclusions

As a conclusion, several elements emerge from the analysis of the topic in discussion: the alternative dispute resolution is an efficient, cost effective solution to the litigation and involves in most of the times a negotiation process. Even where the mediation or arbitration is elected as process of resolving the conflict, negotiation techniques are mostly used. Consequently, the identification of the most appropriate resolution process is crucial in obtaining a good result.

Even though the litigation may in exceptional cases bring an added value to the resolution (that may consist in mitigating the costs, identifying a future partnership or other advantage availed to both parties) negotiation and, in subsidiary, mediation may be considered superior in an economic approach of the problem solving the dispute. The instruments afforded to the parties in solving the dispute are to be observed by further research, in the context of the procedural instruments of mediation and conciliation that have not been properly implemented in Romania, due to little awareness of the benefits of the alternative dispute resolution solutions.

One of the instruments that reflects the advantages resulted form negotiation is the settlement agreement, including all the elements that have been established by the parties further to the bargaining process and, if not valid such an instrument, the dispute itself may not be considered as supervened.

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THE RELATION BETWEEN ART. 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ART. 1 OF PROTOCOL NO. 1 TO THE CONVENTION

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Abstract:
Article 6 of the European Convention on Human Rights (1950) (ECHR) guarantees the right to a fair and public hearing, within a reasonable time, by an independent and impartial tribunal established by law, in the determination of an individual's civil rights and obligations or of any criminal charge against him (or her). The European Court of Human Rights (EctHR), located in Strasbourg, decides on the application of Article 6 in the domestic jurisdictions of each Council of Europe Member State. Article 1 of the First Protocol to the European Convention on Human Rights states that every person is entitled to peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

Key words: *European Convention on Human Rights; Article 6 of the Convention; The First Protocol to the European Convention on Human Rights; Article 1 of the First Protocol.*

1. The right to a fair trial

A. A. Introduction

Article 6 of the Convention enshrines "the right which, by its affirmation, ensures the connection between human rights and the rule of law"[1], namely the right to a fair trial, as it follows:

1. Everyone is entitled to a fair and public trial, within a reasonable period of time necessary for their cause, by an independent and impartial court of justice, established by law, which will decide, either on the infringement of their civil rights and obligations or on the validity of any criminal charge against them. The court order must be pronounced publicly, but the access of the press and public in the courtroom may be prohibited throughout the whole trial, or only during a part of it, in the interest of morality, public order or national security, in a democratic society when interests of juveniles or the protection of parties' privacy require it, or if strictly required by the court when, under special circumstances, publicity would be likely to prejudice the interests of justice.

2. Any person accused of a crime is presumed innocent until her guilt is legally established.

3. Every accused has the following rights:

a. to be informed as soon as possible in a language that he understands and in a detailed way, on the nature and cause of the accusation brought against him;

b. to have the necessary time and facilities to prepare his defence;

c. to defend himself or be assisted by a counsel of his choice and, if he has no necessary means to pay for an attorney, to be assisted, without charge, by a public defender when the interests of justice so require;

d. to examine or have examined witnesses against him and to obtain the citation and examination of defence witnesses, under the same conditions as witnesses against him;

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[1] Raluca Miga Beşteliu, Catrinel Brumar, *"International Protection of Human Rights. Course Notes"*, Pro Universitaria Publishing House, Bucharest, 2006, p.115.

e. to be assisted, without charge, by an interpreter if he does not understand or speak the language used in court".

As mentioned above, paragraph 1 is enlightening to this approach, because in the following, we will refer, in particular, to this paragraph.

Some doctrinaires of the field believe that "the protection of freedom would be meaningless if it was not entrusted to an independent justice, guarantee of a fair trial"[2].

Article 6 of the Convention "has its origins in the texts of article 10 and article 11, paragraph 1 of the Universal Declaration of Human Rights"[3], adopted by the UN General Assembly on December 10th, 1948. According to art. 10 of the Declaration, "everyone is entitled in full equality, to be heard in a fair and public hearing, by an independent and impartial court of justice which will decide either on the infringement of their civil rights and obligations, or on the validity of any criminal charge against them", and according to art. 11, par. 1 "any person charged with a crime is presumed innocent until her guilt is proven, equally, in a public trial, in which all guarantees for her defence were ensured". We find similar provisions also in the UN International Covenant on Civil and Political

rights of 1966[4], in the Inter-American Convention on Human Rights[5] and even in the African Charter of Rights and Peoples[6].

Article 6 of the Convention enshrines a fundamental principle, namely the superiority of law in a democratic society. The article does nothing else than to help ensuring a proper administration of justice, which means that a narrow interpretation of its provisions is incompatible with the object and purpose pursued. As an argument, we quote the opinion of judges of the European Court of Human Rights (ECHR) in the case Delcourt v. Belgium, according to which: "In a democratic society, in the meaning of the Convention, the right to a good administration of justice plays such an important role that a restrictive interpretation of art. 6, paragraph (1) would not fall within the scope and purpose of that provision"[7].

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[2] Frédéric Sudre, *"European and International Law of Human Rights"*, Polirom, Publishing House, Bucharest, 2006, p. 249.

[3] According to Corneliu Bîrsan, *"European Convention on Human Rights. Comments on articles. Vol I. Rights and Liberties"*, All Beck Publishing House, Bucharest, 2005, p. 395

[4] Article 14: "All persons are equal before the tribunals and courts of justice".

[5] Signed at San José (Costa Rica) on November 22nd, 1969. Article 8: "1. Any person has the right to make her case heard with the desired guarantees within a reasonable period of time, by a judge or a competent, independent and impartial court, established in advance, by law, which will decide the merits of any criminal charges brought to her, or establish rights and obligations in civil matters and in employment, taxation, or any other field. 2. Any person accused of a crime is presumed innocent until guilt is proven in accordance with the law. The accused is entitled in full equality, at least to the following guarantees: a) the right to be assisted, without charge, by a translator or interpreter if he can not understand or speak the language used in court, b) the prior notification, in detail, on charges against him, c) providing for the accused time and facilities to prepare his defense; d) the right to be assisted by a lawyer of his choice and to communicate with him freely and without witnesses; e) the right to be assisted by a lawyer provided by the State if the accused does not defend himself or fails to appoint an attorney within the time established by law; he can not derogate from this right, f) the defense right to examine witnesses at the hearing and obtain the participation, as witnesses or experts, of other persons; g) the defendant's right not to be compelled to testify against himself or to plead guilty, h) the right to go to a higher court. 3. Confessions of the accused shall be valid only if made without coercion of any kind. 4. The defendant acquitted by a final decision, can not be prosecuted again for the same offense. 5. Criminal trials are public, unless it is necessary to protect the interests of justice" (http://www.cidh.org/Basicos/French/c.convention htm).

[6] Adopted at Nairobi on June 27th, 1981. Article 7 para. 1, letters a) - d): "Any person has the right to make her case heard. This right shall include: a) the right to go to any competent national jurisdictions with any act that breaches fundamental rights which are recognized and guaranteed by conventions, laws, regulations and customs in force; b) the right to presumption of innocence until guilt is established by a competent jurisdiction, c) the right to defense, including that of being assisted by a chosen defender; d) the right to be trialed within a reasonable time by an impartial tribunal (http://www.aidh.org/Biblio/Txt_Afr/instr_81 htm).

[7] Taken from Nuala Mole, Catarina Harby, *"The right to a fair trial. Guidance on implementation of Article 6 of the European Convention on Human Rights"*, published in the Republic of Moldova, 2003, p. 6. (http://www.bice md/UserFiles/File/publicatii/Manuale/manual3.pdf).

To a close examination of the article, we see that it refers to two aspects, for which we can say that it is divided into two pillars, namely: the general right to a fair trial in civil and criminal matters (par. (1)) and guarantees specific to the right to a fair trial in criminal matters (par. (2) and (3)).

Article 6 guarantees every person, natural or legal[8], the right to a fair trial in civil and criminal matters. The right established by this article, is a "procedural right"[9]. By establishing this right, the Convention does not seek anything else than to protect all personal and property rights of a legal subject within internal procedures, by ensuring a fair trial. From the point of view of States Parties to the Convention, this right appears as a "substantive right, with specific penalties"[10] for its breach, namely the international liability of states concerned.

We observe from the study of specialized literature (quoted in the bibliographic sources), that the provision under which an "independent and impartial court of justice, established by law, shall decide (...) either on the infringement of civil rights and obligations, or on the validity of any criminal charge against any person" is not without critics. In this regard, we note that "authors of the Convention did not want that procedural guarantees contained in its text to be applicable to all judicial proceedings, but only to those of civil or criminal nature. I think that this option is at least strange"[11]. This assertion is based, on the one hand on ECHR jurisprudence which has extended, according to the doctrine, the scope of art. 6, and thus, many areas remain outside the protection offered by the Convention and, on the other hand, on fundamental laws of the States Parties to the Convention, enshrining the right to a fair trial, and which do not distinguish by the case nature "and do not exclude from the protection scope, certain procedures"[12]. Criticism goes further, considering that the principle of ensuring effective guarantee of rights, principle stated in the preamble of the Convention, "undergoes a significant prejudice"[13].

B. The scope of art. 6, paragraph (1)

Under the Convention, art. 6 applies only to disputes "concerning civil rights and obligations and criminal charges"[14]. Given the fact that nowadays, 47[15] countries are States Parties to the European Convention on Human Rights, naturally, there are just as many systems defining the civil or criminal nature of a procedure. The ECHR considered that these concepts can not be interpreted simply by reference to internal law of the state defendant. In this situation, for a uniform interpretation and a proper application of art. 6, paragraph (1), the Strasbourg Court has defined "the concepts of civil rights and obligations and of criminal charge"[16].

a. The concept of civil rights and obligations

This notion is not defined in art. 6, par. (1), which "does not determine the substance of civil rights and obligations in the legal order of States"[17] Parties to the Convention.

According to ECHR, in order for art. 6, par. (1), to be invoked before it, under civil aspect, the following conditions must be met[18]:

[8] This article shall apply to both natural and legal persons. This stems from the opening words of the paragraph (*"any person"*); the text does not mention what persons it refers to.

[9] Corneliu Bîrsan, *op.cit.*, p. 393.

[10] *Idem*, p. 394.

[11] Radu Chiriță, *"European Convention on Human Rights. Comments and explanations"*, vol. I, CH Beck Publishing House, Bucharest, 2007, p.237.

[12] *Idem.*

[13] *Idem.*

[14] Frédéric Sudre *op. cit.*, p. 250.

[15] www.coe.int

[16] Radu Chiriță, *op. cit.*, p. 239.

[17] Corneliu Bîrsan, *op.cit.*, p. 400.

- the existence of a contestation on a right that can be claimed through an action in court, in the national system. However, according to the Court, even if a person has, internally, some claims that may give rise to legal action, sometimes it is not enough only to take into account the material nature of the civil right in question, as defined by national law, in order to consider applicable the provisions of art. 6, par. (1). At the same time, there should not exist "procedural barriers" (such as, for example the immunity of a State from jurisdiction).

- the contestation must be real and serious;

- the outcome of the procedure must be direct and determined by the existence of the right.

More broadly, however, we can say that art. 6, par. (1) shall apply, under civil aspect, in situations where it refers to a "contestation" with patrimonial object and is based on the alleging infringement of patrimonial rights.

Resorting again to the doctrine, which, in turn, is based on the analysis of ECHR jurisprudence, we can identify a number of situations which, by extension, are subject to the provisions of art. 6, par. (1). Thus, we mention:

- the disciplinary litigation;

- the social litigation. The social security rights are civil rights within the meaning of art. 6, par. (1).

- the administrative decisions regarding the exercise of the property right.

- the civil litigation. In those cases, art. 6, par. (1) is applicable when the dispute is related strictly to patrimonial issues (e.g. the payment of salaries or other indemnities).

- the exercise or restraining of ownership. We mention, for example, the situation where a town planning permit is refused, leading thus to the impossibility of building;

- tax matters. We take into account those disputes which have as object the enforcement of taxes. We consider that such disputes have a patrimonial character, because they affect the plaintiff's right to property;

- the unfair competition, etc.

It is clear that disputes that have as object the following are not covered by art. 6, par. (1):

- the procedures described by the ECHR as "administrative and discretionary involving the exercise of prerogatives of public power"[19].

- the control of the authority power to verify the legality of foreigners' situation, for procedures of granting political asylum;

- the officials involved in the exercise of public power;

- the electoral disputes.

b. The notion of criminal charge

Within the meaning of the Convention, the term of "charge" is independent of national law. In the Deweer v. Belgium[20] case, ECHR noted that the term of "charge" should be understood in its material, and not formal acceptation. The notion of "charge" is defined as "the official notification, emanating from a competent authority, of the accusation of having committed a criminal offence, or as having a significant impact on the situation of the suspect".

To determine whether a person is accused of committing a crime, the Court has established in its jurisprudence, the following three criteria[21]:

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[18] Taken from Corneliu Bîrsan, *op.cit.*, p. 401.

[19] Frédéric Sudre, *op. cit.* p. 254.

[20] In this case, the prosecutor had ordered the provisional closure of the applicant's butchery, on grounds of a report demonstrating his breach of an order establishing the price of beef and pork. The acceptance of the proposed transaction by the trader in a friendly settlement cancelled the public action, as required under Belgian law. This did not prevent the ECHR to consider that the applicant had been the object of a criminal charge. (Nuala Mole, Catarina Harby, *op. cit.*).

[21] Corneliu Bîrsan, *op.cit.*, p. 444.

- its qualification as a crime under national law;
- the nature of the crime;
- the nature and degree of seriousness of the penalty that will be applied to its author.

These criteria are alternative and not cumulative.

According to Professor Corneliu Bîrsan, "in order for art. 6, par. (1) to be applied to "a criminal charge" is sufficient that "the offence in cause is, by nature, criminal, by reference to the Convention provisions, or to expose the perpetrator to a penalty that can be qualified as criminal penalty; this does not hinder the adoption of a cumulative approach, if the separate analysis of each criterion does not allow to reach a clear conclusion, regarding the existence of a "criminal charge".

In the scope of art. 6, par. (1), we have the following conditions:

- the order to arrest a person for a criminal offence;
- the formal notification of a person on prosecutions taken against her;
- the requirement of evidence, addressed to a person, by a competent investigation authority on customs offences and the freezing of the bank account of the interested person;
- the appointment of a defender, by a person, after an investigation has been initiated against her, based on a police report.

The procedures for:

- temporary detention,
- extradition,
- a convicted inclusion in a particular category of inmates,
- the reintegration into employment, of a person released on parole or the extension of the detention period due to subsequent discovery, of a relapse status, are outside the scope of art. 6, par. (1).

2. Property protection

A. General aspects

Article 1 of the additional Protocol no. 1 to the Convention[22] enshrines the protection of ownership, as it follows:

"Any natural or legal person is entitled to peaceful enjoyment of possessions. No one shall be deprived of their possessions, except for a cause of public interest and under the conditions provided by law and general principles of international law. The preceding provisions shall not affect the right of states to enforce such laws that they deem necessary to regulate the use of property in accordance with the general interest or to secure the payment of taxes or of other contributions or fines".

The right to property is qualified in the doctrine, as civil right, by content and as economic right, by purpose[23].

Article 1 of the Protocol has its origins in the Universal Declaration of Human Rights, which, at art. 17 provides the following: "Everyone has the right to property, both alone and in association with others", no one shall be deprived, arbitrarily, of their property". Provisions relating to ownership can be found in art. 5, letter d), section V[24] of the UN International Convention on the Elimination of

[22] Called hereinafter, Protocol.

[23] Corneliu Bîrsan, *"The right to property in the ECHR. Jurisprudence applications"*, Journal of Public Law, no. 4 / 2004, p. 103

[24] "States Parties commit to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone to equality before the law, irrespectively of race, color, national or ethnic origin, in order to use the following rights: (...) other civil rights, in particular: (...) the right to property of any person, both alone and in association"

(http://www.onuinfo ro/documente_fundamentale/instrumente_internationale/conventie_eliminare_discriminare_rasiala/).

All Forms of Racial Discrimination of 1965, but also in art. 47[25] of the International Covenant on Civil and Political Rights of 1966.

The Protocol envisages the establishment of international control of how national authorities of States Parties to the Convention shall ensure the enforcement of the right to property.

Any "natural or legal person or group of individuals who claim and demonstrate a breach of the right to property on certain assets (they are holders of this right), within the meaning of the Convention "benefit" from the provisions of art. 1 of the Protocol, under art. 34 of the Convention. An action brought before the Court, by the right holder can be continued by his heirs"[26].

In a careful study of art. 1 of the Protocol, we observe that it contains three rules, interdependent, namely: the general principle of the need to respect property rights, the deprivation of property is possible, but only under certain conditions, and the control over the use of property. The article has its own structure, namely: the respect for property, the causes of deprivation of property and the regulation of property limits.

It should be mentioned even from the beginning that the right to peaceful enjoyment of property implies the protection of the right to property, namely the protection of an existing right and not of a right to property, i.e. the right to acquire in the future, a right to property is not guaranteed. However, in theory it is noted that between "these two concepts lies the concept of legitimate expectation that defines the situation where it is not about an existing property, but not even of a virtuality; under certain legal provisions or court orders, a private person may, legitimately, hope that she will acquire a right over an asset"[27].

The fact that the provisions of the Protocol consider only the already existing right to property and not also the future one is criticized in the doctrine. In this respect, we consider the view expressed by Radu Chiriță[28]: "(...) the incidence of art. 1 of the Protocol undergoes an extremely important and unfortunate limitation (...). Thus, the Convention protects only the right to property of an asset. (...) The presentation, in parallel, of two examples in this direction (...) is enlightening and has as object the jurisprudence of the Court regarding the existence of property in case of nationalized or confiscated property by the communist power. In the first case, (…) the former owners of nationalized buildings (...) brought actions for recovery against the State, demanding for nationalization to be held invalid. After having obtained final court orders, these were cancelled by the Supreme Court, following the exercising of appeals for annulment, on grounds that courts had no jurisdiction to rule on such claim actions, which were outside the scope of court powers. The Court established, in such cases, that it had no jurisdiction to rule on nationalization, because it occurred before the ratification of the Convention by the Romanian state. Instead, the Court found that, after the ratification moment, applicants were recognized the right to property on the building, by a final decision of a court, so that they were, for a while, owners over a good that was in their patrimony. In the other type of cases, applicants have also promoted, action claims, but they were rejected by courts, on grounds that they had no jurisdiction to rule on such claim actions, leaving the remit of the judiciary power. In the latter case, the Court dismissed the complaints as inadmissible, on grounds that people were never holders of a current right to property, after the moment of ratification of the Convention, by Romania. Unlike the first case, in this second case, plaintiffs could not prove that, after the Convention ratification, they were holders of a right on the building, right that they subsequently lost. Consequently, because art. 1 of Protocol no. 1 does not guarantee the right to obtain ownership of an asset, but the respect of existing rights over an asset, in order for a complaint

[25] No provision of the Covenant can affect "the inherent right of all peoples to enjoy and fully and freely use the natural wealth and resources".

[26] Corneliu Bîrsan, op. cit., p. 1007.

[27] Raluca Miga Beşteliu, Catrinel Brumar, *"International Protection of Human Rights. Course Notes"*, Universul Juridic Publishing House, Bucharest, 2006, p.150

[28] *Op. cit.*, pp. 352-356.

to be admissible, the plaintiff must prove to the Court that at one point, after the Convention ratification, the right to property was recognized to him and, as a result of a state action, this right has been affected".

B. The scope of the right to property

a. The concept of "asset"

ECHR judge has given to the concept of "asset", one "independent coverage area"[29] that extends considerably the scope of the right to property.

From the study of doctrine, we keep in mind that the broad concept of property refers to "certain rights and interests constituting assets"[30]. By way of example, we mention that, besides tangible property, the protection granted by art. 1 of the Protocol also envisages the following:

- assets with patrimonial value, including intangible assets (e.g. clients, social parties, rights to inherited assets etc.);
- economic resources and incomes that people have from all their economic activities (e.g., houses built on communal land of the state);
- the established customary right to fish on a lake;
- the right to raise a real estate project;
- the right to exploit a stone quarry;
- the right of usufruct etc.

"Examining various aspects of the concept of "asset" within the meaning of article 1 of the Protocol, it results that this article protects rights on existing assets or on property values, representing at least one legitimate hope for obtaining the asset. On the contrary, the hope of seeing recognized a property right that you are unable to effectively exercise, can not be considered an asset in the sense of this text, and the solution is valid in the case of the conditional claim that is lost for not accomplishing the condition"[31] .

In conclusion, it is important to remember that, within the meaning provided by the ECHR, the notion of "asset" refers to "any interest of a private person that has economic value"[32].

b. Ownership limits (deprivation of property)

From the writing of article 1 of the Protocol, it is clear, unequivocal, that ownership is not an absolute right. Deprivation of property, as already noted, is possible only if certain conditions are met. These conditions apply regardless of how national law calls the deprivation of property: "expropriation, nationalization, deprivation of fact, deprivation of essential prerogatives of ownership"[33].

The necessary conditions for the presence of a lawful deprivation of property are divided into two categories, namely:

- those provided expressly in art. 1 of the Protocol (par. (1) and (2) of art. 1 contain, on the one hand, provisions on deprivation of property, and the property case settlement, on the other hand) and
- those judicially inferred.

To be consistent with the Protocol, the deprivation of property must pursue a purpose of public utility and take place under conditions stipulated by law and general principles of international

[29] Frédéric Sudre, *op. cit.* pag. 376.
[30] *Idem.*
[31] Cristina Nicoleta Ghiță, *"Applicability of Article 1 of Protocol no. 1 of the ECHR"*, in THEMIS, Magazine of the National Institute of Magistrates, no. 3 / 2005, p. 100-101.
[32] Radu Chiriță, *op. cit.*, vol. II, p. 352.
[33] Raluca Miga Beşteliu, Catrinel Brumar, *op. cit.*, 2007, p. 150.

law. In other words, the deprivation of property must be done in the following conditions: it must be provided by law, it must be of public utility and consistent with international law.

The deprivation of property must be provided by law. Making reference to the law requires, first, that the internal law defines, with "sufficient precision, terms and ways of property deprivation"[34].

Again, as in the previous section, we note that the concept of "law" has a special meaning in the context of the Convention. ECHR is, also in this case, the one providing a specific definition of the "law". First, we point out, as shown in the doctrine and jurisprudence of the field, that there must be a distinction between formal and material aspects involved in "the European concept of law"[35]. Under the formal aspect, the ECHR points out that the term "law" refers both to "the right of legislative origin and to the jurisprudential right"[36]. Regarding the material aspect, ECHR said that "in order for a law to exist, within the meaning of the Convention, its formal existence is not enough; the rule must meet two conditions: availability and predictability"[37].

The deprivation of property must be of public utility. According to ECHR, the notion of "public utility" means "any legitimate policy of social, economic or other nature"[38] and, in particular, a policy of "social justice"[39] that can respond to the public utility.

Next, we present some cases of ECHR that are considered by the court in Strasbourg of public utility. In our approach, we resort to the Romanian doctrine, namely, the already mentioned work written by Professor dr. Dr. Corneliu Bîrsan[40]. So, we mention:

- the expropriation of land by national authorities, several years ago, which aimed at securing housing for refugees from Minor Asia, as a result of statutory changes in population, provided in the Treaty of Lausanne, of 1923, was a measure which corresponded to a legitimate purpose, representing, in this view, a cause of public utility, because at that time, receiving refugees was a economic and social matter";

- "auctioning the applicant's goods constitute an interference with his right of respecting property, but it pursues a legitimate purpose, of public utility, namely to pay the bank debt, borrowed by the applicant";

- the control of the art market "by a state through a protection policy of cultural and artistic heritage of the country is a legitimate purpose, as national authorities have certain discretionary power in determining the concept of "general community interest";

- "the obligation of the person who bought the building from the State, whose return to the former owner was ordered, under legal provisions pursuant to remedy abuses committed by the former totalitarian authorities of the State pursues a legitimate purpose, namely to mitigate the patrimonial consequences of these abuses".

The deprivation of property must be consistent with international law. Referring to international law brings in discussion, in particular, "the issue whether art. 1 extends to nationals, the requirement under international law, for prompt, adequate and effective compensation to foreigners deprived of their property"[41]. This issue occurred in the context where, "in case of deprivation of property that occurs as result of the implementation of a social reform, there may be serious reasons to distinguish, in terms of compensation, between nationals and foreigners (...). If it is true that any expropriation must always correspond to a public utility, there may be differences between national

[34] Frédéric Sudre *op. cit.*, p. 380.
[35] Radu Chiriță, *op. cit.*, vol. II, p. 8.
[36] *Idem.*
[37] *Idem*, p.10.
[38] Frédéric Sudre *op. cit.*, p. 380.
[39] *Idem.*
[40] Corneliu Bîrsan, *"European Convention on Human Rights. Comments on articles. Vol. I. Rights and Liberties"*, op. cit., pp. 1024-1027.
[41] Frédéric Sudre *op. cit.*, p. 380.

and foreign; national authorities might consider that there are legitimate reasons to ask nationals to bear, in order to fulfil a general interest, a greater sacrifice than foreigners. This distinction has its origins in a traditional conception, specific to international law, under which nationals can not claim, in a situation of purely internal interest, such as the disposition of a deprivation of property, that they have a right of international origin, i.e. a right that finds its source in an international treaty"[42].

At the end of the presentation of art. 1 of Protocol no. 1 to the Convention, we conclude that there is, however a condition to limit the right to property, namely the proportionality between purpose and means of achievement. There are cases in which the deprivation of property is made in compliance with all requirements, including the providing of compensation to the owner. Nevertheless, the Court sanctioned a state when it took into account, for determining the compensation value for the expropriation of land, only the intrinsic value of the land, without taking into account the damage caused, by depriving that person from the revenue obtained from that agricultural area. Allowance must occur within a reasonable time. It must not be only pecuniary, but may also consist of other compensatory measures.

3. "The connection" ("relation") between art. 6 of the European Convention on Human Rights and art. 1 of Protocol no. 1 to the Convention

As stated above, any provision of legislative, administrative or judicial nature or a court order can affect the right to property. The question is: "shall provisions of art. 1 of the Protocol also apply to relations between individuals?"[43] The answer to this question is provided by the Strasbourg Court. In this regard, ECHR provides that "disputes between individuals on the right to property may create problems regarding the right to a fair trial, within the meaning of art. 6 of the Convention, but not also regarding the compliance with art. 1 of the Protocol"[44]. In this respect, it is stated that "the ruling of a dispute between individuals, by a court, on grounds of rules in force does not engage the state liability in the content of this text"[45]. Thus, "in relations between individuals (...) achieving ownership should not come solely from a private person; the involvement of public power must be, at least mediated, if it is not direct and immediate. However, when an individual puts into question the breach, by a public authority, of the right to property, not only the infringement of provisions of article 1 of the Protocol is invoked, but also those of art. 6 of the Convention"[46].

4. The fair remedying for breach of art. 6, par. (1) of the European Convention on Human Rights and of art. 1 of Protocol no. 1 to the Convention.

Under article 41 of the Convention, "if the Court finds that there was an infringement of the Convention or of its Protocols, and if the internal law of the High Contracting Party concerned allows only imperfectly erasing the consequences of such breach, the Court grants to the injured party a fair compensation, if it is the case".

In other words, in the situation where the state is guilty of breaching any provision of the Convention or its Protocols, and implicitly of items analyzed by us, at the request of the applicant, ECHR compels the State to "measures to ensure compensation for damage suffered by the plaintiff, by violating his rights"[47].

It is important the fact that the Strasbourg Court "can not order the annulment of court orders or administrative acts"[48], but can compel the State to remedy the material and moral damage suffered.

According to the Court's jurisprudence, as shown in literature[49], the provisions of article 41 have been subject to a "strict interpretation considering that it only allows the European court to

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[42] Corneliu Bîrsan, *"European Convention on Human Rights. Comments on articles. Vol. I. Rights and Liberties"*, op. cit., pp. 1028.

[43] *Idem.*

[44] *Idem*, p. 1006.

[45] *Idem.*

[46] *Idem.*

[47] Radu Chiriță, *op. cit.*, vol. II, *p*. 323.

[48] *Idem.*

condemn the State defendant to pay to the injured party, a cash allowance to compensate the damage suffered"[50]. However, there is an exception from this narrow interpretation, in cases of breach of art. 1 of Protocol no. 1 to the Convention. In these cases, the Court, under the principle of restitutio in integrum, pronounced injunctions against the respondent States, ordering them to return the goods to the injured parties". But even in these situations that represent the exception, ECHR did not establish for the convicted state, an unique obligation, to return the asset in kind, but only an alternative obligation, either the restitution in kind or the compensation payment for fair satisfaction; the choice is left solely to the state, which can execute the decision, being released therefore (...) from obligation (…), at free choice"[51].

The allowance for fair satisfaction granted pursuant to art. 41 of the Convention, covers the damage suffered by the injured party (...) and the moratory interests for not fulfilling, in time, the obligation to pay sums awarded as damages for the pecuniary and moral prejudice and for procedural costs"[52].

In conclusion, the right provided in art. 6 of the Convention is a procedural right, while the right guaranteed by Art. 1 of Protocol no. 1 to the Convention is a civil right, through its content, and an economic right, through its purpose. By guaranteeing the right to a fair trial, the Convention seeks to protect all personal and patrimonial rights of a subject of law in internal proceedings. The right to peaceful enjoyment of property involves the protection of the right to property, namely the protection of an existing right and not of a right to property. In case of breach of rights guaranteed, the international liability of States concerned is engaged.

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[49] Corneliu-Liviu Popescu, *"The Enforcement character in Romanian law, of orders of the European Court of Human Rights and Conventions for amicably resolve cases"* in Romanian Pandects, no. 1 / 2003.

[50] Corneliu-Liviu Popescu, *"The Enforcement character in Romanian law…."*, *op. cit., p.197.*

[51] *Idem.*

[52] *Idem, p. 197-198.*

CONSIDERATIONS REGARDING THE DEFINITION AND CLASSIFICATION OF COMMERCIAL INTERMEDIATION

DAN-ALEXANDRU SITARU[*]

Abstract

The commercial intermediation is a complex juridical operation which includes a different number of juridical relationships that takes place between contractual partners either on a national or international level. These partners bare different naming due to their different set of rights and obligations set forth by the law or by the parties, and it is from this that the classification of the intermediation can be set forth. The commercial intermediation represents the activity that one person executes either in the name and on behalf of another person, or using its own name but on behalf of another person, or, finally, using its own name but on behalf of acting towards a common goal with the person who mandated her (the principal), in relation with who it is either a proxy or an independent intermediary, only negotiating or both negotiating and binding the principal. The purpose of the paper is to strictly define and set in order the various variations of the juridical operation that is the commercial intermediation, presented both in the light of the actual legal framework and also by reference to the New Civil Code. Also, the purpose is to highlight and systematize the contractual relationships from which the parties involved in a commercial intermediary operation may choose and the rights and obligations specific to each contract.

Keywords: *commercial intermediation, contract of mandate, contract of commission, agency contract, brokerage contract, franchise contract, exclusive distribution contract*

1. Introduction. The notion of commercial intermediation.

a) Intermediation – complex commercial operation

Commercial intermediation is a complex operation, which includes several legal relations concluded between its contractual partners, having various names and various capacities, carried out either inland or internationally.

Participants to legal relations arising out of intermediation contracts bear various names, depending on the actual contractual relation to which they participate, the capacities in which they act may range from that of mandator and mandatary (in the case of the contract of mandate), to that of principal and commission agent (in the case of the contract of commission), of consignor and consignee (in the case of the consignment contract), principal (client) and sender or shipper (in the case of the shipment contract), principal and agent (in the case of the agency contract), client and broker (in the case of the brokerage contract) etc.

Independently from the legal nature of each intermediation contract, a common feature of all forms of intermediation may be discovered. This discovered feature, common to all forms of intermediation, consists of the object of the intermediation, namely, in that the intermediary, by means of the rendered activity under a specific commercial intermediation contract, acts as an agent for particular commercial affairs between particular partners or on behalf of another person (client), in exchange for payment. This particularity gives the contracts, based on legal relations of commercial intermediation, an onerous feature[1].

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[1] See R. Munteanu, *Intermediation contracts in Romanian foreign commerce* (*Contracte de intermediere în comerțul exterior al României*), Printing House of the Academy of the Romanian Socialist Republic, 1984, p. 138.

Generically, intermediation contracts are contracts for services, the intermediation activity carried out under such contracts favour, especially commercially speaking, the exchange of goods and in general economic development.

b) Origin of commercial intermediation

The origin of commercial intermediation is to be found in the Middle Ages, when it was used every day for carrying out commerce practised at distance. In the 10th and 12th centuries in Italy and in Northern Europe drafts similar to those of the nowadays contract of commission appeared. Commerce at distance carried out on a daily basis by frequent exchanges occurring in European medieval fairs, represented the premise for the first forms of intermediation.

The fast-paced development of commercial transactions, occurring throughout Renaissance, lead to the necessity of adapting commercial transactions, in view of traders cooperating and improving the actual means of exchanging goods.

It was during this period that the commercial mandate was born[2]. However, along with it, as an expression of the expansion of the principle of free commerce, especially international commerce[3], other types of intermediation were encountered more and more often, similar to the nowadays commission and agency contracts.

Indeed, the ever higher complexity of the concluded operations and the obstacles, given the large geographical areas in which such commercial relations arose, along with the language and culture barriers and the significant differences in terms of laws, lead throughout time to the necessity of discovering some advantageous methods for traders to enter and expand in markets from other states, in order to conclude international contracts under easy terms and to maintain durable economic connections[4]. One method which was frequently resorted to as a result of international commerce developing was the execution of intermediation contracts namely contracts of commission.

Once with the development of international commerce, a tradesman entering a foreign market in which he could sell his goods had to be done, via persons they knew on the local market, who had earned their trust and were prestigious, thus procuring the popularization and personal guarantee of their products[5]. The persons in question, who became the intermediaries under the conventions they executed with foreign tradesmen, carried out the required precedent operations and effectively executed commercial contracts in their own name or on behalf of clients; the effects of such contracts reflected upon foreign tradesmen.

c) Sense and definition of the notion of intermediation

The notion of intermediation[6] had an historical evolution, in the traditional sense of the notion, up to the modern concept of our days.

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[2] See F.A. Moțiu, Commercial intermediation contracts without representation (*Contractele comerciale de intermediere fără reprezentare*), Lumina Lex Printing House, Bucharest, 2005, p. 24-25.

[3] For a more detailed analysis of the principle of free commerce, see Dragoș A. Sitaru, International Commerce Law. Treaty. General Part (*Dreptul comerțului internațional. Tratat. Partea generală*), Universul Juridic Printing House, Bucharest, 2008, p. 20-24.

[4] V. Anghelescu, Al. Deteşanu, E. Hutira, International Commercial Contracts (*Contracte comerciale internaționale*), Printing House of the Academy of the Romanian Socialist Republic, Bucharest, 1980, p. 106-113.

[5] See R. Petrescu, General theory of commercial obligations. General Part (*Teoria generală a obligațiilor comerciale. Partea generală*), Romfel Printing House, Bucharest, 1994, p. 185.

[6] For a general presentation of intermediation in international commerce, see O. Căpățînă, B. Ștefănescu, Treaty on international commerce law, vol. II, (*Tratat de drept al comerțului internațional, vol. II*) Printing House of the Academy of the Romanian Socialist Republic, Bucharest, 1987, p. 138-140; B. Ștefănescu, I. Rucăreanu, International Commerce Law, (*Dreptul comerțului internațional*) Didactic and Pedagogical Printing House, Bucharest, 1983, p. 142-144; T.R. Popescu, International Commerce Law, (*Dreptul comerțului internațional*) Didactic and

In the traditional sense, the notion of intermediation is based on the idea of representation, in the sense of technical and juridical procedure whereby a person, named representative (in Romanian *reprezentant*), executes a legal deed in the name and on behalf of another person, called the principal (in Romanian called *reprezentat*), and the effects of the executed legal deed will directly and immediately produce over the principal[7].

It follows that the institution of intermediation is based, in Romanian law, on the contract of mandate; however it may not be restricted to this type of contract.

In commercial law, the notion of intermediation, as that of representation, underlying the former, has a wider range, referring to the situation in which the mandatary acts on behalf of the mandator (in Romanian *mandant*), either in his own name, or in the principals name.

Therefore, according to the principles of the Romanist law system, to which Romanian law belongs, there is a difference between activities in one's own name and on behalf of mandator, in the form of the contract of mandate with representation, or in ones own name by a mandatary however on behalf of the mandator, under the form of a contract of mandate without representation (commission, consignment etc.).

From this respect, a distinction may be noted between the vision of the Romanist law and the Anglo-Saxon one. As far as the Anglo-Saxon system[8] believes the distinction between the mandate with representation and that without representation does not exist, both types of intermediation take the form of the „*agency*"[9] institution. Consequently, intermediaries, no matter if they act as mandataries or consignees the Romanist law system, are both included by the wide term "*agents*"[10]. Agency is characterized in the Anglo-Saxon law system by the multiple possibilities of adapting to the requirements and the nature of the business object of the intermediation, and also by pragmatism and flexibility[11].

In the modern sense of the notion of intermediation, it may not however be limited to traditional contracts, contracts of mandate and commission, and it has so developed that it currently comprises a series of contracts – such as shipment, agency, brokerage, franchise, exclusive distribution, etc. -, in which the institution of representation has either suffered transformations arising from practical reasons, or it is missing.

In the case of contracts in which the institution of mandate (with or without representation) is not met, the intermediary establishes contracts third parties in his own name and on his own behalf, and not on behalf of the principal. Nevertheless the contract is still an intermediation one, due to the fact that certain effects arising from the legal deeds executed by the intermediary with third parties

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Pedagogical Printing House, Bucharest, 1976, p. 326-330; Sofia Ţămbălaru, *Some aspects regarding intermediation in international commerce law*, in Commercial Law Magazine No. 6/1999, p. 75-82 (Unele aspecte privind intermedierea în dreptul comerţului internaţional, în Revista de drept commercial, Nr. 6/1999, p. 75-82) .

[7] In this sense, see Gh. Beleiu, *Romanian civil law. Introduction in civil law. Subjects of civil law, (Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil)* ninth Edition, reviewed and supplemented by M. Nicolae, P. Truşcă, Universul Juridic Printing House, Bucharest, 2007, p. 210; G. Boroi, *Civil Law. General Part. Persons*, (*Drept civil. Partea generală. Persoanele*) third Edition, reviewed and supplemented, Hamangiu Printing House, Bucharest, 2008, p. 291-294.

[8] F.A. Moţiu, *Commercial intermediation contracts without representation*, (*Contractele comerciale de intermediere fără reprezentare*) p. 17-23; Dragoş A. Sitaru, Ş.A. Stănescu, Intermediation contracts in international commerce *(I)*, in Commercial law Magazine No. 11/2005, p. 26-43 (Contractele de intermediere în comerţul internaţional (I), în Revista de drept comercial nr. 11/2005, p. 26-43) .

[9] Clive M. Schmitthoff, *Schmitthoff's Export Trade, The Law & Practice of International trade*, ninth edition, London, Stevens & Sons, 1990 p. 278-316; Ewan Mckendrick, *Contract Law*, sixth edition, Palgrave Macmillan Law Masters, 2005, p. 163-164; R. Munteanu, *op. cit.*, p. 25-30.

[10] For a presentation of the characteristic features of the agency contract, see D. Florescu, L.N. Pîrvu, *International commerce contracts*, (*Contractele de comerţ internaţional*) second edition reviewed ans supplemented, Universul Juridic Printing House, Bucharest, 2009, p. 205-213.

[11] F.A. Moţiu, *Agency contract*, (*Contractul de agency*) in the Annals of Timişoara West University, compilation Case Law, No. 1-2/2001, p. 73-83.

are reflected upon the principal. This is justified by the common interest both the representative and the principal have in executing the intermediation contract, which particular interest is served by the intermediary, through contracting third parties[12].

As regards what has been shown above, we believe that nowadays for the institution of intermediation the idea of mandate or representation is less significant, than in particular the intermediary carrying out an activity in/and for the benefit of another person[13].

It follows that **intermediation may be defined** as being an activity which a person (the intermediary) performs on behalf of another person (the principal), either in the name of the principal (in a legal relation of a mandate with representation), or in his own name (in a legal relation of a mandate without representation), or in his own name and on his own behalf however for achieving a common interest with the principal, activity in which the intermediary is the prepositive of the mediated parties or is independent therefrom, as the case may be, and which solely consists of negotiating or of negotiating and concluding legal deeds with third parties.

Thus, intermediation is the activity carried out by another person other than the actual beneficiary of the economic interest (the principal), on behalf of the latter, either in his own name, or in the name of the beneficiary of the interest in question, or in their own name and on their own behalf however in the context of a professional collaboration with the principal.

Specific to the intermediation contracts is the fact that, based on the powers granted to the intermediary by the principal, the intermediary acts in the sense of perfecting civil or commercial operations whose effects exclusively reflect upon the principal.

2. Classification of legal relations of commercial intermediation

Depending on the criterion of the powers granted to the intermediary, we find four types of commercial intermediation contracts [14], to which we refer hereinafter.

2.1. Intermediation contracts in which the intermediary acts in relation to third parties as the holder of a mandate of representation

The intermediation contracts to which we refer to presuppose the fact that the intermediary, when concluding legal deeds with third parties, acts in the name and on behalf of the person wherefrom the powers follow. Therefore, the intermediary discloses (exhibits) to third parties his capacity as representative (*i.e.* the fact that he is acting *nomine alieno*), third parties are thus informed as regards the fact that the effects arising from the concluded legal deed will reflect not upon the person that handled the execution of the deed, but in the account of the beneficiary of the economic interest, the issuer of the proxy.

The contract of mandate with representation is the highlight of this category of intermediation contracts. The Civil Code in force regulates the mandate under Articles 1532-1559. The new Civil Code[15] dedicates Articles 2013 – 2038 to the mandate of representation.

The commercial mandate is regulated by the provisions of Articles 374-391 of the Commercial Code[16].

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[12] Dragoș A. Sitaru, C.P. Buglea, S.A. Stănescu, *International commerce law. Treaty, Special Part*, (*Dreptul comerțului internațional. Tratat. Partea specială*) Universul Juridic Printing House, Bucharest, 2008, p. 305-306.

[13] Dragoș A. Sitaru, Ș.A. Stănescu, *Intermediation contracts in international commerce (I)*, (*Contractele de intermediere în comerțul internațional (I)*) *op.cit*, p. 21.

[14] For a similar opinion, but with some highlights, see Dragoș A. Sitaru, C.P. Buglea, S.A. Stănescu, *op. cit*., p. 306-308.

[15] We will hereinafter also use the abbreviation N.Civ.C.

[16] As regards the notion and the characteristic features of the mandate contract in domestic commercial law, see St. Cărpenaru, Treaty on Romanian commercial law, (*Tratat de drept comercial român*) Universul Juridic Printing House, Bucharest, 2009, p. 539-548, and for an analysis of the mandate contract in international commerce law, see R. Munteanu, *op. cit*., p. 34-47.

The general principles of the contract of mandate from the civil law[17] are applied to the commercial contract of mandate, its juridical outline is supplemented by the characteristic features of the commercial mandate, arising from the nature of this operation, that of mediating commercial affairs[18].

According to Article 374 of the Commercial Code, "The commercial mandate deals with handling commercial affairs on behalf and on the account of the mandator. The commercial mandate is not supposed to be free of charge".

This legal provision allows us to note the essential features of the commercial mandate institution, which we will briefly reveal hereinafter.

Therefore, the commercial mandate is that particular contract under which a person called the mandatary undertakes to conclude particular legal deeds in the name and on behalf of another person who gave the proxy, called the mandator, which legal deeds are facts of commerce for the mandator[19].

The entering into and execution of the contract of mandate, by the mandatary handling commercial affairs with third parties, in the name and on behalf of the mandator, lead to specific effects, consisting of creating direct legal relations between the mandator and the co-contracted third party. The essential condition for the effects of the legal deeds perfected by the mandatary with the third party producing, directly in the mandator is that the mandatary acted within the limits and under the powers received in his capacity as representative, since the mandate may not be employed and held for the execution of other obligations other than in which the will of participating to the legal deeds generating rights and obligations, via the mandatary, was validly expressed.

The capacity of the mandatary of acting in the name and on behalf of the mandator causes the existence, in principle, of a subordination relation, in the sense that the mandatary is a prepositive of the mandator.

The said provisions of Article 374 of the Commercial Code, according to which the commercial mandate is not presupposed to be a free of charge contract, the concept of the commercial law maker is inferred according to which the commercial mandate is in its nature an contract in exchange for a consideration, in the sense that usually the mandatary is paid for his activity of concluding legal deeds in the name and on behalf of the mandator. The same idea is conveyed by Article 2010 of the N.Civ.C., which states the following "the mandate given for acts of exercising a professional activity is presumed to be in exchange of a consideration", this provision is common for the mandate with and without representation.

Under the commercial contract of mandate, the mandatary benefits from powers higher than the mandatary in a civil contract of mandate. The reason behind this is that in the commercial mandate, the mandatary may fulfil all the operations required by trading.

2.2. Intermediation contracts in which the intermediary acts in relation to third parties as mandatary without representation

Contracts of mandate without representation are mainly characterized by the fact that the mandatary (the intermediary) concludes legal deeds in his own name, however on behalf of the represented person (the principal).

The New Romanian Civil code defines this type of mandate under Article 2039. According to its text, the mandate without representation is the contract under which a party, called the mandatary, concludes legal deeds in his own name (*nomine proprio*) however on behalf of the other party, called

[17] See C. Popa Nistoreanu, *Representation and mandate in private law*, All Beck Printing House, Bucharest, 2004; Cl. Roşu, *Mandate contract in domestic private law*, (*Reprezentarea şi mandatul în dreptul privat*) C.H. Beck, Bucharest, 2008.

[18] R. Munteanu, *op. cit.*, p. 34-38.

[19] St. Cărpenaru, *op. cit.*, p. 540.

mandator, and in relation to third parties undertakes the obligations arising from these deeds, even if the third parties were aware of the mandate.

In the eyes of the new code, the mandate without representation is *genus proximus* for three types of contracts, namely the commission, consignment and shipment contracts, whose main features we will present hereinafter. However such contracts do not exhaust the list of contracts based on this legal institution. Other types of mandate without representation, which are actually forms of commission, maybe encountered in various sectors of commerce, especially international one, such as terminal benefits contracts, applicable in matters of international shipment of goods[20].

a) Contract of commission

The contract of commission is typical for intermediation contracts based on a mandate of representation[21].

Pursuant to Article 405 of the Commercial Code "The commission deals with the commission agent handling commercial affairs on behalf of the principal".

The New Code defines the contract of commission as being the mandate having as object the purchase and sale of goods or services being rendered on behalf of the principal and in the name of the commission agent, acting professionally, in exchange for a payment called commission (Article 2043).

Commercial doctrine defines the contract of commission as being the will by which one of the parties, called commission agent, undertakes based on a proxy issued by the other party, to conclude certain commercial actions, in its own name, however on behalf of the principal, in exchange for a payment, called commission[22].

It follows from what has been mentioned above that this agreement is the technical and legal procedure by which the legal deeds concluded between certain parties produce effects in favour of another person. Therefore, the contract is an original mechanism of intermediation, created to allow a tradesman to conclude commercial operations, benefiting from the services of another tradesman.

The contract of commission is one of the most frequent applications of intermediation contracts, in domestic commerce and also especially in international commerce,[23] this type of contract fulfilling some clear necessities.

The contract of commission appeared as a solution to the limitations presupposed by the commercial mandate, whose use requires some specific conditions, such as that of informing third parties with which they establish contracts on the person of the mandator and the limits of their powers granted under the proxy.

The frequency with which commission is applied in commerce is of course due to the advantages it brings to the contractual parties. Thus, the contract of commission deals with commercial operations occurring over large geographical areas and is based on a legal mechanism favourable to both parties. On the one hand the principal is relieved from having to supervise and control the stages of the operations whose execution and carrying out are delegated to the

[20] See, for terminal benefits contract, especially, O. Căpăţînă, *Transports law. Contract of expedition for goods, (Dreptul transporturilor. Contractul de expediţie a mărfurilor*) Lumina Lex Printing House, Bucharest, 1997, p. 138 - 160; A.T. Stoica, *Contractual liability of the operator in terminal benefits contract*, in the Commercial law Magazine No. 4/2000, p. 134-143 (*Răspunderea contractuală a operatorului în contractul de prestaţii terminale, în Revista de drept comercial nr. 4/2000, p. 134-143*) ; Gh. Piperea, *Transports law*, (*Dreptul transporturilor*) second edition, All Beck Printing House, Bucharest, 2006, p. 87 - 91.

[21] For a more detailed analysis of the contract of commission in Romanian commercial law, see St. Cărpenaru, *op. cit*., p. 559-568, and as regards the features of the contract of commission in international commerce law, see R. Munteanu, *op. cit*., p. 48-70.

[22] See, St. Cărpenaru, *op. cit.*, p. 560.

[23] D. Florescu, L.N. Pîrvu, *op.cit.*, p. 204.

commission agent, and his entire attention and resources are turned to the main activity it carries out, at the same time benefiting from the experience and prestige of the commission agent it has on the relevant market in which it is active[24]. On the other hand, the commission agent in its turn gets benefits from intermediation operations, properly developing its commercial reputation, nevertheless holding on to its independence from the principal who contracted it. It is not only the parties who benefit from this type of contract, but also the third parties with which commercial operations on behalf of the principal are concluded. The third parties in question have the advantage to directly deal with the commission agent, who is undertaking in its capacity as co-contractor and from which they can easily recover debts, unlike the situation in which the legal relations had been established directly with the principal, whom they do not know or is in another state other than the one where the business is perfected.

Given the features specific to the legal regime of the contract of commission, and also the fact that it is a variety of the commercial mandate, a number of similarities and differences may be observed which we will hereinafter present in terms of their essential elements.

The main similarity is the fact that the legal deeds are concluded with third parties by the mandatary "on behalf" of another person, who has given the proxy (the mandator). This similarity is clearly shown by Article 2009 of the N.Civ.C., that defines the mandate as mentioned, in general (with or without representation).

Also, the two commercial agreements are similar in terms of their object, namely "handling commercial affairs". Pursuant to Article 405(2) of the Commercial Code "between the principal and the commission agent there are the same rights and obligations as between the mandator and mandatary" along with the differences established under the Code.

The fact that the commercial mandate is a paid one, as shown above, and the commission is always paid - Article 2043 of the New Civil Code includes this feature in the definition – also brings closer these two forms of contracts of intermediation. The abovementioned Article 2010 of the N.Civ.C. in a common provision for both types of mandate, establishes the same idea.

The main difference between a commission and a commercial mandate resides in the fact that the individual empowered as commission agent acts in its own name, however on behalf of the principal, whereas the mandatary has a right of representation and handles commercial affairs in the name and on behalf of its mandator. It is from here that the defining trait of the commission follows - that of being qualified as a mandate without representation.

Therefore, the commission agent concluding *nomine proprio* legal deeds personally undertakes towards them, and thus direct legal relations arise between third parties and the commission agent, and their effects will however reflect upon the principal. The principal, on whose behalf the commission agent acts, may remain unknown to third parties, who acquire and undertake obligations solely in their relation with the commission agent. This trait specific to the contract of commission is expressly regulated by the provisions of Article 406(1) of the Commercial Code, according to which "the commission agent is directly bound by the person with which it established a contract, as if the affair were its own". Consequently, „the principal may hold no action against the persons contracted by the commission agent and such persons may hold no action against the principal" (Article 406(2) of the Commercial Code), since they established no contractual relations.

As a difference between the mandate and the commission one may also note particular facts, consisting of the actual transparency of one party related to the opacity of the other party. The mandate presupposes representation, arising from the presentation of the mandatary in front of third parties as a simple spokesman of the mandating-tradesman, whereas the commission is characterized by trading commercial affairs in the commission agent's own name, however on behalf of the principal, irrespective whether the principal is acknowledged or not to third parties.

[24] See M.L. Belu-Magdo, *Special contracts*, (*Contracte comerciale*) Tribuna Economică Printing House, Bucharest, 1996, p. 116-117.

Unlike the mandatary, who is usually a prepositive of the mandator, the principal acts "professionally" (Article 2042 of the N.Civ.c.), that means that the latter is organized under the form of an enterprise.

b) Consignment contract

A form of intermediation contracts based on the mandate without representation is also the consignment agreement[25], a variety of the contract of commission.

The consignment contract is lawfully established by Law No. 178/1934 for the regulation of the consignment contract. The New Civil Code, under Article 2054, limits to providing that this agreement is a variety of the contract of commission having as object the sale of some immovable goods which the consignor entrusted to the consignee for this purpose.

The consignment agreement may be defined as the consent, by which a party, called consignor, entrusts the other party, called consignee, certain goods in view of being sold in its own name, but on behalf of the consignor, at a price established by the parties, in exchange for a payment. The consignee is bound to deliver the obtained price or, as the case may be, return the unsold good.

The similarity with the contract of commission resides in the fact that the object of the consignment contract is represented by handling a commercial affair, in its own name, but on behalf of the consignor. The particularity of this type of contract and, at the same time, the distinction in relation to the commission, is the actual object of the operations perfected by the consignee, namely, the execution of sale-purchase contracts for movable goods belonging to the consignor.

c) Shipment contract

In the matter of transport activities, the contract of commission is materialized in the shipment contract. In terms of legal nature, the shipment of goods is an intermediation operation which, according to some standardized conventional norms, it oftentimes also bears the name „contract of commission for transport"[26].

The New Code defines the shipment contract as a variety of the contract of commission by which the sender undertakes to execute, in its own name and on behalf of the principal, a transport contract and to fulfil the related operations (Article 2064).

According to doctrine, the shipment contract is the willing consent between the client / principal (supplier or seller of goods) and shipper (sender), whereby the latter undertakes, in exchange for a payment to execute in its name, however on behalf of the principal, the required agreements with third parties for the shipment of the cargo, and also to fulfil the preliminary acts and things (cargo handling, loading the cargo in the transport means) and the cooperation necessary in view of performing the delivery[27].

The shipment contract is commercial in nature for the shipper (carrier), fulfilling a professional activity of intermediation, enterprise-specific.

The similarity of the shipment contract with the contract of commission consists of the representative concluding commercial operations in its own name, however on behalf of the client, the particularity arising from the specific sector where the shipment contract applies – transport

[25] For a more detailed analysis of the consignment agreement in Romanian commercial law, see St. Cărpenaru, *op. cit.*, p. 569 - 576. Also see, V. Anghelescu, Al. Deteşanu, E. Hutira, *op. cit.*, p. 113.

[26] See for an analysis of this contract, especially, O. Căpăţînă, *Transport law. Shipment contracts for goods*, (*Dreptul transporturilor. Contractul de expediţie a mărfurilor*) Lumina Lex Printing House, Bucharest, 1997, p. 13 - 137; Gh. Piperea, *op.cit.*, p. 65 - 87.

[27] See Gh. Piperea, *op. cit.*, p. 67-69.

activities – and from the specialized object of the commercial contracts perfected by the shipper – the transport contract of the goods and the services related to the shipment.

2.3. Intermediation contracts in which the intermediary acts as an independent professional tradesman, for business negotiation with third parties or for the negotiation and the conclusion of business with third parties

The category of intermediation contracts we refer to is firstly characterised by certain elements pertaining to the legal regime of the intermediary, as follows:

- the intermediary acts on a sustained and professional basis, and is organised under the form of an enterprise, and is not acting as an occasional intermediary, as it usually happens in the case of a commercial mandate;

- the intermediary runs his activity as an independent intermediary, specialised in that particular area, without being subordinated to the principal (client).

- the intermediary acts on the basis of a common interest with the principal, which means that a complex co-operation relation will be formed between them, by means of a contract.

Secondly, these contracts are particularized by the extent of the proxy granted by the principal (client) to the intermediary. Thus, the intermediary might be empowered, either to only negotiate commercial deals with third parties (which is the rule in practice), or to negotiate and conclude such deals in the name and on behalf of the principal.

Within the category of contracts we refer to; the following contracts are especially included: the agency contract, intermediation contracts (occasional) and the brokerage contract.

a) Agency contract

The agency contract is a contract of Anglo-Saxon origin, where the complex juridical institution of "agency", practically refers to all the range of agreements by which a person (the agent) acts on behalf of another person (the principal), as previously shown. Therefore, in the Anglo-Saxon conception, the agent may be empowered either to only to negotiate commercial deals with third parties or to negotiate and conclude such deals in the name and on behalf of the principal.

In Romanian law[28], the agency contract is generally defined, in the specialised literature, as that agreements concluded between two independent tradesmen, by which one person (the agent) undertakes to promote the business of the other person (the principal or the client) within a certain area, through business negotiation and/or the conclusion of business contracts by the agent, on behalf of the principal, in all cases, in exchange for a commission, without there being any subordination relation between the agent and the principal[29].

The institution of the commercial agent is regulated in the Romanian Law No. 509/2002 on permanent commercial agents.

In the New Civil code, the notion of "civil contract" means that agreement by which the principal unfailingly empowers the agent either to negotiate or to negotiate and to conclude contracts, in the name and on behalf of the principal, in exchange for remuneration in one or more determined regions. The New Code adds the provision that the agent is an independent intermediary who acts on a professional basis, and he cannot be the prepositive of the principal at the same time. (Article 2072)

Therefore, according to the Romanian Law, the parties in the agency contract are independent tradesmen, and the agent is not economically dependent or dependent for executive decisions, on the

[28] See, for a detailed analysis of the agency contract, especially, St. Cărpenaru, *op. cit.*, p. 548-559; V. Anghelescu, Al. Deteşanu, E. Hutira, *op. cit.*, p. 109-110; 113-114; Dragoş A. Sitaru, Ş.A. Stănescu, *Intermediation Contracts in international commerce (I)*, (*Contractele de intermediere în comerţul internaţional (I)*) *op.cit.*, p. 19-43.

[29] Dragoş A. Sitaru, C.P. Buglea, S.A. Stănescu, *op. cit*., p. 312-313; D. Florescu, L.N. Pîrvu, *op. cit.*, p. 205-213.

principal. At the same time the agent acts as a professional, meaning it is organised as an enterprise. The agent, as an enterprise, has as main activity business intermediation, and the client (the principal) resorts to his experience as a result of a good professional reputation. The commercial agent is entrusted with dealing with the business of a client on a determined clientele (usually a geographic area), and the legal relations that arise from the agency contract are long lasting.

From the point of view of the scope of the proxy, meaning the extent of the mandate the agent receives from the client (the principal), the agency contract is, of two kinds, as follows:

Firstly, the agent may be granted a proxy solely for the purpose of negotiating the client's affairs, when he is granted by the client a mandate without representation. Under this mandate, the agent negotiates the conditions of future contracts, with third parties, contracts which will be concluded directly between the client and the third parties. Therefore, in this case, the proxy is limited to the procurement of orders/offers from third parties, thus to finding contractual partners for the client. This situation is presumed, in case the contract does not grant explicit powers of representation to the agent.

Secondly, the proxy (explicit) granted to the agent may be for the purpose of negotiating and concluding affairs in the name and on behalf of the client. In this case, the mandate granted to the agent in a mandate with representation.

For a better understanding of the juridical outline of the agency contract, a short comparative overview is mandatory, between the agency contract and the contract of commission and the commercial mandate with representation.

Therefore, there is a difference between the agency contract and the contract of commission, which primarily consists in the fact that the commission agent is empowered by the contract of commission, to conclude in his name, but on behalf of the principal, one or several specific legal deeds; the contract ceases to be in force after the obligation of the intermediary is fulfilled. As regards the agency contract, it is concluded for a determined or non-determined period of time throughout which the agent is bound to conclude commercial contracts on behalf of the client, with a pre-established scope, within the envisaged territory (generally with an exclusivity clause). Therefore, the commission agent usually concludes one or more determined legal deeds, whereas the agent concludes an undetermined number of legal deeds for his client.

Unlike the commercial mandate with representation, the intermediation activity in the case of the agency contract is long lasting and professional in nature, not occasional. Moreover, unlike this commercial mandate where the intermediation activity predominantly unfolds in the principal's interest, the agency contract is characterised by the fact that the intermediation activity is based on the mutual interest of the agent and of the principal to conclude and execute the intermediation activity. Thus, the interest of the principal to capitalize his products and render the services which make the object of its commercial activity is doubled by the agent's interest to negotiate or to negotiate and conclude in the name of and on behalf of the principal as many commercial contracts, thus justifying the right of the agent to be paid[30].

For the situation when the agent is strictly empowered to obtain offers and negotiate contracts, and not with the power to conclude legal deeds, there is an even more clear distinction between the agency contract on one hand, and the contract of commission and the mandate without representation, on the other hand. This distinction resides in the existence of a different scope, such as the conclusion of legal deeds by the commission agent or the mandatary with representation, respectively the execution of pre-contractual commercial operations (of negotiation) by the agent.

To conclude, given the above mentioned particularities, the agency contract represents a special form of intermediation contracts, and not a particular case of mandate or contract of commission.

[30] St. Cărpenaru, *op. cit.*, p. 550.

b) Intermediary contract (occasional)

The New Romanian Civil Code provides for the intermediary contract under Article 2096 - 2102. As per Article 2096, the intermediary contract is defined as the contract by which the intermediary undertakes, in relation to the client, to put him in contact with a third party, for the purpose of concluding a contract. The intermediary is not the prepositive of the intermediated parties and is independent in relation to them in the execution of his obligations.

For the use of the participants to the international commerce, the International Chamber of Commerce in Paris drafted a model for the occasional intermediary contract, entitled ICC Occasional Intermediary Contract –ICC Publication No. 619-2000.[31] The scope of the contract essentially consists of, for the intermediary (agent) obtaining information for the principal about potential clients or about a particular business and, as the case may be, of the assistance offered for the negotiation of a contract, and for the principal, of the payment he is bound to pay to the intermediary for his services rendered. Unless otherwise provided in the contract, the intermediary is not empowered to contract third parties in his capacity as mandatary (with or without representation) of the principal.

Therefore, in principle, the intermediary in this type of contract is empowered by the principal (client) only for pre-contractual operations, acting as a mandatary without representation.

c) Brokerage contract

The brokerage contract[32] is defined in the specialised literature as a contract by which one person, named a broker, undertakes to find for the person from whom he received the task to contract, named client, a contractual partner for carrying out a commercial deal (a co-contractor) in exchange for a payment named brokerage.[33].

The brokerage contract, hardly distinguishes from the intermediary contract (occasional), both resembles and presents important differences from the contracts of mandate with representation, mandate without representation (commission) and agency contract.

The most important difference between the brokerage contract and the contracts of mandate with representation is the fact that in the case of the brokerage contract the mandate is granted without representation. The broker, unlike this mandatary, professionally performs the activity of intermediation, which constitutes the scope of the contract, without participating to the conclusion of the contract. The broker limits himself to making the connection between the persons who want to contract, facilitating and mediating the conclusion of commercial transactions. While the scope of the contract of mandate is the conclusion of legal deeds by the mandatary, in the name and on behalf of the mandator, the broker simply searches for a co-contractor for the client.

The brokerage contract resembles the contract of commission[34] especially because both of them have as scope independently performed intermediation activities. The commission agent distinguishes from the broker through the fact that he concludes in his name the legal deeds he was empowered to perform. The broker limits himself to making the connection between the persons who resorted to his services, without intervening in the conclusion of the contract. Thus, the broker, even if he receives a special mandate, does not act in his own name, but in the name of the mandatary, on the basis of a mandate without representation. Also, the broker does not have any privileges for the

[31] See also, for analysis, Dragoș A. Sitaru, C.P. Buglea, S.A. Stănescu, *op. cit.*, p. 324 - 328.

[32] F.A. Moțiu, *Commercial Contracts of intermediation without representation*, (*Contractele comerciale de intermediere fără reprezentare*) *op.cit.*, p. 218-264.

[33] L. Săuleanu, A. Calotă, *The brokerage contract*, in Commercial Law Magazine No. 7-8/1999 (*Contractul de curtaj, în Revista de drept comercial nr. 7-8/1999*), Lumina Lex Printing House, Bucharest, 1999, p. 210.

[34] Gh. Stancu, *Intermediaries in commerce. The Contract of commission and the brokerage contract*, published in Law, no. 10/2007, (*Contractul de comision și contractul de curtaj, publicat în Dreptul nr. 10/2007*) p. 129-145.

guarantee of debts against the client, unlike the commission agent, whose debts are secured under a special privilege, provided by the law.

The brokerage contract is essentially close in form to that of the agency contract in which the agent is entrusted only to negotiate deals with third parties, meaning the situation where the principal grants the agent a mandate without representation.

2.4. Intermediation contracts in which the intermediary acts in his own name and on his own behalf, in the relations with third parties, but having a mutual legal and economical interest with the principal

As it was justly noted in the specialised literature[35], in the modern sense, the intermediation is no longer restricted to the contracts of mandate and to the contract of commission, which presume a direct or indirect representation, but knows a series of other contractual forms in which the institution of representation, even an indirect one, is no longer found. In the case of these contracts, the intermediary enters into contractual relations with third parties in his name and on his behalf, and not as a mandatary with or a without representation (commission agent). Nevertheless, the activity performed by the intermediary is also in the interest of the co-contractor party to the intermediary contract, for whom it ensures a more efficient sale of merchandise or rendered services. Consequently, at the moment, the intermediation criterion is based less on the idea of mandate (with or without representation), and more on the intermediary performing an activity and in the interest of another person.

Therefore, the contracts to which we refer come under the institution of intermediation because the principal and the intermediary both act for the realisation of a mutual economical and legal interest, similar to that which characterises the agency contract. As a result of this, relations of professional co-operation between the intermediary and the principal are established, and this puts the intermediary in a mixed position, one of independence, but also in a position of economical interdependence on the principal. These contracts are essentially different from the agency contract, when the agent acts in the name and on behalf of the principal (client), as seen above.

We now give a short description of the main categories of contracts, which in our opinion, fall under this category of intermediation.

a) Franchise contract (franchising)

The franchise contract, known in the international commerce under the Anglo-Saxon name of franchising,[36] means the contract by which a person, named franchiser, allows the exploitation of a trademark or a production brand or of rendered services by an independent person, manufacturer or one who provides services, named franchisee, and of the know-how, the use of his trademark and

[35] See, Dragoş A. Sitaru, C.P. Buglea, S.A. Stănescu, *op. cit*., p. 306.

[36] For a general analysis of this contract see especially St. Cărpenaru, *op. cit.*, p. 605 - 616; I. Bălan, *Franchising contractual techniques*, in Commercial Law Magazine no. 3/2000, p. 23 (*Tehnici contractuale ale francizei, în Revista de drept comercial nr. 3/2000, p. 23*) ; M.C. Costin, *Franchising contract*, în Commercial Law Magazine no. 11/1998, p. 132 (*Contractul de franchising, în Revista de drept comercial nr. 11/1998, p. 132*) ; Gh. Gheorghiu, G.N. Turcu, *Franchising operations*, (*Operaţiunile de franciză*) Lumina Lex Printing House, Bucharest, 2002; Dan Alexandru Sitaru, *The Franchise Contract In Domestic and Comparative Law (Contractul de franciză în dreptul intern şi comparat)*, Lumina Lex Printing House, Bucharest, 2007; M. Mocanu, *Franchising contract*, (*Contractul de franciză*) C.H. Beck Printing house, Bucharest, 2008; Dragoş A. Sitaru, Ş.A. Stănescu, *Intermediation Contracts in internaţional commerce (II)*, in Commercial Law magazine no. 12/2005, p. 49-61 (*Contractele de intermediere în comerţul internaţional (II), în Revista de drept comercial nr. 12/2005, p. 49-61*). For a presentation of characteristic features of the agency contract, please see also D. Florescu, L.N. Pîrvu, *op.cit*, p. 213-214.

sometimes the related supply, which the beneficiary should exploit according to the convention, in exchange for a remuneration[37].

In the specialised literature, the franchise contract was defined as representing the system of commercialisation based on a continual collaboration between natural persons or legal persons, financially independent, by which a person, named franchiser, grants another person, named beneficiary, the right to exploit or to develop a business, a product, a technology or a service[38].

In the domestic law, the franchise contract is regulated by the provisions of Government Ordinance No. 52/1997 on the legal regime of the franchise.

In international commerce, tradesmen most often use, as a model for the franchise contract, the codification of usage drafted by the International Chamber of Commerce in Paris, namely ICC Model International Franchising Contract – ICC Publication No. 557-2000. This document provides a summary of commercial practice related to this domain[39].

b) Exclusive distribution contract

The exclusive distribution contract[40] is the commercial contract, concluded for a long term, under of which a party, named supplier, undertakes to deliver to the other party, named distributor, under terms of exclusivity, certain quantities of merchandise, according to the received requirements, which the latter will resell to his clients, using the supplier's trademark, on a market already determined in the contract, in exchange for a remuneration, which consists of the difference between the purchase price and the re-sell price.

Given the lack of special regulations in the Romanian domestic law, the contract to which we refer is included, for usage in international commerce, in the model contract drafted by the International Chamber of Commerce in Paris, entitled ICC Model Distributorship Contract (Sole Importer-Distributor) – ICC Publication No. 646-2002[41] - which has the advantage of representing a summary the commercial practice, representing a codification of usages related to this domain.

The exclusive distribution contract may not be reduced to a contract of mandate (with representation) or to an agency contract, because the deeds to re-sell performed by the distributor are not made in the name and on behalf of the supplier. At the same time, the exclusive distribution contract is not a form of the contract of commission, although the distributor acts, just as the commission agent, in his own name, in relation with third parties. Nonetheless, the distributor, unlike the commission agent, acts in his name and on his behalf.

The exclusive distribution contract is significantly close though to the agency contract, because it presumes that a permanent professional co-operation relation is established between parties, as a consequence of the fact that both parties act for the purpose of achieving a common interest, which is the commercialisation of merchandise and the provision of services which make the scope of the contract.

3. Conclusions

The concept of commercial intermediation has not been seen as a whole but usually it has been analyzed by the doctrine and confirmed by the courts practice in specific, referring only to the

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[37] Dan - Alexandru Sitaru, *The Franchise Contract In Domestic and Comparative Law (Contractul de franciză în dreptul intern şi comparat)*, Lumina Lex Printing House, Bucharest, 2007, p. 33.

[38] St. Cărpenaru, *op. cit*., p. 607.

[39] See for the the analysis of this model Contract of ICC, Dragoş A. Sitaru, C.P. Buglea, S.A. Stănescu, *op. cit*., p. 328 - 341.

[40] R. Munteanu, *op. cit*,. p. 71-96; Dragoş A. Sitaru, Ş.A. Stănescu, *Intermediation Contracts in internaţional commerce (III)*, in Commercial Law magazine no. 1/2006, p. 32-45 (*Contractele de intermediere în comerţul internaţional (III), în Revista de drept comercial nr. 1/2006, p. 32-45*) .

[41] Dragoş A. Sitaru, C.P. Buglea, S.A. Stănescu, *op. cit.*, p. 341 - 353.

contracts that include the representation of another party. There is no doubt that the commercial intermediation is a complex operation, one that includes several legal relations concluded between its contractual partners, having various names and various capacities, carried out either under the domestic commercial law or under the provisions of the international commercial laws, and the history of the development of the concept shows also the same.

Probably the most important new improvement that this paper brings is that it separates the traditional concept in the sense that the commercial intermediation is based only on the idea of representation. But the notion of intermediation is not only expressed in the contract of mandate, the entire legal nature of the other contracts that have a link to the notions, which we thoroughly presented in the paper, shows that the perspective should be much wider. From this the definition of the commercial intermediation had been extracted.

It must be noted also, that the implications of the New Civil Code are mostly as regards the classification of the concept. This is because after the New Civil Code has institutionalized a new conception regarding the regulating system for civil and commercial legal relations. By doing so it redefined the characteristics of mostly every contract that refers to the commercial intermediation. Also, it settles more clearly the criterion of the powers granted to the intermediary, by which we find the four types of commercial intermediation contracts, to which we referred in the paper.

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PRINCIPLE OF PROPORTIONALITY, CRITERION OF LEGITIMACY IN THE PUBLIC LAW

MARIUS ANDREESCU[*]

Abstract
A problem of essence of the state is the one to delimit the discretionary power, respectively the power abuse in the activity of the state's institutions. The legal behavior of the state's institutions consists in their right to appreciate them and the power excess generates the violation of a subjective right or of the right that is of legitimate interest to the citizen. The application and nonobservance of the principle of lawfulness in the activities of the state is a complex problem because the exercise of the state's functions assumes the discretionary powers with which the states authorities are invested, or otherwise said the 'right of appreciation" of the authorities regarding the moment of adopting the contents of the measures proposed. The discretionary power cannot be opposed to the principle of lawfulness, as a dimension of the state de jure.
In this study we propose to analyze the concept of discretionary power, respectively the power excess, having as a guidance the legislation, jurisprudence and doctrine in the matter. At the same time we would like to identify the most important criterions that will allow the user, regardless that he is or not an administrator, a public clerk or a judge, to delimit the legal behavior of the state's institutions from the power excess. Within this context, we appreciate that the principle of proportionality represents such a criterion. The proportionality is a legal principle of the law, but at the same time it is a principle of the constitutional law and of other law branches. It expresses clearly the idea of balance, reasonability but also of adjusting the measures ordered by the state's authorities to the situation in fact, respectively to the purpose for which they have been conceived. In our study we choose theoretical and jurisprudence arguments according to which the principle of proportionality can procedurally be determined and used to delimit the discretionary power and power abuse.

Keywords: *discretionary power, power excess, subjective right, principle of lawfulness, principle of proportionality constitutional law*

I. Introduction

The lawfulness, as a feature that needs to characterize the juridical acts of the public authorities, has as a central element the concept of "law". Andre Hauriou defined the law as a written general rule established by the public powers, after the deliberation and involving the direct or indirect acceptance of the governors[1]. In a wide meaning, the concept of law includes all juridical acts that contain the law norms. The law in a restricted acceptance is the juridical act of the Parliament elaborated in compliance with the constitution, according to some pre-established proceedings, that regulates the most general and most important social rules. A special place in the administered legislative system is owned by the constitution defined by the fundamental law that is placed on top of the hierarchy of the legislative system which contains juridical norms with a superior juridical force regulating the fundamental and essential social relationships, mostly those regarding the installing and exercising of the state power.

The lawfulness status in the public authorities' activity is founded on the concept of supremacy of the constitution and supremacy of the law.

The supremacy of the constitution is a quality of the fundamental law which in essence expresses its supreme juridical force in the law system. An important consequence of the supremacy

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[1] André Hauriou, *Droit constitutionel et institution politiques*, (Paris, Ed. Montchrestien, 1972), p.137.

of the fundamental law is the compliance of the entire law with the constitutional norms[2]. The concept of juridical supremacy of the law is defined like "its characteristic that is seeking its expression in the fact that the norms it establishes should not correspond to neither of the norms, except for the constitutional ones, and the other juridical acts issued by the state bodies, are subordinated to it, from the point of view of their juridical efficacy"[3].

Therefore, the supremacy of the law, in the above given acceptance is subsequent to the principle of supremacy of constitution. Important is the fact that the lawfulness, as a feature of the juridical acts of the state authorities involves the observance of the principle of supremacy of constitution and supremacy of the law. The observance of the two principles is a fundamental obligation of constitutional nature consecrated by the provisions of item 1 paragraph 5 of the Constitution. The non observance of this obligation results, as the case might be, into sanctions of non-constitutionality or unlawfulness of the juridical acts.

The lawfulness of the juridical acts of the public authorities involves the following requirements: the juridical acts should be issued with the observance of the competence stipulated by the law; the juridical act should respect the superior law norms as a juridical force.

The "legitimacy" is a complex category with multiple significances that forms the search topic for the general theory of the law, philosophy of law, sociology and other branches of instruction. The significances of this concept are multiple. To remind a few: the legitimacy of the power, the legitimacy of the political regime; the legitimacy of a governing, the legitimacy of the political system, etc.

The legitimacy concept can be applied also in the case of the juridical acts issued by the public authorities being linked to the "appreciation margin" recognized to them in the exercising of the duties.

The applying and observance of the principle of lawfulness in the activity of state's authorities is a complex problem because the exercise of the state's powers implies also the discretionary power with which the state's bodies are invested, or otherwise said the right of appreciation of the authorities regarding the adopting moment and the contents of the disposed measures. What it is important to underline is the fact that the discretionary power cannot be opposed to the principle of lawfulness, as a dimension of the rightful state.

In our opinion, the lawfulness represents a particular aspect of the legitimacy of the juridical acts of the public authorities. Thus, a legitimate juridical act is a legal juridical act, issued outside the appreciation margin recognized by the public authorities, that does not generate unjustified discriminations, privileges or restraints of the subjective rights and is adequate to the situation in fact, which is determined by the purpose of the law. The legitimacy makes distinction between the discretionary power recognized by the state's authorities, and on the other side, the power excess.

Not all the juridical acts that fulfill the conditions of lawfulness are also legitimate. A juridical act that respects the formal conditions of lawfulness, but which generates discriminations or privileges or unjustified restrained to the exercising of the subjective rights or is not adequate to the situation in fact or to the purpose aimed by the law, is an un-legitimate juridical act. The legitimacy, as a feature of the juridical acts of the public administration authorities should be understood and applied in relation to the principle of supremacy of Constitution.

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[2] For development see Marius Andreescu, Florina Mitrofan, *Constitutional Law. General Theory*, (Pitesti, Printing House of the University of Piteşti), p.61-68

[3] Tudor Drăganu, *Constitutional Law and Political Institutions. Elementary Treaty*, (Bucharest, Lumina Lex Publishing House, 1999, vol.II,) p.362

II. THE DISCRETIONARY POWER OF THE POWER EXCESS IN THE ACTIVITY OF STATE INSTITUTIONS

Antonie Iorgovan asserted that a problem of essence of the rightful state is that of answering to the question: "where ends the discretionary power and where begins the law abuse, where ends the legal behavior of the administration, materialized by its right of appreciation and where begins the subjective law or the legitimate interest of the citizen? "[4]

Approaching the same problem, Leon Duguit in 1900 makes an interesting distinction between the "normal powers and the exceptional powers" conferred to the administration by the constitution and the laws, and on the other side the situations in which the state's authorities act outside the normative framework. The last situations are split into three categories by the author: 1) the power excess (when the state authorities exceed the limits of the legal mandates; 2) the embezzlement of the power (when the state's authority fulfils an act that enters its competence aiming a different scope, other than the one the law stipulated), 3) the power abuse (when the state's authorities act outside their competence, but through acts that don't have a juridical character)[5].

In the administrative doctrine, that studies mainly the problematic of the discretionary power, it was underlined that the opportunity of the administrative acts cannot be opposed to their lawfulness, and the conditions of lawfulness can be split in general lawfulness conditions and respectively in lawfulness specific conditions on opportunity criterions[6]. As a consequence, the lawfulness is the corollary of the conditions of validity, and the opportunity is a requirement (a dimension) of the lawfulness.[7] Nevertheless, the right of appreciation is not recognized by the authorities of the state in the exercising of all duties they have. One must remember the difference between the *linked competence* of the state's authorities that exists when the law imposes them a certain strict decisional behavior, and on the other side the *discretionary competence*, situation in which the state authorities can choose between more decisions, within law limits and its competences. To remember the definition proposed in the literature in specialty to the discretionary power: "it is the margin of liberty that is let to the free appreciation of the authorities, so that in view of fulfilling the purpose indicated by the law maker, to use any means of action within its limits of competence."[8]

Yet the problematic of the discretionary power is studied mainly in the administrative law, the right for the appreciation in the exercise of some duties represents a reality met in the activity of all state's authorities.[9] The Parliament, as a supreme representative organ and with a unique law making authority, disposes of the largest limits in order to show its discretionary power, which is identified by the characterization of the legislative act. The discretionary power exists in the activity of the law courts. The judge is obliged to decide only when it is noticed for, within this notification limit. Beyond these it is manifested the sovereign *right of appreciating* the facts, the right to interpret the law, the right to fix a minimum punishment or a maximum one, to grant or not extenuating circumstances, to establish the quantum of the compensations etc. The exercising of such competences means nothing else but the discretionary power.

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[4] Antonie Iorgovan. *Forward to:* Dana Apostol Tofan, *Discretionary power and the power excess of the public authorities*, (Bucharest, All Beck Publishing House, 1999).

[5] Leon Duguit, *Manuel de Droit Constitutionnel*, (Paris, 1907), p.445-446.

[6] Antonie Iorgovan, *Treaty of administrative law, .Nemira Publishing House, Bucharest 1996,volI,p.301*

[7] Ibidem, p.292.

[8] Dana Apostol Tofan, *quoted works*. p. 22.

[9] In the doctrine, Jellinek and Fleiner sustained the thesis according to which the discretionary power is not specific only to the administrative function, but also it appears in the activity of the other functions of the state, under the form of a liberty of appreciation upon the content, on the opportunity and the extent of the juridical act. (see Dana Apostol Tofan, *quoted works*. p. 26)

Exceeding the limits of the discretionary power signifies the violation of the principle of lawfulness and of legitimacy or, of what in legislation, doctrine or jurisprudence is named to be the "excess of power".

The power excess in the activity of state's organs is equivalent with the law abuse because it signifies the exercising of the legal competences without the existence of a reasonable motivation or without the existence of an adequate relation between the disposed measures, the situation in fact and the legitimate purpose aimed at.

The law of the Romanian administrative prosecution[10] uses the concept of "power excess of the administrative authorities" which is defined to be the "exercising of the right of appreciation belonging to the public administration, by the violation of the fundamental rights and liberties of the citizens stipulated by the Constitution or by the law" (item 2, paragraph 1, letter m). For the first time the Romanian law maker uses and defines the concept of power excess and at the same time acknowledges the competence of the administrative prosecution instances to sanction the exceeding of the discretionary power limits throughout the administrative acts.

The exceptional situations represent a particular case in which the Romanian authorities, and mainly the administrative ones, can exercise the discretionary power, obviously existing the danger of the power excess.

Certainly, the power excess is not a phenomenon that manifests itself only in the practice of the executive organs it can be seen in the Parliament activity or in the activity of the law courts.

We appreciate that the discretionary power acknowledged by the state's authorities is exceeded, and the measures disposed represent a power excess, anytime it is ascertained the existence of the following situations:

1. The measures disposed do not aim to a legitimate purpose;
2. The decisions of the public authorities are not adequate to the situation in fact or to the legitimate purpose aimed, in the meaning that everything that is needed in order to reach the aimed purpose, is exceeded;
3. There is no rational justification of the measures disposed, included the situations in which it is established a juridical treatment that is different for identical situations, or a juridical treatment identical for different situations;
4. By the measures disposed the state's authorities limit the exercise of some fundamental rights and liberties, without the existence of a rational justification that would represent, mainly, the existence of an adequate relationship between those measures, the situation in fact and the legitimate purpose aimed at.

III. THE PRINCIPLE OF PROPORTIONALITY, CRITERION DELIMITING THE DISCRETIONARY POWER FROM POWER EXCESS

The essential problem remains that for the identification of criterions through which are to be established the limits of the discretionary power of state's authorities and to differentiate them from the power excess, that should be sanctioned. Of course there is the problem of using some criterions in the practice of the law courts or in the constitutional prosecution.

In connection to these aspects, in the literature in specialty it is expressed the opinion according to which the "purpose of the law will be then the legal limit of the right to appreciate (the opportunity). Therefore the discretionary power does not mean a liberty outside the law but one allowed by the law."[11]

[10] Law no.554/2004, published in the Official Gazette no.1154/2004.

[11] Rozalia Ana Lazăr, *The Lawfulness of the administrative act. Romanian law and the compared law, quoted works* p. 165.

Of course, "the purpose of the law" represents a condition of lawfulness or, as the case may be, of constitutionality of the juridical acts of the state bodies and that's why it can be considered as a criterion to delimit the discretionary power from the power excess.

Such as results from the jurisprudence of some national and international law courts, in relation to our search topic, the purpose of the law cannot be the only criterion to delimit the discretionary power (synonymous with the margin of appreciation, term used by C.E.D.O.), because a juridical act of the state can represent a power excess not only in the situation in which the measures adopted do not aim to a legitimate purpose, but also in the hypothesis in which the measures disposed are not adequate to the purpose of the law and are not necessary in relation to the situation in fact and with the legitimate purpose aimed at.

The suitability of the measures disposed by the state authorities to the aimed legitimate purposes represents a particular aspect of the principle of proportionality. Significant is the opinion expressed by Antonie Iorgovan which considers that the limits of the discretionary power are established by the: "written positive rules, the general law principles subscribed, the principle of equality, the principle of non retroactivity of the administrative acts, the right to defense and the principle of contradictoriality , *the principle of proportionality" (s.n.).*[12]

Therefore, the principle of proportionality is an essential criterion that allows the delimiting of the discretionary power from the power excess in the activity of state's authorities.

This principle is consecrated explicitly and implicitly in the international[13] juridical instruments or by the majority of the constitutions of the democratic[14] countries. Romania's Constitution regulates explicitly this principle in item 53, but there are other constitutional dispositions that imply it.

In the constitutional law, the principle of proportionality finds its use mainly in the field of protection of human fundamental rights and liberties. It is considered as an efficient criterion of appreciation of legitimacy of the interventions of the state authorities in a situation limiting the exercise of some rights.

Much more, even if the principle of proportionality is not consecrated expressly in the constitution of a state, the doctrine and jurisprudence considers it as being a part of the notion of a rightful state[15].

This principle is applied in many branches of the law. Thus, in the administrative law it is a limit of the discretionary[16] power of the public authorities and represents a criterion in the exercising the jurisdictional control of the discretionary administrative acts. Applications of the principle of proportionality exist in the criminal law[17] or in the civil law[18].

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[12] Antonie Iorgovan, *quoted works* vol. I, p.296.

[13] To remind on this topic item.29, paragraphs.2 and 3 of the Universal Declaration of Human Rights items 4 and 5 of the International Pact regarding the economical, social and cultural rights, item 5, paragraph 1, item 12 paragraph 3, item 18, item 19 paragraph 3 and item 12 paragraph 2 of the International pact regarding the protection of the national minorities; item G Part V of the European Social Chart – revised; items 8, 9, 10, 11 and 18 of the European Convention for the defense of human rights and the fundamental liberties or item B13 of the Treaty regarding the European Economical Community.

[14] For example, item 20, point.4; item 31 and item 55 of Spain Constitution; items 11,13.14,18,19 and 20 of the German Constitution or the provisions of items.13,14,15,44 and 53 of Italy Constitution.

[15] For the development see Petru Miculescu, *The Lawful State,(* Lumina Lex Publishing House, Bucharest, 1998) pg.87-88 and Dana Apostol Tofan *quoted works.*, p.49.

[16] On this meaning see Dana Apostol Tofan, *quoted works* pg.46-50; Iulian Teodoroiu, Simona Maya Teodoroiu, *Lawfulness of opportunities and the constitutional principle of proportionality* in: Law no. 7/1996, p.39-42.

[17] The provisions of item 72 of the Criminal Code refer to the proportionality as a general criterion of judicial individualization of the punishments or the provisions of item 44, paragraph 3 of the Criminal Code considers the proportionality as a condition of legitimate defense.

[18] The provisions of items 951 and 1157 of the Civil Code, allow the cancellation of a contract for the obvious disproportion of the service conscriptions (lesion).

The principle of proportionality is found also in the community law, in the meaning that the lawfulness of the community rules is subject to the condition that the means used to be adequate to the aimed objective and not to exceed what it is necessary to reach this objective.

The jurisprudence has an important role in the analysis of the principle of proportionality, applied in concrete cases. Thus, in the jurisprudence of the European Court of the Human Rights, the proportionality is conceived as a just, equitable ratio, between the situation in fact, the restraining means of the exercise of some rights and the aimed legitimate purpose, or as an equitable ratio between the individual interest and the public interest. The proportionality is a criterion that determines the legitimacy of state interference of the contracting states in the exercising of the rights protected by the Convention.

In the same meaning, the Constitutional Court of Romania, by several decisions established that the proportionality is a constitutional principle[19]. Our constitutional instance asserted the necessity to establish some objective criterions, by the law, for the principle of proportionality: "it is necessary that the legislative institutes objective criterions that should reflect the exigencies of the principle of proportionality" [20].

Therefore, the principle of proportionality is imposed more and more as a universal principle consecrated by the majority of the contemporary law systems, to be found explicitly or implicitly in constitutional norms and acknowledged by the national and international jurisdictions[21].

In the literature in specialty were identified three jurisdictional levels of the administrative acts: "a) the minimum control of the procedure rules (form); b) normal control of the juridical appreciation of the facts; c) the maximal control, when the judge asserts upon the necessity and proportionality of the administrative measures**".**[22]

The maximal control, to which the quoted author refers to, represents the correlation between the legality and the opportunity, otherwise said, between the exigencies of the principle of lawfulness and the right of appreciation of the public authorities, the proportionality couldn't be considered as a super legality criterion, but as a principle of law, whose main finality is to represent the delimiting between the discretionary power and the power excess in the activity of the public authorities.

There are situations in which the Constitutional Court used a "proportionality reasoning" as an instrument for the interpretation of the correlation between the legal contested dispositions and on the other side the constitutional dispositions, and in situations in which the proportionality, as a principle, is not explicitly expressed by the constitutional texts. Self evident in this meaning are two aspects: invoking in the Constitutional Court's jurisprudence of C.E.D.O. jurisprudence, which, in the matter of restraining the exercise of some rights, analyzes also the proportionality conditions, and the second aspect, the use of such a principle in situations in which it is raised the question of respecting the principle of equality.

Declaring as non constitutional a normative disposition on the ground of non observance of the principle of proportionality, applied in this matter, signifies in essence the sanctioning of the power excess, manifested in the activity of the Parliament or of the Government. Also excess of power, sanctioned by the Constitutional Court, using the criterion of proportionality, are the situations in which the principle of equality and non discrimination are violated, if by the law or by the Government ordinance it is applied a differentiated treatment to equal cases, without the existence of a reasonable justification or if exists a disproportion between the aimed purpose and the means used.

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[19] The Decision no 139/1994, published in the Official Gazette no 353/1994, decision no.157/1998, published in the Official Gazette no 3 /1999; the decision no. 161/1988 published in the Official Gazette no 3 / 1999.

[20] The decision no. 71/1996, published in the Official Gazette no.13/1996

[21] For development see Marius Andreescu, *Principle of proportionality in the constitutional law*, (Publishing House C.H. Beck, Bucharest, 2007)

[22] Antonie Iorgovan, *quoted works.* vol.I, p. 296.

IV. Conclusions

There are two most important finalities of the constitutional principle of proportionality: the control and the limiting of the discretionary power of the public authorities and respectively the granting of the fundamental rights and liberties in situations in which their exercising could be conditioned or restricted.

The proportionality is a constitutional principle, but in several cases there is no explicit normative consecration, the principle being deducted by different methods of interpretation from the normative texts. This situation creates some difficulties in the application of the principle of proportionality.

In relation to these considerations we propose that in the perspective of a reviewing of Romania's Constitution, that at item 1 having as a side denomination "Romanian state" to be added a new paragraph that will stipulate that :"*the exercising of the state power must be proportional and non discriminatory"*.

In such a manner many of requirements have been answered:

a) The proportionality is consecrated expressly as a general constitutional principle and not only with a restrained application in case of restraining of the exercise of fundamental rights and liberties, such as it may be considered presently, when having into consideration the provisions of item 53 in the Constitution:

b) This new constitutional provision corresponds to some similar regulations contained in the "Treaty instituted by the European Community" or in the draft for the Treaty for the establishment of a Constitution for Europe, which is very important in the perspective of Romania's adhering to European Union.

c) This new regulation would represent a genuine constitutional obligation for all state authorities to exercise their duties in such a way that the measures adopted, to subscribe within the limits of the discretionary power limits acknowledged by the law and not to represent a power excess;

d) To create the possibility for the Constitutional Court to sanction, by the means of control of constitutionality of the laws and ordinances, the power excess in the activity of the Parliament and the Government, using as criterion the principle of proportionality;

e)To make a better correlation between the principle of proportionality and the principle of equality.

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THE SUSPENSION OF THE ADMINISTRATIVE ACTIONS –A SYNTHESIS OF THE RECENT JURISPRUDENCE

MARTA CLAUDIA CLIZA *

Abstract
The suspension of the administrative acionts is an exceptional measure which can be decided by the administrative courts and whose purpose is the temporary interruption of the effects produced by these actions. That is why the issue debated in this study has a great importance and we tried to point out the courts' trends in the interpretation of the legal texts, texts that regulate the suspension of the administrative actions' issue. But this study took also into account a theoretical approach from which the administrative courts should start when the matters that are subjected to their analysis cases assume the temporary interruption of the effects of some acts which, normally, have an ex officio execution and whose effects can be suspended only exceptionally.

Keywords*: administrative actions, suspension of execution, administrative court law, High Court of Cassation and Justice.*

1. Introduction

Administrative actions, as power actions, enjoy the ex officio execution rule, which rule has its origin in the assumptions underlying the edifice which creates the legal force of such documents: presumption of legality, which in its turn is based on other two assumptions: reliability and authenticity.

That is why the effects of administrative actions can not be permanently or temporarily interrupted, unless in exceptional cases.

If the final interruption is usually the work of issuing authority, the hierarchically superior authority or the court, the temporary interruption of the effects of administrative actions is an exceptional operation.

2. Suspension of administrative actions

Suspension is not - or should not be considered - a way of ending the enforcement of an administrative action. And this is simply because the idea of "*ending the enforcement*" contains in itself, the *final extinctive process*. Or, the suspension by definition is only a transient state, an incident in the normal application of an administrative action; a sort of *purgatory* that settle out the uncertain situation of an administrative action classified as "suspicious" in terms of its legality.

As defined in the dictionary of public law, the suspension is "a legal transaction, part of the legal regime of the administrative action, which consists in interruption of producing legal effects of an action over which are hanging over certain doubts on its legality. It is a guarantee of legitimacy and an exception to the legal regime of administrative actions. Temporary cessation of legal effects lasts up to the clarification of the situation that caused it."[1]

3. Cases of suspension of an administrative act

If an administrative action is legal and appropriate, it should apply. On the contrary, if such an action is clearly illegal or clearly inappropriate, its place in the legal system is not justified.

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[1] Verginia Vedinas, Teodor Narcis Godeanu, Emanuel Constantinescu, *Dictionary of public law,* (C.H.Beck, Publishing House, Bucharest, 2010), p. 127.

Therefore, it must be "disconnected from the apparatus", either by the administration, through revocation or, if it does not consider it necessary, by the court on notification, through its cancellation.

But the actual situation is not always so clear: as *between white and black there are infinite shades of gray.* For instance, the action *seems* legal but is not sure that this is so: or, on the contrary, the action *might* be affected by any illegality flaw, but this is not *indisputable*. So one thing is certain: that a doubt is surrounding the legality of administrative action in question. And in such a case, any extreme measure is at least risky: to keep it enforceable may create subsequently irreparable or hardly reparable damage, the *cancellation* it may be also costly for the government, because, if subsequently the legality of the action is approved, a similar action is required to be adopted, with the corresponding waste of human resources, time and money. We must therefore appeal to a compromise: a measure to preserve a certain *status quo* and hence to reduce any possible losses, as much as possible. Suspension of the action in question is such a compromise. The idea is surprised even by our legislator: pursuant to Article 14, 1st paragraph of Law no. 554/2004, the administrative court may order the suspension of the contested action "*in well justified cases*" i.e., according to the content of art. 2, 1st paragraph, letter t), in those circumstances *relating to the "state of things that are likely to create* ***a serious doubt on the legality of an administrative action***."[2]

4. Judicial suspension

Suspension of an administrative action may be also ordered by the administrative court in terms of art. 14-15 of Law no.554/2004. In order to suspend an administrative action by the administrative court, a **procedure condition** must be complied with: the petitioner must have already filed the prior complaint under Art. 7 of law (in case of suspension based on the provisions of Article 14), respectively to have registered the action of repealing the action to the court (in case of that based on the provisions of Article 15), as well as a **double substantive condition**: to be a well-justified case (existence of a serious doubt upon the legality of contested action - appearance of illegality), as well as to be an imminent damage. If the first condition does not create particular problems, the second would involve discussions on the nature of the damage that may occur. Thus, starting from the reason of the text that tends to avoid an *imminent* damage, but has not yet occurred, the following observations can be made:

a). ***nature of damage*** - material or moral - *has no relevance at all*, as long as it is *imminent;*

b). ***suspension is not required for actions that have already created a permanent damage by their own issuing***. For example, if by an administrative action is created a moral damage - injuring their right to the image - as it is already produced and not an immediate one, practical importance and interest will present only the *annulment* of the action and granting moral damages, but not its suspension;

c). ***suspension of normative administrative actions is questionable***. Thus, although the legal text does not distinguish, it is quite difficult to suspend such an action, because on principle it is not likely to **directly** cause damages, but only through some individual administrative actions. However, reported to the new conception of the legislator regarding the legitimate interest possible to be protected through an administrative action, we believe that the legislative act could also be suspended by the court provided that, for example, introducing some obligations considered illegal in charge of individuals, whose breach would attract sanctions, the imminence of damage is therefore obvious. Moreover, from the economy of analyzed legal text, it is clear that the individual does not need to

[2] O. Podaru, *Administrative law, Academic course, Vol.I. Administrative Action (I) Reference points for a different theory*, (Hamangiu şi Sfera Juridică Publishing House, 2010), p.338-339.

wait for an individual act to cause him a direct damage and can request the suspension of the legislative act if he can prove the imminence of the damage by its future sanction.

d). negative administrative actions can not be suspended (refusal decisions). Just a simple vocation (even legitimate) to obtain in the future a subjective right; therefore, as the **suspension of negative action does not mean implicit recognition by the court, of the existence of positive action**, it would do nothing but bring the claiming individual at the status before issuing the negative act, a status that did not allow him to exercise any subjective right. Therefore, in this case, if by its refusal to issue a positive act, the individual proves that it has suffered any damage, it can only get a subsequent repair.

e). as regards the administrative actions which, by their application, deprives the individual of a certain amount of money (for example, a taxation or a fine payment notice, late payment penalties, etc.) it is not enough only to be invoked the damage consisting just in the payment of such amount of money and negative consequences of this payment must be justified: imminence of bankruptcy for legal entities or lack of subsistence means for individuals, etc. in this respect the jurisprudence has constantly given its verdict[3].

5. Considerations drawn from legal practice on conditions to be met because the court can order the suspension of administrative actions.

As mentioned before and drawn from the text of art. 14 of Law no. 554/2004, in order that the court should dispose the suspension of an administrative action, it must "touch" the test case and to observe the cumulative fulfillment of two conditions: well justified case and imminent damage.

That is why the analysis of jurisprudence on these issues is very useful. In this study we focused on the practice of the High Court of Cassation and Justice, Administrative and Fiscal Department, practice that we find to be relevant for the assessed areas. Besides the two conditions and their specific way of fulfilling, the High Court of Cassation and Justice has also reported other issues on the suspension of administrative actions, issues that will be further analyzed.

From the jurisprudence related to 2006, we indicate by way of example Decision no. 843 of 14th March 2006[4], decision stating that the suspension of executing an administrative action can not be directly requested to the court, such a request being inadmissible. Thus, the High Court shows that according to art. 14 paragraph 1 of the Administrative Court Law in force, in duly justified cases and for prevention of imminent damage, along with the appeal, in terms of art. 7, of the public authority which issued the act, the aggrieved party may request the competent court to order the suspension of the administrative action until the pronunciation of first instance court. To the extent that the plaintiff does not make the proof of filing the request subject to preliminary procedure, its request for suspension of administrative action will be rejected as inadmissible. It follows therefore that prior to the filing of suspension request, the plaintiff will need to notify the issuing authority on the preliminary stage of the procedure, otherwise its action could not be received by the court.

In another decision rendered in the same year 2006, the same court ordered the suspension of an administrative action on the grounds that applying a sanction consisting of a civil penalty with a superior value to the net profit of a company in its 11 years of activity is likely to produce a significant disruption in the company business, also reported to the nature of its activity (distribution), in this case the suspension request being fully justified.[5]

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[3] To see, for example, I.C.C.J.,*s. adiminstrative and tax accounts*, dec. no. 4748 of 16th December 2008, in J.S.C.A.F. semester II/2008, (Hamangiu Publishing House, Bucharest, 2010), p. 103.

[4] To see, I.C.C.J.,*s. adiminstrative and tax accounts*, dec. no. 843 of 4th March 2006, in J.S.C.A.F. semester I/2006, (Hamangiu Publishing House, Bucharest, 2006), p. 131.

[5] To see, I.C.C.J.,s. adiminstrative and tax accounts, dec. no. 1723 of 16th May 2006, in J.S.C.A.F. semester I/2006, (Hamangiu Publishing House, Bucharest, 2006), p. 147.

Showing circumstances on the state of things, the nature of the plaintiff's activity and the possible effects of the execution of act upon it is absolutely necessary in order to argue that it is well-justified case, in the meaning of the legal text ,being unable to note that the relevant issues in the application or retained by the court initiates the case substance and is equivalent to an ante-pronunciation on it.

Regarding the same issue of well-justified case, the High Court of Cassation and Justice held that the revocation of a tax repository authorization, measure that basically requires the cessation of trading activity, make proof of the existence of well-justified case.[6]

Analysis of the two necessary conditions to be cumulatively met in order to suspend administrative actions is carefully detailed by the Supreme Court in the Decision no. 1390 pronounced on 20th April 2006.[7] Regarding the first condition - the well justified case - the law does not include regulations, but it is clear that the existence of a well-justified case, to defeat the principle according to which the administrative action is enforceable ex officio, requires a strong doubt on the presumption of legality of an administrative action issued pursuant to law and for its enforcement. Regarding the second condition - the imminent damage - the law has defined it as a future and foreseeable material prejudice or the serious disruption of operation of a public authority or a public service. Also, this decision contains the role of motivation in the court order by the court. Thus, the High Court shows that both the well justified case and the damage whose imminent occurrence would be eliminated by the suspension of enforcing administrative action must be concretely indicated, not just asserted by taking over legal texts, in the contents of court decisions ordering the measure of suspension under the provisions of Law no. 554/2004.

What the Supreme Court wants to emphasize by this decision is the following issue: the court must that, during the trial of an action subject to the suspension of an administrative action, to consider the rules of evidence that the parties understand to administer in order to actually see whether the two conditions are met. A brief analysis is not sufficient, but fulfilling of both conditions must be deeply investigated. Only in case the court conclude that both conditions are met, may order the suspension measure. The court investigation must be careful just because we face with an exceptional measure, considering the binding and enforceable character of administrative action.

From the practice of the supreme court, we also have examples in which some situations have not been considered to be likely leading to such a measure. Thus, contracting some loans for the development of business and any delay in payment of installments are not elements to prove, by their mere existence, of the well-justified case and the imminence of producing any damage in the sense of art. 14 of the Administrative Court Law, in order to justify the suspension of enforcing the administrative action.[8]

The distraint, as a precautionary measure, upon movable property of the appellant, even if they are its production equipment, does not involve paralysis of the productive activity of the company and can not be appreciated as a well-justified case, because the company can continue to use those assets according to their purpose, even if they can not form the subject of disposal acts of the company.[9] There is no ground according to which the distraint upon property would have been turned into an enforcement distraint, with the consequence of selling those goods, as there was no proof in this regard.

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[6] To see, I.C.C.J.,s. adiminstrative and tax accounts, dec. no. 1207 of 6th April 2006, in J.S.C.A.F. semester I/2006, (Hamangiu Publishing House, Bucharest, 2006), p. 149.

[7] To see, I.C.C.J.,s. adiminstrative and tax accounts, dec. no. 1390 of 20th March 2006, in J.S.C.A.F. semester I/2006, (Hamangiu Publishing House, Bucharest, 2006), p. 150.

[8] To see, I.C.C.J.,s. adiminstrative and tax accounts, dec. no. 1000 of 23rd March 2006, in J.S.C.A.F. semester I/2006, (Hamangiu Publishing House, Bucharest, 2006), p. 266 .

[9] To see, I.C.C.J.,s. adiminstrative and tax accounts, dec. no. 3747 of 1st November, in J.S.C.A.F. semester II/2006, (Hamangiu Publishing House, Bucharest, 2006), p. 38.

On the non-fulfillment of the two conditions, the Supreme Court stated that a decision of a public authority cannot be suspended, by which it is decided the organization of a competition on the grounds that previously it had not been done the promotion, transfer or redeployment of public servants existing within an agency, no public servant holding a public position equivalent to those vacant which have been announced was included in the competition committee, the members of the competition committee did not possess the necessary knowledge for assessment of examinations, the secretariat of the competition committee was not provided by a public servant from the human resources department or by another public servant with responsibilities in this area, the committee for settling appeals has not been legally established, the applicant right to participate in both competitions has not been complied with and persons whose files did not correspond to the legal provisions have been admitted to take part in the competition. All these reasons, in the plaintiff's opinion were grounds subscribing to the well justified case, also being implied the condition of imminent damage.[10]

The court considered that in this situation, the condition of well justified case is not legally met, the circumstances alleged by the complainer, as well as the filed documents are not likely to cause a strong doubt in terms of legality of the contested administrative action.

There was no proof made on imminent damage to which the plaintiff would be subject by complying with the decision of organizing the competition, it occupying a certain position within the defendant authority. Damage caused by non-promotion of the plaintiff, previously to organization of contested competition, in a leadership position within the respondent is not obviously predictable and can not be ground for suspension of administrative action.

Also on these issues, we retain those ruled by the High Court of Cassation and Justice in Decision no. 1377 of 6th March 2007.[11] Thus, the assertions on the fact that the imminent damage produced to the plaintiff by the dismissal action from the public position, applied as a disciplinary sanction, consists in losing the salary rights, are not sufficient and conclusive in order to be considered that the legal requirements for the suspension of execution are met, as such assertions are not likely to overthrow, by themselves, the presumption of legality of the contested administrative action.

Assessment of the illegality of administrative action whose suspension is required under art. 15 of Law no. 554/2004, does not prove the existence of well-justified case, provided by art. 14, paragraph 1 of law as one of the conditions in which presence the measure of suspension may be ordered. In deciding on such assertions and thus examining the legality of the action, the court made a prejudgment of the substance, which exceeds the procedural framework of the application for suspension of administrative action.

The provisions of art. 14 of Law no. 554/2004 is a transposition into the national law of the provisions with principle value contained in Recommendation (89) 8 of the Ministers Committee of Europe Council on provisional legal protection in administrative matters, according to which 'interim protection measures can be primarily granted, if the enforcement of the administrative action is likely to cause serious damage, is likely to cause serious damage, repairable only with difficulty and under the condition of the existence of a prima facie case against the validity of such action." [12]

In decision no. 4748 of 16th December 2008, already mentioned above, the High Court of Cassation and Justice examines several issues arising from the application of art. 14 and 15 of Law no. 554/2004, as follows: according to art. 14, paragraph 1, the measure of suspension execution of

[10] To see, I.C.C.J.,s. adiminstrative and tax accounts, dec. no. 1150 of 2nd February 2007, in J.S.C.A.F. semester I/2007, (Hamangiu Publishing House, Bucharest, 2007), p. 6.

[11] To see, I.C.C.J.,s. adiminstrative and tax accounts, dec. no. 1377 of 6th March 2007, in J.S.C.A.F. semester I/2007, (Hamangiu Publishing House, Bucharest, 2007), p. 45.

[12] To see, I.C.C.J.,s. adiminstrative and tax accounts, dec. no. 2090 of 19th April 2007, in J.S.C.A.F. semester I/2007, (Hamangiu Publishing House, Bucharest, 2007), p. 144.

the administrative action may be ordered only if two conditions are cumulatively met, which we presented in detail in this study. The fulfillment of two conditions must be substantially proved by the party and substantiated by the court by the sentence rendered.

In case of administrative actions charging the aggrieved party with the payment of a sum of money, the fulfillment of condition to prevent an imminent damage is not proven and demonstrated by the mere assertion that payment of such amount leads to a loss in the debtor's assets, because in this way it would reach the conclusion that this requirement is assumed in most administrative actions in this category, which would be contrary to the exceptional character of the suspension institution.

The asset retirement reason stipulated by art. 304, section 3 of Code of Civil Procedure is unsubstantiated in case the Court of Appeal is vested with the settlement of appeal against the conclusion by which it has been settled the request to suspend the execution of an administrative action, formulated pursuant to Art. 15 of Law no. 554/2004, as the issue of material competence of the First Instance Court need to be resolved by the court of first instance vested under article 1 and 15 of the Administrative Court Act with the action having the main object the annulment of the act and, subsequently, with extrinsic character, the suspension of executing such action, because the request for suspension can not be separated from case substance.

The practice of the High Court of Cassation and Justice brings into question other procedural issues related to decisions rendered on such test cases, such as the term for appeal against such decisions. According to the provisions of Art. 14, paragraph 4 of Law no. 554/2004, the court resolution or, if necessary, the sentence rendering the suspension may be appealed within five days of notification.

The mention provided in the content of the suspension decision, which aims at indicating a different appeal term than the one stipulated by law, is not likely to alter the statutory period of appeal and can not be taken into account in exercising it, according to the "nemo censetur ignorare legem" principle.[13]

Another important procedural issue is that according to which the request for suspension of administrative action formulated under Article 15 of Law no. 554/2004, i.e., within the main application containing annulment, is being settled urgently, but by summoning of the parties, as the legal text expressly provides and to allow the parties to exercise their right to defense.[14] A decision subject to a request of suspension, to the judgment of which the parties have not been summoned, violates not only the imperative text of the law, but also some of the fundamental principles of civil case, namely the adversarial principle and that of the defense right.

Conclusions

Of all the above issues, drawn from the practice of High Court of Cassation and Justice, it follows that the court may order the suspension of an administrative action, but only as an exceptional measure. Since this is an exceptional case of temporary interruption of the effects of the action, the court must carefully pronounce upon an evidence aiming only at issues related to the suspension of action, as well as the fulfillment or not of the conditions under which suspension may be ordered. Evidence cannot aim at the legality of the action itself, because the legality issues will be reviewed by the court on the occasion of the action of repeal. It should also be noted that the court must carefully separate those aspects concerning the suspension of those related to annulment, in order not to risk pre-empting on annulment of the action.

[13] To see, I.C.C.J.,s. adiminstrative and tax accounts, dec. no. 3067 of 26th September 2006, in J.S.C.A.F. semester II/2006, (Hamangiu Publishing House, Bucharest, 2006), p. 42.

[14] To see, I.C.C.J.,s. adiminstrative and tax accounts, dec. no. 1966 of 12th April 2007, in J.S.C.A.F. semester I/2007, (Hamangiu Publishing House, Bucharest, 2007), p. 135.

Also, the court will have to take into account in the pronouncement of the judgment, the other procedural issues, corroborating in this regard the provisions of Law no. 554/2004 with those of the Code of Civil Procedure.

It can be also noted that the solutions are varied from case to case, being specifically about the review of fulfillment of imminent damage to well-justified case conditions. In this case, the use of jurisprudence in reasoning some requests for suspension must be done carefully, because of the risk of not identifying similar test cases.

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ASPECTS REGARDING THE EU MEMBER STATES COMPETENCE IN THE ENFORCEMENT OF THE EUROPEAN LEGISLATION[1]

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Abstract
During the EU's progressive consolidation process, the relation between EU and national law has turned out to be extremely complex, being subject both to a positive evolution, but also to a number of difficulties of assimilating EU norms and enforcing them in relation to national legal systems, an uniform regulation proves to be necessary. Still, the adequate and correct enforcement of EU legislation is essential when it comes to maintaining the EU's strong foundation and ensuring that European policies have the effect desired, by acting in favor of European citizens. The effectiveness of governance is menaced when Member States are not capable to enforce common rules correctly, enforcing EU legislation with delay or errors does nothing but weakening the European system, reducing the latter's possibility to achieve its objectives and deprives citizens, as well as enterprises, from various benefits.
At the same time, the enforcement of EU law is the duty of all Member States. Any state has the duty to enforce EU law, as well as the liability for its transgression, no matter which is the state authority, central or local, which committed the violation. The important role played by EU law – the observance of which must be insured both by Europeans institutions and national jurisdictions – imposes on every state the duty to order the most suitable methods of guaranteeing the observance of community law by its public collectivities.

Keywords*: EU law, national law, enforcement of EU legislation, national competencies, autonomy*

Introduction

The present paper proposes to analyse one of the EU's law principal subjects, namely its enforcement by the national authorities of the Member States, in accordance with the latest case-law developments regarding this issue. We also take into consideration the fact that the Member States' role in the enforcement of the European legislation has a specific description in Treaty of Lisboa. For the first time, this treaty emphasis on the fact that the Member States' competence is a *principle competence*, thus EU could interfere if only a uniform regulation proves to be necessary . Equally, according to the constant case law of Court of Justice this competence is not only a simple prerogative but a genuine obligation which makes the Member States to be considered as titulars of the EU's executive function.

The Member States' cooperation regarding the enforcement of EU's law may consist in a normative, judiciary or an administrative action. It can be a legislative intervention in order to complete EU's law provisions, to ensure the European regulations' observance even under the compulsion of the judiciary system. But, most of the national measures bound on the EU's executive function involving the execution of the European decisions by the national administrative institutions.

Taking into consideration the complexity of the theme and the impossibility to be analysed exhaustively in a few pages paper, we are to point out, especially, the methods of enforcement of the

[1] This work was supported by CNCSIS-UEFISCSU, project number PN II-RU, code 129, contract 28/2010.

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EU law; we also analyse the institutional and procedural autonomy of the Member States regarding the enforcement of the EU law and the limitations which results from the necessity of ensuring an uniform application and of guaranteeing an effective protection of the rights deriving from the community regulations.

Thus, we propose to contribute to the actual considerations on this issue basing on a critical report of the European doctrine and case-law, especially French and Belgium doctrine and case-law, seeing that at the present moment, it cannot be discussed on a specific concern on this matter in the Romanian doctrine.

1. The EU Member States – as titulars of the EU executive function

Belonging to European Union involves, amongst other aspects, the necessity of conferring a full application of the European regulations. The legal order of the EU bases on a complementarity between the different levels of the authorities – the European authorities and the national ones[2]. EU's law does not deprive the Member States of the decision making authority but, on the contrary, these have an essential role in the enforcement of EU law.

EU's institutions and authorities dispose of enlarged competences regarding the enactment of measures which are compulsory for the Member States. The adopted measures have priority over the national provisions[3] and they also have a direct effect in the national law[4]; thus the derived law is autonomous in comparison with international and national law, at the same time. However, the enforcement of this law depends on the cooperation between the statal institutions.

In the complex system of the EU which has an important supranational character, the supranational bodies founded by the Member States' will have been charged with working-out the legislative acts. But, the Member States preserve an enlarged power of action in the enforcement of the adopted regulations[5]. This prerogative joined to the Union which is endowed with important attribution competences that are exercised by a dualist executive formed by the Council and by the Committee.

Generally speaking, it can be stated that the EU's law execution principally bases on the Member States competences which are exercised according to the institutional and procedural autonomy principles developped by the community case-law[6] but, at the same time respecting the cooperation and loialty obligations[7]. These competences can be subsidiarily

entrusted to the Committee which exercise them basing on the Council's delegation[8] and under the control of the Member States[9].

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[2] P. Pescatore, *L'ordre juridique des Communautes europeennes. Etude des sources du droit communautaire,* (Bruxelles: Bruylant, 2006), 199.

[3] Stated for the first time in 1964 in Costa/Enel Decision (Case 6/1964, Rec. p. 1141 and next).

[4] Therefore, private persons can directly invoke them in front of the national judge – CJCE, the 5th February 1963, Van Gend & Loss, Case 26/62, Rec. 1963, p. 1.

[5] Considering this specificity, the doctrine has qualified the EU's legal system as being „an incomplete and imperfect one". It is stated that although EU has enlarged competences, it still remains bound on its Member States regarding two aspects: these complete the EU's regulations and lay at its disposal their administrative bodies and besides there are states which have to use their legal power in order to ensure the execution of the EU adopted regulations - Loïc Azoulai, *„Pour un droit de l'execution de l'Union Europeenne"*, in *L'execution du droit de l'Union, entre mecanismes communautaires et droits nationaux,* ed. Jacqueline Dutheil de la Rochere, (Bruxelles: Bruylant 2009), 2-3; Jacqueline Dutheil de la Rochere, *„Rapport de synthese"*, in *Droits nationaux, droit communautaire: influences croisees. En hommage a Louis Dubuis*, (Paris: La documentation Francaise, 2000), 198.

[6] Which are to be detailed on the following point of the paper.

[7] On the strength of these obligations, their competences of execution must not diverge from the common rules.

[8] Under the reserve of specific cases when the Council exercises directly these competences. Treaty of Lisboa reforms the delegation legal proceedings, article 29 TFUE empowers the Parliament and the Council to delegate to Committee the power of to adopt general and non-legislative acts which complete or modify certain unessential

The method of enforcement the European legislation reasserts a fundamental descentralization principle, establishing an "executive federalism"[10] – as it has been stated in the doctrine. On the strength of it, if the legislative function is prevailingly controlled by the institutions, then the legislative acts' executions falls on the Member States, on the ground of a self-competence or a delegated one (it concerns an exclusive community competence)[11].

The Member States' cooperation regarding the enforcement of EU's law may consist in a normative, judiciary or an administrative action. It can be a legislative intervention in order to complete EU's law provisions, to ensure the European regulations' observance even under the compulsion of the judiciary system. But, most of the national measures bound on the EU's executive function involving the execution of the European decisions by the national administrative apparatus. It comes to an indirect administration which interferes in the absence of an European descentralized administration, the EU Member States have the responsibility to ensure the administrative genuine execution of EU's law by taking individual decisions and working out material acts[12].

Doctrine evokes even the existence of an indirect administration principle, officially proclaimed (but without a binding force) in the 43th Declaration attached to Treaty of Amsterdam; according to it the enforcement of the community law, on an administrative plan, it devolves upon the Member States, in the main. Even more, on the background of the distinction between direct and indirect administration as an expression of the competences division which works in the EU and also considering the intensification of the cooperation between national and European authorities regarding the enforcement of the European policies – in the judicial practice – it is stated about the existence of a "*co-administration*", a *compound administration*[13] or a *divided (shared) execution*[14], some authors stating the existence of a new model[15].

Anyway, direct administration represents the exception[16]. Concerning the indirect administration rule, besides the absence of a community field administration the indirect administration bases on the proximity principle stated in the 1st article EUT. According to it, EU's decisions must be adopted as close as possible to the citizens ; thus, giving effectiveness to the principles of subsidiarity and proportionality, at the same time and in the Member States' favour. By this system of enforcement the European legislation, the Member States preserve a right of control regarding the enforcement of the EU law.

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elements of a legislative act. Non-legislative acts adopted by the Committee are named „delegated acts". In the new treaty it is made a distinction between „delegated" acts and „execution" acts (stipulated in the article 291), the first corresponding to quasi-legislative measures and the latter to the execution measures stricto-sensu. These two types of acts have different significations and they exclude each other, an act adopted on the ground of article 290 is excluded from the domain of application of article 291, according to definitions and viceversa.

[9] Article 291(3) EUFT.

[10] Taken from the federal structures (for instance, Germany and Switzerland) where the local administrative authorities are charged with the enforcement of the measures adopted by the federal state.

[11] Dominique Ritleng, „L'*identification de la function executive dans l'Union"*, in *L'execution du droit de l'Union, entre mecanismes communautaires et droits nationaux*, ed. Jacqueline Dutheil de la Rochere, (Bruxelles: Bruylant 2009), 40.

[12] Idem.

[13] E. Schmidt-Assmann, „*Le modele de l'administration composee et le rol du droit administratif europeenne"*, *RFDA* (2006) : 1246.

[14] Jacques Ziller, *Execution centralisee et execution partagee*, in *L'execution du droit de l'Union, entre mecanismes communautaires et droits nationaux*, ed. Jacqueline Dutheil de la Rochere, (Bruxelles: Bruylant 2009), 114.

[15] Jacques Ziller, „*Les concepts d'administration directe, d'administration indirecte et de co-administration et les fondements du droit administratif europeenne"*, in *Droit administratif europeen*, ed. J.- B. Auby, J. D. de la Roche (Bruxelles, Bruylant, 2007), 235; Cl. Franchini, „*Les notions d'administration indirecte et des co-administration "*, in *Droit administratif europeen*, ed. J.- B. Auby, J. D. de la Roche (Bruxelles, Bruylant, 2007), 245.

[16] It has been noticed a partial renationalization even in domains as the competition, as a consequence of the enactment of the 1st Regulations/2003 - D. Ritleng, *op. cit.*, p. 40.

The great role of the Member States in the enforcement of the European legislation did not have a specific description in the texts of the community treaties with the exception of some precise regulations, especially concerning the directives[17] and legal frame-decisions [18] transposal and the provision of article 10 ECT (the former article 5 CEE) which stipulates: "The EU Member States take all general or special measures that are necessary to ensure carrying out the obligations which derive from the present treaty or result from the acts of the community institutions. EU Member States facilitate EU's carrying out its mission. They abstain themselves from taking measures which could endanger the achievement of the present treaty's goals".

In the absence of rigorous and exact regulations regarding the Member States' role in the community law execution, the Court has brought a series of explanations which converge on the fact that this competence is not a simple prerogative but a genuine obligation[19]. Thus, the Court has stated that "in accordance with the general principles which are the basis of the EU's institutional system and which regulates the relations between the EU and its Member States, the execution of the community regulations appertains to the Member States in order to ensure the observance of the regulations in their jurisdictions, on the strength of article 5 EEC"[20]. Furthermore, in its latest case-law[21] the Court has stated that the national authorities must understand their own powers in a mode which ensures the most proper execution of the EU law.

Treaty of Lisboa, taking over the corresponding stipulations from the constitutional Treaty Project, it brings a series of precise information regarding this issue. Thus, it ponts out for the first time that the Member States' competence is a *principle competence*, EU could interfere if only an uniform regulation proves to be necessary[22]. On the one hand in article 4 EUT is pointed out the principle of loyal cooperation which is compulsory for the Member States, on the other hand article 291 EUFT states the following: *"(1) The EU Member States take all legal measures in their domestic law that are necessary for the enforcement of the compulsory acts of EU. (2) In case that unitary conditions are needed in order to enforce the compulsory acts, then these acts give the Committee the execution competences or they give* to *the Council such competences in special and solid grounded cases and also in the cases stipulated in article 24 and article 26 from Treaty of Euroapean Union".*

2. The EU Member States' autonomy in the enforcement of the European legislation

The national authorities which interfere in the EU law enforcement always act "as bodies of a Member State"[23]. On the strength of their statal character, they are not submitted to a hierarchic power of the European institutions. Therefore, the latter ones cannot send them instructions, they cannot replace them and also they cannot modify or repeal the decisions adopted by the national authorities[24].

In the enforcement of EU law, the Member States preserve an institutional and a procedural autonomy which is acknowledged even by the Court of Justice[25]. This autonomy involves, in the

[17] Article 249 ECT.

[18] Article 34 EUT.

[19] Laetitia Guilloud, *La loi dans l'Union Europeenne. Contribution a la definition des actes legislatifs dans un ordre juridique d'integration*, (Paris, LGDJ, 2010), 119.

[20] Decision EECJ – 21th September 1983, case *Deutsche Milchkontor* (conjunct cases 205-215/82), Rec. p. 2633, point 17. Similar arguments can be found in other decisions of the Court: EECJ, 2nd February 1989, *Pays-Bas/Comision*, Case 262/87, Rec. 225; TPI, 4th February 1998, *Bernard Laga*, Case T-93/95, Rec. II 195, p. 33.

[21] EECJ, 13th March 2007, *Unibet*, Case C-432/05, Rec., p.2271, point 44.

[22] Abdelkhaleq Berramdane, Jean Rossetto, *Droit de l'Union Europeenne. Institutions et ordre juridique*, (Paris,. Montchrestien, Lextenso editions, 2010), 373.

[23] EECJ, 9th March 1978, Case *Simenthal*, 106/77, Rec. p. 629 and following. The mention is made regarding the national judge.

[24] L. Guilloud, *La loi dans l'Union Europeenne...*, 119.

[25] Even if it has tried to limit it by time.

main, the fact that the protection of the rights acquired by the justiciables as a consequence of the community direct invoking regulations it is also ensured within the national legal systems by the domestic juridical instruments. As a consequence, national law is the one which decides the types and the powers of the authorities entitled to interfere.

Thus, the institutional and procedural autonomy of the Member States represent an "expression of a preserved sovereignity"[26]. The concrete signification of this autonomy is that the Member States have to lay their means by which they carry out their executive mission at the disposal of the EU. But, they have the right to choose both the bodies charged with the execution and the proceedings and legal forms that are applicable for the enforcement of the EU law.

2.1. The principle of institutional autonomy

Although it is absent from the community treaties, this principle is considered by the doctrine as fundamental principle of the community legal order[27]. The institutional autonomy of the Member States which involves their free choice regarding the bodies charged with the enforcement of the EU law, it is the result of the community case-law that identified this principle in *International Fruit Company decision*[28] and reiterated it many times, stating its importance. Thus, the Court considers that "in case that the provisions of the treaty or of the regulations give powers to Member States or they impose them obligations of enforcement the community law, then the matter to know in an explicite manner if their exercise of these powers and execution of these obligations can be entrusted to determined bodies by the member states, it is a problem that regards exclusively the constitutional systems of each member state"[29].

Therefore, it does not matter for the EU if the execution of the acts adopted by European institutions appertains to the executive or legislative member states' authorities or if it is entrusted to the central or local agencies or to offices more or less autonomous in comparison with the state or to the local colectivities. The member states cand even entrust the execution to private persons or to legal private law entities, but under the condition of disposing of means in order to ensure that they carry out their missions observing the EU law[30]. It is considered that "ensuring the obervance of the community norms in their jurisdictions appertains to the member states' authorities, whether it comes to central statal power authorities, to federal authorities or to other territorial authorities"[31]. The Court stated that this principle is applicable inclusively in the case of exclusive competences of the community[32].

Not only the appointment of the national competent authorities but also the selection of the national competent jurisdictions is submitted to the principle of institutional autonomy[33]. In this respect, the Court stated that "the appointment of the competent jurisdictions to settle the litigations that involve individual rights derived from the community juridical order belongs to the legal order of each state, but, however it is established that the member states have the responsibility to ensure an effective protection of these rights, in every case"[34].

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[26] R. Mehdi, *L'autonomie institutionelle et procedurale et le droit administratif*, in *L'execution du droit de l'Union, entre mecanismes communautaires et droits nationaux*, ed. J.- B. Auby, J. D. de la Roche (Bruxelles, Bruylant, 2007), 687.

[27] Laurent Malo, *Autonomie locale et Union europeenne*, (Bruxelles, Bruylant, 2010), 349.

[28] EECJ, 15th December 1971, *International Fruit Company*, Cases 51-54/71, Rec., p. 1116 and following.

[29] 3rd point from *International Fruit Company* Court's decision, mentioned above.

[30] Jacques Ziller, *Execution centralisee et execution partagee*, în *L'execution du droit de l'Union, entre mecanismes communautaires et droits nationaux*, sous la direction de J. D. de la Rochere, Bruxelles, Bruylant, 2009, p. 126.

[31] EECJ, 12th June 1990, *RFG/Commision*, Case C-8/88, Rec. p I-2321 and next, point 113.

[32] EECJ, decision *Sukkerfabriken*, case 151/70, Rec., p. 1.

[33] EECJ, 19th December 1968, *Societe Salgoil/ Ministere du comerce exterieur de la Republique italiene*, Case 3/68, Rec., p. 661.

[34] EECJ, 9th July 1985, *Piercarlo Bozzetti/ Invernizzi SpA*, Case 179/84, Rec., p. 2301, point 17.

2.2 The procedural autonomy of the EU member states

The autonomy of the member states concerning the exercise of their EU law execution function is not only an institutional one but also they are acknowledged a procedural autonomy which consists in the fact that the domestic legal bodies charged with the execution determine the acts which must be adopted and the enforcement legal proceedings.

So as the institutional autonomy, procedural autonomy's founding and establishment derives from a case-law work. At the beginning of the case-law the community judge limited to offer a minimal level of orientation in this matter[35] and he stated that the mode of protection of the rights belonging to a person unfavourably affected by the infringement of the community law appertains to the national legal system[36]. Later on, the community judge has given a series of explanations, stating that the enforcement of the EU law is made by the member states with the observance of the legal proceedings and forms stipulated by their national law[37].

Procedural autonomy enforces equally to domestic jurisdictions charged with the enforcement of the EU law insofar as the member states are the only competent concerning the legal solutions determination. On the basis of their national law, they have to establish the competent jurisdictions, the means of attack and the rules of writing summons and of development in front of the instances. The Court stated that the national judge has to select "from the different proceedings of the juridical domestic order those which are proper for the protection of individual rights conffered by the community law"[38]. Recently it considered that the national judge must ensure the full effectiveness of these regulations, removing if necessary any application of a national contrary provision[39] (inclusively a procedural norm[40]) without requesting or waiting the elimination of that provision by a legislative method or by other constitutional proceedings.

However, procedural law of the member states is not harmonized so that a competence of the EU should be necessary. Considering all these, the Court had to give up the approach in case that community regulations in this matter do not exist, then the responsibility to determine the conditions of protection of the rights deriving from the EU regulations appertains to the member states. Thus, the Court has imposed two "community" legal requests concerning the national conditions[41]: the request of equivalency and the request of the national means effectiveness regarding the enforcement of the EU law. Under the condition of carrying out these requests, the EU member states must determine the competent authorities and the procedural methods to ensure the protection of the justiciables' rights conffered by the community law[42]. The EU member states are not obliged, in the main, to set up other legal measures to ensure the observance of the national law[43] than the existing ones, under the condition that these measures mustn't affect exercise of law in the legal practice[44].

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[35] Paul Craig, Grainne de Burca, *EU law. Comments, case-law and doctrine*, (Bucharest, Hamangiu, 2009), 382.

[36] Decisions *Humblot/Belgium* (Case 6/60, ECR 559) or *Societe Salgoil* (mentioned before).

[37] EECJ, 11th February 1971, *Norddeutsches Vieh und Fleischkontor/Hauptzollamt Hamburg St. Annen*, Case 39/70, Rec. p. 48.

[38] EECJ, 4th April 1968, *Gebruder Luck/ Hauptzollamt Koln-Rheinau*, Case 34/67, Rec., p. 359.

[39] To be seen in this respect decision on 9th March 1978, *Simmenthal*, 106/77, Rec., p. 629, point 24 and also decision on 19th November 2009, *Filipiak*, C-314/08, unpublished in the summary of case-law.

[40] Court's decision on 5th October 2010, case *Elchinov*, C-173/09, unpublished.

[41] P. Craig, G. de Burca, *EU law*..., 384.

[42] To be seen in this respect, EECJ, 16th December 1976, *Rewe-Zentralfinanz şi Rewe-Zentral*, Case 33/76, *Rec*. p. 1989, point 5; EECJ, 14th December 1995, *Peterbroeck*, Case C-312/93, *Rec*. I-4599, point. 12; EECJ 13th March 2007, *Unibet*, Case C-432/05, *Rec*. p. I-2271, point 39 and EECJ, 12th February 2008, *Kempter*, Case C-2/06, *Rec*. p. I-411, point 57.

[43] Thus the enforcement of EU law does not "overturn" the national law system but it brings to it a series of adjustments - Claude Blumann, Louis Dubouis, *Droit institutionnel de l´Union Européenne*, (Paris, Litec, 2007), 578.

[44] EECJ, 2nd February 1988, *Barra/Belgium*, Case 309/85, Rec. 355; EECJ, 11th July 2002, Marks&Spencer/Commissioners of Customs and Excise, Case C-62/00, ECR I-6325.

3. Limitations of the institutional and procedural autonomy of the EU member states

The necessity of ensuring a unitary application and of guaranteeing an effective protection of the rights deriving from the community norms, especially because of the increasement diversity of the national systems as a consequence of the successive accessions, it has determined the progressive introduction of some case-law limitations regarding the institutional and procedural autonomy of the member states. As it is stated in the doctrine, "the dialectics autonomy/uniformity represents the essence of the juridical integration process"[45].

The recourse at the national institutions in order to ensure the enforcement of EU law makes that its efectiveness depends on the efectiveness of the statal authorities. Under these circumstances, the pronouncement of contrary solutions in the enforcement of EU law seems to be predictable. These solutions are contrary to the principle of the law rule and of the uniform enforcement of the EU law and they justify, on the one hand the limitation made by the Committee as a "guardian of treaties" and on the other hand the limitations made by the European judge concerning the enforcement methods[46]. Thus, the rules of conduct which are compulsory for the member states in the exercise of their execution competences are clearly defined[47].

Concerning the principle of the institutional autonomy of the member states, its limits result from the fact that no matter the independence degree of the legal bodies charged with EU's law policies execution, the state is responsible for the effectivity of this execution and for the observance of the principles and provisions stipulated in the treaties, in the Court of Justice case-law and in the derived law[48]. At the same time, member states are responsible for the injuries caused to private persons as a consequence of the EU law infringement, no matter the statal body that infringed it[49]. This responsibility was stated by Francovich decisions[50] and also in the later case-law based on it[51].

The EU member states have a sovereign competence to establish the legal bodies charged with the enforcement of EU law and their powers. But, member states do not have a complete freedom of appreciation. Their autonomies are directed and controlled in order to avoid the deviations which may lead to the infringement of EU law.

The European Committee is the one that guards the legal and correct enforcement of the community law by the member states. This competence of "guardian of treaties" is stipulated in the article 17 from EUT ("…The Committee supervises the enforcement of EU law under the control of the European Court of Justice.") and it was completed by the Court's case law which stated the existence of a "general supervision competence" which allows it to guard the manner the member states observe their obligations which result from the treaties and their decisions taken in order to enforce them[52].

The Committee has preventive competences such as the right of information which result from various provisions of the treaty completed by enlarged verification competences or even repressive ones (as it happens in the competitional law concerning the state aids (grants)).

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[45] Denis Simon, *Le sisteme juridique communautaire*, (Paris, PUF, 2001), 157.

[46] L. Guilloud, *La loi ...*,125.

[47] A. Berramdane, J. Rossetto, *Droit de l'Union Europeenne* …, 376.

[48] Jacques Ziller, *Execution centralisee et execution partagee...*, 127.

[49] EECJ, 5th March 1996, *Braserie du pecheur şi Factorame*, Conjunct cases C-46/93, şi C-48/93, Rec., p. I-1029.

[50] EECJ, 19th November 1991, Francovich şi Bonifaci, Cases C. 6/90 şi C. 9/90, Rec, I-5402.

[51] The principle of states' responsibility for the infringement of the community law has been admitted since 1960, EECJ stating conclusions regarding the redress obligation. In decision Humblot/Belgium (Case 6/60, ECR 559), the Court considered that if she states in a decision that a legislative or an administrative act deriving from the authorities of a member state is contrary to community law, then that state is obliged to repeal it and to repair its illicit effects, on the ground of article 86 CECO.

[52] EECJ, 5th May 1981, Commission/Olanda, Case 804/79, Rec. p. 1045.

Regarding the procedural autonomy of the member states, the Court has stated that the reference to the national legal rules works in the absence of stipulations which should harmonize national law procedure existing in the community law. National judges cannot apply to the actions based on the infringement of the community law norms more severe legal rules than those applied to national actions with the same object (the principle of equivalency/of national treatment)[53] and in all cases the protection ensured for the justiciables must be effective (the principle of effectiveness)[54]. As a consequence, national jurisdictions must ensure the enforcement of the EU law with the same effectiveness and rigour as they do it for the enforcement of the national law[55].

Concerning the principle of equivalency, we mention that according to a constant case-law all the legal rules applicable to actions should be applied without a distinction both to actions derived from the infringement of EU law and to actions derived from the non-observance of the domestic law[56]. However, this principle does not oblige a member state to enlarge its most favourable legal treatments concerning all the actions introduced in a certain law domain[57].

4. The procedural autonomy of the member states concerning the European judicial framework

In a general point of view, the enforcement of the EU law hasn't brought great alterations in the national legal system. Despite the absence of the community procedural norms the member states have procedural autonomy on the condition of the observance of the principles of equivalency and effectiveness (analysed before). The enforcement of Treaty of Amsterdam has created a particular situation concerning the European judicial framework. Article 29 from EUT (and article 61 ECT) stipulates the target of establishing a framework based on liberty, security and justice with the observance of the fundamental rights and of the different law systems and their juridical customs. But, by introducing article 65 in ECT the processual law – as it was stated in the doctrine – it became a self-objective of the community construction[58]. This text is resumed in Treaty of Lisboa (article 81 EUFT) and it stipulates the enactment of measures in the civil juridical cooperation with cross-border implications. The 2nd paragraph, letter f) provides that it comes to the "elimination of the obstacles regarding the normal developpment of civil procedural rules enforced in the member states". The main objectives in this domain are the juridical security and the free access to justice equality which involves various aspects: an easier identification of the competent jurisdiction, a clear indication of the enforceable law, the existence of fast and equitable trials and also the existence of effective execution proceedings. Legal proceedings must conffer to private persons the same guarantees thus

[53] To be seen, EECJ, 12th September 2006, Case *Cauza Eman and Sevinger/ College van Burgemeester en Wethouders van Den Haag*, C-300/2004, ECR I-8055.

[54] EECJ, 9th July, *Case Bozetti*, mentioned before.

[55] In the decision pronnounced in case Rewe, the Court states that "any type of action provided by the national law must be used to ensure the observance of the community norms which have a direct effect in the same conditions of admissibility and procedure which ensure the enforcement of the national law" - Case Rewe Handelgesellschaft Nord MBH and others, Aff. 158/80, Rec. p. 1805.

[56] To be seen in this respect decision from 15th September 1998, *Edis*, C-231/96, Rec., p. I-4951, point 36, decision on 1st December 1998, *Levez*, C-326/96, Rec., p. I-7835, point 41, decision on 16th May 2000, *Preston and other*, C-78/98, Rec., p. I-3201, punctul 55, Decision on 19th September 2006, *i-21 Germany and Arcor*, C-392/04 and C-422/04, Rec., p. I-8559, point 62 and also Decision on 26th January 2010, Transportes Urbanos y Servicios Generales, unpublished, point 33.

[57] Decision *Levez*, mentioned before, point 42, decision Transportes Urbanos y Servicios Generales (mentioned), point 34.

[58] Mathias Audit, *Autonomie procedurale et espace judiciaire europeen*, în *L'execution du droit de l'Union, entre mecanismes communautaires et droits nationaux*, ed. Jacqueline Dutheil de la Rochere, (Bruxelles: Bruylant 2009), 254.

the legal treatment shouldn't be unequal amongst the different jurisdictions. The rules may be different but they must be equivalent one to another.

The doctrine states with good reason[59] that once with the European judicial framework the principle of procedural autonomy is redefined; this principle is "diluted" in this legal framework because of the intrinsic incompatibility between the common procedural norms and the preservation of the national processual laws. Basing on the stipulations mentioned above, a common procedural law is wanted to be developped in order to replace the national provisions enforced in this matter (inclusively regarding the competence, the procedure or the effects of the judicial decisions)[60].

The Court of Justice has brought its contribution to the unity of the European procedural law. The Court considered that a certain uniformity or at least an equivalency between the domestic procedural laws is required[61].

In any case, at the present moment it can be discussed only about a minimal approach in the procedural domain for cross-border cases and not about a material law, at least for the moment. It's obvious that certain domains are very sensitive and some of the EU member states insist on the fact that the EU should not exceed its competences in these domains. On the other hand, the judicial cooperation based on the mutual recognition involves the existence of a mutual trust which can be realized only by a minimal harmonization of the procedural and enforcement legal rules. As a overall view, the principle of procedural autonomy in the domain of the European judicial framework is being seriously discussed, national procedural laws must be subordinated to this framework formation. According to the doctrine, a possible "fracture" of the processual law could interfere, which could also involve a complication both for the judge and for the justiciables. Thus, two processual laws would coexist in front of the national judge: a specific one which is enforceable in intra-community litigations and it is common to all member states and a national law enforceable to any other types of litigations[62].

5. Conclusions

A proper and a correct enforcement of the EU legislation is essential for the maintenance of a solid basis of the EU and it also important for the achievement of the exepcted European policies impact. The construction of an autonomous legal order of the EU completed with the national legal orders and with an extremely complex and coherent case-law hadn't been enough in order to ensure the effective enforcement of the EU law. In this respect, there are necessary more combined efforts of the EU institutions and of the member states in order to achieve this goal.

Nowadays, the enforcement of the EU law has to cope with great challenges. For a long time, the Community and the Union performed in their legislative competence, they increased their normative production and they offered it a binding force in the member states' territories; thus, they hoped to get closer to carryout the fixed goals. At the present moment it is considered that this legislative abundance has complicated the acknowledge and the enforcement of the European norms, thus the legal system became complex and to a certain extent it becam unenforceable. Under these circumstances, working out of some operational enforcement criteria and creating new enforcement instruments prove to be necessary in order to offer effectiveness to EU legislation. It comes to limit

[59] M. Audit, *Autonomie procedurale et espace judiciaire europeen...*

[60] The enactment of various instruments which institute a series of European proceedings is explanatory; for instance: the European executory title (Regulations 805/2004),, the proceeding of European writ of debt (Regulations 1896/2006) or the regulations of little conflicts (Regulations 861/2007).

[61] To be seen, EECJ, 8th May 2003, *Gantner*, Case C-111/01 or EECJ, 27th April 2004, *Turner/Grovit*, Case C-159/02, Rev. 654.

[62] M. Audit, *Autonomie procedurale et espace judiciaire europeen...*,260-261. According to the author, the solution would be a determined uniformization of the member states processual laws basing on the EU law which could become a standard law for the procedural law of the member states.

the legislative production and to improve its effectiveness thus charging the member states with enlarged obligations in concordance with the EU law[63].

Generally speaking, it can be stated that the EU's law execution principally bases on the Member States competences which are exercised according to the institutional and procedural autonomy principles developped by the community case-law but, at the same time respecting the cooperation and loialty obligations. It comes to an indirect administration which interferes in the absence of an European descentralized administration, the EU Member States have the responsibility to ensure the administrative genuine execution of EU's law by taking individual decisions and working out material acts. The method of enforcement the European legislation reasserts a fundamental descentralization principle, establishing an "executive federalism" – as it has been stated in the doctrine. On the strength of it, if the legislative function is prevailingly controlled by the institutions, then the legislative acts' executions falls on the Member States, on the ground of a self-competence or a delegated one (it concerns an exclusive community competence).

As a consequence of the explanations brought by Treaty of Lisboa (article 291 EUFT) it can be stated that the member states are the titulars of the EU executive function. This competence of the member states represent a general principle. The intervention of the European institutions can be only subsidiary because they have a limited competence. The very necessity of an uniform execution of the EU acts justifies and imposes the entrusting of these obligations to the European echelon[64].

In the enforcement of EU law, the Member States preserve an institutional and a procedural autonomy which is acknowledged even by the Court of Justice. This autonomy involves, in the main, the fact that the protection of the rights acquired by the justiciables as a consequence of the community direct invoking regulations it is also ensured within the national legal systems by the domestic juridical instruments. As a consequence, national law is the one which decides the types and the powers of the authorities entitled to interfere.

Thus, the institutional and procedural autonomy of the Member States represent an "expression of a preserved sovereignity"[65]. The concrete signification of this autonomy is that the Member States have to lay their means by which they carry out their executive mission at the disposal of the EU. But, they have the right to choose both the bodies charged with the execution and the proceedings and legal forms that are applicable for the enforcement of the EU law.

The necessity of ensuring a unitary application and of guaranteeing an effective protection of the rights deriving from the community norms, especially because of the increasement diversity of the national systems as a consequence of the successive accessions, it has determined the progressive introduction of some case-law limitations regarding the institutional and procedural autonomy of the member states. Thus, the rules of conduct which are compulsory for the member states in the exercise of their execution competences are clearly defined, their autonomy is directed and controlled in order to avoid the deviations that can lead to the infringement of the EU law.

A particular situation has been noticed in the European judicial framework. This domain has registered the greatest evolutions in the last years. It is also an important uniformization of the procedural law of the member states, existing the possibility to turn it into a common processual law which should replace the national legal rules applicable in this matter. The problem which interferes in this case is that of a national processual law halving which involves the existence of two categories of laws: some of them enforceable to intra-unional litigations which is common to all member states and other laws enforceable to other types of litigations which could overturn the national judicial system. A solution that should be taken into consideration is that of a determined uniformization of the processual law of the member states; thus the EU law could become a standard law for the

[63] L. Azoulai, *op. cit*., pp. 4-5.
[64] D. Ritleng, *op. cit*., p. 49.
[65] R. Mehdi, *L'autonomie institutionelle et procedurale et le droit administratif*, in *Droit administratif europeen*, ed. J.- B. Auby, J. D. de la Roche (Bruxelles, Bruylant, 2007), 687.

procedural law of the member states[66]. However, it's obvious that such a proposal is subordinated to the future developments in this matter and we should take into consideration that these evolutions depend on the political will of the member states, in a great extent.

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[66] For this proposal, to be seen M. Audit, *Autonomie procedurale* ...,. 260-261.

EFFECTIVENESS OF EU LAW IN MEMBER STATES

ANCA-MAGDA VLAICU[*]

Abstract
When the original Rome Treaty was drafted, it was envisaged by the authors that the procedure as set out in what is now article 258 T.F.E.U. (infringement procedure) would be the primary means by which EU law is enforced - a "centralized" and "public" form of enforcement assured by the ECJ, the Commission and Member States, which was itself innovative, since most international treaties contained no such mechanism. It was a point of view shared by Member States, who could see no reason why provisions of EC Treaties should be treated any differently from those of other international treaties.
Thus, on the one hand, the effect of international treaties was generally governed by the principle that they cannot by themselves create rights and obligations for individuals, but only for contracting states - therefore, states were considered the only ones entitled to claim respect of international norms in international courts (individuals and national courts were excluded); on the other hand, as the text of EC treaties made no specific reference to the effect their provisions were to have, the general rule governing international treaties should also apply to them. The European Court of Justice disagreed and engaged in a prolonged judicial activism, resulting in the creation of other legal mechanisms by which national courts and individuals (rather than ECJ, Commission and Member States) were to take the leading role in the enforcement of EU law - a "decentralized" and "private" form of enforcement, governed by three interrelated principles developed jurisprudentially by the ECJ: direct effect, indirect effect and state liability.
In this context, the purpose of this paper is to provide an overview of actual means of EU law enforcement, as presented above; to this end, there will be considered the legal/judicial basis, scope, limits and practical difficulties of the "centralized" and "decentralized" form of enforcement.

Keywords: *infringement, direct effect, incidental horizontal effect, indirect effect, state liability*

1. Introduction

The paper intends to provide an overview of primary means by way of which, at present, EU law is enforced against Member States, national authorities and individuals.

The topic proposed is central for EU law, both from theoretical and practical point of view.

From a theoretical perspective, the importance of analysis results, on the one hand, from the fact that means of EU law enforcement are different from those provided in case of international law enforcement; on the other hand, nor treaties or the other EU law sources identify a general scheme of these means (of which some have been established, in fact, by the case-law of Court of Justice of the European Union) – the analysis should therefore prove useful, taking into account the lack of legal provisions and also the evolving jurisprudence of ECJ on the subject.

From a practical perspective, although EU law measures should willingly be complied with in Member States, experience has proved that existence of coercive methods of enforcement is still necessary, and a good knowledge of those methods is undoubtedly useful.

In this context, the paper will systematically present the public and private means of EU law enforcement which are part of the complex coercive means at the disposal of all those involved in application of EU law (EU institutions, Member States, national authorities, individuals); it will also discuss their legal or judicial basis, area of application, limits and possible interferences; to this end, both ECJ case-law and doctrinal opinions will be presented.

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2. General aspects

Since none of the sources of EU law provided a general scheme of means ensuring EU law enforcement, the difficult task of conceptualising most of them fell on the European Court of Justice; the concepts established by ECJ were subsequently discussed and systematized by juridical literature.

The starting point was represented by the distinction between „public" and „private" enforcement – „Law can be enforced either through a public arm of government, which is accorded power to bring infringers to court, or through actions brought by private individuals, or a mixture of the two"[1].

The „public" enforcement was stipulated by the EEC Treaty and initially considered as the only means of enforcement; nevertheless, the ECJ conceived a complex system of „private" means, at the same time pointing out that „public" and „private" ways of enforcement do not exclude each other, but must coexist in order to ensure a complete effectiveness of EU law in Member States[2].

It can be concluded from those presented above that, at the present time, there are two channels which secure compliance with EU law in Member States: on the one hand, a „centralised" and „public" system of enforcement, assured by the Commission/Member States through actions brought before ECJ, and on the other hand a „decentralised"[3] and „private" system, assured by national courts in proceedings brought by individuals; the coexistence of these two forms amounts to what the European Court of Justice[4] and juridical literature[5] have referred to as „dual vigilance".

3. Public enforcement of EU law

When the original Rome Treatiy was drafted, the principal channel of Community law enforcement conceived by the authors consisted in a specific procedure by which the Commission/Member States could demand sanction of failure to fulfil an obligation under the Treaty, through actions brought before the European Court of Justice.

It was a „public" and „centralised" form of enforcement of Community law, stipulated by articles 169-170 of the Treaty and assured by the ECJ, the Commission and Member States, which was itself innovative, as most international treaties contained no such mechanism of international law enforcement.

The procedure mentioned above still exists and finds its actual legal basis in the provisions of articles 258-259 T.F.E.U.[6]

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[1] P. Craig, G. de Burca, *EU Law, Text, Cases And Materials*, Fourth Edition, Oxford University Press, 2007, p. 269 (translated to Romanian by B. Andreşan Grigoriu and T. Ştefan, Hamangiu Publishing, Bucharest, 2009, p. 335).

[2] A. Evans, *A Texbook on EU Law*, Hart Publishing, Oxford, 1998, p. 186.

[3] J. Engstrom, *The Europeanisation of Remedies and Procedures through Judge-made Law – Can a Trojan Horse Achieve Effectiveness?*, European University Institute, Doctoral dissertation, Florence, 2009, p. 1; C. Boch, *The Iroquois at the Kirchberg; or some Naive Remarks on the Status and Relevance of Direct Effect – Dual Vigilance Revisited*, in Jean Monnet Working Papers no. 6/1999, published by Jean Monnet Center for International and Regional Economic Law & Justice, NYU School of Law, p. 1.

[4] „The vigilance of individuals concerned to protect their rights amounts to an effective supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States." – ECJ decision, 05.02.1963, *NV Algemene Transport - en Expeditie Onderneming van Gend & Loos c. Netherlands Inland Revenue Administration*, C-26/62.

[5] B. Moriarty, *Direct Effect, Indirect Effect and State Liability: An Overview*, Irish Journal of European Law, vol. 14, no. 1 and 2, 2007, p. 197-160, p. 100; J. Steiner, L. Woods, C. Twigg-Flesner, *EU Law*, Ninth Edition, Oxford University Press, 2006, p. 112; C. Bosch, *op. cit.*, p. 1; A. Howard, D. J. Rhee, *Private Enforcement – A Complete System of Remedies ?*, in *A True European. Essays for Judge David Edward*, edited by Mark Hoskins and William Robinson, Hart Publishing, Oxford and Portland, Oregon, 2003, p. 307-326, p. 308; R. Munteanu, *Drept european. Evoluţie – Instituţii - Ordine juridică*, Oscar Print Publishing, Bucharest, 1996, p. 347.

[6] Ex articles 226 and 227 EC Treaty.

There are nevertheless significant limits of this form of EU law enforcement, which will be presented further on.

The first and most important limit is represented by the fact that individuals[7] take absolutely no part in this procedure (which was, indeed, conceived not for the protection of individuals, but as a form of EU law enforcement) – therefore, legal proceedings cannot either be initiated by individuals, nor used against them (active procedural position is attributed to the Commission/Member States[8], and passive procedural position to Member States).

Secondly, in most of the cases, the Commission itself finds out non-compliance with EU law only as a consequence of individual complaints (not every breach is as blatant as to determine the Commission to take action or result in a complaint on part of a Member State) and therefore its actions depends on the vigilance of individuals; on the other hand, the Commission does not have the institutional capacity to prosecute but a rather small number of infringements; finally, the Commission has discretionary power over the decision to initiate or not legal proceedings[9].

Thirdly, the sanction itself in case the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties is rather ineffective, as long as the ECJ decision (althouhg compulsory) is not self-executing and has only declarative effect – the Court limits itself to declare non-compliance of a Member State with an EU law obligation[10].

Thus, the Court cannot impose on Member States in breach certain obligations or particular measures – it is only for the domestic authorities to establish and carry on measures of execution of the infringed EU obligation so as comply with the judgment of the Court; the most „burdensome" sanction consists, eventually, in imposing on the Member State concerned payment of a lump sum or penalty payment (the Commission indicates the amount of the lump sum or penalty payment to be paid by the Member State which it considers appropriate in the circumstances[11])[12].

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[7] Both physical and moral persons - A. Fuerea, *Drept comunitar European. Partea generală*, All Beck Publishing, Bucharest, 2003, p. 34.

[8] The procedure stipulated by article 258 T.F.E.U. is used frequently by the Commission; by contrast, Member States themselves make use of provisions of article 259 T.F.E.U. quite rarely (e.g., ECJ decision, 04.10.1979, *French Republic v. United Kingdom of Great Britain and Northern Ireland*, C-141/78 and ECJ decision, 16.05.2000, *Kingdom of Belgium v. Kingdom of Spain*, C-388/95), choosing instead to inform the Commission of the infringement, which continues the procedure in conformity to article 258 T.F.E.U.

[9] O. Ţinca, *Drept Comunitar General*, Third Edition, Lumina Lex Publishing, Bucharest, 2005, p. 337; C. Boch, *op. cit.*, p. 2, points out that in practice, in most cases, Commission's decision depends on political considerations.

[10] This is the reason why „judgements declaring Member States in breach of their Community obligations were all too often ignored" – C. Boch, *op. cit.*, p. 4.

[11] According to article 260 T.F.E.U. (ex article 228 EC Treaty).

[12] G. Gornig, I. E. Rusu, *Dreptul Uniunii Europene*, Second Edition, C. H. Beck Publishing, Bucharest, 2007, p. 104, pointed out that it was only in 2000 when the ECJ first decided to impose on a Member State penalty payments (ECJ decision, 04.07.2000, Commission v. Greece, C-387/97) – as a consequence of having been found in breach of EU obligations by judgment of the Court from April 1992, case C-45/91, Greece had been imposed to take measures necessary for the disposal of waste and toxic and dangerous waste from the area the area of Chania without endangering human health and without harming the environment in accordance with Article 4 of Council Directive 75/442/EEC of 15 July 1975; as Greece had not implemented the measures necessary to comply with the judgment in Case C-45/91, penalty payments were ordered by the Court. "Greece has been imposed payment of penalty payments (20.000 Euros per day) ... The Court took into consideration calculations proposed by the Commission, which assured transparency, predictibility, legal certainty and proportionality of the measure".

4. Private enforcement of EU law

In this context, starting from the first and well-known case Van Gend en Loos[13] up to the present, the European Court of Justice "has engaged in a prolonged and radical programme"[14], which resulted in the judicial establishment of methods by means of which „national courts, rather than the Court of Justice, are expected to play the lead role in the enforcement of Community law against the Member States, national authorities and private parties"[15].

The Court thus legitimated a „private" mechanism of EU law enforcement which integrated individuals into UE legal order, by establishing their capacity to invoke EU law, respectivelly challenge domestic non-compliance with EU provisions before national courts[16].

English literature[17] appreciated that three principal means have been conceived and subsequently developped by the Court: direct effect, indirect effect (harmonious interpretation of domestic law in accordance to EU law) and state liability for breach of EU provisions (methods to integrate EU law into domestic law[18]).

In addition to these channels of compliance, juridical literature also made reference to the preliminary ruling procedure[19] regulated by article 267 T.F.E.U.[20] and incidental horizontal effect[21] consacrated by the Court.

Preliminary ruling procedure will not be discussed in the present paper – although it undoubtedly allows individuals to invoke EU law before domestic courts, its efficiency is still weak concerning individuals' implication in the procedure and their protection.

On the one hand, decision to send the case before ECJ belongs exclusively to domestic courts (individuals have absolutely no competence in this respect), and on the other hand the procedure was designed in order to ensure the correct and uniform application of EU law by internal courts, and not for the purpose of individual protection.

Concerning incidental horizontal effect, for reasons to be presented, its efficiency is also diminished, mainly because this judicially established notion has not yet been intirely clarified by the Court.

4. 1. Direct effect

No legal provision consacrated direct effect, and therefore the main role in establishing the theory belonged to the ECJ[22] – the Treaty on the Functioning of the European Union contains a

[13] ECJ decision, 05.02.1963, *NV Algemene Transport - en Expeditie Onderneming van Gend & Loos c. Netherlands Inland Revenue Administration*, C-26/62, quoted before.

[14] D. Chalmers, C. Hadjiemmanuil, G. Monti, A. Tomkins, *European Union Law, Text and Materials*, Cambridge University Press, 2006, p. 365.

[15] Idem; B. Moriarty, *op. cit.*, p. 159.

[16] A. Howard, D. J. Rhee, *op. cit.*, p. 307, underline the exclusive judicial effort of ECJ which, in spite of the contrary opinion expressed both by G.A. Roemer and the Member States in Van Gend case, has dismissed the argument that the Treaty addresses only to Member States and thus the only means of enforcement is the one stipulated by ex articles 169 and 170 EEC Treaty, emphasising that the Treaty also creates individual rights, which can be invoked before domestic courts.

[17] P. Craig, G. de Burca, *op. cit.*, p. 269-300; D. Chalmers, C. Hadjiemmanuil, G. Monti, A. Tomkins, *op. cit.*, p. 365; J. Steiner, L. Woods, C. Twigg-Flesner, *op. cit.*, p.89; S. Prechal, *Member State Liability and Direct Effect: What's the Difference After All?*, European Business Law Review, vol. 17, no. 2, 2006, p. 299-316, p. 300.

[18] See I. Moroianu Zlătescu, R. C. Demetrescu, *Drept Instituțional European*, Olimp Publishing, Bucharest, 1999, p. 140.

[19] C. Bosch, *op. cit.*, p. 1.

[20] Ex article 177 EEC Treaty, respectively ex article 234 EC Treaty.

[21] B. Moriarty, *op. cit.*, p. 112.

[22] The theories of direct effect and supremacy of EU law (the latter was consacrated by ECJ decision, 25.06.1964, *Flaminio Costa v. E.N.E.L.*, C-6/64) have been established together (this is the reason why there are cases where the Court discusses both theories in the same judgment); in addition, direct effect and supremacy are inextricably

single disposition regarding direct applicability[23] (and not direct effect) of EU regulations (and not all sources of EU law), respectively article 288 T.F.U.E.[24], according to which regulations are directly applicable in all Member States.

In essence, direct effect theory[25] stipulates that a EU provision (should certain conditions be satisfied) has the capacity of creating individual rights and obligations, which can be relied on before national courts[26].

It can easily be observed that, by establishing direct effect theory, the most important deficiency of the infringement procedure has been eliminated – individuals have been brought into the legal order of European Union and could rely directly on EU law[27].

On the other hand, enforcement of measures of EU law partially shifted to domestic courts[28], which from this point on could sanction Member States at national level for failure to comply by means of direct application of EU provisions[29].

Effectiveness of EU law was therefore achieved even in cases where the „public" means of enforcement had proved ineffective – e.g., Member States ignored an ECJ decision declaring them in breach of EU law, choosing instead to pay the lump sum or penalties imposed.

Nevertheless, direct effect theory has important limitations[30], which result both from the Court's case-law, and also from national legislations.

In this respect, it should be noticed that not every source of EU law has been acknowledged the capacity of producing direct effect (e.g., the situation of non-binding secondary measures of EU law - recommendations and opinions).

Also, there is not always the case that the EU norm concerned fulfils the judicially established direct effect criteria of clearness, precision and unconditionality (this is the situation when direct effect is conditional).

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linked, as the problem of solving a conflict between a domestic and a EU law provision and decide which one should apply to the dispute (supremacy) cannot be settled but after having already established that both cathegories of norms produce effect in the national system concerned (direct effect).

[23] Direct applicability defines a specific characteristic of EU law which means that it needs no transposition measures in order to be applied at national level (therefore, EU law can be directly applied by domestic courts or national administration to particular litigations).

[24] Ex article 249 EC Treaty.

[25] Consacrated by ECJ decision, 05.02.1963, *NV Algemene Transport - en Expeditie Onderneming van Gend & Loos c. Netherlands Inland Revenue Administration*, C-26/62, quoted before.

[26] The narrower sense of direct effect consists in the capacity of a provision of EU law to confer rights on individuals (this sense is referred to as „subjective direct effect"); there is also a broader sense of the definition of direct effect, which can be expressed as the capacity of a EU law provision (clear, precise and unconditional) to be relied on by individuals before national courts – the provision does not necessarily create individual rights, but individuals are still interested in invoking it, e.g., in order to protect themselves in a dispute with a national authority or obtain disapplication of a national provision contrary to EU law (this sense is known as „objective direct effect").

[27] By contrast to the situation of „international law, where individuals are powerless before the all mighty State, the doctrine of direct effect of EC law opened for individuals effective channels, and thus made EC law a reality states should respect"– P. Pescatore, *L'effet direct du droit communautaire*, Paricrisie Luxembourgeoise, Imprimerie Joseph Beffort, Luxembourg, 1975, p. 19.

[28] Juridical literature pointed out the importance of the role played by domestic courts in enforcement of EU measures - R. Kovar, *L'integrité de l'effet direct du droit communautaire selon la jurisprudence de la Cour de Justice de la Communauté*, Das Europa der zweiten Generation, Nomos Verlagsgesellschaft, Baden-Baden, 1981, p. 164; also, see P. Pescatore, *op. cit.*, p. 1 – the author concludes that integration of EU law into domestic systems of Member States by way of direct effect entrusts its application mainly to the national judge and national courts.

[29] Direct effect "does not have the sole purpose of individual protection, but at the same time aims to guarantee effectiveness of EC law in national juridical orders." - D. Simon, *Le système juridique communautaire*, Second Edition, Presses Universitaires de France, Paris, 1998, p. 268.

[30] For a critical point of view over direct effect doctrine and an exhaustive presentation of its deficiencies - I. Sebba, *The Doctrine of „Direct Effect": A Malignant Disease of Community Law*, in *Legal Issues of European Integration*, Law Review of the Europa Instituut, no. 2/1995, Amsterdam University, p. 35-58.

Finally, there are UE measures in case of which only vertical direct effect was accepted (the well-known situation of directives, where the Court constantly denied horizontal direct effect)[31].

In the first case (EU measures which do not have the capacity of producing direct effect), the theory of direct effect is totally ineffective and, in addition, the infringement procedure is also not available, given the fact that recommendations and opinions are non-binding (effectiveness of these EU measures is therefore difficult to be achieved, but for the situation they are willingly accepted by the Member States).

In the second situation (failure to satisfy the conditions imposed in situation of conditional direct effect), although direct effect theory still remains useless, the public way of enforcement provided by article 258 T.F.E.U. becomes available, as the EU sources concerned are binding (nevertheless, in this situation, there is practically a turn over to the initially single form of enforcement stipulated by ex article 169 EEC Treaty).

The third case (no horizontal direct effect for directives) represents one of the most important judicially established limit of the doctrine, which means that non-implemented/inadequately implemented directives cannot be relied on in litigations between private parties (regardless that the directive in question should fully satisfy direct effect criteria).

Some authors[32] remarked also limitations imposed by Member States' legislation – litigations at national level where direct effect of EU measures is relied on must be judged by domestic courts in accordance to their own internal procedural rules, different fron one state to another, and which have obviously not been adopted for the purpose of enforcing EU law (e.g., a case solved by a Romanian court by application of the status of limitation concept[33] renders impossible the analysis of the merits, and therefore the enforcement of rights conferred by EU provisions on individual parties by way of direct effect theory).

4. 2. Horizontal incidental effect

Horizontal incidental direct effect was also established judicially by the ECJ[34], with the purpose of lessening the deficiency of direct effect doctrine consisting in denial of horizontal direct effect in case of directives; in essence, it means that directives can be relied on in litigations between private parties, in order to set apart inconsistent national legislation.

This does not mean that the directive concerned creates rights or obligations for individuals, but simply that it has an „exclusionary" impact of contrary domestic law and the protection it provides for individuals; the „vacuum" thus created is filled in by another conforming national provision, and private parties can therefore be subject of liability deriving from obligations created by the latter provision.

In other words, in such cases, the directive is invoked in litigations between individuals to preclude the application of inconsistent domestic law, and the result is that parties are exposed to a potential liability[35] under another consistent provision of national law - which would not have happened if offending national law would have been applied.

English doctrine[36] concluded that „The crucial factor in these horizontal cases is that one party suffers a legal detriment and the other party gains a legal advantage from the terms of an unimplemented directive".

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[31] In the particular case of directives, acknowledgement of direct effect is in fact a sanction against the Member State to which the directive is addressed – or, the sanction should apply strictly to the Member State who committed a wrong, and not also to other subjects, such as individuals.

[32] C. Boch, *op. cit.*, p. 6.

[33] In Romanian law – "excepția prescripției dreptului la acțiune".

[34] ECJ decision, 30.04.1996, *CIA Security International SA v. Signalson SA and Securitel SPRL*, C-194/94; ECJ decision, 26.09.2000, *Unilever Italia SpA v. Central Food SpA*, C-443/98.

[35] Although the State itself is in breach of EU law, individuals must accept the advantages/disadvantages of exclusion of the national law.

[36] P. Craig, G. de Burca, *op. cit.*, p. 297.

The most important limit of incidental horizontal direct effect theory, remarked by juridical literature[37], is that it is often difficult in practice to clearly distinguish it from horizontal direct effect theory, as the case-law of the Court in the area of incidental horizontal direct effect is rather confuse.

Thus, the no-horizontal-direct-effect-of-directives rule (unimplemented/inadequately implemented directives cannot be relied on in litigations between private parties) is based on the argument that directives cannot impose obligations upon individuals – or, incidental horizontal direct effect has the result that, although the directive itself does not create obligations upon individuals, it allows removal of domestic legal protection and makes the individual subject to potential liability; thus, indirectly, directives produce effects in private litigations.

4. 3. Indirect effect

Most deficiences presented above were stepped aside by creation of indirect effect theory[38] (a second „private" means of enforcement of EU law), according to which domestic courts[39] must interpret national legislation in conformity with EU law.

It must be underlined that indirect effect theory applies to all EU sources[40], even those non-binding, such as recommendations[41]; also, it applies to all measures of national law (including domestic case-law[42]).

In addition, indirect effect theory applies regardless of fulfilment of direct effect criteria[43] by the EU provision concerned – in this respect (independence of theories of direct and indirect effect), it was pointed out[44] that „duty to construe national law in conformity with Community law ... gives an individual the possibility of obtaining satisfaction, not because he can derive rights from directly effective Community law ... , but because he can derive rights from national law once it has been interpreted in conformity with Community law."

In the same line of reasoning, indirect effect operates independently of complete direct effect –directives do not have horizontal direct effect, but national courts are still under the obligation to interpret national law according to directives even in litigations between private parties.

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[37] B. Moriarty, *op. cit.*, p. 155; P. Craig, G. De Burca, *op. cit.*, p. 296.

[38] The Court established the indirect effect theory in Von Colson case – ECJ decision, 10.04.1984, *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*, C-14/83, based on provisions of ex article 5 EEC Treaty (ex article 10 EC Treaty and the actual article 4 alin. 3 T.E.U.).

[39] Indirect effect theory is to be considered not only by domestic courts, but also by all national authorities applying EU law, either legislative, administrative or judicial – G. C. R. Iglesias, J.-P. Keppenne, *L'incidence du droit communautaire sur la droit national*, Mélanges en hommage à Michel Waelbroeck, vol. I, Bruylant, Bruxelles, 1999, p. 530.

[40] In case of Treaties – ECJ decision, 05.10.1994, *Van Munster v. Rijksdienst voor Pensioenen*, C-165/91, ECJ decision, 26.09.2000, *Rijksdienst voor Pensioenen v. Robert Engelbrecht*, C-262/97; in case of regulations – ECJ decision, 07.01.2004, *Montres Rolex S.A. and others v. Customs Authorities Kittsee-Austria*, C-60/02; in case of directives – ECJ decision, 10.04.1984, *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*, C-14/83; liberalisation of indirect effect theory was consacrated in the Pfeiffer case (ECJ decision, 05.10.2004, *Bernhard Pfeiffer, Wilhelm Roith, Albert Süß, Michael Winter, Klaus Nestvogel, Roswitha Zeller, Matthias Döbele v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV*, joined cases C-397/01 to C-403/01), where the Court stipulated that requirement of conforming interpretation is „inherent to the system created by the Treaties" and thus applies to all sources of EU law (including decisions - measures of secondary binding EU law - in case of which it could not have been identified a case explicitly taking in discussion harmonious interpretation).

[41] ECJ decision, 13.12.1989, *Salvatore Grimaldi v. Fonds des maladies professionnelles*, C-322/88.

[42] L. Flynn, *Simple catchwords and complex legal realities: recent developments concerning the juridical effects of EC legal norms*, Irish Law Times, no. 16, 2000, p. 260, exemplifies by ECJ decison, 13.07.2000, *Centrosteel Srl v. Adipol GmbH*, C-456/98, where the Court makes reference to case-law.

[43] Idem, p. 260 - „the direct effect of a legal norm forming part of the Community legal order is not the only way in which such a norm can have juridical effect ... principle of loyal interpretation also gives rise to such effect even in the case of measures which do not have direct effect themselves".

[44] W. van Gerven, *From "direct effect" to "effective judicial protection"*, in Schritfenreihe der Europaischen Rechtsakademie Trier, Bundesanzeiger, 1996, Band 12, Academy of European Law, Trier, p. 31.

Nevertheless, establishment of harmonious interpretation theory succeeded only in smoothing the limit consisting in prohibition of horizontal direct effect of directives, but not creating a secure means of repairing of loss suffered by individuals as a consequence of non-implemented/inadequately implemented directives – this is because the juridical effect of such a directive concerning the rights it confers on individuals is left to the power of appreciation of domestic courts, which are sovereign in the interpretation of national law according to the said directive[45].

On the other hand, the Court itself was fully aware of the risks implied by use of indirect effect theory, and therefore specifically established two important limits of its application.

Firstly, the Court has held that „in applying national law, ... , the national court called upon to interpret ... is required to do so, *as far as possible*, in the light of the wording and the purpose of the directive"[46] – indirect effect does not require thus *contra legem* interpretation of national law (the force of the interpretative obligation is not so strong as to impose a provision of domestic law to be given a meaning that clearly contradicts its ordinary meaning)[47].

Secondly, the Court was very cautious in allowing application of indirect effect in the area of criminal law, where legal certainty is especially important for the protection of individual rights and freedoms[48] - provisions of criminal law must be interpreted and applied *stricto sensu*, and indirect effect cannot result in determining or aggravating liability in criminal law[49].

4. 4. State liability

As a consequence of limits presented above, there were still cases when individuals could not use direct/indirect effect theories, and therefore a third „private"[50] way of enforcement of EU law against the Member States was conceived by the Court[51], namely the theory[52] of state liability for breach of EU law.

The starting point was the situation of unimplemented/inadequately implemented directives – in horizontal litigations, rather than attempting to enforce the obligation stipulated by such directives against the opposite party by way of incidental horizontal direct effect or indirect effect[53], the individual can bring proceedings for damages against the state (a much more effective means to impose Member States correct and in due time implementation of directives).

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[45] For evolution of English case-law concerning application of harmonious interpretation theory and cases where it was denied, see J. Steiner, L. Woods, C. Twigg-Flesner, *op. cit.*, p. 108 - 110.

[46] ECJ decision, 13.11.1990, *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, C-106/89.

[47] ECJ decision, 16.12.1993, *Teodoro Wagner Miret v. Fondo de Garantía Salarial*, C-334/92 (where the Court suggested legal proceedings based on state liability procedure, as indirect effect procedure was inapplicable) – for a comment on this decision, see S. Drake, *Twenty years after Van Colson: the impact of "indirect effect" on the protection of the individual's Community rights*, European Law Review, vol. 30, no. 3, 2005, p. 329-348, p. 342 ("As a result, it is clear that the duty of purposive interpretation imposed on national courts is not absolute and is not designed to give national courts a legislative function so as to allow them to re-write national law"); in the same line of reasoning, see D. Chalmers, C. Hadjiemmanuil, G. Monti, A. Tomkins, *op. cit.*, p. 365.

[48] ECJ decision, 26.09.1996, *Criminal proceedings against Luciano Arcaro*, C-168/95.

[49] ECJ decision, 08.10.1987, *Criminal proceedings against Kolpinghuis Nijmegen BV*, C-80/86.

[50] P. Craig, G. de Burca, *op. cit.*, p. 300.

[51] ECJ decision, 19.11.1991, *Andrea Francovich and Danila Bonifaci and others v. Italian Republic*, joined cases C-6/90 and C-9/90.

[52] Some authors use the expression "*principle* of state liability" - D. Chalmers, C. Hadjiemmanuil, G. Monti, A. Tomkins, *op. cit.*, p. 365; T. Ştefan, B. Andreşan Grigoriu, *Drept comunitar*, C. H. Beck, Publishing, Bucharest, 2007, p. 236 or „*doctrine* of state liability " - D. Chalmers, C. Hadjiemmanuil, G. Monti, A. Tomkins, *op. cit.*, p. 391 (interchangeable use of these expressions is also characteristic for direct/indirect effect).

[53] In this case, direct effect theory is inapplicable.

Over the years, application of state liability theory extended beyond the original situation of non-implementation/inadequate implementation of directives[54] (the said theory had been created as a means of enhancing the ability of national courts to enforce directives, still without allowing them full direct effect), and in consequence the state could also be held liable in case of breach of EU law by way of legislative[55], administrative[56] or judicial[57] actions (which did not have to relate to directives at all).

What should firstly be noticed is that state liability theory applies regardless of the direct effect of the concerned EU provision (even in case of a directly effective EU norm, the individual is not imposed to use the direct effect theory prior to bringing proceedings based on state liability theory) - nevertheless, until having been clarified by the Court in *Brasserie du Pecheur*[58] case, this was a subject of debate.

Some domestic courts[59] and a part of juridical literature[60] opinated that state liability as a remedy for breaches of EU law should be made available only in case of infringement of directly effective EU provisions (arguing that non-directly effective norms do not have the capacity of having any juridical effect whatsoever).

There was also an opposite opinion, according to which state liability should apply only for breaches of non-directly effective measures of EU law[61] – individuals can assert their rights by way of direct effect theory if they are directly effective.

The Court dismissed both opinions in the *Brasserie du Pecheur* case, holding that „The right of individuals to rely on directly effective provisions before national courts is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of Community law. That right … cannot, in every case, secure for individuals the benefit of the rights conferred on them by Community law and, in particular, avoid their sustaining damage as a result of a breach of Community law attributable to a Member State."

Secondly, state liability theory is available independently of any prior use of the infringement procedure regulated by articles 258 and 259 T.F.E.U.[62], and this aspect was also clearly stated by the Court in the same *Brasserie du Pecheur* case:

„ … to make the reparation of loss or damage conditional upon the requirement that there must have been a prior finding by the Court of an infringement of Community law attributable to the Member State concerned would be contrary to the principle of the effectiveness of Community law, since it would preclude any right to reparation so long as the presumed infringement had not been the subject of an action brought by the Commission under Article 169 of the Treaty and of a finding of an infringement by the Court. Rights arising for individuals out of Community provisions … cannot

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[54] A. Ward, *Judicial Review and the Rights of Private Parties in EU Law*, Second Edition, Oxford University Press, 2007, p. 73 (the author discusses in detail the means conceived by the Court in order to compensate prohibition of horizontal direct effect of directives).

[55] ECJ decision, 05.03.1996, *Brasserie du Pecheur and Factortame III*, joined cases C-46/93 and C-48/93.

[56] ECJ decision, 26.03.1996, *The Queen v. H. M. Treasury, ex parte British Telecommunications plc.*, C-392/93.

[57] ECJ decision, 30.09.2003, *Gerhard Köbler v. Austria*, C-224/01.

[58] ECJ decision, 05.03.1996, *Brasserie du Pecheur and Factortame III*, joined cases C-46/93 and C-48/93, quoted before.

[59] S. Prechal, *op. cit.*, p. 299, identifies the judgment of Hoge Raad (the Netherlands), 11.06.1993, AB 1994, no. 10, regarding the proceedings which concerned the so-called „Roosendaal-method" of expulsion of aliens. The author points out that, generally, proceedings setteled by domestic courts prior to the *Francovich* decision (the case concerned a non-directly effective directive) implied only application of EU directly effective provisions (for discussion, see A. Barav, *State Liability in Damages for Breach of Community law in the National Courts*, in Heukels and McDonnel (eds), *The Action for Dameges in Community Law*, Kluwer Publishing, Haga, 1997, p. 363).

[60] W. van Gerven, *op. cit.*, p. 40-41.

[61] In this respect, S. Prechal, *op. cit.*, p. 299, makes reference to M. Nettesheim, *Gemeinschaftsrechtliche Vorgaben für das deutsche Staatshaftungsrecht*, Die Offentliche Verwaltung, 1992, p. 1002.

[62] B. Moriarty, *op. cit.*, p. 119.

depend on the Commission's assessment of the expediency of taking action against a Member State pursuant to Article 169 of the Treaty or on the delivery by the Court of any judgment finding an infringement."

In fact, direct effect of the EU provision concerned or prior use of the infringement procedure are not at all mentioned among criteria to be satisfied for incidence of state liability theory (which are: the EU rule of law infringed is intended to confer rights on individuals, the breach is sufficiently serious, and there is a direct causal link between the breach of the obligation imposed on the Member State and the damage sustained by individuals).

This final private way of EU law enforcement also has its limit, belonging to the procedural area, namely the principle of national procedural autonomy, according to which cases involving state liability are to be judged by domestic courts by applying national relevant provisions.

Still, this principle is subject to two conditions: 1. procedural circumstances required by national law may not be less favourable in the context of EU law enforcement than they are in case of norms deriving from domestic law[63]; 2. procedural domestic circumstances must not be applied if their effect is practically to make impossible to exercise the EU rights which national courts are required to enforce[64].

5. Conclusions

There are two channels which secure at present effectiveness of EU law in Member States: on the one hand, a „centralised" and „public" form of enforcement assured by the ECJ, the Commission and Member States, based on the procedure stipulated by articles 258 and 259 T.F.E.U., and on the other hand a „decentralised" and „private" form of enforcement in which national courts and individuals play the leading role, through legal proceedings based either on direct/indirect effect theories, or on the theory of state liability for failure to comply with EU law (the coexistence of these „public" and „private" means of enforcement amounts to the notion of „dual vigilance", initially legitimated by the Court and later accepted in doctrine).

All these „public" and „private" forms of enforcement are legally independent one from another, and their use in practice evolved over the years, as the ECJ attached increasingly more importance to integration of individuals in EU legal order and therefore to the significant contribution of the „private" way of enforcement of EU law[65].

The „public" means of enforcement has never been contested, nor by Member States or doctrine (contestation would anyway have been difficult, as legal basis was provided by the Treaty); on the other hand, in spite of the initial opposition of some of the Member States to the judicial creation of the „private" channels, the theories of direct effect, indirect effect and state liability are nowadays fully accepted.

Judicial acknowledgement of horizontal incidental direct effect remains though highly controversial, especially as a consequence of an insufficient delimitation from the concept of horizontal direct effect (and this is an aspect which needs to be cleared by the Court in its case-law to follow).

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[63] Condition of equivalence.
[64] Condition of effectiveness.
[65] ECJ decision, 25.07.2002, *Unión de Pequeños Agricultores v. Council*, C-50/00 P.

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PUBLIC LAW AS A VICTIM OF THE ECONOMY

MARIUS VĂCĂRELU[*]

Abstract
Every day of 2009 has a common speech: economic crisis and its consequences, not only in economic topics, but also in few others domains, connected with the real economy.However, in this public speech, it was a problem: we must find a guilty element, because it must be someone who was not able to function correct, to not respect some rules that was good many years, but not in first years of 21st century. And, as always, every specialist and whole political class offered an answer. But this is not enough: a crisis has not only causes, but it has its victims. The globalization was one of them; human rights – in few states, young generation is a perpetual victim.
In legal branch, the consequences were much simple: private law (banking law and commercial law) didn't suffer too much, but public law – because whole eyes were settled in this direction – felt this pressure. State intervention in the economy was considered not really political correct, not really a benefit for economies, but something necessary. In fact, public law was considered only a reserve. In this case, can we speak about a de-legitimization of public law? Is the purpose of public law available for 21st century or it become now only a simple reserve, necessary only to solve the "side-slip" of the private law? And, because the connection between private law and the economy is too strong, can we see now the public law as a victim of the economy?

Keywords: *public law, private law, economy, legitimization, victim.*

Introduction

Every day of 2009 has a common speech: economic crisis and its consequences, not only in economic topics, but also in few others domains, connected with the real economy. However, in this public speech, it was a problem: we must find a guilty element, because it must be someone who was not able to function correct, to not respect some rules that was good many years, but not in first years of 21st century. And, as always, every specialist and whole political class offered an answer.

But this is not enough: a crisis has not only causes, but it has its victims. The globalization was one of them; human rights – in few states, young generation is a perpetual victim.

In legal branch, the consequences were much simple: private law (banking law and commercial law) didn't suffer too much, but public law – because whole eyes were settled in this direction – felt this pressure. State intervention in the economy was considered not really political correct, not really a benefit for economies, but something necessary. In fact, public law was considered only a reserve.

But this reserve was forced to solve all the difficulties of banking system – of private law mistakes, in other words. This process must be understood somehow: as a manifestation of private law force? As a demonstration of continue sacrifice of public law during the economic crisis? It is very important to offer an answer to those questions, because, without it, during another new crisis we'll discover that we didn't learnt nothing from this, and we'll make the same mistakes: erare humanum est, perseverare diabolicum!

The author intends to answer underlining few ideas who are still available in legal science, especially in their relation with new socio-political paradigm. In the same time, we must offer a perspective for the future: the dispute between public law and the economy will have, on this lack of resources time, a long continuation: the pressure for both direction of human activity is too big now to can be avoided.

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There is some literature for this subject: less in Romanian doctrine, more in Western Europe and other developed part of the world. But this idea is not too much studied, because it is a Pandora box for a fundamental change to some truths understood as "eternal", after 1989: the complete victory of capitalism (the economy) against communism (state intervention and public law).

The author believes that is time to come back to normal logic in public law and into the economy, because this way of world organization cannot be changed.

Paper Content

1. Toward the end of the 1990s, a group of economists, specializing in finance and building upon the emerging emphasis on institutions, conducted cross-country econometric research to determine what legal rules best contributed to strength in the financial sector and thereby to economic growth. Their studies in Law and Finance represented an unprecedented focus on microeconomic analysis of the influence of legal rules on economic growth. Their work led to another researches by other economists and by lawyers into the role of legal institutions in economic development[1].

A major conclusion reached in their studies was that countries whose legal systems originated in the English common law have enjoyed superior per capita income growth compared with so-called civil law countries, whose law is based on European codes, especially those countries whose law is based on the Napoleonic codes and hence on French law[2].

Their conclusions have drawn criticisms on various grounds, especially because many civil law countries—not only those in Western Europe but also some developing countries—have enjoyed superior economic growth and because many common law countries in the third world have done quite poorly in the economic growth tables.

But this idea is not new, Max Weber had spoken about this is his fundamental book dedicated to the ethics. The religion was seen as an obstacle, the strongest one for the society to achieve economic development. But the center of Weber's study was the relation between Catholics and Protestants, this rivalry being easy to find for empirical studies. But Max Weber didn't imagine the first years of 21st century, when communist China represents the strongest economic force, and its religion is something completely different by the Western Europe; for sure, the Arabic petro-dollars was not imagined by Weber too – and, of course, the deep economic transformation in global political and legal world.

Despite such criticisms of these economists' specific results, the idea that institutions and especially legal institutions are crucial to the process of economic development is now broadly accepted in the academies and in the research departments of international financial institutions such as the World Bank.

When we speak about economic development, we must analyze a framework that includes:

a) A correct attitude for work belonging to the citizens;
b) A coherent legal framework;
c) The dimension of demography;
d) The possibility to have access to important amount of resources;
e) The quantity of energy consumed for produce one piece of product.

If we try to explain the first and the third causes of a real and strong economic development, we must talk about geopolitics.

In the same time, speaking about the possibility to have access to important amount of resources we are forced to analyze mainly the possibility for new wars, because in modern times the

[1] Kenneth Dam: *The law-growth nexus : the rule of law and economic development*, Brookings Institution Press, (Washington D.C., 2006), p. 8.

[2] Ibidem.

prices of few important materials are more important than law principles of human rights and peaceful existence.

Only the last point (e) is connected with productivity, because to loose energy is a crime for today's economy. In fact, the difference between states is represented by this percentage: a modern technology means to economize not only the material resources used to create a new unit of product, but also it means o use less energy (and, if is possible, clean or renewable).

However, it is necessary to describe in a few words all these steps for the economic development, to understand much more the second idea: a coherent legal framework.

2. Several social scientists and historians have found strong evidence that culture explains at least some differences in the rate at which countries develop. An economic history said: if we learn anything from the history of economic development, it is that culture makes almost all the difference.

Unlike political and economic factors, cultural factors, such as ethnicity, language and religion, suffer relatively few changes over a comparatively long period of time. They can, therefore, serve as an important instrument for the comparative analysis of the world economy. However, given the great varieties of ethnic, linguistic, and religious groups throughout the world, the number of individual cultures is too large to be a practical tool and it would be very difficult to conduct useful multicultural economic comparisons. Consequently, to facilitate multicultural economic analysis and comparison, our analytical framework will be based on a synthetic term – "culture area"[3].

There usually exists a small and relatively homogeneous core in each culture area. Culture areas also have boundaries. The influence of a specific culture is always strongest in the core and becomes weaker from the core to peripheral areas. In theory, the boundary of a culture area can be determined as the line beyond which the influence of culture reduces to zero.

However the boundaries between culture areas are not necessarily distinct; recognizable cultures within a given area may contrast with those of neighboring ones, and if the boundaries are not sharply delineated, zones of composite culture or blended traits may make the transition from one to another a matter of gradation. Within a single area, quite different ways of life may coexist as characteristic patterns[4].

3. Natural resources once figured prominently as a production factor in studies of economic growth. At times, natural resources (such as land, climate, biology, water, minerals and energy) have indeed been the primary component among the factors that influence social and economic activities. But early pessimists like Malthus and Ricardo were probably wrong about the importance of scarce natural resources as a retardant of growth[5].

However a huge labor force does not sufficiently represent an advantage in human resources for economic development, particularly when a country is undergoing transformation from an agricultural society, mainly using traditional methods of production to an industrial society, which requires not only new and advanced technologies but also well-trained personnel.

A well-educated and law-abiding population that possesses a strong work ethic is the sine qua non of modern economic growth. A striking feature of the world economy in the twentieth century was the enormous increase in the average level of education. Before the nineteenth century the majority of the population was illiterate in almost all countries.

Since then, universal enrolment in primary education has become obligatory in advanced countries. As a result the proportion of people receiving secondary and higher education has risen steadily

Technological innovation has been the most fundamental element in promoting, either directly or indirectly, economic development and social change. Although it is very difficult to

[3] J. Sevillia: *Corectitudinea politica*, (Ed. Humanitas, Bucharest, 2007), p. 29 – 30.

[4] R. Cooper: *Destramarea natiunilor*, (Ed. Univers Enciclopedic, Bucharest, 2006), pg. 82.

[5] Rongxing Guo: Cultural influences on economic analysis : theory and empirical *evidence*, (Palgrave Macmilan, London, 2006), p. 146.

measure its short-term impact precisely, no one would reject the idea that technological progress is changing the world at an incredibly high rate.

The most obvious contributions are in transport and communications where crude means (such as horses, carriages and handwritten letters) have been superseded by super-jets, telephones and faxes, as well as by increasingly efficient computer networks, including the Internet which is becoming the most important means for transmitting information. Mobile telephones, computer networks and other technological inventions which were once considered to be either impossible or useless are now becoming the necessities of our daily life[6].

Before the early twentieth century, technological innovation had been contributed mainly by individual inventors or small-scale entrepreneurs. But now the great bulk of it – such as the space shuttle and the Internet, to list but two – is conducted by prominent firms with substantial budgets, as well as by governments. As a result the process of technological innovation has become more complicated than ever before.

Specifically, technological and related products are positively related to capital stock of, and personnel engagement in, technological innovation. In addition, technological innovation is also related to educational levels, as the content of education changes over time to accommodate to the growing stock of knowledge. There has been a proliferation of specialized intellectual disciplines to facilitate the absorption of knowledge and to promote its development through research[7].

4. If we are to explain why economic growth rates have been so diverse among nations, it is necessary for us to consider political and institutional influences. Institutions in economic research are analyzed as formal (laws, regulations) and informal (customs, traditions, norms) rules that structure and simplify human interactions within a society. Historically, institutions have been devised by human beings to create order and reduce uncertainty in exchange[8].

They evolve incrementally connecting the past with the present and the future. According to new institutional economics, the economic system, like other production factors required in economic development, is a special kind of scarce resource and should be treated thus.

The economic system of any nation is the mechanism that brings together natural resources, labor, technology and the necessary managerial talents. Anticipating and then meeting human needs through production and distribution of goods and services is the end purpose of every economic system.

While the type of economic system applied by a nation is usually artificially decided, it is also to a large extent the result of historical experience, which becomes over time a part of political culture.

5. Public sector purchases totaled some 1.5 trillion euros in 2002. This explains the seriousness with which European Community institutions approached the task of injecting competition into public procurement as part of the single market project.[9]

By 1993, the institutions of the European Community had enacted the legislation required for completion of a single European public procurement market, potentially introducing competition into the huge market for purchases of goods and services by governments at all levels in member states.

Drawing on EC Treaty articles prohibiting restrictions on the free movement of goods, the rights of establishment, and the right to perform services within the single market, the Commission had proposed "positive" legislative measures supplementing these prohibitions, including procedures

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[6] Rongxing Guo: Cultural influences …, p. 147.

[7] Ibidem.

[8] A.M. Stoenescu: *Istoria loviturilor de stat in Romania, vol. IV*, part. I, (ed. Rao, Bucharest), p. 63

[9] Mitchell P. Smith: *States of liberalization: redefining the public sector in integrated Europe, (State* University of New York Press, Albany, 2005), p. 58

for purchasing of supplies, commissioning of works, and contracting for services by public authorities at all levels—local, regional, and national[10].

As national governments transposed these measures into law the European Community formally moved toward a single market in public procurement.

However, as this chapter demonstrates, in practice little interpenetration of national markets ensued; legislation was a necessary but not sufficient condition for the genuine introduction of competition. Political leaders of the EU member states had supported the single market in public procurement, the appropriate legislation had been crafted by the European Commission and approved by the Council of Ministers, and single market public procurement rules had significantly altered domestic administrative practices.

Yet more than a decade after the formal completion of the single market in public procurement, there is only limited cross-border competition for public works and supplies contracts within the EU, and closed local, regional, or national public contracting practices constrain the emergence of a single European market[11].

National governments support competition in the 1.5 trillion euro public procurement market because of the gains in efficiency and competitiveness it promises. Moreover, the fiscal benefits to be captured by competitive procurement coincided with objectives of budget consolidation central to the process of economic and monetary union accompanying the single market.

As an additional ingredient in the recipe for sector reform, the European Commission has supplied supranational leadership by promoting awareness of the potential benefits to governments and mobilizing support for a legislative package. Yet in successive Commission reviews of the progress of the internal market, public procurement persistently ranks among the "missed targets" of efforts to complete the project.

6. For the countries of the European Union as a whole, the protections traditionally accorded markets served by the public sector have been eroded significantly, and governments and public service providers that seek to sustain restrictive practices face further challenges.

Public services in numerous sectors now operate in a competitive environment that would have been unthinkable a decade ago. Governments cannot freely subsidize state-owned public service providers and thereby keep markets closed to foreign-owned or domestic private sector competitors. But the case studies also indicate that European economic integration has not created a liberalization steamroller that simply "flattens" the public sector across EU governments, rendering it an apolitical mechanism for the pursuit of economic efficiency[12].

Nor has liberalization advanced without accommodating the interests of protected public service providers. There are few more vital contemporary questions for political scientists than those that emanate from the relationship between neo-liberalism, the exercise of state power, and the institutions and practice of global governance.

Since the demise during the early 1970s of the first "Washington Consensus" provided by the capital controls and fixed exchange rate system of the Breton Woods international economic order, its neo-liberal successor has come to dominate the relationship between states and markets in both the industrialized and the industrializing economies.

Policies of privatization, deregulation, and liberalization of markets have not only given entrepreneurs and trans-national corporations greater freedom to innovate and take risks in pursuit of profit, but also largely redrawn the boundaries between the public domain of the state and citizenship and the private domain of the market, entrepreneurship and consumerism[13].

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[10] Ibidem.
[11] Mitchell P. Smith: States of liberalization …, p. 94
[12] Kenneth Dam: The law-growth nexus …, p. 109
[13] Mitchell P. Smith: States of liberalization …, p. 127

Globalization, often when allied to arguments about the need to maintain international competitiveness, has provided a generation of politicians with both a convenient alibi, to explain their inaction or indifference to rising inequality and other social consequences of unfettered market forces, and an ideological weapon, to justify major restructuring of domestic political, economic, and social institutions in the guise of urgent and overdue modernization. In fact, this was the program created by Anthony Giddens (the Third way) and implemented by Tony Blair.

7. The parallel response of a generation of voters, to this attempt to roll forward the frontiers of the private domain of the market, entrepreneurship and consumerism as agencies of social change, has been to abandon the public domain of political parties and the electoral ballot box in increasing numbers.

The first is that neo-liberalism has failed to provide a framework for state power and global governance capable of delivering stable and lasting prosperity for the richer industrialized economies, and a developmental route out of poverty for the poorest economies.

Second, the role of politics and the exercise of public policy should be more broadly defined that the simple construction of institutions for the market. While the World Bank has argued that this limited role for the state is an effective one, the analyses furnished by the contributors to this volume suggest otherwise. The relationship between the state and market needs to be reordered to foster a broader conception of the public domain that will deliver greater effectiveness in both state power and the pattern of global governance, and thereby advance human development. In particular, the contemporary pattern of state power and global governance needs to be re-balanced in favor of the public domain of the state and citizenship, in order to redress some of the inequalities bequeathed by three decades of liberalization, privatization, and deregulation.

Third, while international flows of finance, goods and trade have challenged and constrained the exercise of state power, the degree to which globalization has undermined the policy autonomy of the democratic state has in many cases been overstated. Consequently, any analysis of the impact of neo-liberalism upon state power and global governance must recognize the importance of context, including the impact of society, historical traditions and culture, in mediating the effects of neo-liberalism.

8. The 3rd May 2004 was widely marked, if not celebrated, by the British media as the 25th anniversary of the election of Margaret Thatcher as Prime Minister of the United Kingdom[14].

This event was remembered as one of the pivotal turning points of twentieth century peacetime British politics. However, it was equally important for global political economy because it marked the beginning of the process by which the political leadership of the Group of Seven industrialized economies began to embrace the New Right's project of rolling forward the frontiers of the market in the name of neo-liberalism. This was the point at which the Thatcher Government, equipped with 'a different analysis and a different set of policies' challenged the social democratic orthodoxy about the role of state power, both domestically and internationally. Domestically, it identified six main obstacles to full employment and prosperity, namely, high state spending; high direct taxation; egalitarianism; nationalization; a politicized and Luddite trades union movement; and the presence of an enterprise culture[15].

To restore the political and moral authority of the state, and to return politics to the "common ground" of prosperity would require nothing less than salvation for an "endangered species", and the rediscovery of the "missing dimension in our economic thinking" and "the only route to our prosperity, namely the entrepreneur".

Ronald Reagan supported this thesis, contending that "In this present crisis, government is not the solution to our problem; government is the problem".

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[14] Simon Lee, Stephen McBride: *Neo-Liberalism, State Power and Global Governance*, (Springer, 2007, Netherlands), p. 31

[15] Ibidem.

Neo-liberalism thrived ideologically on both sides of the Atlantic during the 1980s and 1990s because it was able to exploit a loss of confidence in the efficacy of the Keynesian social democratic welfare state. Internationally, the suspension of the convertibility of the dollar, the introduction of floating exchange rates, and the liberalization of its financial markets by the United States had brought an end to the Bretton Woods era of managed capitalism through fixed exchange rates and capital controls. Domestically, the coincidence of rising inflation and unemployment in the aftermath of the 1973–1974 Oil Crisis had challenged longstanding assumptions about the attainability of full employment, the desirability of high rates of taxation, and the dangers of welfare dependency and subsidy addiction[16].

Neo-liberalism was able to exploit this uncertainty by placing faith in the market as a discovery process for entrepreneurs to acquire the knowledge and information that would enable them to take risks and innovate to provide new goods and services to consumers. The superiority of the market mechanism over the state was held not just to be economic, in terms of a more efficient allocation of resources, or political and social, as a better and more spontaneous basis for human organization, but also moral, because of its maximization of individual liberty from the state[17].

9. If state and public intervention is not welcomed, it means that the economy is the single one correct ideology, because the struggle between two very old social notions cannot be finished without a real and clear winner: when two capital concepts fight one against each other, it cannot be a real scientific debate: there is only a place for one winner, and only one place for the second place (not looser, because these institutions are eternal).

But Stiglitz and other economists predicted that this moment (victory of economics) cannot be too long – it will be a time for "state revenge", or – precisely – a moment of truth, for remake the balance, the equilibrium. The main problem was the dimension of the gap between economy and public intervention. If this gap was small, it was easy to recreate the balance.

But since Reagan moments and the first days of crisis (economic crisis) it was a long time, almost 25 years. In this time the gap becomes huge. The economy consolidated its image, but, as always, there is a difference between image and reality. And, when the reality finally had spoken, it was obvious that the economy is not only an image, and the state intervention, as expression of public law was necessary.

The author doesn't want to talk about the great ideological debates that appeared in 2007 in whole Western Europe about the collapse of capitalism. In fact, this debate is only an expression of something impossible to imagine 50 years ago: intellectuals cannot believe in state intervention in economy.

For sure, to understand this is necessary to come back to famous Fukuyama's essay about the end of history, where the capitalism was considered the only one legitimate way for humanity. This text was written soon after communism collapse, and for few years it was almost an acceptable idea. For sure, in modern times 15 years (1991 to 2006) represent a big period of time, with important changes in social reality. It is sure that the world as it was seen in 1990 was radically (and not only in a small part) modified by the technological advance of this time.

But 2007 was tremendous. And, like always in first moment of crisis, first months are used to talk about "what can we do, what kind of idea can bring a light is a tunnel". But the ideological debates (of course, ideology, not scientific dialogue) were accompanied by the governmental actions, straighter and more unequivocal: they intervened to save the big actors of the private economy.

Of course, this is an administrative mechanism, created by state in the moment when state was created too. However, this intervention was claimed, and it was for many people the only chance to survive. In this case, we must note that this intervention was considered a "necessary bad",

[16] A.M. Stoenescu: *Istoria loviturilor de stat* …, p. 104.
[17] Simon Lee, Stephen McBride: Neo-Liberalism …, p. 58.

because, like everyone understand, the economy is only one truth owner, and state is only a palliative when the speed of the economy decrease.

Conclusions

As we can see, the state intervention – a form of administrative action – it was a perfect medicine to save great banking actors (and especially their bosses[18]), but it was seen only as a violation of ideological terms of society after communism fall. It is amoral to claim state intervention, and to present it like a wrong method to solve a problem, because for many years the ideological debate tries to impose a bad idea: that public law and its actions are the worst thing for the society.

So, we can conclude, without any hesitation – public law represent, in ideological war of 21st century only a victim of economy. In fact, we must understand this phenomenon, because a lawyer cannot stay only as technician: he must understand the context of the law science.

In this case, the specialists of public law felt that their works is not necessary. You can works well, but if public image of your work disregard whole activities of public sector, we can predict, for sure, for the next 10 years a great migration of best specialists from this sector to the private one. In this case, the quality of public services will decrease, because the interest for them is only at speech level. So, it must be adopted new regulation to prevent this exodus, otherwise, the gap between public and private law specialist will be very important, and nothing can replace the differences.

For us, like for other researchers, it is a time to re-evaluate these aspects, because is not the time to stay immobile. In fact, our opinion is sure that is necessary a new education of people in a sense of state intervention acceptance. And for this it is compulsory – again this imperative verb – to recreate and to re-present public law in its normal and correct light.

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[18] And, of course, their bonuses – received for "good activities for their banks".

LENIENCY POLICY AND ITS IMPLICATIONS ON THE INSTITUTION OF ADMINISTRATIVE RESPONSIBILITY

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Abstract
According to the Order of the Competition Council. 300/2009, individual denunciation of participation in anticompetitive agreements eliminate the contravention liability imposed by the provisions of Law no. 21/1996, or reduce the fine imposed, if the conditions to qualify for leniency, contained in the Guidelines on conditions and criteria for application of the leniency policy, part in the order mentioned above, are fulfilled.The amendments to competition legislation establish a case of removing anti-competitive acts liability for rewarding companies that cooperate with the authorities to denounce anti-competitive practices and a case for reducing the penalty for contravention, for those who, although not qualified for immunity from fine, actually have an important and actually role in uncovering anticompetitive practices.
This paper presents interest to the current developments of the institution of administrative responsibility resulting from the takeover in the national legislation of the elements of Community law, transposing the general principles also comes into the right to good administration.

Keywords*: leniency, responsibility, competition, law, cartel*

Introduction

The usefulness of finding the contraventions and applying the sanctions by the concurrence authorities as a remedial tool to restore a normal competitive environment is undeniable.

First, the imposition of fines by the competition authorities generates a deterrent effect among undertakings. It creates such a real threat of being pursued and punished, and this is likely to outweigh the possible intentions of the companies to engage in anti-competitive behavior.

Second, applying of differentiated fines, according to the role of each participant in the case of collective violations such as cartels, aims to increase the costs to organize and maintain such an anti-competitive agreement .

In addition, differentiated fines correlated with an effective leniency policy increases the risk that some cartel members do not respect anti-competitive agreements and intend to denounce others participants.

Third, applying fines against those who violate the competition law has a cautionary effect, reinforcing the belief to comply with these rules for those people who follow these prescriptions.

At EU's level, The Commission's action is the most important tool in the fight against the crimes covered by the competition law and therefore a fine is the most effective way to punish and deter the commission of such crimes .

The main objective of leniency programs is to provide an incentive to an undertaking participating in an unlawful cartel to come forward and to expose the cartel by offering immunity from, or a reduction of the fines that would have been applicable to that undertaking had the cartel been discovered by the relevant competition enforcement authorities whitout the undertaking's assistance.

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Leniency in antitrust enforcement can be defined as granting of immunity or reduction on penalties for antitrust violations in exchange for cooperation with the public authorities mainly in the form of provisions of intelligence and evidence of competition infringements.

Lenient treatment is particularly convenient for discovery of hidden cartels because of the mere character of the violation and the fundamental features of collusion being continuative, collective and hard to detect[1].

The origin of this policy as part of public enforcement mechanism can be traced back to 1978 when the US adopted its first Corporate Leniency Notice. In the US, the encouragement of whistle-blowing has proven to be higly successful,which inspired the European Commission to follow the example and to adopt in 1996 its first Leniency Notice .

The Commission subsequently amended it twice in 2002 and 2006 to make leniency more efficient and to take into account the lessons learned from its operation. The main changes were that immunity became automatic, that fine reductions became more strictly aligned to the timing of the cooperation and also improved the transparency and certainty of the conditions on which the immunity and the reduction of fines is granted.

European Union's leniency policy

In order to obtain immunity the undertaking has to provide sufficient evidence for the Commission to commence an investigation , or must be the first to enable the Commisssion to establish an infringement of Article 81 EC.

The 2006 Notice on Immunity from Fines and Reduction of Fines in Cartels Cases states that an undertaking that has coerced any other undertaking into participating in the infringement or remains in it does not qualify for immunity, although it may qualify for a reduction of fines, between 20 and 50 per cent, depending on the importance of the provided information :

The Notice, II.A, §8 : "The Commission will grant immunity from any fine which would otherwise have been imposed to an undertaking disclosing its participation in an alleged cartel affecting the Community if that undertaking is the first to submit information and evidence which in the Commission's view will enable it to:

(a) carry out a targeted inspection in connection with the alleged cartel; or

(b) find an infringement of Article 81 EC in connection with the alleged cartel".

The Programme does not protect an undertaking from civil litigation whose purpose is the coverage of the damages resulting from the cartel actions.

There was concern that leniency programmes should operate by the rule of total immunity, to include all applicable penalties: fines, civil damages and / or criminal sanctions, considering the U.S. experience, where it was only after they waived the triple sanction system, the leniency program has made notable results, encouraging individual interest of cartel participants to abandon such an anticompetitive agreement[2] .

It is important to note that leniency as operated by the Commission does not mean absence of prosecution in all cases. The Commission might adopt a decision finding an infringement of the competition rules which might constitute a reason to treat the whistle-blower as a recidivist if any involvement in other cartels is subsequently discovered. [3]

As the Commission has currently no powers to impose penalties on individuals other than undertakings, the grant of immunity to a company does not concern its directors or employees and

[1] N. Zingales – "European and American Leniency Programme: Two Models towards Convergence?", 2007, Competition Law Review 1, p.5, avalaible at http://papers.ssrn.com .

[2] F. Leveque - „L'efficacite multiforme des programmes de clemence" in „Concurrences. Revue des droits de la concurrence" no. 4/2006, p. 34

[3] European Commission 2006 Leniency Notice [Commission Notice on immunity from fines and reduction of fines in cartel cases, [2006] OJ C298/17.]

there is no separate immunity policy for individuals.[4] This is another major difference with the US model which operates a Leniency Policy for Individuals.

It is interesting to note, however, that managers of undertakings can be still punished for their role in the cartel, if the Member State"s antitrust legislation provides for individual sanctions. Member States retain their competence to adopt sanctions for breach of antitrust rules and to provide or not for any lenient treatment of whistle-blowers.[5]

That point leads to another important feature of leniency in the EU context: the existence in parallel of the Commission"s policy of distinct leniency programmes of the Member States which concern infringements of both EU and national competition rules.

The Commission has the jurisdiction to decide on the existence of a competition law's violation , even if the term of extinctive prescription of the fine was fulfilled, because the fulfilling of this term does not prevent establishing the existence of an anti-competitive act.

The Commission retains the power to adopt a decision on the existence of prescribed anti-competitive acts, but only if there is a legitimate interest in this, such as clarifying an issue of principle or facilitate the introduction of "actions for damages" by individuals to the national courts in civil law.

The Commission still retained an important role in the enforcement mechanism, as the co-ordinating force in the newly created European Competition Network (ECN). This Network, made up of the national bodies plus the Commission, manages the flow of information between NCAs and maintains the coherence and integrity of the system.

This policy has been of great success as it has increased cartel detection to such an extent that nowadays most cartel investigations are started according to the leniency policy. The purpose of a sliding scale in fine reductions is to encourage a "race to confess" among cartel members. In cross border or international investigations, cartel members are often at pains to inform not only the EU Commission, but also National Competition Authorities.

Romanian leniency policy

Leniency did not exist in the Member States before the Commission adopts its first Notice. Although mostly similar to the Commission's model, a number of significant differences do exist between the EU and national programmes due to the freedom of the Member States with regard to the substantive provisions of leniency which has resulted in a variaty of leniency procedures and lastly in a lack of harmonisation. [6]

In our legislation, the participation of firms in anti-competitive practices is prohibited by the imperative provisions of art. 5. 1 of the Competition Law no. 21/1996, republished : "Are prohibited any express or tacit agreements between undertakings or associations of undertakings, any decisions by associations of undertakings and concerted practices which have as their object or effect the restriction, preventing or distorting competition in the Romanian market or on a part of it, especially those aimed at:

a) Concerted fixing, directly or indirectly, of the sale or purchase prices, tariffs, rebates, markups, and any other trading conditions;

b) limiting or controlling the production, distribution, technological development or investments;

[4] W. Wils, Is Criminalization of EU Competition Law the Answer?, (2005) 28 Competition Law Review 2, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=684921

[5] Article 5 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003, p.1-25

[6] See 2009 Report on assessment of state the convergence, ECN Model Leniency Programme available at: http://ec.europa.eu/competition/ecn/model_leniency_programme.pdf

c) sharing markets or sources of supply, on a territorial basis, the volume of sales and acquisitions criterion or other criteria;

d) application to trading partners of dissimilar conditions to equivalent transactions, thereby creating, for some of them, a competitive disadvantage;

e) conditioning the contracts of partners' acceptance of clauses stipulating supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts;

f) participation in a concerted manner, with fake offers in auctions or other forms of competitive tendering;

g) elimination of other competitors in the market, limiting or preventing access to the market and the free exercise of competition by other companies, as well as agreements as not to buy from or sell to certain parties without reasonable justification. "

In the current legislation, the Competition Council may impose a fine of up to 10% of the total turnover of the previous financial year for the most serious violations, punishable as contraventions, of art. 5 para.1 of Law no. 21/1996.

The agreements between two or more competing undertakings[7] resulting distortion of competition are generally called cartels, the main types of cartel being those aimed at pricing and / or market sharing.

Leniency in antitrust enforcement can be defined as granting of immunity or reduction in penalties for antitrust violations in exchange for cooperation with the public authorities mainly in the form of provision of intelligence and evidence of competition infringements[8].

The discovery and dismantling of cartels prevail over sanctioning economic agents participating in a cartel. By their cooperation with the Competition Council they are able to help at the detection and punishment of such behavior.

In this context, in order to encourage the cooperation of the competition authorities with those undertakings that have resorted on practices forbidden by law, the Competition Council established, by Instructions[9], the conditions and the criteria for application of the clemency policy. According to the Order of the Competition Council 300/2009, the individual termination and exposure of participation in a contravention anticompetitive agreement eliminate the liability or reduce the fine imposed by the provisions of Law no. 21/1996. This is the case if the conditions to qualify for clemency are fully met, these conditions being mentioned in the guidelines and criteria for the application of the leniency policy, contained in the Order mentioned above.

The amendments to the competition legislation establish a case of removing liability for anti-competitive acts, by rewarding those operators who are cooperating with authorities to denounce anti-competitive practices and a case for reducing the contraventional penalty, for those which have actually an important role in the disclosure of anti-competitive practices, although not fulfilling the conditions of immunity from fines.

However, the facts referred to are subject to the clemency program only if they have a high degree of seriousness and gravity. This means that it reffers to horizontal agreements or concerted practices cartel-type oriented, through which actions such as those prohibited by art. 5(1) of Law no. 21/1996 are deployed, influencing decisively the market or other vertical agreements and concerted practices, aimed at restricting the territory or customers and giving absolute territorial protection.

The two main elements of the leniency policy are: immunity from fines and reduction of fine. Immunity from fines represents exoneration from the fines provided for violations of art. 51 (1a) of the Competition Law. 21/1996, republished, and is granted for the following situations:

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[7] A.Fuerea – „Drept comunitar al afacerilor", (Ed. Universul Juridic, Bucharest, 2006), p.. 215

[8] W. Wils, Leniency in Antitrust Enforcement: Theory and Practice, (2007) 30 Competition Law Review 1, p. 4 available at http://ssrn.com/abstract=939399

[9] The Competition Council's Order no. 300/2009 , M.Of. no.. 610/7.09.2009

• the economic agent as a whistle blower, is the first to provide evidence that will allow the initiation of an investigation and will authorize and conduct to unannounced inspections, when the Competition Authority had no such evidence (A-type immunity)

• the economic agent is the first to provide evidence which, according to the Competition Council, will prove a breach of art. 5(1) of the Competition Act no. 21/1996, republished, given that the Competition Authority had failed to gather sufficient evidence to show violation of art. 5(1) of Law no. 21/1996 or art. 81 of the Treaty (B -type immunity).

The immunity of the type A and type B is granted only if the general conditions for granting clemency are met, namely:

• the whistle-blower cooperates effectively and continuously with the Competition Council;

• it provides the Competition Council with all the evidence it has, without destroying or falsifying information;

• it is not disclosing the existence of the application for leniency;

• effectively terminates its involvement in the alleged anticompetitive agreement.

With regard to the second measure - reduction of the fine - may be applied also to those businesses which, although not the first to denounce anticompetitive agreements, provide information and evidence, revealing their participation in the cartel.

However, the information provided must make a significant additional contribution to the evidence already held by the Competition Authority, that is to allow proving the existence of a certain organized anticompetitive cartel, through the evidence provided by the applicant economic agent.

One criticism of the leniency programs, not only at the national but also at European level, is concerning insufficient protection of information provided by applicants. Within the European Competition Network (ECN) and the national networks organized by this model, all network members are informed about the existence of an applications for clemency. It has been contended that the security of these networks is weak, with the possibility of leaking information to those affected.

National leniency program is criticized from the same point of view but more then this it is considered not providing effective protection of the identity of the trader alleging anticompetitive agreements.

The specific legislation is requiring written request for prior immunity and it contains no such provisions to ensure confidentiality of the identity of the applicant for immunity, while the European legislation has added protection of the applicant, imposing just oral forms for prior immunity.

The threat of disclosure of these confessions could have a negative influence on the quality of the whistle-blower's submission or even dissuade him from applying for leniency at all[10]. Therefore, adequate protection against disclosure in private actions must be ensured for corporate statements submitted by all leniency applicants and not only the successful one in order to avoid placing the applicants in a less favourable situation than the non-cooperating co-infringers.

To avoid these risks, the White Paper proposes uniform rules for evidentiary disclosure and special provision of non-disclosure at any point in time of the corporate statements of both successful and unsuccessful leniency applicants.

Another major deficiency[11] can be found in the whistle-blowers' insufficient protection from discovery rules in cases covering multiple jurisdictions. The decentralization of EU competition enforcement can often lead to investigations being simultaneously carried out in several Member

[10] White paper, Section 2.9., p. 10 [Commission White Paper on Damages Actions for Breach of the EC antitrust rules COM (2008) 165.]

[11] A. Kaczorowska – „European Union Law", Routledge-Cavendish , London, UK, 2008, p. 903

States[12]. The frequent involvement of different jurisdictions and thus different legal systems might deter some cartel members from confession, because they would fear not to receive the same treatment under other States' national standards.

Conclusions

The legislative changes are absolutely necessary, as the main instrument of European integration is legal integration through the establishment of community law, based on the principle of the primacy of Community law to the national law[13]. Unlike other international organizations, The European Union is an organization of integration that primarily involves the building of a supranational legal system and the harmonization of national laws with it.

Building a stable legal framework compatible with EU recommendations, in line with the new economic realities, can equate with changing the competitive and create new competitive advantages, such as that resulting from the adoption of the leniency policy in the national competition law.

Promoting leniency policy and severely sanctioning cartels must become an essential objective in the activity of any competition authority, in order to induce positive effects in maintaining a normal competitive environment and to guarantee a proper functioning of the market economy.

Finally, adapting national legislation, especially in the field of administrative responsibility to the requirements of the European Union helps us to define mechanisms to protect the rights and interests of citizens of Member States from the government actions in general, the ultimate purpose aiming of ensuring equity in relationships between citizens and public power.

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[12] Network Notice, para. 6 provides that investigation will be conducted by whichever authority is „well placed when the infringement has effects or implementation in that State.

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POLITICAL PHENOMENOLOGY OF LAW

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Abstract
The present paper is a presentation of three regulation phenomena that are characteristic of society: the phenomenon of antroponomic regulation, the phenomenon of socioeconomic regulation and the phenomenon of politonomic regulation. The paper is also a clear introduction to the most important concepts used in the field of political phenomenology of law.

***Keywords**: political phenomenology of law, antroponomic regulation, socioeconomic regulation, politonomic regulation, politocracy*

Introduction

The Phenomenon of Antroponomic Regulation

As a political being, man cannot manifest himself outside juridical regulations because human behavior evolves towards the *homo juridicus* status only through normativism. According to phenomenology, antroponomic normativism regulates social behavior through political relationships that act – in a positive way – within a juridically formalized system. Antroponomic effects are produced due to the simultaneous action of sociocracy, namely in relationship with politocracy. Antroponomic regulation phenomenology assumes that human evolution is – in a positive way – a rule for any system of law.

The Phenomenon of Socioeconomic Regulation

Paradoxically, the stronger social regulation is (social regulation being regarded as a political phenomenon), the weaker political power becomes; in other words, the more juridical regulation institutions exist, the less necessary the political regulation power is. From a socioeconomic point of view, normative institutions regulate themselves both as far as their inner structure is concerned and they also regulate each other thanks to the information they exchange in order to formalize social values for sociocratic interests to correspond to politocratic will. Politocracy *in actu* – as a form of exercising public power – depends on a multitude of institutions that communicate norms, principles and values for the political system and that interact permanently. Phenomenology of law reveals the fact that the setting up of certain hybride political and juridical institutions aims to make the two systems (the political and juridical systems) function synchronically to preserve the status quo or, in other words, to maintain public order. Ideonomy can describe the functioning of a society better than any economic mechanisms. As to the systems in which the legal norm is valued the most – see the American system – politocracy recognizes the obligation to subject to the law; on the other hand, where no superior norm is recognized by political authorities – see the French system – control exercised by the constitutionality of laws is not accepted.

The phenomenon of politonomic regulation

The interdependence between law and politics is revealed by the fact that politocracy has the capacity to create and apply juridical norms, transforming political will into a juridical imperative; it is also true that the existence of political institutions is pre-determined by juridical norms. Politocracy creates law thanks to the assumed antroponomic and socionomic values, but, in a rule of law state,

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politocracy must limit itself to the juridical field it created. The fact that politocracy *in actu*, as public power, imposes its will through the application of juridical norms, if necessary by means of its coercitive force, can lead to the conclusion that law is a politocratic instrument.

1) The Phenomenon of Antroponomic Regulation

As a political being, man cannot manifest himself outside juridical regulations because human behavior evolves towards the *homo juridicus* status only through normativism. According to phenomenology, antroponomic normativism regulates social behavior through political relationships that act – in a positive way – within a juridically formalized system. Antroponomic effects are produced due to the simultaneous action of sociocracy, namely in relationship with politocracy. Antroponomic regulation phenomenology assumes that human evolution is – in a positive way – a rule for any system of law.

One could not talk about antroponomic regulation outside the identity of meaning that exists between socionomic norms, principles and values and politonomic principles and values. This ideonomic identity is revealed by the fact that no individual can simultaneously comply with contrary regulations, i.e. the *homo juridicus* status cannot be in contradiction with the *zoon politikon* status within the same system. Political phenomenology of law argues that any fact is empirically perceived in different ways, according to the field in which it occurs, although ideonomically the fact has the same meaning. E. g., for defining the antroponomic regulation of human behavior we use the notion of *permissiveness*, for defining the socionomic regulation – the notion of *lawfulness*, and for defining the politonomic regulation of human behavior – the notion of *legitimacy*. Consequently, political-juridical identity is possible only if there is ideonomic compatibility between sociocratic and politocratic institutions. The fact that man has a *homo juridicus* status if and only if he is a *zoon politikon* could be regarded as an axiom.

Every sociocratic type has its own system of ideonomic filtration by which only those norms which are highly efficient in regulating society are selected; in a contrary case, the satisfaction of social needs generates other needs, thus, as a consequence, the significance and content of antroponomic regulation is modified almost in parallel with socioratic institutions. Ideonomically, antroponomic conformity states that a regulation can be normative only if there is such a regulation of normativity. Political phenomenology of law states that regulation normativity depends on a series of conditions, such as: the clarity of the law terms and concepts, as well as the clarity of the implementation techniques and/or policies.

Phenomenologically, no regulation can have an antroponomic effect unless the individual understands the politonomic significance of the regulation. In other words, the political regulation of human behavior assumes that regulation is characterized by humanity as long as human nature is characterized by *universality*. From this perspective, regulating social behavior means actualizing the human being's general potentiality to manifest as *homo juridicus*, beyond morality, society or history. The effects of antroponomic regulation have as a premise the idea that natural rights are political rights within politonomics, as Leo Strauss noticed: *political life, in all its forms, unavoidably implies the problem of natural right.*

Phenomenology reflects the interdependence that exists, in time and space, between antroponomy - as the being of *homo juridicus* in itself and socionomy - as the being of *homo socialis*; in other words it is a transposition of human nature in sociality and, vice versa, it is a socialization of human nature. Socionomically, socialization is an expression of normativism that transcends sociality and manifests itself as biunivocal correlation between politocracy and sociocracy. On the one hand, politocracy acts through the judicial effect of legislative, administrative or jurisdictional acts which express the will of politocratic authorities: parliament, government, public authorities. On the other hand, sociocracy acts through the force of those social institutions which reflect the will of sociocratic entities: corporations, trade unions, employers' associations, pressure groups etc.

Ideonomically, law defines the sphere of juridical institutions that are conceived by abstract thought in such a way that they correspond to the political-social reality.

Political phenomenology of law states that, in principle, political regulation has antroponomic effects due to the simultaneous action exercised by the juridical and political systems within a finite spatial and temporal universe. Analysing this principle, antroponomic regulation takes as a starting point the individual's subjective manifestations to come to the awareness of normativity which is understood as an expression of *politicity*. After being set up, the behavior types (matrices) become stable, extra-individual units, with a serious coercitive power over beahavior. Antroponomically, people lose a part of their personality through political integration because they assimilate a certain behavior type (matrix) which is different from their initial individuality.

The effects of political and juridical regulation imply the simultaneous action of the political and law systems through their elaboration, transmission and assimilation of normative information. The phenomenology of law reveals the fact that, differently from other systems in which information is sent in a *non-formalized* way, the juridical system accomplishes a formalization of legal norms, principles and values in accordance with ideocracy (the ideatic system promoted by public power), which makes normativism become a certain type of politonomic communication. Antroponomic regulation is not accomplished unless the transmission (communication) of the norm is not followed by its application. In other words, any time a public authority applies a law in an individual case, it does not simply materialize a text, but it imposes a political will. Normativism – as a regulation means – signifies the power to apply a rule now and here.

Political phenomenology of law points out the fact that social and political regulations have effect upon *homo juridicus* through the normativity of the law systems. A first particularity rests on the fact that ideonomy is a *sine qua non* condition for regulating human behavior. In other words, the (in) formed individual is ideonomically an ally to politocracy, apart from the uninformed individual (the politonomically isolated individual) who socially is neutral or even hostile to power. It is obvious that *homo non-juridicus*, who does not know and does not understand normativity as a condition for his social existence, will not accept his political condition either. This socionomic lawfulness determines politocracy to intervene by regulating the antroponomic formation and information. In order to ensure the individual's right to information, politocracy *juridically* organizes institutions that grant access to public information and that have a political purpose. This type of hybride (political and juridical) institutions most eloquently express the fact that communicating "public information" is always accomplished in accordance with politocratic will and its content is strictly determined. Ideonomy is the phenomenologic expression of political ideas which have a normative significance by which politocracy accomplishes antroponomic regulation and it implements political information. From the point of view of antroponomic regulation, for example, the phrase *public information* has a politonomic meaning because it refers both to those normative acts that regulate the organization and functioning of *political* institutions and to the audience program for the citizens, the ministers' or other political leaders names. Moreover, the granting of the right to information has a political significance also as a consequence of the fact that state institutions are obliged to ensure the ways of attack in case this right is aggrieved.

For political phenomenology the regulation of social institutions has antroponomic regulation effects depending on the extent to which politocracy ensures the identity (not the equality) of treatment for individuals through a certain type of juridical normativism. Apart from other types of social regulation, juridical regulation is ideonomically accomplished through the setting up (conceiving) of a certain antroponomic model. Juridical regulation aims at creating a certain socionomic model, i.e. a model with a certain politonomic value that is established by the lawmaker without a direct correspondence to the place and time in which that regulation will be applied – this being an expression of positive law. Any time the antroponomic model is not juridically defined, it is politically conceived. From the perspective of antroponomic regulation,

the accomplishment of the social scope is more important to the lawmaker than the law itself – politonomically this is a *ratio legis*.

Political phenomenology of law proves that any politocratic regulation led to a sociocratic change which generated an antroponomic effect, so that we may state that law is in fact a politonomic institution. Politocracy could not regulate any law system unless antroponomy would define the individual as a political being; one might say that the individual's rights, from a juridical point of view, are derived – politically speaking – from his/her freedom.

Antroponomic effects of political regulation depend on normative order, which is the order that ranks the other social values and which has a politonomic character thanks to its social modeling capacity. In other words, antroponomic regulation through juridical norms is a political phenomenon on condition that social norms formalized by politocracy ensure (self) regulation of human behavior.

Antroponomic regulation is a *sine qua non* condition for the existence of politocracy to the extent to which the individual can be ideonomically integrated as a particular consciousness within a common political consciousness. In this respect, one may say that political and juridical regulation functions as an interface for sociocracy and politocracy. A first remark can be made with reference to the fact that normative systems generated by sociocracy are ideonomically processed by politocracy and become political and juridical institutions. One can notice that any type of ideonomy is a consequence of creating, imagining and rationalizing normativity by a political power. The fact that law is a juridical "fiction" does not mean that it is meaningless, but, on the contrary, that it has a political meaning since this "fiction" produces antroponomic effects.

For politocracy the most important criterion for assessing validity of law has an antroponomic character because it appreciates political value of juridical norms either as an expression of consensus between people, or as an institutionalization of everyone's will, as an expression of collective will. Nobody can empirically establish the extent to which collective will has a "social", respectively "political" character in the process of juridical regulation. Socionomy – as a reflection of normativity in collective consciousness – is the result of the simultaneous action of both sociocractic and politocratic systems. One can define ontonomy – the *creation and existence* of law – as an attempt to solve the problem regarding the existence or inexistence of a collective consciousness; at the same time one can define antroponomy as the *creation and existence* of *homo juridicus*. Juridical idealism rejects the socionomic character of law arguing that collective consciousness does not exist; juridical positivism, on the contrary, denies the antroponomic character of law, arguing that juridical systems express only the will of the state.

2) The Phenomenon of Socioeconomic Regulation

Paradoxically, the stronger social regulation is (social regulation being regarded as a political phenomenon), the weaker political power becomes; in other words, the more juridical regulation institutions exist, the less necessary the political regulation power is. From a socioeconomic point of view, normative institutions regulate themselves both as far as their inner structure is concerned and they also regulate each other thanks to the information they exchange in order to formalize social values for sociocratic interests to correspond to politocratic will. Politocracy *in actu* – as a form of exercising public power – depends on a multitude of institutions that communicate norms, principles and values for the political system and that interact permanently. Phenomenology of law reveals the fact that the setting up of certain hybride political and juridical institutions aims to make the two systems (the political and juridical systems) function synchronically to preserve the status quo or, in other words, to maintain public order. Ideonomy can describe the functioning of a society better than any economic mechanisms. As to the systems in which the legal norm is valued the most – see the American system – politocracy recognizes the obligation to subject to the law; on the other hand,

where no superior norm is recognized by political authorities – see the French system – control exercised by the constitutionality of laws is not accepted.

As long as the positive law (as a system of applicable juridical norms) is regarded as the expression of politocratic will, the problem of law validity is settled by ideonomy. From a teleological point of view, law should have as an aim (goal) *the common welfare* or the *general interest* –understood from an ideocratic perspective. Adopting J. Bentham's theory on utilitarianism, any political will, including the one referring to law, must be practically dealt with, that is to say by searching the appropriate instruments for achieving social *good*.

The juridical system produces more important socioeconomic effects for politocracy than any other economic, social or cultural systems do because law ensures the functionality of all the other systems and, consequently, the functionality of the whole political system; this determines us to state that the juridical system represents the basis for politonomy. Phenomenology reveals the fact that, although one can find a whole range of juridical systems in time and space, these have a common feature, namely their capacity to regulate the political system. The regulation of social institutions in conformity with the law principles has *isonomic* effects, by the normative institutions that ensure the individual's freedom and political equality; *socionomic* effects, by the institutions that ensure right to autonomy as a form of human communities freedom and equality; *politonomic* effects, by the institutions that guarantee the individuals' right to political association – as a form of free political association. For political phenomenology of law, the effect of the interaction between political and juridical institutions – that is the effect of *the status quo* – is the one that matters. Any political system can extend itself through the normativity function or, in other words, through the (self) regulation of its organization and functioning.

Political phenomenology also describes the intervention of politocracy in regulating social dysfunctions because a social deregulation manifests itself as entropy at political level. Social deregulation generates a series of negative phenomena at all the system levels; at communities level (family, school, culture, religion etc.) isonomy degrades itself and isoarchy appears as an informational and normative lack of order; at the level of human collectivities, dysfunctions lead to the appearance of socio-archy (understood as normative-informational disorder) and it can reach such a high threshold that it can lead to politocracy (political system disorder); at state level, institutional dysfunctions generate unwished forms of polyarchy (see the dictatorial, totalitarian etc. type). Socionomic regulation brings into evidence the correlation existing between sociocracy and politocracy, which is an evolution of interacting juridical systems, and the evolution of political institutions; however, this regulation does not make reference to social and historical modifications.

Political phenomenology of law considers that lack of social self regulation is equivalent with socionomic disorder in that politocratic institutions – which are incomplete, disorganized or contrary to the lawful order – generate socio-archy. In all the cases in which social disorganization could not be normatized, politocracy evolved towards anarchy or dictatorship, especially because of the fact that political and juridical systems did not adapt to the evolution. In case of socionomic dysfunctions, the conflict between the governed and those who govern is more acute; this points out the disorganization of the political system as the entropy model reveals. The openness of the juridical system towards socionomic values leads to a decrease in politonomic entropy by the increase of the information volume and its quality (reduction of juridical ambiguities or unpredictable norms).

Political phenomenology of law allows us to compare open (democratic) systems to the closed ones (the dictatorial systems); this comparison reveals the fact that socionomic regulation is politically more efficient in democratic systems because politocracy promotes social values; on the contrary, in a dictatorial system, socionomic effects are limited because of the lack of correspondence existing between antroponomic and politonomic values.

Taking Habermas' theory as a starting point, one can state that political phenomenology of law is, in fact, a synthesis based on the assumption that the nationalized domains of society interact with state socialized sectors. Socionomy reflects the fact that phenomenology made it possible for

classic private law to appear, as a "socialization" of private law, in correlation with "privatization" of public law. In the first case, one can find the example of restraining property rights by transforming location contracts to quasi public contracts for location surfaces. In the second case, one can find the example of the way in which the state gives up public law prerogatives in favour of private law, by transferring tasks from administration to private economic agents.

From a phenomenological point of view, any social structure in which entropy has an increased level may be regulated by a juridical system in which entropy has a low level and vice versa. This regulation type exists at sociocratic level and it is created by the action of social groups (trade unions, employers' associations, lobby societies) which influence governing and which constitute a power reservoir for politocracy. On the other hand, political institutions (Parliament, Government, parties etc.), which are a power reservoir for social structures, function at politocratic level. Through these connections, the entropy of juridical and political systems will be proportionally reduced as information flow increases and it will be reflected in political phenomenology by regulation at structural level.

The bigger the disorder in juridical or political systems is the more necessary synchronization of structural changes is. In certain conditions, socio-archy uses different *self-organization* types for setting up a certain sociocracy that should replace the inexistence of a legitimate politocracy. One of the solutions for reducing social disorganization consists in regulating ideonomy through modern knowledge instruments, forms and the regulation possibilities offered by IT. In other words, the better politocracy knows the institutions with sociocratic potential and it transfers them on ideonomic level, the more efficient it becomes.

One of the conditions for regulating socionomy is represented by information technology, because politocracy, which is based on information, has more chances to reach its political goals. The more efficiently socionomic information is assimilated, the more legitimate the institutionalization of power is, because, ideonomically, political decision reflects social information and socionomically, a governing becomes a power strategy. Political phenomenology of law pointed out the fact that in time trust (rating) decreases in comparison with politocracy, as an effect of power inefficiency (government), self regulation, and also as an effect of not accomplishing what was promised to be accomplished or of giving up public interest for the personal one etc. Thus, institutional socionomic regulation is a chance to maintain trust (often in an artificial way) in political power.

Structural regulation opens way for the "rationalization" of public services and organizations through which differences between the sociocratic functioning of the state and the politocratic functioning system are regulated. Rationalization of social structures seriously depends upon the normative capacity of political self organization, because it allows new institutions to be continuously created and to contribute to adapting politocracy to the new requirements (interests) of society. In this context, as one of the key state components, politocracy acquires functions that are different from the classical ones, exactly because of the obligation to reduce social disorder.

Political regulation acts in a different way in comparison with socionomic entropy – in the same way in which social order acts differently from politonomic entropy. Politonomic regulation is obviously a consequence of the interaction between the juridical and political systems. Within each of these systems other subsystems act so that divergent, neutral and convergent relationships are created within and between the two systems. Phenomenologically, the regulation of relationships between these systems – by means of political and juridical institutions – reduces the differences existing between sociocracy and politocracy. In this sense, politonomy is a reflection of juridical regulation and normativity because it explains the way political power mechanisms function. Normativism can be approached ideonomically, socionomically (as legitimacy) or politonomically (as a governing type) – through the institution named *legitimate violence* by Max Weber.

Juridical systems, as well as political systems, do not evolve in a linear manner; they undergo stages of stability and transition, in which disorder makes the system reorganize in a new structure. Moreover, the recognition of one politocracy by another politocracy depends upon the politonomic

compatibility between themselves, upon the concordance of their principles and socionomic values that are institutionalized by each of them. As to non democratic politocracies, there appears a non synchronization between the evolution of social institutions and the outer environment, which is settled in a relatively simple manner thanks to the fact that the system is quite stable since it is dominated by a unique ideology and a unique order parameter. Politocratic systems need to be regulated in a democratic/authoritarian/anarchic way only when the system faces up a stage crisis. In democratic states the prediction of juridical and political systems regulation is significant from a politocratic point of view (as to parliamentary, presidential and local elections) and also from a sociocratic point of view (as to the way local communities are organized). Political phenomenology demonstrates that transition determines the setting up of institutions whose normative action is different ideonomically, socionomically and politonomically.

The diminishing of state authority as well as of its institutions depends on the inefficiency of government and the implemented public policies. Politocratic normative authority decreases along with sociocratic efficacy. On the one hand, state authorities reduce their capacity to adopt decisions autonomously under the pressure of interest groups and/or the more and more organized public opinion; under these conditions socionomic regulation, (harmonization) between juridical and political systems is no longer possible because politocracy tries to impose norms that are different from the ones of sociocracy. On the other hand, sociocratic structures start to function autonomously from politocratic institutions; administrative technocratism, globalization and transnationalism, as well as techno-scientific systems (bionics, office machines and equipment, Intenet etc.) restrain the capacity of traditionally regulating institutions to adopt decisions.

Socionomic regulation has not always generated positive politonomic effects, that is to say it has not always led to the appearance of superior social organization and ruling systems. The contesting of politocracy and even institutionalized forms that oppose politocracy do not always produce a contrary reaction and, even when facing opposition, politocracy did not disappear. Most often, the act of contesting and opposing politocracy is expressed only antroponomically, as a way of breaking normativity by the revolted individual, or socionomically, as an expression of defense and common resistance against confinement. Thus, social fight against politocracy does not represent a form of regulation for the political system. Political phenomenology proves that opposition, revolt or revolution are not meant to modify ideonomy, in the sense that they do not come up with new legal principles, nor do they rely on axionomy, that is to say they do not impose other values to the juridical system.

3) The phenomenon of politonomic regulation

The interdependence between law and politics is revealed by the fact that politocracy has the capacity to create and apply juridical norms, transforming political will into a juridical imperative; it is also true that the existence of political institutions is pre-determined by juridical norms. Politocracy creates law thanks to the assumed antroponomic and socionomic values, but, in a rule of law state, politocracy must limit itself to the juridical field it created. The fact that politocracy *in actu*, as public power, imposes its will through the application of juridical norms, if necessary by means of its coercitive force, can lead to the conclusion that law is a politocratic instrument.

Within the state, antroponomic regulation and socionomic regulation are accomplished differently, depending on the way politocracies are organized, as democracies or autocracies, as parliamentary, presidential, semi-presidential regimes etc. Basically, polinomics keeps democratic systems working because it allows sociocracy and politocracy to normatively regulate each other in a transparent and continuous way and also in real time. Politocracies that are open towards the inner and the outer have the capacity to adapt more easily to social changes, they can organize themselves more quickly and can be adequately controlled by civil society. That is why political control of social institutions has been the politonomic regulation instrument of society that has been present in all

political systems in the course of time. Politonomically, we are interested in the fact that, no matter the nature of control, politocratic intervention in the sphere of law has, among other effects, the effect of regulating not only social institutions, but also its own institutions.

Political phenomenology of law takes into consideration the fact that politonomic regulation is possible as a ***mediation*** procedure for the disputes that appear between the governants and the governed ones. As soon as the mediator institution appeared – as a conciliation institution between citizens and authorities – it spread incredibly quickly thanks to its socionomic regulation effects. The (inter) mediation procedure, as a social mechanism, has a politonomic content as long as the mediator regulates the relationships between citizens and the state. From a politonomic perspective, the moderator's activity has a political character and it generates social effects even if it is juridically limited to making *recommendations*. In this respect, one should mention the fact that the mediator can make publicly available the annual activity report that it presents to the Parliament and this, obviously, generates socionomic effects.

The problem of mediation, as a form of regulating society, transcends the philosophy of law to the extent to which political decisions precede juridical regulation. At a political level, normative acts on social regulation are always the result of an (inter)mediation or negotiation process which leads to an agreement that is expressed either as an identity or as a compromise. For this type of idiocracy to become nomocracy it is necessary to politonomically formalize certain norms, principles and values as: laws, decrees, decisions etc.

Arbitration is a method used for settling socionomic or politonomic disputes outside the juridical system. As a form of politonomic regulation, it involves two conditions: the existence of two conflicting parties that agree for a third one (that is invested with authority by the other two parties) to mediate the conflict incurred between them; secondly, the settling of the dispute should be accomplished without applying preexistent juridical norms, the arbiter being free to decide how to settle the conflict.

From a socionomical point of view, arbitration has the advantage of reducing tension accumulated between the conflictual parties and it conciliates disputes more quickly than a court of justice does, because the latter has to observe specific procedures. From an antroponomic point of view, a person feels less humiliated if it resorts to arbitration instead of going to a court of justice and this is a plus for the humanism of the judgement act. Finally, for politonomy it is relevant the fact that a *court of arbitration* is constituted of arbiters, chosen by each of the parties, and a neutral president that is also chosen by the two parties on condition that the president's opinion is defining for for settling the dispute.

The enactment of laws is also the result of a permanent arbitration process existing between the political objectives that are expressed by politocracy and the social reality generated by sociocracy; the enactment of laws is also the result of mixing *politics* and social *policies*, and of the interaction between politics and its beneficiaries. Different ideonomic trends do not successively integrate, but in a simultaneous way, through the action of economic, industrial and commercial vectors which concur for ensuring convergence of options. From a politonomical perspective, the enactment of laws is the result of the interference between sectorial interests and consequently it implies a power stake. Expressing and selecting a legislative option is, from an ideonomic perspective, a confrontation of interests, a solution for settling conflicts, a negotiation or a sociocratic compromise.

From an axionomic perspective, political regulation of society is important because the rule of law state is an instrument for promoting and ensuring social security or, as J. Chevallier pointed out, it is an institution which can limit state's supremacy due to rediscovering law as a means for social regulation. After World War II politonomy included social regulation within the sphere of law because law could be regarded as an ideonomic solution to antitotalitarianism. In the former communist states, politocracy accepted juridical institutions that are specific for the rule of law state

both in theory and in practice. Moreover, the regulation force of law was overrated with the result that far-fetched theories were created as to *the law without state* or *the law against the state*.

Politonomic regulation reveals the fact that beyond the harmonization of politocratic functions and sociocratic necessities, the exercise of social power implies the setting up of new structures, institutions, services and organizations that are capable of "producing" public goods, security and social protection, welfare etc., depending on the level and structure of the social need.

The power of sociocracy over politocracy (particularly over social regulation institutions) is reflected in the way in which public resources are distributed (especially in the private economic sector). The latest and, to be frank, the most efficient politonomic regulation method in society is represented by the way in which welfare is (re) distributed. Politocracy adopts various ideonomic positions: either it makes a distinction between the so-called strategic problems and the other existing problems in order to avoid discussing them in the public, or it presents them separately in order to avoid comparing them simultaneously.

When we deal with politocratic institutions, we must take into consideration the fact that politonomic regulation works on the basis of institutions hierarchy. Institutional hierarchy seems to be the expression of political democracy if we accept the idea that political institutions reflect the citizens' will and are subject to this will. In all democratic systems, parliament, as the most important political institution, sets forth the organization and functioning of the other institutions in order to eliminate arbitrary action and to establish the lawful order. Institutional hierarchy reflects the politocratic will to impose supremacy in society on the basis of political norms, principles and values, which must be institutionalized; the most eloquent proof of power institutionalization is juridical institution hierarchy.

Institutional hierarchy is the expression of politocratic will to set a certain juridical norm in accordance with social phenomena it has to regulate. The juridical force of normative acts provides what institutions are politically empowered to adopt those juridical acts. One can state that over hierarchized juridical institutions lead to subordination within political institutions. In reality, the pyramid of normativity is no longer efficient unless it is doubled by politocracy; a person (institution) that has the power to issue a juridical act will not do this because it "likes" to observe superior juridical acts, nor because it respects the ideonomic content of superior acts, but because it is afraid of political consequences. The institution which passes a juridical act is bound to observe the existing juridical hierarchy for fear of political constrains: the fear of losing the present office or position in the party (thanks to which it obtained the present power).

In order to increase social regulation, politocracy multiplies social institutions so that the political system gradually becomes a special form of *corporatism*. Ministers and political party members organize their cabinets, which are made up of members belonging to the same party, in order to promote the interests of the group they belong to; presidents of local public administration authorities and public administration couselors become the voice of the group's interests; persons appointed to public offices on political criteria will promote their individual interests.

Conclusions

Political phenomenology of law defines social regulation as the juridical regulation of the political power. Ideonomically, this thesis contains a logical contradiction: political power can be limited by the policy of power. In socionomic terms, the problem of socially limiting political power has not been settled ever since the French Revolution because fight against power (which confines democracy) implies the further exercise of power (for maintaining democracy). Of course, the "lawfulness" of power institutions is the first condition for politocracy not only from a chronological or sociological, but also from a politological point of view.

The adaptation of juridical institutions to politocratic structure modification (the new political elite, new leaders, new ideologies and political parties) and vice versa. This synergic characteristic of

politocracy - as an effect of social dynamic, which creates new sociocratic structures - makes it possible for the juridical system to evolve in a relatively synchronic way with the political system. The existence of political catalyzers influences politonomic regulation of juridical, political and social systems because they ideonomically define the directions followed by politocracy when a change appears or/and the new typology of power. The capacity to ideonomically integrate these catalyzers makes it possible for ideocractic strategy to be implemented. In fact, it is impossible to politonomically define a society without pointing out its catalyzers that act in order to modify juridical and political systems. Naturally, the most powerful catalyzers are the sociocratic ones because they promote power institutions – democratic or autocratic ones – as governing solutions, although one must not ignore catalyzers who promote totalitarian, theocratic, military institutions etc.

Synchronization of the political system evolution with the juridical system in the context of politonomic regulation may be approached as a governing form if it ensures reproduction of politocracy through normative institutions; although political systems are cyclically affected by social crises, still they survive thanks to their capacity to self regulate.

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THE INTERFERENCE OF EUROPEAN UNION LAW WITH PUBLIC INTERNATIONAL LAW

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Abstract
The European Union Law is an unique legal phenomenon developed in the process of European integration within the framework of the European Communities and the European Union; a result of the implementation of the supranational authority of the European institutions. The European Union law is a specific legal system having independent sources and principles that developed at the border-line of international law and domestic law of the EU's Member States. The authonomy of the European Union law is affirmed by a case-law of the Court of Justice of the European Union.
The European Union has its own legal order which is separate from international law and forms an integral part of the legal systems of the Member States. The legal order of the Union is founded on various different sources of law. The different nature of these sources has imposed a hierarchy among them. At the pinnacle of this hierarchy we find primary law, represented by the Treaties and general legal principles, followed by international treaties concluded by the Union and secondary law founded on the Treaties.

Keywords: *EU law, international law, domestic law, sources of law, international treaties.*

Introduction

In this paper, we intend to present and argue the fact that between European Union law which, currently, represents a system of law analyzed distinctly from international law, and public international law, is a close relationship, but not only in terms of respecting the international legal order by the first.

We believe that creating a unified legal system, as the one of the European Union, is no innovation at international level, as long as at the basis of what today forms *the European Union law*, we find several international treaties concluded under the existing rules of international law. In this respect, we consider, first, the three treaties establishing the European Communities, and which, from the viewpoint of international law, have at least three fundamental characteristics, namely: first, they express the legal bond between member states of the Communities, secondly, they represent an organized set of legal rules, and thirdly, documents drawn up under these treaties, by bodies with responsibilities in this regard, produce legal effects in States Parties.

Paper Content

1. The constituent treaties are authentic international treaties

Concluding international treaties requires a set of procedures that must be fulfilled in order for a treaty to be created, to become binding on parties and to enter into force. According to Nguyen Quoc Dinh[1], the conclusion of an international treaty "is a process involving multiple issues", such as:

- adopting the text of the treaty and certifying it;
- the state consent to be bound by the treaty ;

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[1] Nguyen Quoc Dinh, Patrick Daillier, Alain Pellet, *„Droit international public"*, 7th Edition, (L.G.D.J, 2002), p. 125.

- the international notification of the consent;
- the treaty entry into force, according to its terms, on states that have expressed their consent.

The international notification of the state consent to become party in a treaty and the entry into force of the treaty are subject exclusively to international law, while expressing the state consent to be bound by that treaty is governed solely by the law of that State. Given this, it is undisputed that treaties constituting the European Communities and the European Union have been concluded by sovereign states, which have willingly expressed their approval. Thus, states became *"contracting parties"*[2] to three multilateral treaties, before becoming *"Member states"* of some organizations whose primary purpose was the economic integration.

Although Community treaties have entered into force over 60 years ago (one of these treaties even ceased to have legal effect because the period for which it had been concluded, has ended), that purpose has not been yet achieved, the process of economic integration continuing even today; this is why, we believe that member states, despite the fact that "they have limited, only in some areas, their sovereign rights and have created a system of law applicable to nationals and states themselves"[3], they are still contracting parties, keeping, naturally, their sovereignty. This aspect was stressed whenever the issue of concluding new EU treaties, in order to amend the constituent treaties, by negotiating reciprocal rights and obligations, arose.

The constituent treaties contain both obligations, but also rights for States Parties. At a closer examination of these international legal instruments, we see that they contain general obligations, but also some special obligations.

1.1. The rights of States Parties

The constituent treaties confer certain rights to states, as contracting parties, which are, in fact essential for the functioning of the Union. Thus, we find: the participation of states to the establishment of common institutions and entities, the right of action before the Court of Justice of the European Union in order to ensure compliance with treaties, immunity from execution, the right to decide on the accession of new member states, the right of revising treaties.

A. Under the constituent Treaties, States Parties have the right to take part, according to certain criteria, in establishing the main institutions of the European Communities[4] and subsequently of the European Union. In this respect, each state has one representative at ministerial level in decision-making institutions. Member states governments appoint Commission members - the true executive of the European Union. As for the Court of Justice, its members are appointed by the common agreement of member states governments.

B. States Parties to the constituent treaties have the right to bring before the Luxembourg Court of Justice, a claim against any contracting party; this claim aims at ensuring compliance with Community law and, more recently, with European Union law.

C. Another right granted to States Parties to the constituent Treaties is the immunity from execution, as resulting from the fact that these Treaties contain no provisions concerning the enforcement of states in case they do not fulfil their obligations[5]. In this situation, we believe that the

[2] Under the Preambles of the three constituent treaties.

[3] Court Order of July 15th, 1964, *Costa v./ ENEL*, C-6/64.

[4] According TCECA: the Special Council of Ministers, the High Authority, the Common Assembly, the Court of Justice. Each one of Treaties establishing EEC and Euratom sets the following institutions: the Council, the Commission, the Assembly, the Court of Justice.

[5] The situation was, however, different in the case of the Treaty of Paris which initially provided in art. 88, paragraph (3), two penalties for the state failing to enforce its obligations, namely: the suspension of payment by CECA to the state in cause and the authorization given by the High Authority of member states to take, notwithstanding the common market principles, measures of defense or retaliation on the state concerned (see http://eur-lex.europa.eu/fr/treaties/dat/11951K/tif/TRAITES_1951_CECA_1_FR_0001.pdf).

immunity from execution applies on grounds of states sovereignty. It is clear that if the EU Court of Justice gives an order against a state that did not fulfil its obligation, this judgement is, in fact only a matter of principle, because it is not likely to be enforceable. This situation was considered in the specialized literature as "essential for understanding the Community institutional system. Unlike what happens in a federal state in which the federal power has the means to reduce a possible resistance of the federal state against the federal order, in the Community, there is no community enforcement"[6]. Within the European Union, member states keep their sovereignty; nevertheless, if they voluntarily refuse to execute their obligations, then the non enforcement exception applies *("non adimpleti contractus").* By invoking this exception, a suspension of the Union's own obligations towards that member state is obtained until the moment it will fulfil its incumbent obligations.

However, there is still a way to penalize the member state which is guilty of failure of obligations. Thus, if by not fulfilling the obligations, that state breaches individual rights and interests, persons aggrieved may appeal to national jurisdictions and obtain, under certain circumstances, compensation for the damage caused, like, for example, the conviction of the state to refund illegally collected taxes.

D. EU accession of a state entails, among other things, the agreement of all other member states. In other words, any EU member state is entitled to express its consent or, conversely, to make use of its right of veto on the accession of new member states.

E. The constituent treaties contain a clause under which any revision can be made only with the unanimous agreement of all member states. The review is achieved through a diplomatic treaty subject to ratification. Thus, no commitment can be altered without formal consent.

1.2. The obligations of member states

Naturally, States Parties to the constituent treaties acquire, next to rights, also a series of obligations, which we shall classify into general and special.

General obligations. Although not numerous, they are fundamental and specific to international law.

A. A first general obligation is loyalty to the Union. Constituent treaties contain a clause of loyalty to the Union, under which States Parties should implement the treaties in good faith and take action to ensure the achievement of objectives. This clause is nothing more than a way of expressing the principle of international law, *pacta sunt servanda*[7]. The idea, from which the obligation to fulfil and act in good faith results, is found in art. 5[8] of the Treaty establishing the EEC[9], under which member states shall take all appropriate measures, either general or particular to comply with obligations under this Treaty or under acts of Community institutions. At the same time, it facilitates its mission. Under the same article, member states must refrain from any action likely to endanger the achievement of objectives of this Treaty.

Moreover, the Court of Justice, even from its early decisions, has resorted, in its motivations, to this general obligation of cooperation and loyalty to member states, either by citing articles that consecrate it, or by referring, in a more general form, to the obligation of solidarity between member

[6] Pierre Pescatore, *„L'ordre juridique des Communautés Européennes. Etude des sources du droit communautaire", (*Presses Universitaires de Liège, A.S.B.L., 1975), p. 54.

[7] For modifying treaties, the Vienna Convention of 1969 on the Law of treaties is also relevant; in art. 26, it provides that: "Every treaty in force is binding upon parties and must be executed by them in good faith".

[8] The current art. 4 TEU.

[9] Similar clauses are found in art. 192 of the Euratom Treaty, but also the Treaty of Paris contained such clauses in art. 86, para. (1) and (2).

states. In this respect, we find several court orders, of which we mention the first data of the Court, in this field:

- the 1969[10] court order of the ECJ mentions that "solidarity is the basis of the whole Community system, according to the agreement provided in art. 5 of the Treaty";

- the *Scheer* court order[11] of 1970, in which the Court orders the following: at the beginning of the implementation process of the common agricultural policy, during which the Commission could not fully assume its role, member states were entitled and were bound to take measures of the national legislation in order to facilitate the proper implementation of EU law;

- the court orders of 1971: *Commission v. / France*[12] and *Commission v. / Italy*[13]. In the first court order, the Luxembourg Court speaks of a general obligation of cooperation provided in art. 192 of the EAEC Treaty, under which parties must use the means offered by the Treaty to resolve any legal uncertainty that states are required to overcome in order to cover the fact of not fulfilling their obligations;

- the court order of July 13, 1972[14], in which the Court states that the Community law effect, considered as having force of judgement by the Republic of Italy, involves the competent national authorities' refraining from applying a national prescription recognized as incompatible with the Treaty and the obligation to take all necessary measures to facilitate the effect of Community law.

B. Another general obligation has as object the coordination of national policy in order to ensure the common interest, established initially in art. 6 of the EEC Treaty. According to the Treaty, member states commit to coordinate their economic policies in order to achieve objectives of the Treaty. Unlike the principle of good faith that exists in all three constituent treaties, this obligation is not provided, in similar terms, in ECSC and Euratom Treaties. However, in the last two treaties, we find a general clause which gives to the Council of Ministers, the task of coordinating national policies with the Communities action[15].

C. The financial contribution is another obligation of States Parties to the constituent Treaties. This obligation is found in the Treaties of Rome, but it is absent in the Treaty of Paris. This absence is not a shortcoming, but has a reasonable explanation in the sense that this Community had its own resources in the form of samples of the coal and steel production[16]. The obligation of financial contribution no longer exists today because, since 1970, national contributions of member states have been gradually replaced by own resources[17].

D. The obligation of responsibility for Communities / Union actions towards third states. Although this general obligation is not covered by any of the three treaties, we believe that it should, however be taken into consideration, because it results from the general rules of international law.

Special obligations. By joining the constituent Treaties, member states have undertaken a number of obligations resulting from the economic character and main objective of the European Communities, which is the creation of a Common Market. It is about taking action, about obligations characteristic, in particular for the transition period, in other words, about the States Parties' commitment. We mention that this is not about rules directly applicable to member states subjects. Given the large number of these special obligations, we will only do a listing of those that we

[10] ECJ Judgement of December 10th, 1969, *Commission v. / France*, C-6/69.

[11] ECJ Judgement of December 17th, 1970, *Scheer v. / Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, C-30/70.

[12] ECJ Judgement of March 31st, 1971, *Commission v. / Conseil*, C-22/70.

[13] ECJ Judgement of December 14th, 1971, *Commission v. / France*, C-7/71.

[14] ECJ Judgement of July 13th, 1972, *Commission v. / Italy*, C-48/71.

[15] Art. 26 TCECA and art. 115 TCEEA.

[16] Art. 49 TCECA.

[17] Under the Treaty of April 22nd, 1970.

consider as being illustrative for the achievement of the major Communities objective, namely the economic integration. Thus, we find:

- the obligation to gradually eliminate, national customs rates and replace them with a common customs rate;
- the obligation to abolish quantitative restrictions within the Common Market;
- the obligation to establish the free movement of workers;
- the obligation to establish the freedom of residence and to provide services;
- the obligation to liberalize the financial services;
- the obligation to renounce at the state aid;
- the obligation to eliminate tax differences, etc.

2. Institutional systems under the constituent Treaties

As known, under international law, one of the constituent elements of international intergovernmental organizations is the existence of an institutional system. The constituent Treaties of the European Communities, and subsequently the European Union are not limited only to achieve mutual legal relations between the contracting parties, but they also create one institutional system, for each organization that they found. In other words, constituent treaties provide the establishment of an "organized social ensemble towards a common goal, which is totally different from the result of national interests in attendance. This ensemble is provided with entities, invested, to a certain extent, with autonomy and capable to work towards achieving a common interest"[18].

A significant part of the constituent treaties content is reserved to the European Union institutions.

3. The Revision of instituting Treaties

Under international law, international treaties in force may be changed under the conditions when reasons for which they have been completed or conditions of application require the transformation of some provisions in order to be adapted to the new requirements. Treaties usually, contain express clauses on modification procedures, through amendments that are being adopted by unanimity or by qualified majority of two thirds or by simple majority. In general, amendment is the generic term which indicates any change to the text of a treaty. However, terms used for such changes vary and are often equivalent: amendment, revision. The amendment relates to certain changes, partial and of minor importance, and the revision designates substantial and extensive changes to the text of a treaty[19]. In any case, there are two general rules on the modification of Treaties (Art. 39, Vienna Convention, 1969):

- any treaty can be amended only with the parties' agreement;
- in order for changes to take effect, this agreement must follow, in principle, all prescribed steps for signing the Treaty[20].

Within the European Union law, revision is defined as any change or addition to institutive Treaties, and is a legal intervention that has the same legal value as the original Treaties. Unlike international law, where we find two rules on revising treaties, the European Union law distinguishes between classical revision, specific revision of international law and independent revision.

[18] Pierre Pescatore, *op. cit*., p. 56.

[19] For details, see Dumitra Popescu, Adrian Nastase, *"Public International Law"*, (Chance Publishing House, Bucharest, 1997); Ion M. Anghel, *"The Law of Treaties"*, vol. 1 and 2, second edition, revised and enlarged, (Lumina Lex Publishing House, Bucharest, 2000); Nguyen Quoc Dinh, Patrick Daillier, Alain Pellet, *op. cit*., etc.

[20] Negotiation, adoption, ratification and entry into force.

1.3.1. The classical revision, under international law

Each constituent treaty contains a revision clause. So, we remember that the Treaty of Paris provided that "after the expiration of the transitional period, the government and the High Authority of each member state can propose amendments to this Treaty. The proposal will be presented to the Council. This issues, by a two thirds majority, a favourable assent in a conference of representatives of member states governments, which will be immediately convened by the President of the Council, in order to reach a common agreement on amendments to the Treaty. Amendments shall enter into force for all member states, after being ratified by all member states in accordance with their respective constitutional rules"[21]. Similar provisions can be also found in the Treaties of Rome, as it follows: the government of any member state or the Commission may submit to the Council, proposals on the revision of this Treaty (EECT respectively EECAT n n.[22]). In case the Council, after consulting the Assembly, even in cases received from the Commission, issues a favourable assent, in a conference of representatives of member states governments, convened by the President of the Council in order to reach a common agreement on amendments to this Treaty. Amendments shall enter into force after being ratified by all member states in accordance with their respective constitutional rules[23].

Currently, provisions relating to the revision of EU Treaties are found in art. 48 of the Treaty on European Union. According to that article, treaties can be amended in accordance with an ordinary revision procedure. Also, they can be amended in accordance with simplified revision procedures. As for the ordinary procedure, the following aspects are important: the Government of any member state, the European Parliament or the Commission may submit proposals for treaties revision, to the Council. These proposals may aim, among others, either at increasing or at reducing competences conferred in Treaties, to the Union. These proposals shall be submitted to the European Council, by the Council and shall be notified in national Parliaments. If the European Council, after consulting the European Parliament and the Commission, adopts by simple majority a decision in favour of examining amendments proposed, the president of the European Council shall convene a Convention composed of representatives of national Parliaments, Heads of State or Government of member states, of the European Parliament and of the Commission. The European Central Bank is also consulted if institutional changes in the monetary field occur. The Convention analyzes the proposals for revision and adopts, by consensus, a recommendation addressed to the Conference of representatives of member states governments. The European Council can decide, by simple majority, with the European Parliament's approval, not to convene a Convention if it is not justified by the extent of amendments. In the latter case, the European Council shall define the terms for the Conference of representatives of member states governments. The President of the Council convenes a Conference of representatives of member states governments in order to adopt, by common agreement, the amendments that are to be brought to treaties. Amendments shall enter into force after being ratified by all member states in accordance with their constitutional rules.

Referring to the simplified revision procedures, it should be mentioned that they only apply if the total or partial revision of the provisions of Part III of the Treaty on the functioning of European Union concerning the internal Union policies and actions is wanted. The initiative belongs to the government of any member state, Parliament or Commission. The draft for total or partial revision is submitted to the Council. The European Council may adopt a decision of totally or partially amending the provisions of Part III of the Treaty on the functioning of the European Union. The European Council shall decide unanimously, after consulting the European Parliament and the Commission, but also the European Central Bank, in the case of institutional changes in the monetary

[21] Article 96 TCECA (1951 version).
[22] Our reference.
[23] Art. 236 TCEE and art. 204 TCEEA (1957 version).

area. This decision shall enter into force only after the approval of member states, in accordance with their constitutional rules.

To a careful analysis of texts presented above, we note that the revision procedure has a preparatory stage, with community character and a diplomatic stage. Thus, we note that the preparatory phase, which develops within the Union, consists of the fact that the initiative of Treaties revision can be of a member state government, of the Commission or European Parliament. The draft is then submitted to the European Council which must consult, in turn, the European Parliament, and in case the initiative belongs to one of the member states governments, then it must be submitted to the Commission. Subsequently, the European Council will convene a convention in order to revise the Treaty in question. Once the decision to convene a convention is made, the diplomatic phase begins. The Convention's mission is to reach a common agreement on the total or partial revision of a European Union Treaty. We believe that within the Convention, nothing happens other than the completion of negotiations on amending the Treaty, by signing it, by representatives of Member States, since negotiations are held within the preceding phase. In other words, the amendments are negotiated and agreed within the European Council and the convention's object is represented by the required formality of signing. The amendments shall enter into force only after all member states have expressed their consent, according to their national constitutional rules.

In conclusion, the European Union Treaties can be revised in whole or in part, in accordance with the rules of classical international law, under which the amendment of treaties in force follow the procedure stipulated for their conclusion, namely: negotiation, signature and ratification by all States Parties to the original Treaty.

1.3.2. The independent revision

Treaties establishing the European Communities and European Union have provided and still provide the possibility for EU institutions to amend certain provisions. However, this procedure is not specific to the European Union, being also used for other treaties concluded under the auspices of other international organizations. For example, we bring the following to the forefront of attention:

- art. XX of the Constitutive Act of the United Nations Organization for Food and Agriculture[24] allows to the Organization's Conference to amend the Constitutive Act, by the vote of two thirds of the votes cast. Amendments adopted by the Conference must not, however, establish any new obligations on member states;

- art. XII of the UNESCO Constitution[25] allows the adoption, by the General Assembly, of some amendments to the constitutive act, by a majority of two thirds of the votes. This time too, it is expressly provided that the amendments must not represent "fundamental changes" in the organization's purpose;

- art. 41 of the Statute of the Council of Europe[26] contains a provision under which the Committee of Ministers can adopt amendments to the Statute.

4. The compatibility of international law with EU law

The European Union has a legal order which can be confused neither with the international order, nor with the state order, but rather, stems from these two, being different from them in its essential points. Those features, which highlight the unique character of the construction which Jean Monnet imagined, have important consequences for the legal and political institutions of the system, whose development is carried out according to integration steps of the Union.

[24] October 16th, 1945 (http://www fao.org/docrep/003/x8700e/x8700e01 htm#20).
[25] November 16th, 1945 (http://www.un-documents net/unesco-c htm**).**
[26] May 5th, 1949 (www.coe ro).

Regarding the existing relation between EU legal order and rules of public international law, the Luxembourg Court admitted the compatibility of the two systems in a number of areas such as: the extraterritorial effect of the right to competition, the law of the sea, the basic principles of international liability or international criminal law. Likewise, ECJ often applies, as rightful source of EU law, the rules of international law in defining treaties, as well as methods of interpretation of their effects, by invoking the Vienna Conventions of 1969[27] and 1986[28] or based on customary international law[29].

Thus, in case of interpretation or coverage of gaps of EU law, it does not resort directly to specific principles of international law, but indirectly; they can be used only if ECJ determines their compatibility with EU legal order. Conversely, EU law can not claim that it directly contributes to the development of public international law.

However, the Union, as object of international law, is subject to compliance with general international law, and certain rules or principles of the latter create for the Union, obligations which are likely to produce effects within the EU legal system; their compliance is required both to institutions and member states.

A careful study of ECJ jurisprudence shows that it proves certain reluctance on the principles of international law. In this respect, the European Court of Justice rejects the use of any principle regarded as incompatible with the legal nature of EU institutional structure. Thus, the EU principle of public international law which entitles member states to do justice by themselves, can not be applied in EU legal order; Treaties establishing the European Union contain a complex system of judicial tools used in case of default, from a state, of obligations under the Treaty.

The principle of reciprocity also enters the category of international law principles to which the Court does not recognize the applicability within the EU system.

However, the Court admits the possibility of using some originating principles of international law provided that they meet the specific requirements of Community law. In this way, if there is a conflict between an EU treaty and a convention relating a member state to another state or a third party, the Court states that, under the principle of international law, a state that assumes a new obligation contrary to its rights recognized by a previous treaty, by this action, it renounces to the execution of the new obligation[30].

Among principles of international law frequently used by the Court are, in particular, the followings: the principle under which a state can not refuse its nationals the entry into and staying on its territory[31], the principle of continuity in matters of states succession and the principle of good faith. The First Court[32] took into consideration the principle of good faith, in order to point out that signatories of an international agreement can not adopt, before the entry into force of that agreement, acts likely to deprive it from its object or purpose, as a customary rule recognized by international jurisprudence, being imposed to the Community.

I believe, however, that due to the increased role of the European Union, as an actor of the international community, through the proliferation of agreements with many countries, the presence in international organizations, the diplomatic relations involving both the representation in the European Union and its foreign delegations, as well as the development of foreign policy and common security, all this will lead to a development of using the principles of international law in ECJ jurisprudence.

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[27] Vienna Convention of 1969 on the law of treaties.

[28] Vienna Convention of 1986, on the law of treaties concluded between states and international organizations or between international organizations.

[29] Denys Simon, *„Le système juridique communautaire”*, 2nd edition,(PUF, Paris, 2000), p. 215.

[30] ECJ Judgement of February 27th, 1962, *the EEC Commission v. / Italy*, C-10/61.

[31] ECJ Judgement of December 4th, 1974, *Yvonne van Duyn v. / Home Office*, C-41/74.

[32] The Law court, today.

Conclusions

In conclusion, we note that the Treaties which established the European Communities and, subsequently the European Union are international legal instruments governed by rules of public international law. The negotiation, conclusion, expression of consent, amendment of Community Treaties, and of ones of the European Union are specific phases for the entry into force of any international treaty, being governed by the same rules of international law.

As an argument, we mention, by way of example, the Treaty of Accession of Romania to the European Union, which is a modifying treaty of European Union constituent Treaties. Thus, as methodology, procedurally speaking, in order to conduct negotiations for Romania's accession to the European Union, the national authorities have prepared to be sent to the European Union Council, one position paper corresponding to each negotiation chapter. The position papers were drawn up under the commitments that Romania had and could assume within the negotiation chapter.

Once developed, the position papers were submitted for adoption, by the Government. Once adopted, consultations were held with the relevant committees, for each chapter of negotiations, in accordance with the provisions of the Constitution. To the position papers of Romania, the EU Council responded with common positions, in which the position of Romania was accepted or our country was asked to change its views on certain specific issues. In the latter case, Romania adopted a new position paper on that chapter, modified depending on requests received and on its own interests and possibilities.

On December 14, 2004 in the 12th ministerial meeting of the Conference of Romania's accession to the EU, it was shown that our country had successfully completed the first phase of the timing of accession, namely the completion of negotiations in 2004. Based on the outcome of this Conference, the European Council of December 17th politically confirmed the closure of Romania's accession negotiations, moving on, so the next phase: adopting and signing the Accession Treaty. Once accession negotiations completed, since December 2004, Romania has started the formalities for drawing up the Treaty of Accession. The Treaty of Accession to EU is the legal act of accession of a State to the European Union. The English version for the Accession Treaty was completed in late January, so that on February 4th, 2005, it was agreed by Member States of the EU in Brussels, within the COREPER[33]. A week later, Romania was agreeing on the text. After translating the Treaty in all 20 official EU languages, as well as in Romanian and Bulgarian, texts were officially transmitted to the member states, Parliament, European Commission, Romania and Bulgaria. On April 13th, 2005 the European Parliament gave its assent[34] to the accession of Romania and Bulgaria to the European Union.

The assent, introduced by the Single European Act[35], is a way of the European Parliament of approving a proposal from the Council. Thus, the legislative act must be approved by Parliament in order to be adopted. However, the procedure does not allow the Parliament to act directly. For example, it can not propose or require amendments in the assent procedure, its role is only to approve or reject the proposed act.

[33] COREPER, the French acronym under which is known the Permanent Representatives Committee, is composed of the permanent representatives (ambassadors) of member states and, in a stage which involves preliminary negotiations, assists the Council of Ministers (Council of European Union) in dealing with issues on the agenda. This Committee occupies an essential position in the union decision-making system; at the same time, COREPER is a forum for dialogue (among permanent representatives and between them and the capitals that they are representing) and a body of exercising political control.

[34] With 497 votes for, 93 against and 71 abstentions, the recommendation of the rapporteur for Romania, Mr. Moscovici, on Romania's accession to the European Union was adopted.

[35] It entered into force in 1986.

The assent from Parliament in Strasbourg gave the possibility to go further through with the procedure of Romania's accession to the EU. Thus, on April 20th, 2005, Member States agreed in COREPER, the draft of EU Council Decision on the Treaty of Accession of Romania and Bulgaria.

The official signing of the Treaty of Accession of our country to the EU took place on April 25th, 2005, in the presence of member states representatives, and of representatives of Romania and Bulgaria.

It is known that signing the text of a treaty, according to international regulations, does not usually commit parties under any aspect, because the signing only authenticates the text. However, starting from the signature of the Treaty of our country accession to the EU, new rights and obligations on the parties have been created.

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CONSTANT ASPECTS OF LAW

ELENA ANGHEL[*]

Abstract:
"Are we watching, in the succession of history, the appearance and disappearance of legal systems or assisting, in a greater or lesser extent, to what might be considered, in a sense, an evolution of those systems?"[1]
Law, indissolubly linked to the general evolution of society, has recorded a number of differences in time and space, both in terms of content of various types and positive law systems, and also in terms of forms that take the rules of law, authorities who have the ability to edict it or the procedure to be followed.Indeed, there is no law for all times and all places, as law is not an abstract product of our reason, it comes from the human experience, it is a product of history and that is why institutions of each society can only be different from one society to another.[2] *But, as in reality there are not quantities of history - many, little or very little - but just history*[3]*, we can say that in typology there is not socialist law absolutely different from bourgeois, feudal or slave law, so there is just law.*
By this approach, I wanted to bring back into question the existence of some factors of constancy in law, those "legal permanencies" investigated by Edmond Picard, believing that "there is something in the legal relationship that necessarily subsist anywhere"[4].

Keywords*: constant aspects, diversity, "given", "constructed", continuity*

Introduction:

This subject has been researched in the specialized literature under different aspects: unity and diversity in law typology, "given" and "constructed", continuity and discontinuity in law.

Unity and Diversity in Law Typology

Any state has its legislated laws, in accordance to its own social-political exigencies, to the traditions and values it proclaims. Unlike the principles of natural rights, the legislated norms are variable over time and space.

Man himself renders different value to the abstract concept of equal chances and the abstract freedom of choice. We are born with a common biological setting, nonetheless we each consolidate our own features, aspirations, values. And, although we are alike through the values which are given to us, we are different by the capitalizations we make. There is no perfect, timeless, spatial and universally moral model.

Individual identity is given by the sense of belonging to a certain community and therefore the potential conflicts that might arise cannot be settled through instituting a universal positive law; the law of each state represents the expression of living experience.

Our planet's mankind is not at the present moment in the same historical phase or stage[5]. Correspondences and contamination between cultures are common, however uniformity is out of the question. Behaviors differ depending on race, ethnics and religion. The normative structure of

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[1] Ion Gheorghe Maurer, *Cuvânt înainte*, in „Studii şi cercetări juridice", nr. I/1956.

[2] Radu I. Motica, Gheorghe Mihai, *Teoria generală a dreptului*, (Bucuresti, Ed. All Beck, 2001), p. 35.

[3] Radu I. Motica, Gheorghe C. Mihai, *Fundamentele dreptului. Optima justiție*, (Bucuresti, Ed. All Beck, 1999), p. 7.

[4] Ibidem.

[5] Gh. Mihai, *Fundamentele dreptului. Teoria izvoarelor dreptului obiectiv*, vol. III, (Bucuresti, Edit. All Beck, 2004), p. 47

communities has always differed from one tribe to another, from one people to another, from one nation to another. Even the Romans, who conquered so many people, understood the existing differences between civilizations and did not impose the established law of Rome to abolish the existing rules governing the conquered people.

The evolution of the human civilization is not a uniform process. Thus, every law areas and types emphasized by historical evolution have specific particularities, which are determined by ensemble set of factors influencing law, rendering it dynamic, of evolutive nature, distinctive. The natural framework, social-political transformations from one phase to another, the interests of social structures, human individuals with their aspirations, the role played by tradition in different historical moments, ideological differences, in other words, the totality of factors that have configured the law have generated changes in the normative contents of the law, qualitative and quantitative modifications in the systematical structure of law, emphasizing on one hand the idea of juridical progress and, on the other hand, the fact that there cannot exist an universally valid legislation.

However, summing up, we can say that just as history cannot be expressed as a quantity a lot of history, very much history, some history, very little history – but there simply is history[6], there is no socialist law in typology that is absolutely different than the bourgeois law, the feudal or the slave law, but there is law; institutions and principles exist that are based on roman law and that have survived over societies that have created them, being applied throughout millennial evolution; notions and concepts exist (such as subjective right, legal deed, legal act, legal will) that surpass national framework and have the same significance in any theory on the system of law; a general theory of law exists (juridical encyclopedia) that "chooses from all law elements what is essential, what constitutes the very articulation of legal thinking and by willingly establishing its logical process, defines what law is". [7]

Therefore, there cannot exist a common legislation for all societies however "there is in the juridical relation something that necessary subsists anywhere"[8] and that "something" is represented by the legal permanencies, the **constant aspects of law**, subject matter to the legal encyclopedia.

Given and Constructed in Law

Montesquieu drew attention over the fact that "the laws that seem opposed are in some cases based on the same spirit".[9] In this context, we will attempt to answer the following question: can the legislator create ("originate") the law by simply establishing norms in the form and upon the procedure required by laws or, on the contrary, besides these "exterior marks", is the legislator conditioned by some merits, contents criteria because of which the efficiency and validity of legal norms depend? [10]

François Gény distinguishes between the "***given***" that arises from the very nature of things, and exists prior to the legal phenomenon, and the "***constructed***", which consists of the legislator's work. As regards the "given" aspects of social life, Gény classified such in four categories:

a) real "given", consisting of all conditions that arise from the nature of things and that impose themselves to any will (both natural conditions and conditions that refer to the anatomic and psychological structure of man, his moral aspirations);

b) historical "given", that accompany mankind evolution, and provide such with a series of precepts arising out oflived experiences (for example those concerning private property);

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[6] Radu I. Motica, Gheorghe C. Mihai, *Fundamentele dreptului. Optima justiție*, Ed. All Beck, 1999, p. 7

[7] Mircea Djuvara, *Teoria generală a dreptului (Enciclopedie juridică*),(Bucuresti, Ed. All, 1995), p. 6

[8] Ibidem

[9] Montesqieu, *Despre spiritul legilor*, III, (Bucuresti, Ed. Ştiintifică, 1970), p.118

[10] Anita M. Naschitz, *Problema dreptului natural în lumina filozofiei marxiste a dreptului*, în „Studii și cercetări juridice" nr. 3/1966

c) rational "given", meaning the totality of rules dictated by reason, basically referring to the content of natural rights;

d) ideal "given", that concentrates all aspirations, feelings, beliefs of mankind in respect with the progress of positive right, the utmost objective to which law aims.

Paul Roubier also is of the similar idea that the work of legal creation has two phases: acknowledging such "given" elements of social life and based on them constructing the legal rule[11]. By analyzing the basics of legal rules, Roubier shows that in case the legislator creates the legal rule without taking into consideration the "given" aspects of the social order, then the legislator creates a useless piece of work. Consequently, there are three groups of factors that need to be taken into consideration: economical factors (interests), religious and moral factors (traditions) and political and social factors (ideologies).

Emphasizing the importance of the fact that the historical materialism developed by Karl Marx exaggerated the importance of the economical factor, placing such as the basis of all social phenomena, Roubier considered it was absurd to render unilateral explanation to great historical events, whereas such are always based on a complex set of causes.

Essentially, Marx asserted that the legislator did not invent laws, but merely formulates such.[12] In the opinion of Marxist philosophy, the rights (equivalent to positive rights) is the result to the conscious creation of people; nevertheless, Marxism admits the idea of a "given" in law, which it places in the natural and social environment and in the framework of which the work of "constructing" law is developed.

The Marxist philosophy considers that the legislator cannot create laws randomly but, in order for the legal norms to be efficient, a series of factors must be taken into consideration regarding not only the form but also the grounds of juridical regulations, which factors compose the "given" side of law and that concern *social relations, the human factor and objective laws on the development of society and thinking.*

Therefore, the relations established between people at a certain historical moment (economical, political, cultural, family relations) represent a fundamental "given" aspect of the law whereas, on one hand, they represent the subject matter of legal provisions and, on the other hand, by their specific nature, by means of their influence over the human reason, feelings and will, they drive the solutions comprised in such provisions.[13] Nonetheless, the action of law over social relations is always meant as a participation of the legal conscience[14], an idea which will be further developed herein.

Man is a complex factor to be considered by the legislator; man, with his biological and social specific nature, is a product of his era, is a fundamental "given" of law, from two standpoints: as subject of the legal provisions and furthermore as their addressee. His interests, beliefs, ideals are the ones that drive the legislator's activity and the evolution of law.

Moreover, only if the aims set up by the legislator and the solutions created in order to fulfill such are in accordance with the laws of nature and society development, then legal provisions can play a positive social role, guiding society's evolution on a normal path, and not hinder historical development. That is because "efficiency can only be achieved grounded on what exists. The

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[11] Paul Roubier, *Théorie générale du droit, Histoire des doctrines juridiques et philosophie des valeurs sociales*, 2 edition, (Éditions Dalloz 2005), pag. 193

[12] Marx, Engels, *Opere*, vol. I, E.S.P.L.P., (Bucuresti, 1957), p. 166

[13] Anita M. Naschitz, *Problema dreptului natural în lumina filozofiei marxiste a dreptului*, în „Studii şi cercetări juridice" nr. 3/1966

[14] Traian Ionaşcu, Eugen A. Barasch, *Îmbinarea cercetării fundamentale cu cea aplicativă pe tărâmul dreptului*, în „Studii şi cercetări juridice" nr 3/1966

purposes only have a precise significance if they are adapted to the means. Problems are not socially meaningful unless they can be solved"[15] and law giving is the product of discerning human actions.

The study of the three main components of the "given" aspect in law shape the Marxist notion over the historical nature of law, over its dependency of time and place conditions as well as the powerful connection established by Marxism between the right of every formation and the development level of the production forces at a given moment.

Continuity and Discontinuity in Law

The idea of a "given" aspect in law does not have to lead to establishing some general and invariable criteria, situated beyond human experience, which criteria would discipline creation in law. On the contrary, the "given" in law being itself variable, explains the existing differences between legal systems, also under the aspect of content and finality of legal regulations belonging to some different types of law.

Admitting nonetheless that, on a psychological level, in the way of thinking of an age traces can be found of the thinking method of the previous age/ages and, furthermore that life does not start over with every instauration of a new production method (idea which has been emphasized from the very beginning of this research), we can mention a series of continuity elements in the "given" aspect of law and, in addition, the transposing of such into "constructed" of law as well.[16]

Thus, referring to social relations in various historical ages, we can easily notice the differences of content between ownership relations in the slave society, for example, and that of feudal, bourgeois and socialist societies; however through an abstractization process, elements of continuity can be noticed on the level of such relations' structure, which elements are reflected in law under two aspects: in the juridical regulation subject matter – the fact that certain categories of social relations (ownership relations, relations between spouses, between seller and buyer) are regulated in all areas of law; in the logical-conceptual mechanism – certain legal categories and concepts (such as the ownership ones, contract, juridical rapport) can be found in all the systems of law, emphasizing the permanent value of the logical structure of law.

Irrespective of the existing differences, all law families (German-Roman, Anglo-Saxon, Muslim, etc) protect the same fundamental institutions: individual's primate, property, family. Although etatic law changes along with states (34 at the beginning of the 20^{h} century, approximately 102 at the middle of the same century, over 200 at the beginning of the 21st century),[17] the notion of legal norm does not render different meanings, but it has "the same significance, same legal function and the same logical form, irrespective time and space, and regardless to the legislator and the normative form that includes it".

Professors Traian Ionaşcu and Eugen A. Barasch, while researching the legal institution of contract in socialist and bourgeois law, reveal that what has changed from one regime to another are the interests to which the law serves; therefore, the end scope of the two types of contracts are different from one age to another, thus "the contract in the socialist law is a whole new different contract"[18]. Nevertheless, in both regimes the concept of contract exists and thus the concepts are maintained, while what changes are the concepts' functions, the substance; the same technical construction, i.e. the contract –, takes, fundamentally different end scopes and contents.

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[15] Traian Ionaşcu, Eugen A. Barasch, *Îmbinarea cercetării fundamentale cu cea aplicativă pe tărâmul dreptului*, în „Studii şi cercetări juridice" nr 3/1966

[16] Traian Ionaşcu, Eugen A. Barasch, *Îmbinarea cercetării fundamentale cu cea aplicativă pe tărâmul dreptului*, în „Studii şi cercetări juridice" nr. 3/1966

[17] Gh. Mihai, *Fundamentele dreptului*, vol. I-II, (Bucuresti ,Edit. All Beck, 2003_, Generalităţi introductive

[18] Traian Ionaşcu, Eugen A. Barasch, *Îmbinarea cercetării fundamentale cu cea aplicativă pe tărâmul dreptului*, în „Studii şi cercetări juridice" nr. 3/1966

A current positive does not cease connections with the precedent positive law, meaning a series of principles and normative ideas are maintained. The institution of the civil contract, the principle of liability for an illegal action, are not the creations of a certain modern positive law, but have instead a millenary legal oldness[19]. Conclusive to such end is the way how many of the principles, institutions, concepts and categories created by the Roman law have survived to the society which had created them and were taken over and successfully applied in feudal society as well as in the modern one.

To this end, the words of Professor N. Popa are clarifying: "In the case of law, but not only, it is necessary that each time we start with the Greek and Roman antiquity because that is where the source of the entire European development lies. Although nowadays society is no longer similar to the old one, while the institutions which govern us are radically different, somewhere deep, at the level of the founding principles, universally valid ideas can be found, which govern us in the present as well."[20]

The existence of principles is innermost related to human activity; "law cannot function outside general principles."[21] They constitute the underlayer of positive law. The general principles of law represent a stability factor in law; they ensure the legal system's evolution, the continuity of the legal order and are characterized by longevity. If the loss or modification of a simple law rule is only "of episodic nature", then eliminating a principle "risks causing a large damage to the legal order because the fate of numerous legal rules is at stake"[22].

In this respect, Professor Nicolae Popa shows that the general principles of law have a double dialectics[23]. The internal dialectics refers to "the set of internal connections characteristic to the legal system, the interferences of its composing parts", while the external dialectics regards the dependency between principles and the set of social conditions, being reflected in the legal conscience of a nation at a certain moment; its evolution imposes the "rethinking of some principles in accordance to the economical-social mutations that demand for adequacy according to the legal regulations and institutions"[24].

Continuity in law also has that law fundamental "given" aspect, consisting of objective social laws, the action of which sometimes exceeds the frame of a single social-economical formation; for instance, the law of value, whereas "the precise law is unviable outside values, which values are always typically expressed in the wording of a law system's principles." [25]

The more so the human factor, the central area of interest for the legislator, represents a continuity factor in law, on one hand, through their physical, biological, physiological characteristics – which are common to all people – and on the other hand, due to volitions, ideals, interests for which they have fought along history and which are also found in the plan of legal regulations' end scope. Therefore, the history of human rights can be synthetically described as being the struggle for having human dignity respected by the state authorities.

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[19] Gh. Mihai, *Fundamentele dreptului. Teoria izvoarelor dreptului obiectiv*, vol. III,(Bucuresti, Edit. All Beck, 2004), p. 46

[20] Nicolae Popa, Ion Dogaru, Gh. Dănişor, D.C.Dănişor - *Filosofia dreptului. Marile curente*, (Bucuresti, Ed. All Beck, 2002), p. 3.

[21] Gheorghe Mihai, *Fundamentele dreptului – Teoria izvoarelor dreptului obiectiv, vol. III*,(Bucuresti, Edit. All Beck, 2004), p. 138.

[22] Jean Louis Bergel, *Theorie generale du droit*, 4 edition, (2003, Dalloz)

[23] Nicolae Popa, Mihail Ctin Eremia, Simona Cristea, *Teoria generală a dreptului, Ediția 2*, (Bucuresti, Ed. All Beck, 2005), p. 105

[24] Nicolae Popa, *„Cu privire la conceptul şi rolul principiilor generale de drept"* , RDP nr. 1-2, ian-dec 1996

[25] Gheorghe Mihai, Fundamentele dreptului, vol. I - II, (Bucuresti , Edit. All Beck,2003), p. 167.

In its grand historical-spatial diversity, in spite of the normal differences, the law presents a permanent nature represented by a bunch of constants. Law does not mean the simple recording of facts but also the permanent relation to values and principles and, thus, observing these constant guide marks.

Professor Djuvara considers that "the law can be a science, and the legal knowledge changes also into science when, having as an objective a higher number of documents related to law, they arrange and relate them according to their essential characteristics through legal notions or principles that are universally valid, just like the laws of nature". [26]

The Transition from "Given" to "Constructed": Legal Conscience

Researching the fundament of legal regulations and end scopes pursued by such represents the essential task of legal science. But scientific research, fundamental or applicative, is elaborated in consideration of practice. Research means knowledge, practice means action, it calls for finding solutions to answer the needs revealed by theory.[27] Establishing what it is, the scientific research has to also determine what it could be, what it needs to be. As emphasized by Paul Roubier[28], the essentially normative nature situates law science in the "has to be" domain and subordinates it to the law of end purpose an, unlike sociology, which is an explanation science, dominated by the laws of causality and necessity. Law is not simple "social engineering", but it implies a social order inclined to reaching some end purposes.

Any positive law has its end scopes of which the law makes use differently, "legally dimensioning such, measured in terms of times and people; the Nazi social order, Arabic-Saudi or Japanese one do not portray the same meaning".[29]

The scientific research pursues at detecting that process of transition from "given" aspects to "constructed" aspects, from what it is to what it could be, from indicative to imperative. Social efficacy of law depends on the degree of compliance between "given" and "constructed".

The law creation activity cannot be arbitrary; tracing the correct line between necessity and freedom implies finding optimal solutions for assuring a climate that is favorable to all; the transition from what it is to what it should be is made by means of legal conscience.

Law, before being a normative state, is a state of conscience, a set of representations, ideas, beliefs. Legal conscience thus appears as a premise to law giving and the enforcement of law norms.

Juridical reality does not only imply norms, but also assumes value judgments, legal conscience, relating to facts and interests. Therefore, "a law system can only exist if its creators and addressees are aware of it".[30]

The transition from *sein* to *sollen* implies, first of all, knowing and understanding the phenomena of social life (the cognitive phase of legal conscience), so that those necessities that claim for legal regulation can be selected; legal conscience then proceeds to their examination, in its aim to take from the entire set only the social relations that, in relation to the interests that need to be protected, will wear the legal clothing (action hypostasis); also the axiological phase implies their capitalization, establishing the essential solutions that need to be promoted and the technical-legal means through which such can be inserted in law order.

The legal conscience has a complex structure: legal ideology contains elements of rational nature by which it is understood what it is, and legal psychology, composed of affective elements, refers to what must be accomplished.[31]

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[26] Ioan Ceterchi, Ion Craiovan, Introducere în teoria generală a dreptului,(Bucuresti, Ed. All,1992), p. 5

[27] Anita M. Naschitz, *Problema dreptului natural în lumina filozofiei marxiste a dreptului*, în „Studii şi cercetări juridice" nr. 3/1966

[28] Paul Roubier, *Théorie générale du droit, Histoire des doctrines juridiques et philosophie des valeurs sociales*, 2 edition, (Éditions Dalloz 2005), Préface

[29] Gheorghe Mihai, *Natura dreptului: ştiinţă sau artă?*, în Studii de drept românesc nr. 1-2/2000

[30] Gheorghe Mihai, Fundamentele dreptului, vol. I - II, (Bucuresti , Edit. All Beck, 2003), p. 156

The shift from conscience to norm is a process carried out through that determining factor of legal conscience, legal will, focused on the regulation of social relations, which will the legislator rises to the level of state will, expressed in the form of legal norms.[32]

Legal conscience and, consequently, the law, are changing along with the society in which they have appeared, depending to the ruling process such reflects. The form changes (law, legal conscience) correspond to some content modifications.

However, in spite of the existing differences between legal civilizations, there can easily be noticed the common aspects that compose the essence of law. To research the essence of law implies entering the intimacy of legal phenomenon, noticing its internal qualities, "establishing its substance" (Aristotle). Legal will is that which can be found in every norm and in the set of laws; irrespective the transformations faced by law, such legal will, of mandatory nature, represents a constant element of law.

Nevertheless, from the point of view of essence, the law systems are "identical", in terms of the way how they organize the content they are different from one another.

Conclusions

By distinguishing in any legal relation a factual element and a rational one, Mircea Djuvara shows that, as two individuals having the same figure or two leaves with identical shape cannot exist, the same goes for two factual relations that cannot be identical in their entire complexity[33]. The factual element always varies from on moment to another. "Laws do not remain the same, although their letter stays the same…The way in which Napoleon code is applied today is in many ways different than the one applied 100 years ago; how it is applied in our country is in many ways different that in France".

Therefore, "the idea law is fixed, eternal, immutable, purely rational, however its content varies". In their content, legislations are always different, norms and regulations differ in time and space, but in essence and form, constant elements do subsist.

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THE RIGHT TO AN INDEPENDENT COURT

ALIN-GHEORGHE GAVRILESCU*

Abstract
The independence of the court is essential of state of rule, to maintain the stability in juridical intercourse, for the existence of a constitutional democracy achieved through a warranty of the necessary objectivity for the steady and legal settlement of the causes deducted to the trial and the achievement of a fair trial.
The article emphasizes the main international juridical tools in which independence of justice is reflected, achieving an examination of judicial practice of European instance as well as an analysis of this principle as it is regulated by Romanian justice.

Keywords: *independence, impartiality, justice, judge, instance*

1. Introductive Notions. Juridical Framework

The justice independence is, beside its impartiality, essential for the legal state, in order to keep the stability in the juridical relations, for the existence of a constitutional democracy, being constituted in order to guarantee the objectivity needed for the reasonable and legal settlement of the causes, for protecting the society's general interests, the legal order and also the civic rights and liberties.

The two notions never overlap whereas independence does not necessarily suppose impartiality. A court may be independent, automatically meaning that it does not necessarily have to be impartial[1], but if a judge can be independent and not partial, he cannot be impartial unless he is independent[2]. Therefore, independence is prior to impartiality.

Even independence and impartiality are two separate and distinct values of justice, there is a tight connection between them. Given this connection between independence and impartiality, the two values are regulated together by the stipulations of the main incident international juridical tools in the legal matter at an equitable lawsuit, respectively:

- art. 10 of Universal Declaration of Human Rights consecrating every person's right to be equitably, publically examined in a reasonable term by an independent and impartial court;

- art. 6, paragraph 1 of the European Convention for protecting the human rights and basic liberties that, by regulating the right to an equitable process, shows that the judgement of any person's cause must be equitably and publically made in a reasonable term by an independent and impartial court;

- art. 47, paragraph 2 of the Charter of Basic Rights of the European Union that acknowledges any person's right to an equitable, public process in a reasonable term in front of an independent and impartial judicial court constituted in prior by law.

The tight connection between independence and impartiality also results from art. 2 of the Basic Principles referring to the magistracy independence[3] that, specifies that justice must decide in

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[1] V. Pătulea, *Theoretical and Judicial Practice Synthesis of the European Court of Human Rights related to art. 6 of the European Convention of the Human Rights. The right to an equitable lawsuit. The right to an independent and impartial court (III),* in Law no. 12/2006, p. 218.

[2] Magistrate Association of Romania, *Magistrate Deontological Code, Application Guide*, Magistrate coordinator Fl. Costiniu, (Hamangiu Press, 2007), p. 29.

[3] Adopted by the 7th Congress of the United Nations for preventing the offences and the delinquents' treatment (Milano, August, 26th – September, 6th 1985) and confirmed by the General Assembly of the United Nations Organization by means of resolutions no. 40/32 from November, 29th 1985 and no. 40/146 from December, 13th 1985.

the causes brought to it based on the facts and according to the law, with no restrictions, no unwanted influences, no delusions, pressures, threats or direct or indirect interferences of anybody, no matter the reason, considering elements related both to independence and impartiality[4]

Beside the stipulations of art. 10 of the Universal Declaration of Human Rights, of art. 6 of the European Convention for Protecting the Human Rights and Basic Liberties and of art. 47, paragraph 2 of the Charter of Basic Rights of the European Union at the international level, a special importance regarding the judges' independence belongs to the Basic Principles regarding to the magistracy independence stipulating the obligation of every government and of the other institutions to acknowledge and respect the judges' independence.

Following the promotion of the judges' independence in order to reinforce the law supremacy in the democratic states, at the European level it was adopted, in the matter of the judges' role and the justice independence, Recommendation no. (94) 12 regarding the judges' independence, efficiency and role[5]. At point 2 letter d of Principle I – General principles regarding the judges' independence, it is established, in imperative terms, that in the process of making decisions, judges must be independent. Also, point 3 letter a of Principle V- Judicial responsibilities of the same Recommendation shows, among other things, that especially judges must act as fully independent in all the cases and ignoring any extern influence.

The judges' independence principle is also regulated by art. 1 of the Judges' Universal Status[6] stipulating that the judge, as an owner of the judicial authority, must be able to exert his function in a full independence in relation to the constraints / the social, economical, and political forces even in relation to other judges and to the judicial administration.

The judge's independence is also reflected by Bangalore principles where it is shown that justice independence is the premise of the legal state and a basic guarantee of the equitable lawsuit (Value 1-Independence). The judge must independently exert his judicial function based on his own appreciation of the facts and in the spirit of the law, with no external influences, suggestions, pressures or direct or indirect interference, no matter whom they come from and under what reason.

Considering the stipulations of art. 6 of the Convention for Protecting the Human Rights and Basic Liberties, of the Basic Principles referring to the judges' independence, referring to Recommendation no. (94) 12 of the Minister Committee of the Member States and interested ones in the fact that the promotion of the judges' independence needed for reinforcing the supremacy of law and of protecting the individual rights and liberties in framework of the democratic states should be effective, the participants to the multilateral reunion regarding the judges' status in the Europe organized by the European Council on July, 8th – 10th 1998 at Strasbourg adopted the European Charter regarding the judges' status[7]. This contains stipulations showing that the Judges' Status wants to provide the competence, the independence and the impartiality any person legally waits from the courts and from every judge whom the protection of their rights is entrusted to. He excludes any stipulation and any procedure able to debase the confidence in this competence and impartiality. The Charter contains the stipulations most able to guarantee the achievement of these objectives (General Principles, point 1.1.).

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[4] V. M. Cioabanu, *Judicial Authority* in *Romanian Constitution. Comment on articles*, Coordinators I. Muraru, E. S. Tănăsescu, (C.H. Beck Press, Bucharest, 2008), p. 1219.

[5] Adopted by the Minister Committee of Member States of the European Council on October, 13th 1994.

[6] Adopted by the Magistrate International Union in 1999 at Taipei.

[7] When contracting the works of the first multilateral reunion in Strasbourg from July 1997, the participants to this reunion, coming from 13 countries of Western, Central and Eastern Europe, together with the representatives of the Magistrate European Association (MEA) and the European Magistrate Association for Democracy and Liberty (EMADL) expressed their will to be offered by the European Council the frame and the support needed in order to elaborate a Charter regarding the judges' status. The Juridical Affairs Direction entrusted to an expert in France, Poland and Great Britain the publishing of a Charter pre-project. The pre-project was elaborated in the spring of 1998 and presented to the participants to the second multilateral reunions develop still in Strasbourg on July, 8th – 10th 1998. After being brought a series of amendments, the text was unanimously adopted.

As it results from the Basic Principles referring to the magistracy independence, the magistracy independence must be guaranteed by the state and stated in the Constitution or in other national law. In the same sense, at point 2 letter a of Principle I – General Principles regarding the judges' independence of Recommendation R (94) 12 it is specified that judges' independence must be guaranteed (...) by adopting express stipulations in this sense in the Constitution or in other legislative texts (or by incorporating the stipulations of this Recommendation in the intern law).

In the Romanian law, the justice independence principle is consecrated by art. 124, paragraph 3 of the Constitution stating that judges are independent and only obey to the law. Thus, in the constituting legislator's conception, the judges' independence is accomplished by the fact that they only obey to the law. As a consequence, independence also supposes the settlement of the cause deducted to the judgement only based on the administrated evidence and according to the legal stipulations that are mandatory for the judges, without other factors influencing his conviction. Considering the importance of this principle, the legislator established in the basic law that the justice independence cannot make an object of the Constitution review.

The justice independence principle also results from other texts of the Romanian legislation in the matter and of the Judges and Prosecutors' Deontological Code. Thus there are:

- art. 2, paragraph 3 of Law no. 303/2004 stating that judges are independent, only obey to the law (…);

- art. 10 of Law no. 304/2004 that, under the direct influence of the stipulations of the Universal Declaration of the Human Rights and of the European Convention for Protecting the Human Rights and Basic Liberties establishes that all the persons have the right to an equitable lawsuit and to settling the cases in a reasonable term by an independent court (…), constituted according to the law;

- art. 3 of the Judges and Prosecutors' Deontological Code that, after instituting the judges and prosecutors' obligation to protect the justice independence, shows that they must objectively exert their function (…) their only basis being the law, without encouraging any type of pressures and influences.

2. Institutional Independence and Individual Independence

The magistrate's independence must be analysed under a double aspect, namely:

- The one of the institutional (or functional) independence referring to the relations between magistrate and other internal factors (other magistrates) or extern ones this interferes with (legislatively, executively, parties etc);

- The one of the personal independence referring to the actual magistrate's independence (de facto independence).

The two aspects are in an interdependence relation and together, they provide a real independence of justice. The institutional independence and the personal one must not be dissociated and analysed separately from each other whereas it may occur for a judge to be in that mood providing the personal independence but, if the court he belongs to is not independent in report to other factors, we cannot say that the judge is independent.

1. Institutional independence. The essence of justice independence consists in the judge's full freedom to decide in the causes deducted to the judgement. In this sense, in the content of Principle I of Recommendation no. (94) 12 (point 2 letter d) it is shown that judges must be absolutely free to decide impartially on the causes they are announced of based on their intimate conviction and on their own interpretation of the facts and according to the valid legal norms. In the decision making process, judges must act with no restriction and without making the object of any influences, suggestions, pressures, threats, or direct or indirect interferences, no matter where they come from and under what reason. Judges must not be forced to account to any person outside the judicial power on the settling offered to the causes. The stipulations of the Recommendation no. (94)

12 develop the ones contained by the UN Basic Principles regarding the justice independence establishing that the judges must solve the causes deducted to judgement based on the facts and according to the law, with no restrictions, inadequate influences, suggestions, pressures, threats or direct or indirect interferences, no matter where they come from and under what reason (Justice Independence, Principle 2). The stipulations meant to provide the judge's full freedom in the judging activity are also found in Bangalore Principles where it is shown that the judge must independently exert his judicial function based on his own appreciation of the facts and in the spirit of the law, with no external influences, suggestions, pressures, threats and with no direct or indirect interference, no matter where they come from and under what reason.

Institutional independence should be analysed at least from the following viewpoints:

- Independence to the other powers of the state;
- Independence to the parties;
- Independence to court leaders and to colleagues.

A) Independence to the executive and legislative. The constitutional principle of justice independence gives the magistrates the possibility to pronounce decisions according to their own convictions, independently from the executive and legislative power, supposing that the judge may impose his controlling power in relation to these powers[8].

The independence of the judicial power to the executive and legislative one is indirectly consecrated in the Romanian Constitution, by instituting in art. 1, paragraph 4 the principle of powers separation[9]. Thus, the principle of powers separation involves the one of justice independence. This could be compromised if the magistrate's career depended on the executive power or if the rules referring to this career could be changed at any moment[10].The executive and legislative power should provide the fact that judges are independent and that there were not adopted measures able to endanger this independence[11]. The arbitrary interference of the legislative or of the executive in the justice business would constitute an obstacle in the way of the exertion of the judicial court functions. The interferences of any kind and the "suggestions" given to judges in order to judge in one way or another would put into the shade the idea of justice, would hack, would damage or diminish judges' prestige, making them dependents on certain political forces[12].

The judge has to have no kind of inadequate connections and not to be influenced by the executive and legislative power, but he should be perceived like that by any outer observer[13].

a) Independence to the legislative power. The Parliament has no right to interfere in the process of accomplishing the justice because, according to art.125, paragraph 1 of the Constitution, the justice is accomplished by the High Court of Cassation and Justice and by the other judicial courts. The legislative power cannot arrogate the competence of settling no lawsuit. At the same time, the legislative cannot adopt retroactive laws able to trouble the stability of the juridical reports consecrated or constituted by a judicial decision, it cannot change a decision given by the judicial court, it cannot issue interpretative laws whose purpose is to supply the solution of a developing process. Also, the legislating authority cannot adopt normative documents in order to block the jurisdictional procedures or the execution of judicial decisions. In this sense, the Constitutional Court stated that a legal stipulation by means of which the judgement development or the execution of the

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[8] I. Stoenescu, Gr. Porumb, *Romanian Civil Processual Law*, (Didactic and Pedagogical Press, Bucharest, 1986)

[9] M.-M. Pivniceru, C. Luca (coordinators), *Deontology of the Magistrate Job. Contemporary Reference Points*, (Hamangiu Press, Bucharest, 2008) p. 71-72.

[10] Fr. Hamon, M. Troper, *Droit constitutionnel*, 29e édition, (L.G.D.J., Paris, 2005), p. 852.

[11] Point 2 letter b. Of Principle I – General Principles regarding the judges' independence of Recommendation no. (94) 12 regarding the judges' independence, efficiency and role.

[12] V. Duculescu, C. Călinoiu, G. Duculescu, *Romanian Constitution, commented and annotated*, Bucharest, Lumina Lex Press, 1997, p. 337.

[13] Bangalore Principles, Value1 - Independence, point 1.3.

definitive judicial decisions referring to certain determined causes is unconstitutional when it does not result from a decision of the judicial court[14], but it operated legally[15]. In the same sense, the Constitutional Court decided that "a legal stipulation, by means of which it would be forbidden – even only temporarily – the execution of a judicial decisions would represent an interference of the legislative power in the process of justice accomplishment, being contrary to the constitutional principle of the powers separation within the state" referring to certain determined causes, such legal stipulations being unconstitutional[16].

The parliament may exert the controlling right on the way of judicial authority bodies' operating, establishing in this purpose rules of judicial organization of competence and of procedure, namely the ones according to which the judicial activity develops. This right may be exerted only by respecting the authority of the judged thing, art. 15, paragraph 2 of the Constitution, stipulating that laws, except for the criminal or the contravention ones that are more favourable cannot have a retroactive feature. Thus, the legislative cannot approve laws that retroactively change certain judicial decisions. Regarding this problem, the European Court of the Human Rights showed that the judge is prevented from applying a retroactive law of a litigation he is noticed about, this fact has incidence on the independence in accomplishing his mission[17].

In case of this control, the Parliament cannot stop the judicial courts from exerting their mission of accomplishing justice, any interference of the legislative power that could put the judicial authority in the impossibility to work, having as a consequence the breach of the constitutional balance between these authorities. In this sense, it was shown in jurisprudence that the principle of law pre-eminence and the notion of equitable lawsuit are opposable to any interferences of the legislative power in the justice administration in order to influence the judicial ending of litigation[18].

The judicial courts cannot refuse the application of a law emitted by the legislative power, prevailing their independence. The only exception is constituted by the refuse to apply legal stipulations against the stipulations of the Basic Laws, and the judge has the possibility to lift ex officio the unconstitutionality exception of the stipulations of a law or of an emergent ordinance, interfering thus in the control of the law constitutionality accomplished by the Constitutional Court[19].

b) Independence to the executive. Regarding the relations between the executive power and the judicial one, the first one can mainly settle no lawsuit, cannot stop the judging development, cannot oppose to the execution of the judicial decisions. To the executive power, the judicial one depends by the fact that judges' appointment is made by the Romanian President, but this dependence is apparent because the President can assign judges only at the suggestion at the High Magistracy Council. The Constitutional Court stated[20] that the Romanian President is the only exponent of the people's will in the reports to the judicial authority; the appointment of a judge involves a juridical responsibility and that is why it is explainable the possibility to refuse the

[14] Only the judicial authority is competent to suspend the execution of a judicial decision. According to the stipulations of art. 403, paragraph (1) of the Civil Procedure Code until settling the complaint at execution or of other demand regarding the forced execution, the competent court may suspend the execution, if there is a bail in the quantum established by the court, beside the case when the law stipulates differently.

[15] The Constitutional Court of Romania, Decision no. 6/1992, published in the "Official Gazette of Romanian" no. 48/March, 4th 1993; Decision no. 388/2003 published in the "Official Gazette of Romania" no. 789/November, 10th 2003; Decision no. 1055/2008 published in the "Official Gazette of Romania" no. 737 from October, 30th 2008.

[16] The Constitutional Court of Romania, Decision no. 50/2000 published in the "Official Gazette of Romania" no.277 from June, 20th 2000.

[17] CEDO, Pressos Cause, Naval company and others c. Belgia, Decision from November, 20th 1995.

[18] Decision from December, 9th 1994, V. Berger, *Jurisprudence of the European Court of Human Rights*, Bucharest, 1997, p. 208-209.

[19] C. Danileț, *Justice Independence in Legal State (I). Structural Independence Standards*, Themis Magazine no. 1/2010, p. 77.

[20] Romanian Constitutional Court, Decision no. 375/2005 published in the "Official Gazette of Romania", Part I, no. 591/2005.

suggestion made; since the second refusal is not allowed, it means that the final word belongs to the High Magistracy Council.

In the practice of the European court of human rights contentious it was considered in several causes that the Government appointment of the members of a court is not compatible with the notion of court independence[21]. But, in another cause, the Court considered that a disrespect of art. 6 paragraph 1 of the Convention is represented by the fact that the members of the sea chamber (the president and the vice-president) who should have judged the cause referring to the establishment of the guilt of the crew members regarding the wreck of a ferry were also called revoked from their job by the minister of justice with the notice of the minister of transports, appreciating that they cannot be considered as irremovable and that there is a hierarchical subordination between them and the ministers[22].

B)Independence to the parties. Magistrates' independence should equally be expressed to the litigants. In this sense, at point 1.2. of Value 1-Independence of the content of Bangalore Principles it is shown that the judge will be independent in the relations with the society, in general, and in the relations with the parties placed in a litigation it is called to judge.

Regarding the court independence to the parties, the Romanian Constitutional Court decided that the judicial assistants assigned in composing the panels settling the work litigations in the first place as representatives of the association, respectively to the syndicates, did not accomplish sufficient guarantees of independence and impartiality as long as the representatives of the parties were in litigation, given the fact that they participated to the decisional process next to the judge, the decisions being taken together with most of the complete members[23]. The solution of the Romanian constitutional court agrees with the practice of the European court that decided that, since in a court there is a person who is subordinated, the litigants may legally doubt that person's independence[24].

In order to provide justice independence, the distribution of the causes should not be influenced by the desire of any party in lawsuit or of any other persons interested in the result of the decision. Regarding this distribution, point 2 letter e of Principle I of Recommendation no. (94) 12 shows, as an example, that it cannot be made by lot or by a system of automatic distribution based on the alphabetical order or by other similar criterion.

In the Romanian law, one of the principles that should be respected in the development of the judging activity is, according to art. 11 of Law no. 304/2004 republished, as further amended and completed, the principle of the random distribution of the files. The rule governing the random repartition of the causes on panels is that they are distributed in a computerised system (art 53 paragraph 1 of Law no. 304/2004), by ECRIS programme (art. 95, paragraph 2 of the Internal Regulation of the judicial courts). As an exception from this rule, art. 95, paragraph 3 of the Regulation stipulates that, when the computerised repartition cannot be applied because of objective reasons, the causes repartition is accomplished by the method of the cyclic system. By this last method, the files are taken over by the person or the persons yearly assigned by the court president, with the notice of the leading college that distributes a file, in order, to the judicial panels that are constituted at the beginning of every year and that are numbered according to the court or, depending on the case, to sections. The same rule is applied at the causes repartition to the specialized panels (art. 96 of the Regulation).

C) Independence to the court leaders and to colleagues. As it is shown at point 1.4. Value 1 – Independence contained in Bangalore principles, in exerting his juridical function, the judge will

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[21] CEDO, Clarkc cause vs. Great Britain, Decision from August, 25th 2005; CEDO, Lithgow cause etc. vs. Great Britain, Decision from July, 8th 1986; CEDO, Sramek cause vs. Austria, Decision from October, 22nd 1984.

[22] CEDO, Brudnika cause etc. vs. Poland, Decision from March, 3rd 2005.

[23] The Romanian Constitutional Court, Decision no. 322 from November, 20th 2001, published in the "Official Gazette of Romania", no. 66/November, 20th 2001.

[24] CEDO, Sramek cause vs. Austria, Decision from October, 22nd 1984; Pantea cause vs. Romania, Decision from May, 22nd 1998, published in the "Official Gazette of Romania" no. 251 from April, 16th 2007.

have to be independent to his magistrate colleagues regarding those decisions he has to take independently. The independence must be manifested both to the leaders of the higher courts or of the active courts that does not have to interfere with directives, and also to the other colleagues.

Judges are only administratively subordinated to the court leader who cannot exert on them a control regarding the proper development of the judging activity. In this sense, art. 46, paragraph 2 of Law no. 304/2004 establishes that the checking personally made by the presidents or the vice-presidents of the judicial courts or by assigned judges should respect the principles of the judges' independence and of their submission to the law, and also the authority of judged thing and art. 16, paragraph 2 of the Judges and Prosecutors Deontological Code shows that the magistrates with leading functions cannot use the prerogative they have in order to influence the process development and the causes settling.

On the other side, even if a higher court has the possibility to censure the decision of an inferior one, the judge of the inferior court is not hierarchically subordinated to the one of the higher court in exerting his function. The Constitutional Court decided that the background judges' independence is not hacked by the fact that, re-judging the cause, it adopts the legal settling established by the cassation court, because this is why they are not submitted to the will of an authority different from the judged cause, but they obey to the judicial decision given in the exertion of the legal competence of judicial control. The judges of the court of sending to re-judgement, after the admission of the attack way, have the processual obligation to obey the juridical viewpoints solved by the decision that admitted the attack way, but this obligation does not reach the independence of the judges who, in the shown limits, keep the right to decide according to their consciousness.

The European court established that the judges' obligation to obey a jurisprudence established in sections united by the supreme court of a country is not contrary to the independent feature of a court since the reunion in chambers or sections of a high jurisdiction has as a purpose the offering of a special authority of certain principle decisions in important fields of the judicial activity, without reaching the law and the obligations of the inferior courts to examine totally the concrete causes deducted to settling, in a total independence[25].

2) Personal independence. Before everything, magistrates' independence represents a temper problem. Under this aspect, Bangalore Principles trace, as a behaviour reference point, the target for the judge to manifest and to support a qualitative judicial behaviour in order to reinforce the public confidence in justice, without which we cannot keep the independence of the judicial power. (Value 1 – Independence, point 1.6.). Therefore, judges, as well as the prosecutors, should be equidistant to their own tendencies, passions, ideological affinities that could influence them, to have consciousness, balance, courage, objectivity, understanding in order to provide the correct application of the law and the equitable, efficient and quick instrumentation of the causes.

The magistracy independence does not represent a personal prerogative of each judge, but rather their responsibility.

Internationally, this responsibility is established in the target of the judges of Principle V of Recommendation no. (94) 12 where, since the judicial responsibilities are treated, it is shown that the judges should especially assume their responsibility to act independently in all the cases and with no outer influence.

In the Romanian law, the responsibility to provide the justice independence belongs both to judges and to prosecutors. In this sense, there are the stipulations of art. 3 of the Judges and Prosecutors' Deontological Code instituting in the target of both of the magistrate categories, the obligation to protect justice independence. Also, this responsibility of judges and prosecutors results from the stipulations of art. 107 of Book I of Law no. 161/2003 regarding certain measures in order

[25] CEDO Ciobanu cause vs. Romania, Decision from July, 16th 2002, unpublished, quoted by C. Bârsan, *European Convention of Human Rights. Comment on articles*, vol. I, C. H. Beck Press, Bucharest, 2005, p. 493.

to provide the transparency in exerting the public dignities, the public functions in the business environment and the corruption prevention as it was changed and completed[26] that stipulates that the magistrates have the obligation to announce immediately the court president or, depending on the case, the general prosecutor in whose suborder it works any interference in the judicial, political or economical document, from a natural person or legal entity or from a group of persons. Also, the stipulations of the same law establish that the contracting of stipulation of art. 107 constitute a disciplinary deviation sanctioned according to the report of its seriousness to the job suspension of maximum 6 months or even the removal from magistracy.

3. Appreciating the independence

In the European jurisprudence, there were considered criteria of appreciating the independence of a court: the assigning way and the mandates time of the court members, the existence of an adequate protection against the outer pressures, and also the independence appearance[27].

Regarding the assigning way, the European court of human rights contentious showed that judges' appointment should not be let at the discretion of the executive power[28] and that their independence is provided if they are assigned in order to pronounce individually and they cannot receive instructions from the public powers[29]. Regarding the mandate time, the European Court considered that it was not necessary to assign the judges for life[30], since they may be assigned also for a shorter term, for example 2 years[31] or 5 years[32] as long as they enjoy being irremovable during their mandate[33].

Referring to the protection against the outer pressures, the Court specified that they are related to the protection of the court members against their replacement during the mandate[34].

Regarding the independence appearance, it represents the confidence the courts must inspire to the litigants[35].

4. Conclusions

Justice independence is a fundamental guarantee for exercising human rights. It creates the conditions for the objectivity necessary for thorough and legal settlement of matters which results in the consolidation of parties' trust in the activity of judicial courts.

This constitutional principle of justice gives the magistrates the possibility to sentence resolutions in accordance with their beliefs and independently both from the legislative and executive power and from their colleagues and parties.

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[26] Published in the "Official Gazette of Romania", part I no. 279 from April, 21st 2003, changed by O.U.G. no. 40/2003, approved by Law no. 171/2004 and by O.U.G. no. 14/2005 ("Official Gazette of Romania", part I, no. 200 from March, 9th 2005).

[27] CEDO, Campbell cause and Fell vs. Great Britain, Decision from June, 28th 1984; CEDO, Langborger cause vs. Sweden, Decision from June, 22nd 1989; CEDO, Procola cause vs. Luxembourg, Decision from September, 28th 1995; CEDO, Bryan cause vs. Great Britain, Decision from November, 22nd 1995; CEDO, Findlay cause vs. Great Britain, Decision from February, 25th 1997; CEDO, Forum Maritime S.A. cause vs. Romania, Decision from October, 4th 2007.

[28] CEDO, Brudnika cause vs. Poland, Decision from March, 3rd 2005, quoted by J.-Fr. Renucci, *op. cit.*, p.434.

[29] CEDO, Sramek cause vs. Belgium, Decision from October, 22nd 1984.

[30] CEDO, Le Compte, Van Leuven and De Meyere cause vs. Belgium, Decision from June, 23rd 1981.

[31] CEDO, Sramek cause vs. Belgium, Decision from October, 22nd 1984; CEDO, Campbell and Fell cause vs. Great Britain, Decision from June, 28th 1984.

[32] CEDO, Ringeisen cause vs. Austria, Decision from July, 16th 1971.

[33] CEDO, Campbell and Fell cause vs. Great Britain, Decision from June, 28th 1984.

[34] CEDO, Sramek cause vs. Belgium, Decision from October, 22nd 1984.

[35] C. Bârsan, *op. cit.*, p. 490.

Independence is first of all a matter of character. Magistrates have to protect justice independence not as a privilege that belongs to them, but rather as a guarantee for the society without which there would be no democratic society organized on the principle of law supremacy. Within the development of any activity magistrates have to display a conduct that does not jeopardise the trust in their independence.

Judges have to make all the efforts possible in order for their sentence to be in accordance with the reality. The force of the lawful state is in the promotion of truth in the work of carrying out the justice.

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THE RELATIONSHIP OF THE ACCOUNTING LAW WITH THE MODERN SOCIETY AND THE PRESENT-DAY KNOWLEDGE ECONOMY

IACOB BACIU[*]

Abstract
The relevance of the accounting information in the knowledge of the company's patrimonial situation is not only a problem of economic theory, but also of accounting law. Beyond the norms regarding the meaning threshold and the axioms of the economic sciences there appear aspects of contractual nature. The most accurate, systematized and representative data can be obtained only from accounting. The managers and members of the Board will want to obtain by this means as much information as possible, sometimes exceeding the natural capacity of the bookkeeping. For such situations, the accounting law as border discipline will have a word to say.

Keywords: *accounting law, globalization, owner's equity, costs, IAS/IFRS*

1. Introduction

The leap into the *globalization era* is not possible without remarkable progress in the generalization of some rules and norms accepted by the accountants in different countries. Among these norms, principles and conventions, nowadays there are the International Accounting Standards (IAS), the International Financial Reporting Standards (IFRS) and other similar regulations. The manner, rhythm and amplitude of their extension will be monitorized by members of the Board, managers and company owners in order to know the rhythm in which their business can be developed all over the world without the discomfort of the different accounting systems. Strictly methodological, the International Accounting Standards and the other similar regulations form the *international accounting law,* which is another argument in the recognition of the accounting law as a distinct and advanced branch of law.

2. The present-day knowledge economy and the accounting law.

By means of the *accounting law* the costing and the management accounting play a more and more important part in pursuing the observance of the rules of *honest business practice.* Without such rules, the extension of trade - and especially of the international one – is inconceivable. As a matter of fact, the most efficient control instruments over the ratio between the price and the purchase cost can be found in the accounting of the economic agents. The accounting arguments are based on figures having as foundation the documents. Thus, the evaluations are accurate and the degree of the law infringement can be appreciated in figures. The use of the accounting instruments in monitorizing the market behavior is a part of the accounting law. Those documents «produced » by the accountants will be chosen, which can legally be proofs in the relations of protection of the competition. Not any accounting document – and so much the less not any accounting information – can enter the system of proofs or evidence in litigations of the kind of competition protection. In the contemporary economy the accounting law will be the legal basis for the selection of the accounting documents or information in such cases.

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The management of the owner's equity and its specific activities, such as the inventory, supplies a rich study material for the accounting law.

The aspects of legal procedure related to the concrete performance of the inventory, the stages to be covered, the situations in which the inventory is compulsory, the turning to account of the inventory results and the effects of different concrete situations created by this activity are the moments in which the accounting law intervenes. Some chapters of the accounting law, such as the revaluation of the owner's equity, enters into direct connection with branches of law. The law of the present-day business cannot be conceived without the legislation concerning the revaluation.

The companies' working out of their own accounting policies within the framework of the present norms of international accounting law determines a set of legal relations that can be clarified only by the same accounting law.

The internal body meant to make proposals and the decision body will comply at the same time with the commercial law, that however cannot explain and solve all the aspects implied by the company accounting policies. Within the management mechanism of the modern patrimonial entities, the method of budgets enters more and more as an indispensable part.

The accounting law will regulate, in principle, the working out of budgets, their transmission and layout, perhaps their monitoring and inclusion in the system of performance and salary indices. On this stage there are interferences with the labour law and with the commercial law. The occurrence of a complex institution cannot modify the specific feature of each of the law branches that intervenes in the budgetary procedure.

3. The accounting procedures and their integration in the general system of the modern compay.

The procedure aspects – by their nature – belong rather to branches of law than to accounting. The monitoring of the accounting procedures and their integration in the general procedure system of the modern company can be only part of the accounting law in its position as branch with a strong interdisciplinary character.

A component part of the contemporary accounting law is represented by the operating of the professional bodies. The relations between them and the public authorities or other civil organizations, the relations of the professional bodies with their members or with the representatives in the elected bodies including with their own technical staff are elements which belong to the interest area of this new branch of law and in which the lawyers together with the economists must sometimes give solutions. Therefore they are going to know the operating peculiarities of different types of bodies, including by relating to the international practice in similar circumstances.

The introduction of the accountant survey (audit) among the means of evidence in different legal procedures (civil, commercial, criminal a.s.o.) raises, for the judge, the problem of construction of the conclusions reported by the experts. Beyond the technical character of the survey, the court of law will relate to norms of accounting law in order to reach a fair verdict.

Within the department of human resources one of the tasks is to draw up the job description. In the case of persons with leading positions or with tasks in the financial-accounting field, this document of the labor law will relate to the accounting law.

The lawyers' position at the beginning of the 21^{-st} century as members of the local, national and universal community should not be omitted. A new type of fraud is more and more frequent and therefore it is natural that a branch of law should develop to study the basic juridical relations. Automatically appears the interest for this activity which can produce greater financial disasters than we can imagine. In Eastern Europe – and especially in Romania – the population was accustomed to the concealing of this kind of fraud. We can say that the criminal law and the coercion power of the state have reached the edge of the juridical relations regulated by the accounting law due to the special position of the guilty persons in this field.

By the norms of the accounting law and of the civil law, the owner's equity of the associations of proprietors, one of the broadest collective structure of social organization on national level, is protected. Most people live in a collective system and are integrated in this organization system. During the recent years, many cases of fraudulent management by the administration staff have occurred, with direct impact on the members 'personal income. Such frauds can be explained first of all by infringements of the accounting law.

The activity within the community includes the participation in the discussion of some present-day topics in fields of general interest. Such a field is represented nowadays, for example, by sports. In Romania, in the world of sports, there have been intense disputes within certain clubs or between certain personalities. The analysis of the activity of some club leaders, the debates regarding the organization and creation of professional football clubs as public limited companies and the manner of distribution of the voting rights in them are only a few examples that draw the attention on the problems tackled by the accounting right.

Within the interdependence created between the older law branches and the accounting law lies also the definition of the entities on the level of which the accounting is organized. The terms of legal person, branch, subsidiary company, and workshop are taken over by the accounting law as well as by the bookkeeping from the classical law system. Without these exogenously defined categories, the accounting and the accounting law would lack the necessary fundamental landmarks.

4. The Generalization Of Application Of The International Accounting Standards In The Contemporary Business Environment

In the contemporary economy there are more outstanding differences in the accounting system of the states based on the common law tradition, including the USA and the U.K. and of the states based on the legal system of the Code law tradition, to which France, Germany and all the other states belong, that have adopted the code law regulation.

At present, examining the whole of the components of the accounting systems in the USA and the U.K., respectively France and Germany, important differences or only some slight differences can be noticed.

If we refer only to the taxation of the achieved income in the world of the business performed in companies, we are obliged to mention:

- the different manner of calculation and accounting of the taxation on the expected income in France and Germany resides in essence in the rather different legal tax regulation;
- another example refers to the creation of provisions for reserves.

In both above mentioned countries there are regulations in the sense that the patrimonial entities have the right to create a reserve that is legal from the viewpoint of accounting, by taking amounts of money from the profit, within the limit of a certain percentage (normally 5%). It is also stipulated that such an operation may be continued over several years, until the level of about 10% of the face value of the capital is reached (10% of the share capital in France, respectively 10% of the face value of the share capital in Germany, in general). Such takings from the profit are not reflected in the costs because they are exempted of the corporation tax. It is useful to point out that the accounting rules adopted in Japan have been initially moulded after the German accounting, as a result of an association on multiple levels between these countries in the first half of the 20-th century. Recently, in Japan an American influence in the field of accounting can be noticed, what leads to a generalization of the U.S.-G.A.A.P. system.

In spite of the American influence, that manifested itself in the area of the profession of public accounting, the Japanese accounting and financial reporting continues to follow the model of the European accounting. Thus, there have been stipulated statutory provisions that have envisaged the diminishing of the reported profit, in the sense of a harmonization with the legal provisions existing

in the U.S. or U.K -G.A.A.P. Prudence is one of the most important concepts lying at the basis of accounting.

In a similar manner, the states in Central and South America, which were under Spanish and Portuguese influence for a long time, have accounting rules which are similar to those in force in the European countries.

Although there existed some specific differences in the field of accounting in the above mentioned countries, the conventions, principles and rules of the double-entry bookkeeping are universally applicable, and the differences related to taxation are diminished to a broad extent. The need to enhance the harmonization of the system of financial positions leads to a generalization of the I.A.S.C. standards. Especially the standards IAS 1-41 can and must become more and more reference instruments.

The internationalization of the financial markets, the stronger development of the multinational companies constitutes objective factors which lead to a more complex organization in the field of bookkeeping and especially referring to the financial positions.

The multinational companies (M.N.C.) have become a reality in the business world. Especially in the last quarter of the 20-th century, they have taken on an outstanding role in several market shares and have stimulated many activities in the national economies of different countries.

5. The bookkeeping depends on the type of economic system to which it belongs.

The bookkeeping is a component part of the economic sciences and, at the same time, a remarkable technique improved lately in order to be more and more useful for business and people. The accounting is anchored in the knowledge economy. The political economy supplies the bookkeeping, as well as the other economic disciplines, with the basic conceptual "infrastructure". The accounting, - although it has a great functional autonomy – will however depend on the type of economic system to which it belongs. In the era of globalization we come across opinions and arguments in favour or against the globalization. Consequently, there will be viewpoints to anchor the accounting in this tendency or to point out its development in the isolationist national context. Some economists will study the possibility to adapt the accounting to the great challenges of the transparent business in any place of the earth so that worldwide business should be encouraged. Others will find errors or inherent elements of incompatibility between the international accounting framweork and the national economic realities.

For any of these cases, the need to use judgment is essential. The analyst must use judgment when performing ratio analysis. A key issue is wheyher a ratio for a firm is within a reasonable range for an industry, with this range being determined by the analyst. Although financial ratios are used to help assess the growth potential and risk of a business they cannot be used alone to directly value a company or determine its creditwothiness. The entire operation of the business must be examined, and the external economic and industry setting in which is operating must be considered when interpreting finantial ratios.

The financial analyst who is interested in assesing the value of creditworhiness of any entity is required to estimate its future cash flows, assess and risk associated with those estimates, and determine the proper discount rate that should be applied to those estimates. The objective of the financial statements is to provide information which is useful to users in making economic decisions. However, the financial statements do not contain all the information that an individual user might need to perform all of the above tasks, because they largely portray the effects of past events and do not necessarily provide nonfinancial entity (its income and cash flows), as well as its current financial condition (assets and liabilities) that are useful in assessing future prospects and risks. The financial analysis must be capable of using the financial statements in conjunction with other information in order to reach valid investment conclusions.

The notes to financial statements should be issued according to the accounting law and are an integral part of the IFRS financial reporting process. They provide important detailed disclosures required by IFRS, as well as other information provided voluntarily by management.

6. Conclusions.

The bookkeeping plays an important part in the management of the modern patrimonial entities. This contribution can be noticed on several levels.

In the modern management system, the *budgets* are frequently used for planning, monitoring and control of the activity as well as for the establishment of some easily measurable parameters. In the substantiation, working out and monitoring of the budgets, there are used, first of all, data from the bookkeeping. The main "referential" mark for the indices in the budgets is the financial management accounting of the patrimonial entity.

In the current activity of the modern company, sometimes there must be made *evaluations* and revaluations of owner's equity or of the performed business. For such evaluations and revaluations, the data from the accounting are used, even if other sources are used as well.

A concept of the modern management is that of management by means of costs. In order to calculate the costs of the patrimonial entity, most of the data are taken over from the financial accounting. The cost calculation is itself a part of the activity in the management accounting.

The development of the patrimonial entities, as well as the drawing of additional financial resources from the banking system or from the capital market, suppose – in principle – the working out of feasibility studies or of business plans. For these documents of the guidance of the future activity much information is needed that can be found only in the accounting.

The manager's or administrator's instrument board is another leading instrument proposed by the contemporary business science. Within this instrument board, a great part of the information comes from the accounting. Some are recorded as such on the board, while others undergo some processings. The accounting remains, however, a significant supplier of such information.

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THE HARMONISATION OF LEGISLATION ON COMBATTING TAX EVASION IN THE EUROPEAN UNION

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Abstract
Combating tax evasion is part of the Lisbon Strategy. Tax fraud created a significant distortion in the functioning of the internal market and prevented fair competition.
In its resolution of 2th of September 2008 on a coordinated strategy to improve the fight against fiscal fraud (2008/2033 (INI)) the European Parliament stressed that the Member States cannot combat cross-border fraud in isolation and called on the Commission to propose mechanisms to promote cooperation between Member States.
This paper aims to analyse the main mechanisms to combat the tax evasion at the European level and, also, the changes that our country had to make in the field of legislation in order to achieve the EU standard on the fight against tax evasion.

Keywords: *tax evasion, fraude, harmonisation, VAT, Eurofisc*

Introduction

The harmonisation of fiscal legislation in the field of preventing and combating tax evasion constitutes an imperative for Member States of the European Union, especially in the current economic context. At present, there are many efforts to diminish the effects of fiscal evasion at a community level, especially in the case of VAT tax evasion. This is the reason why a document that contains proposals for the modification of legislation on the value added tax has been put forward for discussion, with the goal of unifying this legislation in the member states of the European Union.

The Member States cannot fight fiscal fraud each on its own, therefore cooperation mechanisms have been instituted among them.

The battle against tax fraud is a challenge for the European Union that goes beyond its borders and consequently it must be reflected in the international agreements concluded by the European Union with third party states or in multilateral covenants of which it is a signatory.

In order to efficiently combat fraud, the European Union negotiates agreements or multilateral covenants, on behalf of itself and the Member States.

The paper analyse the main mechanisms created in order to fight against the fiscal fraud at the European level and, also the measures that must be taken to achieve this goal. Those measures are underlined, especially, in the European Parliament Resolution from 2 September 2008. Part of them were already applied, but some of them are still object of a proposal submitted to the Member State's analyse, as the proposal of modifying the Directive concerning VAT.

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1. Measures on combating fiscal fraud in the European Union

The protection of their financial interests has been a main concern for the Member States of the European Union, so on 26 July 1955 it drew up the Convention on the Protection of the European Communities' Financial Interests. Any type of fraud that injures community interests is defined as[1]: in respect of expenditure, any intentional act or omission relating to: "the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities, non-disclosure of information in violation of a specific obligation, with the same effect, the misapplication of such funds for purposes other than those for which they were originally granted" and in respect of revenue "the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities, non-disclosure of information in violation of a specific obligation, with the same effect, misapplication of a legally obtained benefit, with the same effect."

Pursuant to the provisions of the Convention, serious fraud is any type of fraud whose minimum value must be fixed by every Member State, though no more than 50 000 euros.

Article 3 from the Convention sanctions the principle, according to which leaders that exert a legal power or that head businesses cannot be automatically exonerated from any form of liability, when there is fraud affecting the financial interests of the European Union.

The text of the definition in the Convention has been assimilated into the national legislature, in Law 78/2000 on the prevention, discovery and punishment of acts of corruption, thus fulfilling the obligation stipulated by article 1, paragraph 2 from the Convention [2].

Tax fraud causes important distortions in the workings of the domestic market and constitutes an obstacle for loyal competition.

In its resolution from 2 September 2008 on a strategy coordinated for the intensifying of the fight against tax fraud (2008/2033 (INI)), the European Parliament highlights the fact that Member States cannot fight against cross-boarder tax fraud each on their own and therefore they appeal to the Commission to propose measures of promoting the cooperation between member states.

An efficient fight against VAT fraud in the domestic market requires a common approach both in the legislative field but also on certain aspects of the operational management of the VAT system, operational differences between Member States can provide fraudsters the opportunity to undermine the efficiency of subjacent community legislative measures.

The measures that the Commission was to propose or implement aimed to[3]: prevent the illegal use of the VAT system by potential fraudsters, consolidate the means used to detect TVA fraud and improve possibilities of collecting taxes lost due to fraud and the punishment of the tax evaders.

Measures for enhancing the tax system and fiscal cooperation with the goal of preventing VAT fraud impose: common minimum standards for the registration and deregistration of taxable persons[4], confirmation of information, invoicing rules, chargeability on intra-Community transactions.

Among the measures for enhancing the efficiency of the tax administration in order to detect VAT fraud, we must mention the reduction of the timeframes for both the reporting of intra-

[1] Article 1 from the Convention on the Protection of the European Communities' Financial Interests.

[2] Ioana Maria Costea, *Combaterea evaziunii fiscale şi frauda comunitară, (*Bucureşti: Ed. C.H.Beck, 2010), 289.

[3] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0807:FIN:EN:PDF.

[4] A correct and valid VAT indentification number represents an essential element within the framework of current VAT systems, because it establishes the rules and obligations applicable especially in intra-Community commerce. Both financial administrations, as well as companies must be able to rely on the correct information concerning the VAT status of the economic agent.

Community transactions by traders and the exchange of information between tax administrations, exemption of VAT at importation, enhancing cooperation between Member States, automated access to data, the creation of a European network, called Eurofisc, for closer operational cooperation between Member States in the fight against VAT fraud.

The measures of enhancing the capacity of the tax administration to collect and recover taxes include several liability[5], recovery of taxes - uniform instruments including enforcement or precautionary measures, which should reduce the administrative burden of the authorities concerned and allow quicker reactions -, shared responsibility for the protection of all revenues of Member States.

Concerning the rules of invoicing, Directive 2006/112/CE on the joint VAT system was amended through Directive 2010/45/UE[6] by the Council, on 14 July 2010.

The directive contains measures in view of the simplification of different existing requirements concerning invoicing, including electronic invoicing. The directive stipulates the equal treatment applied to both invoices on paper an in electronic form, the principle applicable to both types being that the authenticity of the origin, the integrity of content and the legibility of the invoice should be ensured from the moment of issue until the invoice is placed in storage. The directive contains the method of electronic data exchange and the advanced electronic signatures, as well as the stipulations concerning self-invoicing, invoice simplification, translation of invoice, currency, centralised invoices, modifications concerning the origin and VAT changeability, the right to deduct VAT, etc.

Member States must adopt and implement the provisions of the directive by 31 December 2012.

On 6 October 2009, pursuant to article 93 of the Treaty establishing the European Community, the Council decided to consult the European Economic and Social Committee on the Proposal for a Council Directive amending Directive 2006/112/CE as regards an optional and temporary application of the reverse charge mechanism in relation to supplies of certain goods and services susceptible to fraud COM (2009) 511 final – 2009/0139 (CNS)[7].

The EESC was in favour of the proposal for a Council Directive, which introduces a reverse charge mechanism for certain products and services.

The EESC has expressed its approval of the proposals contained in the European Parliament Resolution from 2 September 2008 concerning a coordinated strategy for enhancing the fight against tax fraud, especially taxation in the country of origin with a single 15% rate for intra-Community transactions. This option would conform to the provisions of article 402 from Directive 2006/112/EC.

Combating fiscal fraud, especially intra-Community fraud, has not made great progress these last years. Total fiscal losses caused by fraud amount to a sum between 200 and 250 billion EUR, the equivalent of 2% of the EU gross domestic product.

VAT fraud accounts for 40 billion EUR, i.e. 10% of revenues from this tax.

The progressive increase of exchanges has led to a proliferation of the so-called „carousel" fraud. Legislation on this matter stipulates that merchandise transiting through the EU should pass freely, the VAT on commercial transactions between Members States are to be collected in the country of destination.

By introducing a fictitious taxable person in the transaction, one obtains an illegal triad, which thus simulates the double transfer of the same goods. The buyer has the right to reclaim VAT, which has not been paid by the third conspirator however, who in turn has bought the VAT-exempt goods from a supplier from another Member State. The third conspirator thus vanishes.

[5] The provision concerning several liability already exits in the VAT Directive, however until now Member States have used it only in national transactions.

[6] http://discutii mfinante ro/static/10/Mfp/infotva/Directiva_2010_45_facturarea.pdf.

[7] Official Journal C 339(14/12/2010): 0041 – 0044.

Due to the reverse charge mechanism, the supplier from the same Member State does not invoice the VAT to the taxable persons who, in turn, must pay this tax. Theoretically, the possibility of using the carousel fraud is eliminated by this procedure.

The contraindications of the system based on applying the country of destination principle, which – in order to function correctly – is conditioned by a consolidated and efficient system of exchanges of information between Member States, give rise to fiscal frauds, which are difficult to counteract. The Community has definitely opted for the country of origin principle, which provides a form of compensation between Member States, by redistributing VAT. Article 402 from Directive 2006/112/EC from 28 November 2006 states that taxation on intra-Community exchanges should be done in the country of origin.

Redistribution is necessary for the compensation effect on the revenue resulted from taxation, exportation and import tax deductions, which are already charged in the country of origin.

Adopting a permanent scheme, which should drastically reduce intra-Community fiscal fraud, needs a system integrated by administrative cooperation.

In order to counteract the growing cases of intra-Community fraud perpetrated through the so-called *missing traders* (Missing Trader Intra-Community fraud) better known as *carousel fraud* (given that it refers to the repeated transfer of the same goods between operators in different Member States), some Member States have appealed to the Commission to grant the derogation stipulated in article 395 of the EU VAT Directive, which allows the introduction of a temporary system of reverse taxation on certain goods and services.

The Commission considered that an amendment of the VAT Directive would be more suitable, by introducing article 199 a, which grants the derogation until 2014.

On the list of goods that might benefit from the optional introduction of this reverse charge system, there are among other things common appliances, such as mobile telephones and devices with integrated circuits. This scheme is already being used in the United Kingdom, which has been granted derogation from the Council.

Perfumes and objects made from precious metal, which are not collection pieces or antiquities, complete the list of the four types of goods given by the directive. The services include transactions with issued certificates.

Since 2008, the European Parliament has emphasized the risks connected with the possibility of new acts of fraud occasioned by the introduction of the generalised reverse charge system, especially in retailing and by the abusive utilisation of the VAT identification number, via an appeal addressed to the Council to act more decisively in the fight against fiscal fraud[8]. Parliament suggested in its resolution that the transit and charge policy of intra-Community delivery of goods should be surpassed by a rate of 15%, as an optimal solution.

The European Court of Justice has already decided on the matter of reverse taxation[9]. The decision refers to the request of payment from a tax administration, owing to a misinterpretation of the reverse charge mechanism. In order to avoid useless and costly proceedings, it will be necessary to verify the national legislations, which although applying general principles, present inadvertencies for example between the terms of the reimbursement requests and those for the payment of taxes.

The administrations of Member States which will adopt this system shall have to examine a great number of requests for the reimbursement of VAT surplus, filed by taxable persons who can no longer deduct the VAT previously charged.

The burden of paying this tax is transferred onto smaller and smaller economic operators, who may prove to be less reliable than the VAT taxpayers (medium-sized and large companies that pay

[8] The European Parliament Resolution from 2 September 2008 on a coordinated strategy for the enhancement of the fight against fiscal fraud [2008/2033(INI)], JO C 295 E/13 from 04.12.2009.

[9] Reunited cases C 95/07 and C 96/07 from 08.05.2008.

the most considerable part of the revenues obtained from these taxes). By eliminating the fragmented payments, the system increases the risk of losing fiscal revenues.

After a complete analysis, it seems that a rigorous control system is necessary, in order to protect Member States against the negative effects, which the reverse charge mechanism could occasion. It is necessary that the process of enhancing the monitoring measures take place at the same time as the consolidation of administrative cooperation and the utilisation of standard systems of information exchange between administrations.

A part of the European strategy to combat tax evasion and fraud in general, the European Council adopted on 7 October 2010, Regulation 904/2010 on administrative cooperation and combating fraud in the field of value added tax[10] with the purpose of extending and strengthening the legal framework for the cooperation and exchange of information between the competent authorities of Member States. The regulation does not prevent Member States from applying the rules on mutual assistance in criminal matters.

Starting from the premise that, in order to collect due taxes, the Member States should not only monitor the correct application of the tax owed on its own territory, but it must also equally offer assistance to other Member States, so that it guarantees the correct application of the tax owed in another Member State as a result of activities on its own territory, the regulation establishes the conditions, in which the competent authorities from the Member States responsible for the application of VAT legislation should cooperate amongst themselves and with the Commission, in order to ensure the respective legislation.

Every Member State designates a single central liaison office, which has been delegated with the responsibility for contacts with the other member states in the field of administrative cooperation. The competent authority of every Member State may designate liaison departments, in which case the central liaison office must update a list of these departments and supply it to other central liaison offices from other Member States.

At the request of a requesting authority, the requested authority communicates information, including any information concerning one or more specific cases, which could help to effect a correct assessment of VAT, to monitor the application of VAT, particularly on intra-Community transactions, and to combat VAT fraud.

This information will be transmitted, without any prior request, by the competent authority of each Member State to the competent authority of every other Member State concerned, in the following cases: when it is considered that the taxes will be collected in the Member State of destination, and the information given by the Member State of origin is necessary to the efficiency of the control system of the Member State of destination; when a Member State has reasons to believe that a breach of the VAT law has been committed or is possible in the other Member State; when there is a risk of fiscal losses in the other Member State.

Every Member State may abstain from taking part in the automatic exchange of information, with respect to one or more categories of information, in case the collection of the respective information would impose new obligations on the persons liable for VAT or would force a disproportionate administrative burden upon the Member State.

From 1 January 2015, the competent authority in every Member State will proceed to automatically exchange information, which will allow the Member States to ascertain whether taxable persons not residing in their territory declare and correctly pay VAT owed for telecommunication, television and radio services as well as electronically supplied services, regardless of whether these persons use the special scheme stipulated by Directive 2006/112/EC in Title XII, chapter 6, section 3, or not. The Member State of residence informs the Member State of consumption of any discrepancies discovered.

[10] Official Journal of the European Union L268/1 from 12.10.2010.

The regulation also regulates the storage and automatic exchange of specific information, simultaneous controls[11] and providing of information to taxable persons.

In order to promote and facilitate cooperation in the fight against VAT fraud, the regulation establishes a network of quick exchanges of specific information between Member States, called Eurofisc. Within the framework of this network, the competent authorities of every Member State designates at least one Eurofisc liaison official to establish a multilateral early warning mechanism for counteracting VAT fraud, to coordinate the rapid and multilateral exchange of information within the Eurofisc working fields[12].

The battle against tax fraud is a challenge for the European Union that goes beyond its borders and consequently it must be reflected in the international agreements concluded by the European Union with third party states or in multilateral covenants of which it is a signatory.

In order to efficiently combat fraud, the European Union negociates agreements or multilateral covenants, on behalf of itself and the Member States.

In the context of the reinforced arrangement of the EU and the G-20 to establish a high level of cooperation internationally with the financial centres and tax havens in third party countries, which meet the OECD standards on fiscal cooperation, and following the Ecofin Council meeting of February 2009, the Commission amended its proposal, adopted on 10 December 2008, for a Council Decision on the signing and concluding of a cooperation agreement between the European Community and the Member States, on one side, and the Principality of Liechtenstein, on the other side, to combat fraud and any other illegal activity to the detriment of their financial interests[13]. The amended proposals were adopted in November 2009 and include the recent standards providing for the exchange of information in the field of taxation and the changes imposed by the coming into effect of the Lisbon Treaty.

This agreement would bring considerable value to the extent to which its scope covers not only tax evasion, tax fraud and any other unlawful activities affecting the financial interests of the parties involved, but also the exchange of information on fiscal matters, in accordance with the OECD standard, in this way preventing banking secrecy from being invoked as an exception that would hinder the exchange of information.

The agreement is particularly important because it should be used as an model for anti-fraud agreements made with third party countries, in accordance with the recommendations adopted by the European Commission in June 2009.

„The existence of tax havens and the effects of economic activities of people residing in such places impose the adoption of a strong joint stance of all states. The stated purpose is to attract the financial resources to the state budget of the country, which receives the taxable revenue, in order to efficiently use it for the benefit of the respective country's nationals."[14]

2. The harmonization of the Romanian legislation with the European legislation

The accession of Romania to the European Union has led to a series of important measures in the fight against tax evasion and fiscal fraud, with efforts aimed firstly at diminishing underground commerce and promoting legislative measures to accelerate the development of the market economy.

The following measures have been taken in view of the Romanian accession to the European Union: the acceleration of reforms in public administration; the reform of the social security system

[11] Member States may agree to perform simultaneous controls every time they consider such controls to be more efficient than controls performed by a single Member State.

[12] Article 33 from Regulation 904/2010 on the administrative cooperation and combatting VAT fraud.

[13] http//ec.europa.eu/anti_fraud/reports/commission/2009/RO.pdf Commission Report to the Council and the European Parliament - The Protection of the Financial Interests of the European Union – Combatting Fraud – Annual Report 2009.

[14] Dan Drosu Şaguna, Mihaela Tofan, *Drept financiar şi fiscal european, (*Bucureşti: Ed. C.H.Beck, 2010), 289.

with an emphasis on social insurance – especially financial reliability and the relation between paid contributions and received benefits; the general reform of indirect taxation, especially VAT, in agreement with the conditions for integration into the European Union; the increase of regulation simplicity, transparency and stability concerning taxes and tariffs; the elimination of wasteful policies that generate problems in the activities of the official sector of the economy; the acceleration of institutional reforms, in accordance with the conditions of integration into the European Union.

Romanian legislation on fiscal fraud and tax evasion has been adapted to the requirements of Community directives, and the main provisions are contained in the Position Document of Romania, Chapter 10 – Taxation, Chapter 12 – Statistics, Chapter 24 – Justice and Domestic Affairs, Chapter 28 – Financial Monitoring, Chapter 29 – Financial and Budgetary Provisions. However, national legislation is not effective enough to eliminate tax evasion[15].

Conclusions

Combating fiscal fraud, especially intra-Community fraud, has not made great progress these last years. Total fiscal losses caused by fraud amount to a sum between 200 and 250 billion EUR, the equivalent of 2% of the EU gross domestic product.

An efficient fight against VAT fraud in the domestic market requires a common approach both in the legislative field but also on certain aspects of the operational management of the VAT system, operational differences between Member States can provide fraudsters the opportunity to undermine the efficiency of subjacent community legislative measures. So, it must be realised: common minimum standards for the registration and deregistration of taxable persons, confirmation of information, invoicing rules, chargeability on intra-Community transactions.

According to the EC, the tax evasion concerning VAT is about 100 billion EUR every year, at the communitarian level[16]. That's why the European Union wishes to reduce the tax evasion effects at the communitarian level. In this respect, it was submitted to a public debate a consultative document concerning the amendments to the VAT legislation with the purpose of using a single rate, reducing the number of exceptions to the payment and extending the tax base.

Reducing tax evasion and increase revenue collection will be the result of simplifying the system and reducing administrative burdens.

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CONSIDERATIONS ON THE PROTECTION OF WOMEN'S RIGHTS IN THE LIGHT OF THE EQUAL OPPORTUNITIES PRINCIPLE BETWEEN MEN AND WOMEN

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Abstract
Development cannot be achieved if fifty percent of the population is excluded from the opportunities it brings! Gender equality and women's empowerment are human rights that lie at the heart of development and the achievement of the Millennium Development Goals. Women's rights around the world is an important indicator to understand global well-being. A major global women's rights treaty was ratified by the majority of the world's nations a few decades ago. Yet, despite many successes in empowering women, numerous issues still exist in all areas of life, ranging from the cultural, political to the economic.Equality between women and men is also a fundamental right, a common value of the European Union and a necessary condition for achieving the objectives of economic growth, employment and social cohesion.

Keywords: *sex discrimination, sexual harassment, equality of chances, dignity, rights*

Introduction

European society is changing, influenced by different factors such as technological progress, the globalisation of trade and an ageing population. European employment, social affairs and equal opportunities policies contribute to improving people's living conditions with a view to sustainable growth and greater social cohesion. The European Union (EU) plays the role of a trigger in social change. It has introduced a protective legal framework for European citizens. It fosters the cooperation of Member States, the coordination and harmonisation of national policies, and the participation of local authorities, unions, employers' organisations and other stakeholders involved.

The priority aims of this policy are to increase employment and worker mobility, to improve the quality of jobs and working conditions, to inform and consult workers, to combat poverty and social exclusion, to promote equality between men and women, and to modernise social protection systems.

Equality between women and men is one of the fundamental principles of Community law. The European Union's objectives on gender equality are to ensure equal opportunities and equal treatment for men and women and to combat any form of discrimination on the grounds of gender. The EU has adopted a two-pronged approach to this issue, combining specific measures with gender mainstreaming. The issue also has a strong international dimension with regard to the fight against poverty, access to education and health services, taking part in the economy and in the decision-making process, women's rights and human rights[1].

Starting with 2007 - "International Year of Equal Opportunities for All" - women's rights issues, particularly with regard to equality between men and women, has acquired new meanings in general and the rights of defense and fundamental rights.

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[1]"Equality between men and women", accessed February 15, 2010, http://europa.eu/legislation_ summaries/employment_and_social_policy/equality_between_men_and_women/index_en htm.

The Protection of woman's rights in international documents

The differences that had happened based on the person`s gender have imposed the statutory principle of equality between men and women in terms of international regulations. The issue of women's rights, proclaiming and subscribing their inclusion in official statements and laws (including constitutions), and the existence of a system to guarantee those rights both internationally and locally, implicitly requires the existence of policy instruments and legal defense[2]. The concerning of the international community to eliminate all forms of discrimination against women has led the United Nations to act in this direction by enrolling in this action to promote the principle of equality between men and women.

The first intergovernmental organization to adopt concrete measures against gender discrimination was the Organization of American Republics. Thus, at the 5th Inter-American Conference, held between March 25th and May 3rd, 1923, in Santiago de Chile, decided to enroll in the program of the future Conference to study the means like the abolition of constitutional and legal incapacity of women for it can enjoy all civil and political rights. This has led to the creation of the Inter-American Commission of Women.

The general instruments enshrining the principle of general equality between women and men are:

a) The preamble of the United Nations Charter which proclaims the people` faith "in the equal rights of men and women ‘’;

b) The first article of the UN Charter states one of the UN goals, namely to encourage "the respect for human rights and fundamental freedoms for everyone, without the question of race, gender ...", and the 8th article guarantees "the access for men and women, on equal terms, in all functions, the principal and subsidiary institutions ‘’;

c) The Universal Declaration of Human Rights which stipulates in art. 2 that "everyone is entitled to all rights and all freedoms set forth in the Declaration, without distinction of any kind such as race, color, gender;

d) International Covenants on Human Rights, which also prohibit discrimination based on gender.

Among the specific tools to eliminate discrimination against women, the most common include[3]:

- Declaration on the Elimination of Discrimination against Women, reaffirms, on the one hand, the principles of the UN Charter, the Universal Declaration of Human Rights and two international pacts and, on the other hand, new principles are proclaimed, establishing itself as a necessity because the equal rights of women continue to be the subject of extensive discrimination.

- Convention on the Political Rights of Women, wich entered the express provision that women have, on equal terms with men, the right to vote in any elections without any discrimination that may be, under conditions of full equality with men, elected in political oragnisms/institutions, established under the national law.

- Convention on the Elimination of All Forms of Discrimination against Women, defines "discrimination against women" which, in terms of article 1, "refers to any distinction, exclusion or restriction based on gender, which has the effect or purpose of impairing or nullifying the recognition, enjoyment and exercise by women regardless of their marital status, based on equality between man and woman, human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

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[2] Roxana Radu, *Elements of social security law* (Craiova: Aius PrintEd, 2009), 184.

[3] Cezar Avram and Roxana Radu, "Considerations on sex discrimination and sexual harassment in the light of the equal treatment principle", *Euro-Dreptul* 1(2006):26-35.

- Inter-American Convention on the Prevention, Punishement and Eradication of Violence against Women, "Belem do Para Convention"[4], provides in art.3 that "every woman has the right to be free from violence in both the public and private spheres". The article 4 affirms the fact that "every woman has the right to the recognition, enjoyment, exercise and protection of all human rights and freedoms embodied in regional and international human rights instruments and mentions other categories of rights: the right to have her life respected; the right to have her physical, mental and moral integrity respected; the right to personal liberty and security; the right not to be subjected to torture; the rights to have the inherent dignity of her person respected and her family protected; the right to equal protection before the law and of the law; the right to simple and prompt recourse to a competent court for protection against acts that violate her rights; the right to associate freely; the right of freedom to profess her religion and beliefs within the law; and the right to have equal access to the public service of her country and to take part in the conduct of public affairs, including decision-making".

The principle of equality (of treatment) among men and women in international labor law

Millions of women and men around the world are denied access to jobs and training, receive low wages, or are restricted to certain occupations simply on the basis of their sex, skin colour, ethnicity or beliefs, without regard to their capabilities and skills. In a number of developed countries, for example, women workers earn up to 25% less than male colleagues performing equal work. Freedom from discrimination is a fundamental human right and is essential for both workers to choose their employment freely, to develop their potential to the full and to reap economic rewards on the basis of merit. Bringing equality to the workplace has significant economic benefits, too. Employers who practise equality have access to a larger and more diverse workforce. Workers who enjoy equality have greater access to training, often receive higher wages, and improve the overall quality of the workforce. The profits of a globalized economy are more fairly distributed in a society with equality, leading to greater social stability and broader public support for further economic development. ILO standards on equality provide tools to eliminate discrimination in all aspects of the workplace and in society as a whole. They also provide the basis upon which gender mainstreaming strategies can be applied in the field of labour[5].

The field in which women are the most flagrant discriminated is the employing management. International Labour Organization has developed two special agreements on this issue. It's Convention no. 111 from June 4, 1958 concerning the discrimination in respect of employment and occupation and the Convention no. 100 from 1951 on equal remuneration for men and women's labor, for work of equal value. This fundamental convention requires ratifying countries to ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value. The term "remuneration" is broadly defined to include the ordinary, basic or minimum wage or salary and any additional emoluments payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment.

The principle of equal treatment or discrimination in matters of employment is a creation of the International Labour Organisation. Enshrines the principle of equal treatment, the Convention no. 111 defines discrimination as " any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. It requires

[4] Adopted in Belém do Pará, Brasil, on June 9, 1994, at the twenty fourth regular session of the General Assembly

[5]"Equality of opportunity and treatment", accessed February 15, 2010, http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/equality-of opportunity-and-treatment/lang--en/index htm

ratifying states to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in these fields. This includes discrimination in relation to access to vocational training, access to employment and to particular occupations, and terms and conditions of employment. "

The discriminations based on the gender have imposed the statutory principle of equal treatment between men and women in the field of labor relations in terms of international regulations, but they were equally the source of numerous controversies about the unacceptable discriminations and distinctions based on gender. The rules that ensure the protection of women who do a paid work are considered by some authors as a violation of the principle of equality between the gender[6]. It was stated in the literature, that it must be generally accepted that "neither men nor women should not be subject to safeguards based on gender, except in strictly biological reasons. The existence of traditional stereotypes regarding gender division of labor is not considered a valid reason to grant special protection to women[7]. Therefore, differences in treatment are admitted to the strictly biological grounds requiring special protection to women especially during pregnancy and post-partum".

The changes appeared in Europe in terms of gender roles within the family and society led to the adoption of Directive no. 76/207/EEC[8] that governs the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

The principle of equal treatment means that there should be no discrimination whatsoever on the grounds of sex**,** either directly or indirectly, by reference in particular to marital or family status. Member States may, however, exclude from the Directive's scope occupational activities for which, by reason of their nature, or the context in which they are carried out, the sex of the worker constitutes a determining factor.

The Directive is without prejudice to provisions concerning the protection of women (pregnancy, maternity), or to measures to remove existing inequalities which affect women's opportunities in the areas covered by the Directive.

Application of the principle means that there should be no discrimination on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts at all levels of the hierarchy.

The principle applies to access to all types and all levels of vocational guidance, basic and advanced vocational training and retraining. Application of the principle to working conditions, including conditions governing dismissal, means that men and women must be guaranteed the same conditions.

Member States must take the measures necessary to ensure that any laws, regulations and administrative provisions contrary to the principle of equality are abolished or amended if they were originally based on a concern for protection which is no longer well-founded; inappropriate provisions included in collective agreements, individual contracts of employment, the internal rules of undertakings or rules governing independent professions can be declared null and void or amended.

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[6] Jean-Michel Servais, *Droits en synergie sur le travail. Elements de droits international et compare du travail* (Bruxelles: Bruylant, 1997), 126-131

[7] Ruth Nielsen, "La legislation protectrice des femmes et les pays nordique", *Revue internationale du Travail, vol.119,* 1(1980):51, cited by Jean-Michel Servais – cited work:127, cited by Avram Cezar and Roxana Radu, "The European year of the Equality of Chances for all. The protection of woman rights in 2007", *Revue de Sciences Politiques,* 13(2007), 22-35

[8] For full document please http://www.equalitytribunal.ie/uploadedfiles/AboutUs/council_directive_76207eec.pdf

Labour and management must be requested to undertake the revision of such provisions in collective agreements. Persons wronged by failure to apply the principle must have the right to pursue their claims by judicial process.

Employees must be protected against dismissal by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.

The provisions adopted pursuant to this Directive and the relevant provisions already in force must be brought to the attention of employees by all appropriate means.

Member States must periodically assess the occupational activities excluded from the field of application of the Directive in order to decide, in the light of social developments, whether there is justification for maintaining the exclusions concerned. They must forward all necessary information to the Commission by the stipulated deadline, to enable it to draw up a report on the application of the Directive.

Article 119 of the EEC Treaty establishes the principle of equal pay for equal work between men and women. The principle of equal pay entails, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration. Where a job classification system is used for determining pay, it must be based on the same criteria for both men and women. Employees wronged by failure to apply this principle must have the right of recourse to judicial process to pursue their claims.

Member States shall abolish all discrimination between men and women arising from laws, regulations or administrative provisions which do not comply with the principle. They shall take the necessary measures to ensure that provisions appearing in collective agreements, wage scales, wage agreements or individual contracts of employment which are contrary to the equal pay principle may be declared null and void. They shall ensure that the equal pay principle is applied and that effective means are available to take care that it is observed.

Employees shall be protected against dismissal by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the equal pay principle.

The aim of the Directive is to reinforce the basic laws with standards aimed at facilitating the practical application of the principle of equality to enable all employees in the Community to be protected, as there are still disparities between Member States despite efforts to date.

There is a clear need for a Convention to prevent and combat domestic violence and other forms of violence against women and to protect and support the victims. The Council of Europe is the first European organisation to tackle this problem head on by setting up the Ad Hoc Committee on Preventing and Combating Violence against Women and Domestic Violence (CAHVIO) which began its work in April 2009. At its meeting in December 2010, the CAHVIO approved the Draft Council of Europe Convention on preventing and combating violence against women and domestic violence for transmission to the Committee of Ministers. The CAHVIO concluded its work in January 2011 with the approval of the draft Explanatory Memorandum.

The member states of the Council of Europe and the other signatories hereto[9]:

- Condemning all forms of violence against women and domestic violence;

- Recognise that the realisation of de jure and de facto equality between women and men is a key element in the prevention of violence against women;

- Recognise that violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women;

[9] For more informations see the *Preamble* of the Council of Europe Convention on preventing and combating violence against women and domestic violence

- Recognise the structural nature of violence against women as gender-based violence, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men;

- Recognise the structural nature of violence against women as gender-based violence, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men;

- Recognise, with grave concern, that women and girls are often exposed to serious forms of violence such as domestic violence, sexual harassment, rape, forced marriage, crimes committed in the name of so-called "honour" and genital mutilation, which constitute a serious violation of the human rights of women and girls and a major obstacle to the achievement of equality between women and men;

- Recognise the ongoing human rights violations during armed conflicts that affect the civilian population, especially women in the form of widespread or systematic rape and sexual violence and the potential for increased gender-based violence both during and after conflicts;

The purposes of this Convention are to:

a) protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence;

b) contribute to the elimination of all forms of discrimination against women and promote substantive equality between women and men, including by empowering women;

c) design a comprehensive framework, policies and measures for the protection of and assistance to all victims of violence against women and domestic violence;

d) promote international co-operation with a view to eliminating violence against

e) women and domestic violence;

f) provide support and assistance to organisations and law-enforcement agencies effectively co-operate in order to adopt an integrated approach to eliminating violence against women and domestic violence.

The protection of women's rights and the principle of equality between men and women in Romania

According to art. 20 para. (1) of the Romanian Constitution, constitutional human rights provisions are interpreted and applied not only under international treaties to which Romania is party, but also to the Universal Declaration of Human Rights.

The law reviewing the Constitution amended art. 16, adding that Romania shall guarantee equal opportunities between women and men to fill public office or dignity, civil or military.

The framework law on protection against discrimination against women is Law *no. 202/2002 on equal opportunities between women and men.* Thus, article 1 of the law regulates the measures to promote equal opportunities between women and men, in order to eliminate direct and indirect discrimination based on gender criteria in all spheres of public life in Romania.

Measures to promote equal opportunities between women and men and to eliminate direct and indirect discrimination on the criteria of gender is in labor, education, health, culture and information, participation in the decision, and in other areas governed by special laws[10].

In labor, equal opportunities between men and women means non-discriminatory access to:

a) choice or the free exercise of a profession or activity,

b) employment in any position or job vacancies at all levels of professional hierarchy;

c) equal pay for work of equal value;

[10] Nicolae Voiculescu , "Some considerations on the Law nr. 202/2002 concerning the equality of chances of men and women and its harmonization with the community directives", *The Romanian Review of Labor Law*, 2(2003): 17

d) information and counseling, initiate programs qualification, training, specialization and retraining

e) promote any hierarchical and vocational level

f) working conditions that comply with health and safety at work, according to the legislation in force,

g) benefits, other than such wage and social protection measures and insurance.

The equality of opportunity and treatment between women and men in labor relations is enjoyed by all workers, including those self-employed and agricultural workers.

It is prohibited the discrimination by employers using practices which disadvantages people of a particular gender in relation to industrial relations, on:

a) announcing, organizing competitions or examinations and selection of candidates to fill vacancies in public or private sector,

b) termination, suspension, modification and/or termination of employment or legal service,

c) establishment or modification of job duties;

d) determining the remuneration

e) benefits, other than salary and social protection measures and insurance;

f) information and counseling, program initiation, qualification, training, specialization and retraining;

g) assessment of individual professional performance;

h) promotion

i) disciplinary measures;

j) the right to join unions and access to its facilities ;

k) any other conditions of work performance, according to the laws in force.

Exceptions are the jobs that, given the nature or conditions of performing the work prescribed by law, are essential features of gender.

Regarding the access to education, health, culture and information is prohibited any form of gender based discrimination in terms of access of women and men at all levels of education and training, further training and generally to lifelong learning. Education institutions both public and private, social factors are involved in processes of educational and all other training providers and training, authorized by law are required to include in curricula, and analytical programs other curricula measures respect the principle of equal treatment and opportunities between women and men. These institutions will implement measures to promote equality of opportunity and treatment between women and men in their current activities[11].

Extending equal opportunities between men and women in employment of any functions, both public and private sectors and to all rights stipulated by labor legislation (wages, working conditions, promotion, etc.) derives from art. 5 of the new Labour Code (Law no. 53/2003).

The principle of equal treatment between men and women in the field of labor relations is a consequence of the principle of equal treatment of all employees and employers, according to art. 5(2) of the Labor Code, which prohibits, any direct or indirect discrimination against an employee based on gender.

It is direct discrimination "acts and deeds of exclusion, distinction, restriction or preference based on one or more of the criteria set out in para. 2 (gender, sexual orientation, age, national affiliation, race, color, ethnicity, religion, political option social origin, disability, family situation or responsibility, trade union membership or activity), which have the purpose or effect of granting, restriction or removal of recognition, use or exercise rights under labor law. "

It is indirect discrimination "acts and deeds apparently based on criteria other than those provided in par. 2, but having direct effects of discrimination."

[11] Avram Cezar and Roxana Radu, "The European year of the Equality of Chances for all. The protection of woman rights in 2007", *Revue de Sciences Politiques*, 13(2007): 22-35

According to Article 2 paragraph 1 of Law no. 217/2003 on preventing and combating domestic violence, domestic violence is any physical or verbal action deliberately perpetrated by one family member against another member of the same family that causes physical pain, psychological, sexual or material damage. In para. 2 of the same article states: "It is also preventing women from domestic violence to exercise their rights and fundamental freedoms." This provision of the law proves the concern of the legislature to defend against any infringement of women's rights in general, and against domestic violence in particular. The law seeks to protect the rights of women against any breach came from a family member, a family member taking into account the spouse and close relative as defined in Art. 149 of the Criminal Code. The effects of this law and persons who have established relationships similar to those between spouses or between parents and children, established on the basis of social inquiry, that people living in concubinage, adopters and adopted or persons actually dependent on others.

For the provisions of Law no. 217/2003 on preventing and combating domestic violence in February 2004 was established the National Agency for Family Protection, as a specialized body with legal personality, subordinated to the Ministry of Health and Family. The agency`s objectives are:

a) promoting family values, understanding and mutual assistance in family violence prevention and control in relationships between members,

b) to assist family members in distress as a result of acts of domestic violence,

c) to assist victims through the recovery of health and social reintegration,

d) assisting the perpetrators of alcoholism treatment, rehabilitation, psychological and psychiatric

e) protecting victims, particularly minors, confidentiality measures to preserve their identity and psychological measures for their protection during handling of the case;

f) initiating and coordinating social partnerships in preventing and defending from the domestic violence.

To achieve the objectives in the care and protection of victims of domestic violence, the agency shall:

a) prepare, justify and implement strategies and programs to care and protect the victims of domestic violence,

b) controll the application of regulations in their own field and the business units operating under its authority,

c) fund or, where appropriate , co-specific defense programs and strengthen the family and the care and protection of victims of domestic violence;

d) establish shelters and telephonic hotlines for victims of domestic violence,

e) education, professional licensing and coordinating the activities of family assistants,

f) organizing courses on knowledge of forms of domestic violence;

g) studies and research, strategies, forecasts, production and publication of scientific and specific promotional materials;

h) manage the database of domestic violence situations;

i) involve and support initiatives for social partners in tackling domestic violence,

j) establish rehabilitation centers for victims of domestic violence,

k) establish call centers for abusers.

Conclusions

Promoting equal opportunities for women and men and ensuring full enjoyment of all human rights is a priority in Romania. Romania’s non-discrimination legislation has been constantly modernized to incorporate the most advanced international norms and standards .

Although Romania has made important steps forward in the field of gender equality and it is moving in the right direction, the pace is not fast enough. Speaking about gender issues, one can easily notice that further efforts are still necessary to improve the situation. Some measures could include:

a) To increase awareness on gender issues;
b) To better inform and raise the awareness of people on the protection of their rights;
c) To enhance the transparency (reports and statistics available);
d) To raise the financial support at the level of local authorities and local public administration;
e) To deliver an extended and diverse educational offer within the non-formal educational system;
f) To improve the collaboration among specialized organisations and bodies at all levels;
g) To make the agencies and other specialised bodies more visible and active.

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THE RIGHT OF WITHDRAWAL FOR CONSUMPTION CONTRACTS

MOISE BOJINCĂ*

Abstract
The romanian legislature in its attempt to align the national legislation with European law requirements stated by a series of acts the right of termination in some consumer contracts.
The rule is not a general application one of this category of contracts but concerns only the conventions more dangerous or more disadvantageous to the consumer through the procedure for their termination or by the effects of engaging them.
These consumerism rules relating to prior mandatory period of reflection and denial free and legal right applicable to training of certain consumer contracts aimed at trying to protect the consumer before the transaction contract.
By the regulation, there is either delaying the final formation of the contract or subsequent withdrawal, in a certain period of time stipulated by the law of consent expressed, leading to derogate from the traditional way of reaching at the volitional agreement .

Keywords: *the right of termination, consumer contracts, volitional agreement, the offer to contract, the moment of signing the contract*

1. Classical Form of a Volitional Agreement

1.1. Preliminaries

The volitional agreement notion expresses one of the meanings[1] of the consent[2] that is the will agreement, a result of the understanding between two or several persons in order to produce juridical effects.

In this case, it is about "consensus" as a structural element of the conventions.

According to art. 942 Romanian Civil code, the contract represents "the will agreement of two or several persons in order to constitute or turn of a juridical report between them"[3].

As such, the contract execution supposes the accomplishment of the will agreement of the parties on the contractual clauses, by meeting on a full concordance, under all aspects, the offer to contract its meaning.

The contract offer and its acceptance represent the two sides of the will to contract, sides that initially appear separate, but that, by their meeting, may be reunited in what we call a will agreement.

The mechanism of reuniting the offer and the meaning represents the mechanism of the contract execution itself. It is usually complex and that is why it is preceded by negotiations.

1.2. The Offer to Contract

The parleys related to the contract signing start with a suggestion to contract made by a person. This suggestion is called offer or unfinished offer and represents the first will expression for forming the volitional agreement.

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[1] The other acceptation assigns the will manifestation to be force.

[2] Etymologically, the term of consent comes from the Latin expression „cum sentire", meaning "to feel" or "you together". See, Gh. Iliescu, Civil Law. General Part, Sibiu, 1977, p. 173, M. Bojincă, Romanian Civil Law. General Theory, („Academica Brâncuşi" Press, Târgu Jiu, 2008), p. 186.

[3] In the acceptation of art. 1166 of Law no. 287/2009 (Assumed Civil Code) "The contract is a will agreement between two or several persons wanting to constitute, change, transmit or turn off a juridical report".

The offer to contract is often preceded by commercials, publicity, discussions, negotiations, and it is finally materialized in an offer juridically valid.

The offer may be made in writting, verbally or even tacitly.

For the offer validity, mainly, it is not required any special condition of form.

The offer to contract can be addressed either to a determined person, but also to some undetermined persons – addressed to the large public. Also, the offer can be made with or without a term.

The offer, being a side of the consent, must fulfil its general conditions. Thus, it should be:

-a real, serious, conscious, non-vitiated will expression having the purpose to juridically conclude a contract;

- firm, meaning that the tenderer has no possibility to change or retract it;

- unequivocal – specific, exact and punctual;

- complete, namely it should contain all the essential elements of the contract.

The problem of the mandatory force of the offer regards the moments before its acceptation. After being accepted, we deal with a formed contract, regarding which we may apply the rules regarding the mandatory force of the contract.

In literature, there were the following two problems:

- if the offer is launched, before being accepted, it gives birth to an obligation in the tenderer's target;

- if it creates obligations in his target, what the nature is and how long this obligation lasts.

Whereas in the current Civil Code there is no express regulation that could elude these things, and the only text referring to this matter– art. 37 of Commercial Code[4] – leaves us to understand that, until signing the contract, the offer may be unilaterally revoked by the one who did it, the judicial practice and the special literature accept that, in discussing the mandatory effect of the offer it is necessary to consider two situations whether the offer arrived or not to its addressee[5].

If the offer did not get to the addressee, the tenderer may revoke it freely and with no consequences. But it is necessary for the revocation to get to the addressee at the same time with the offer, the latest.

If the offer got to the addressee, we must distinguish it whether it has or has no term.

If it has a term, the tenderer has to keep it until the term expires. As soon as the term expires, the offer becomes weak.

If the offer has no term, it is admitted that the tenderer is forced to keep it for a reasonable time appreciated depending on the factual circumstances, in order to allow its addressee to deliberate and to pronounce on it.

1.3. Accepting the Offer

Accepting the offer constitutes, similar to the unfinished offer a unilateral voluntary document by means of which its addressee accesses the contracting suggestion.

Symmetrically to the offer features, an acceptation is valid if:

- it is the expression of a juridical will consciously elaborated and freely declared;

- it corresponds to the unfinished offer, namely it constitutes a response to all the offer requirements and data;

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[4] Art. 37 Commercial Code stipulates that "Until the contract is perfect, suggestion and acceptation are revocable. However, even if the revocation stops the contract from being perfect, if it gets to the knowledge of the other party, after it had proceeded to its execution, then the one revoking the contract is responsible for damages – interests".

[5] L. Pop, *Civil Law. General Theory of Obligations. Treaty, (*"Chemarea" Foundation Press. Iaşi,) 1994, p. 47-48; C. Stătescu, C. Bârsan, *Civil Law. General Theory of Obligations*, (All Press, Bucharest, 1993), p. 44-45; T. R. Popescu, P. Anca, General Theory of Obligations, Scientific Press, Bucharest, 1968, p. 72-73; R. *Sanilevici, Civil Law. General Theory of Obligations*, (laşi University, 1976), p 40-41.

- it is unequivocal, namely it expresses, no doubt, the contracting will of the unfinished offer addressee;

- it is opportune, and it should interfere when the offer is current or efficient.

The material modalities used by the acceptant in order to show his accession may be very different whereas, just like the unfinished offer, the acceptation is expressed in written or verbally, by gesture or by attitude, or by the simple execution of the offer content.

1.4. The moment of signing the contract

1. 4. 1. The importance of the moment of signing the contract

Whereas most of the contracts are consensual, the moment of signing the contract coincides to the one of accomplishing the will agreement. The exception is represented by the solemn contracts that are signed when accomplishing the formalities stipulated by the law for their validity. The determination of the moment of signing the contract presents a practical importance whereas, in report to this moment, it is appreciated:

- the parties' ability to contract;

- the civil law applicable for law conflict in time;

- the date when there start certain legal and conventional terms, such as: the extinctive prescription term and the suspensive or extinctive term of executing the contract;

- the date of the transfer of the property right or of other real rights and of the risk of the fortuity disappearance of the good from the one estranging to the acquirer in the translative contracts, having as an object certain goods;

- nullity causes or causes of annulling the contract;

- the place of the contract signing.

In order to determine the moment of the contract signing, it is necessary to distinguish, in the first place, if the contracting parties are present, or they are not in the same place, a situation when the convention is contracted by correspondence. In the last case, we should distinguish between mutual obligation contracts and unilateral contracts.

1.4.2. Determining the moment of the contract signing between present persons

If a contract is signed between the present parties, it is formed since the moment of the agreement accomplishment, for the consensual contracts or of the accomplishment of the other formalities or material requirements for the solemn or real ones.

Both of the parties being present, the moment of the contract signing will be concomitantly known by each of them, the problem of specifying the constituting time has no special interest for the juridical technique. The moment coincides to the one of declaring the integral acceptation of the offer, with no reserves. The acceptation declaration should interfere immediately so that the tenderer knows it even from the moment it is expressed by the other party. As a consequence, in that moment the contract is signed. To these, we assimilate the contracts signed by phone from the viewpoint of determining the moment of their signing.

1. 1.4.3. Determining the moment of the contract signing between absents

1.4.3.1.Determining the moment of signing the mutual obligation contracts[6]

For contract signing between absents or by mail (post office, courier, telegraph, telex, internet etc.), whereas the offer transmitting and the answer reception suppose a lapse of time that is often difficult to establish, it is necessary to specify the moment when the convention is accomplished if the addressee accepts the offer.

[6] Juridical term of signing these contracts is constituted by the stipulations of art. 35 and the following ones of Commercial Code, by means of which the mutual obligation contract is regulated between distanced persons.

For determining this moment, there were suggested several systems, namely:

a) ***The emission system or the system of the will declaration***. It considers that the contract is signed when the offer addressee expresses the will to access the suggestion made and to contract the convention. It is a juridical wording that emphasizes the consensualism principle. It considers the contract as being signed since the moment of the acceptation emission whereas, no matter how it gets to the tenderer's knowledge, the acceptation produces juridical effects like a unilateral juridical document. The emission system has the advantage of not being able to specify with no doubt for both of the parties the moment when the acceptation is produced and also the one of allowing the acceptant to come back to the accession before it is known by the demander.

b) ***The dispatching system***, establishes that the contract signing is produced the moment when the acceptant entrusts his affirmative answer in order to be sent to the tenderer, to the postal services or to other means of transmitting the mail: It is a system having efficiencies under the aspect of the security conditions offered by the tenderer's rights as it does not allow him to be immediately aware by the acceptant's consent. In the lapse of time between sending the acceptance and its reception by the demander, the acceptant being allowed to come back on his voluntary manifestation and to create difficulties to the other party, by means of it.

c) ***The system of reception acceptation*** by the demander whose basic idea is concretized in the increased certainty provided to the juridical operation by the tender of the one who accepts. Elaborated depending on two of the hypotheses that may interfere in reality - the simple mail reception by the addressee without opening the letter and its reception followed by its opening and finding its content, this formula is presented as „***the reception***" or the simple reception of its acceptation and the one of „***information***".

c_1) According to the ***first option*** of the reception or of the simple reception of the acceptation, the acceptation is considered as being known by the tenderer since the mail containing the access to the unfinished offer gets to its residence (the reception system) without being necessary for the tenderer to be informed on the content of the received letter. The offered solution, settling the moment of the contract signing when the mail is received, even it is more specific and, by that, more prudent by the others, still keeps an uncertainty coefficient whereas it does not allow the addressee to be fully elucidated on the mail content.

c_2) ***The second option*** – the informing system– considers that the agreement was contracted and the convention was formed only when the tenderer received the mail from the acceptant addressee, opens it and it is informed on its content. This time, there were also spotlighted deficiencies regarding the acceptant's position. He is left in the terms of the informing system at the arbitrary of the tenderer that may tergiversate or stop the contract signing by an intentional delay or a deliberate refusal to acknowledge the content of the received mail.

The relativity of the practical results of these systems of establishing the moment of the contract signing determined the doctrine to grant them the value of certain presumptive data having a limited proving efficiency of accomplishing certain contrary evidence. Practically, it is useful to consider, in choosing the system, the stipulations of the special laws or the contractual stipulations of the parties. In their absence, it is necessary to settle the moment of the contract signing, the one corresponding, depending on the cause circumstances, real will of the parties.

The contract is usually considered as being signed at the tenderer. However, according to the stipulations of art. 37 Commercial Code it is possible for a contract to be also signed at the acceptant if the tenderer considers the convention as being contracted by the simple execution of its object by its addressee.

1.4.3.2. *Determining the moment of signing unilateral contracts*

The moment of signing unilateral contracts is mainly determined according to the acceptation starting from the stipulations of art. 38 Commercial Code stipulating that: "the suggestion is mandatory as soon as it gets to the knowledge of the party for which it is made". The law relatively

presumes that the acceptance interfered when the offer is received. This presumption may be removed by contrary evidence.

The system of the acceptation emission is applied only as a principle, since there are no special derogatory legal stipulations. For example, for the donation contract, by an exception norm, it was consecrated the informing system or the acknowledging one with a correction, namely it had place when the donor accepted the reception.

In this sense, art. 814, paragraph 2 Civil Code stipulates that, when the donation acceptance is made by subsequent authentic writing, it is necessary for the acceptance document to be communicated to the donor during his life.

2. Juridical mechanisms of accomplishing the volitional agreement in some consumption contracts

2.1. Preliminaries

The Romanian legislation, by transposing the stipulations of certain Directives and European Regulations[7] in the field of consumption contracts, integrated, regarding the contract signing of the mechanism of the mandatory prior reflection term and the one of the legal and free right of unilateral denunciation of the contract in order to protect the consumers by juridical means.

2.2. The mechanism of the mandatory term of prior reflection

In the Romanian right of consumption, Law no. 289 from June, 24th 2004 regarding the juridical system of the credit contract for consumption meant to the natural persons stipulate in annex 1 called "Mandatory minimal causes of credit contracts, depending on the object of each of them, at point 1 Credit contracts having as an object the financing of the goods and services supply, letter g)" indicating the eventual term of reflection (indicating a grace term in order to analyse the credit opportunity).

The Romanian legislator, even if he stipulates the necessity to indicate this term, does not establish the legal time of such a reflection term and it does not show the sanction applicable to the professional who would ignore this protectionist proceeding.

3. Mechanism of the unilateral denunciation of certain consumption contracts

3.1. Notion

The unilateral denunciation right represents the proceeding (mechanism) offering to the consumer the possibility to come back, after signing the contract, in an usually quite short time placed in the proximity of its acceptance.

3.2. The application field

This mechanism of accomplishing the volitional agreement – consisting in the retraction right that is constituted in a legal denial right that can be manifested in a certain lapse of time established by the law refers to:

[7] See, for example, the Directive of the European Parliament and of the Council no. 97/7/CE from May, 20th 1997 regarding the consumers' practice for the distance contracts, Directive 1999/44 from May, 25th 1999 regarding certain aspects of the sale and of the connected guarantees, CE Regulations no. 593/2008 regarding the law applicable to the contractual obligations (also called Roma I Regulations). This regulation was adopted by the European Parliament on June, 17th 2008 and became valid on December, 17th 2009 in all the member states of the European Union (except for the United Kingdom of Great Britain and of the Kingdom of Denmark). The regulation replaces the Rome Convention regarding the law applicable to the contractual obligations.

- distance contracts[8]. According to art. 7 of G.O. 130/2000 regarding the consumers' protection when signing and executing distance contracts, the consumers have the right to unilaterally denounce the contract in a 10-working day term, with no penalties and without invoking a reason";

- contracts outside the commercial spaces. According to art. 9 of the Government Ordinance 106/1999 regarding the contracts signed outside the commercial spaces, the consumers are allowed to unilaterally denounce the respective contracts "in a 7 working days term that start flowing: a) since the contract is signed, if this date is concomitant to the date of the product deliverance; b) since the contract of service performance is signed; c) since the consumer receives the product, if the deliverance was accomplished after signing the contract";

- *time sharing* contracts. According to art. 6, paragraph 1 letter a) of Law no. 282/2004 prevents the acquirers' protection regarding certain aspects of the contracts referring to the gaining of a using right on a limited term of some real estates, the acquirer has, complementarily to the common law options related to the contract nullity or annullable feature, the right "to unilaterally denounce the contract, without needing the invocation of a reason, in a 10 calendar days term since it has been signed by both of the contracting parties or since the parties have signed a pre-contract, depending on the case".

3.3. Reasons of the legislator regarding the regulation of the unilateral denunciation right of these contracts

Naturally, for each of the three categories of contracts, the legislator referred to the consumers' protection, but the reasons this protection is based on are different.

Thus, in case of distance contracts, the legal retraction right of the consent resides in the fact that the consumer contracts, based on some simple images or descriptions of the product or of the services, and this is the risk of receiving a good that would not correspond to his expectations comes from.

Actually, the consumer is able to appreciate the opportunity of contracting and the correspondence of the good features to his needs only after receiving the product.

The reason of unilateral denunciation right of the distant contract is different from the one applicable to the contracts signed outside the commercial spaces. Thus, unlike the residence offer, when the buyer is deprived, in the first place, of the possibility to compare and, in the second place, of the possibility to reflect enough on the contracting opportunity, in case of the distance selling contracts, the consumer has a sufficient lapse of time for thinking, but he has no possibility to accomplish a sensorial direct contact with the respective product. As such, it is possible for him to be disappointed regarding the product qualities when he has contact with it.

In case of the *time-sharing* real estate contract, the reason of the consumer's legal right of consent retraction comes from the dangers the consumer is liable to, reported to his contractual situation that comes from a location contract[9].

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[8] The distance contract, defined by art. 2, paragraph 1 letter a) of the Government Ordinance no. 130/2000 regarding the juridical system of the distance contracts that transposes in the intern legislation the requirements formulated in the Directive 97/7/CEE from May, 20th 1997 regarding the consumers' protection in matter of distanced contracts, represents "the contract of supplying products or services contracted between a merchandiser and a consumer, in frame of a selling system organized by the merchandiser who exclusively uses, before and when signing this contract, one or several techniques of distance communication".

[9] For the time-sharing contract, the consumer has a series of inconveniences such as:

-accomplishing a contract in order to temporarily use a real estate that is still unconstructed or being constructed but for which he is forced to pay in advance the integral price of the future using periods;

-the lack of finishing the real estate or the recovery of the advanced sums;

-the big time of contracting, the law stipulating the minimum time of 3 years, but it does not limit the maxim lapse of time.

4. Conclusions

The special literature[10] has tried to explain the juridical nature of these contracts and has advanced a series of theories. As far as we are concerned, we acquiesce to the opinion according to which the unilateral right of denunciation of these contracts registers in the specific mechanism of accomplishing the volitional agreement in a progressive way. This supposes that the valid forming of these contracts is not accomplished anymore when the offer meets the acceptation.

The initial meeting of the consumer's content with the professional's one does not lead to the fully forming of the volitional agreement, but only for a short time, whereas the legislator – starting from the professional inequality in matter of the two co-contracting parties – offers to the consumer a term of 7/10 days of growing and gradually reinforcing the consent – in a direct contact with the good. Only when the respective term is achieved, the consent is considered as fully formed and definitely expressed.

As such, in these contracts, the consumer's initial juridical will is not enough in order to improve the respective contract, but it needs a subsequent confirming will expressed in the 7/10 days term since the initial moment. This confirming will is accomplished by non-exerting in this lapse of time the legal denial right. On the contrary, if the consumer uses the retracting right, the initial juridical will is denied and the parties are put in the situation before the initial meeting of the contracting offer with its acceptation.

As such, the consumer's original consent is insufficient for the full accomplishment of the volitional agreement.

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[10] For their development, see: J. Goicovici, Potestative Right of Retracting the Consent in Matter of the Consumption Contracts, (in Romanian Pandects, no. 1/2009), p. 45-70.

PRESENTATION AND REASONING INSTRUMENTS OF THE DRAFT NORMATIVE ACTS

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Abstract
The aim of this paper is to present an important activity in the law-making process which is reasoning of draft normative acts, fact that consists of an intellectual operation that presents the basic reasons of the new legal regulation, its configuration, the expected social effects and the costs required by the application of the new normative act. The paper makes a description of the presentation and reasoning instruments that need to accompany the draft normative acts that are to be adopted in the Romanian legal system: exposures of reasons, substantiation notes, submission reports and impact studies.

Keywords*: law-making, law-making technique, exposure of reasons, substantiation note, submission report and impact study.*

Introduction

Until the apparition of Law no. 24/2000, the reasoning necessity of the draft normative acts was regulated by the parliamentary regulations and by the Government decisions in this domain[1].

The Law no. 24/2000, republished[2] introduces an independent and general regulation regarding the reasoning of the normative acts, stating that the draft normative acts submitted for adoption must be accompanied, according to the dispositions of the article 6 paragraph (3), read in conjunction with the article 30 paragraph (1) from the republished Law no. 24/2000, by the following presentation and reasoning instruments:

a) *exposures of reasons* – for draft laws and legislative proposals;

b) *substantiation notes* – for ordinances and decisions Governmental[3];

c) *submission reports* – for the other normative acts.

d) *impact studies* – for draft laws of major importance and great complexity, for draft laws about which the Government assumes its responsibility, for the approval draft laws of the ordinances emitted by the Government under an enabling law and subjected to approval by the Parliament."[4]

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[1] According to the article 84 from *Regulamentul Camerei Deputaților* and to the article 66 paragraph (2) from *Regulamentul Senatului*, the draft laws submitted by Government and the legislative proposals submitted by deputies, senators or citizens must be accompanied by a statement of reasons and written in the required form for the draft laws. This prescripted provision is equally about the draft laws for the approval of an ordinance.

[2] Law no. 24/2000 *regarding the law-making technique rules for drafting normative acts* (republished in the Official Journal of Romania, Part I, no. 260/21 April 2010).

[3] The ordinances that must be submitted to Parliament for approval, according to the enabling law, and the emergency ordinances are communicated to the Parliament accompanied by the statement of reasons for its approval draft law.

[4] The exposures of reasons, the substantiation notes, the submission reports and the impact studies represent both presentation instruments, and also reasoning instruments for the new proposed regulations.

For the draft laws for which the Government assumes its responsibility, the reasoning documents accompanying these drafts are *the exposures of reasons* and, respectively, for the draft codes or other complex laws, submitted to the Parliament or, where appropriate, to the Government, to start the legislative procedure, *the report regarding the preliminary theses.*

The normative acts with impact on social, economic and environmental areas, on the general consolidated budget or on the legislation in force, are elaborated on the basis of some ***public policy documents*** approved by the Parliament or by the Government[5].

The public policy documents[6], defined and structured according to the dispositions of the Government Decision no. 870/2006 regarding the approval of the Strategy for improving the elaboration, coordination and planning system of the public policies for the public central administration[7] and of the Government Decision no. 775/2005 for the approval of the Regulation regarding the elaboration, monitoring and evaluation procedures of the public policies for the central level[8], are:

a) *the strategy*;

b) *the plan*;

c) *the proposal of public policies*.

The documents of public policies are initiated, adopted and applied according to the dispositions of Law no. 90/2001 regarding the organization and the functioning of the Romanian Govern and of the ministries[9], with the subsequent amendments and supplementations[10], of the

[5] The Government defines the types and the structure of public policy documents.

[6] *The public policy documents* are decision-making instruments through which the possible solutions to the public policy problems are identified, as they are defined in the Government Decision no. 870/2006 *regarding the approval of the Strategy for improving the elaboration, coordination and planning system of the public policies for the public central administration.*

The public policy documents include also information regarding the impact evaluation, the monitoring, the evaluation and the implementation measures of the identified solutions.

[7] Government Decision no. 870/2006 2006 *regarding the approval of the Strategy for improving the elaboration, coordination and planning system of the public policies for the public central administration* (published in the Official Journal of Romania, Part I, no. 637/24 July 2006).

[8] Government Decision no. 775/2005 *for the approval of the Regulation regarding the elaboration, monitoring and evaluation procedures of the public policies for the central level,* (published in the Official Journal of Romania, Part I, no. 685/29 July 2005).

[9] Law no. 90/2001 *regarding the organization and the functioning of the Romanian Government and of the ministries* (published in the Official Journal of Romania, Part I, no. 164/2 April 2001).

[10] Law no. 90/2001 was completed and modified through the following acts: Law no. 161/2003 *regarding some measures to ensure the transparency in the exercise of the public dignities, the public functions and in the business environment, and to prevent and punish the corruption* (published in the Official Journal of Romania, Part I, no. 279/21 April 2003); The Emergency Ordinance of the Government no. 64/2003 *to establish some measures regarding the establishment, the organization, the reorganization and the functioning of some structures from the units of the Government, of the ministries, and of some other special bodies of the central public administration and of some other public institutions* (published in the Official Journal of Romania, Part I, no. 464/29 June 2003); Law no. 23/2004 *for amending and supplementing of the Law no. 90/2001 regarding the organization and the functioning of the Romanian Government and of the ministries* (published in the Official Journal of Romania, Part I, no. 187/3 March 2004); The Emergency Ordinance of the Government no. 11/2004 *regarding the establishment of some reorganization measures in the central public administration* (published in the Official Journal of Romania, Part I, no. 266/25 March 2004); Law no. 194/2004 *regarding the approval of the Emergency Ordinance of the Government no. 64/2003 for the establishment of some measures regarding the establishment, the organization, the reorganization and the functioning of some structures from the units of the Government, of the ministries, and of some other special bodies of the central public administration and of some other public institutions* (published in the Official Journal of Romania, Part I, no. 486/31 May 2004); The Emergency Ordinance of the Government no. 17/2005 *for the establishment of some organizational measures for the public central administration* (published in the Official Journal of Romania, Part I, no. 229/18 March 2005); Law no. 117/2005 *for the completion of the article 19 from Law no. 90/2001 regarding the organization and the functioning of the Romanian Government and of the ministries* (published in the Official Journal of Romania, Part I, no. 389/9 May 2005); The Emergency Ordinance of the Government no. 76/2005 *for the amending of the article 26 paragraph (3) from Law no. 90/2001 regarding the organization and the functioning of the Romanian Government and of the ministries* (published in the Official Journal of Romania, Part I, no. 618/15 July 2005); Law no. 250/2005 regarding the rejection of the Emergency Ordinance of the Government no. 76/2005 *for the amending of the article 26 paragraph (3)from Law no. 90/2001 regarding the organization and the functioning of the Romanian Government and of the ministries* (published in the Official Journal of Romania, Part I, no. 734/12 August 2005); Law

Government Decision no. 870/2006 regarding the approval of the Strategy for improving the elaboration, coordination and planning system of the public policies for the public central administration, of the Government Decision no. 775/2005 for the approval of the Regulation regarding the elaboration, monitoring and evaluation procedures of the public policies for the central level, with the subsequent amendments, and also of the Government Decision no. 561/2009 for the approval of the Regulation regarding, on the Government level, the elaboration, the approval and the presentation of the drafts for the public policies documents, of the draft normative acts, and of some other documents for adoption/approval[11].

Law no. 24/2000, by the legislative amendments aiming, in particular, the quality improvement of the legal standards, introduced dispositions that regulates the elaboration of the *impact studies* for draft laws of major importance and great complexity, for draft laws about which the Government assumes its responsibility, for the approval draft laws of the ordinances emitted by the Government under an enabling law and subjected to approval by the Parliament, and also *the preliminary evaluation of the draft normative acts' evaluation*, as an analysis method of the implications of some existent or proposed regulation[12].

These impact studies[13] and preliminary evaluations represent an essential stage in the substantiation of a state's legislation, detailed procedures in this regard existing since the late 90s in the European Union[14].

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no. 250/2006 *for the amending of the Law no. 90/2001 regarding the organization and the functioning of the Romanian Government and of the ministries* (published in the Official Journal of Romania, Part I, no. 554/27 June 2006); The Emergency Ordinance of the Government no. 87/2007 *for the amending of the Romanian citizenship Law no. 21/1991* (published in the Official Journal of Romania, Part I, no. 634/14 September 2007); The Emergency Ordinance of the Government no. 221/2008 *for the establishment of some organizational measures for the public central administration* (published in the Official Journal of Romania, Part I, no. 882/24 December 2008); The Emergency Ordinance of the Government no. 7/2009 *regarding the abolition of the Prime-Minister Chancery and the establishment of some measures about the reorganization of the Government's working apparatus* (published in the Official Journal of Romania, Part I, no. 145/9 March 2009); The Emergency Ordinance of the Government no. 24/2009 *regarding the setting of some competences for the main credit coordinator of the Government's working apparatus* (published in the Official Journal of Romania, Part I, no. 176/20 March 2009); Law no. 376/2009 *for the amending of the article* 26 from Law no. 90/2001 *regarding the organization and the functioning of the Romanian Govern and of the Government's ministries* (published in the Official Journal of Romania, Part I, no. 835/3 December 2009) and The Emergency Ordinance of the Government no. 2/2010 *regarding some measures about the organization and the functioning of the Government's working apparatus and the amending of some normative acts* (published in the Official Journal of Romania, Part I, no. 76/3 February 2010).

[11] Government Decision no. 561/2009 *regarding the approval of the Regulation about the procedures, at Govern level, for the elaboration, submission and presentation of the draft public policies documents of the draft normative acts and of some other documents for adoption/approval* (published in the Official Journal of Romania, Part I, no. 319/14 May 2009).

[12] Law no. 49/2007 *for the amending and the supplementing of* Law no. 24/2000 *regarding the law-making technique rules for drafting normative acts* (published in the Official Journal of Romania, Part I, no. 194/21.03.2007)

[13] First reflections on the imperative of the impact studies had as a starting point the Mandelkern group's works, established by the European Commission, named so after the name of its leader - Dieudonné Mandelkern, who, on 13th of November 2001, published a report about the regulation of the quality (Better Regulation). Based on this report, the European Commission worked out a communication on the impact analysis, document which mentions that the applications of the impact studies were in the energetic field, in the environment protection field and in the chemic industry field. In this document, the European Commission insists on the necessity to undergo an impact analysis in order to achieve the communal objectives, namely the economic growth and the competitiveness. However, it is stated that the impact studies elaboration process has been a little modified from what the documents from 2002 were predicting, but the Commission kept the general approach, which consists in the necessity to realize a Road Map preliminary impact study and then an in-depth impact study. According to this document, all the Commission's proposals and the Commission's work program are analyzed in these impact studies, studies that aim to see which are the economic, environmental and social consequences of the envisaged measures (S. Popescu and V. Țăndăreanu, "Modificările aduse Legii nr. 24/2000 privind normele de tehnică legislativă pentru elaborarea actelor normative", in *Aspecte practice de tehnică și evidență și legislativă*, edited by S. Popescu,, C. Ciora and V. Țăndăreanu (Bucharest : "Monitorul Oficial" Publishing House, 2008), 96.

The impact study. The elaboration scope of the impact study is, according to the dispositions of the article 33 from the republished Law no. 24/2000, to estimate the costs and the benefits brought in economic and social field by the adoption of the draft law, and also to highlight the difficulties that might appear in the implementing process of the proposed regulations.

The impact study is usually made by the speciality structures of the central public administration, at the Government's request. For the legislative proposals initiated by the deputies or by the senators, the impact studies are prepared by line ministries, at the request of the parliamentary committees.

The impact study is referred to:

a) the status quo existing at the time of the new regulation elaboration;

b) the amendments proposed for the existing legislation;

c) the objectives persuade by amending the existent legislation;

d) the available means to achieve the proposed goals;

e) the difficulties that might be encountered in applying the new dispositions;

f) the assessment of the costs imposed by the adoption of the draft law and any budgetary savings generated by it, the reasons underlying this assessment and how to calculate the costs and the savings;

g) the benefits derived by implementing the draft law, other than the economic ones;

h) the comparative analysis of costs and benefits involved in the draft law, showing whether the benefits are justified by the costs.

The preliminary evaluation of the draft law impact, of the legislative proposals and of the other draft normative acts. This represents, according to the article 7 from the republished Law no. 24/2000, a set of activities and procedures with the purpose to ensure an adequate foundation for legislative initiatives. The preliminary evaluation of the impact assumes the identification and the analysis of the economic, social, environmental, legislative and budgetary effects produced by the proposed regulations.

This instrument represents, at the same time, a fundamental prerequisite for improving the legislation quality in each regulation field, being necessary to implement *the Strategy for improving the elaboration, coordination and planning system of the public policies for the public central administration*[15].

Evaluation is also a monitoring and management instrument for the normative acts, which offers the possibility of improving the relations between the legislator and the society, the degree of cooperation and coordination between various public and private institutions and also the stability of the legal system[16].

The necessity of a better substantiation of the legislation is reported by both public institutions and organizations in the intern field, and also by the reports from the last years elaborated by the recognized international bodies[17].

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[14] *Ibidem*, 88-96.

[15] Approved by Government Decision no. 870/2006.

[16] S. Popescu and V. Țăndăreanu, *quoted work*, 98.

[17] In *Raportul de monitorizare al Comisiei Europene din mai 2006*, in the chapter about "The public administration reform", it is mentioned the fact that the legislation is still transmitted to the Parliament without an evaluation of all the implications or of the necessary administrative capacities to implement it, being recommended the introduction of some measures to allow the facilitation to realize the impact analyses for the central public administration.

Also relevant from this point of view were the recommendations formulated in *Raportul Grupului Mandelkem*, whose content includes a set of concrete conclusions on the need for proper grounding of the proposed normative acts.

Specifically, the main problems identified in the drafting normative acts are:

a) the improper grounding of the normative acts;

b) the lack of preliminary evaluation of the impact regarding the proposed measures by the public policy or by the respective draft normative act;

Preliminary assessment of the impact of the draft normative acts is considered to be the foundation for the proposed legislative solutions and must be realized before the adoption of the normative acts.

The substantiation of the new regulation must take into account both the evaluation of the specific legislation in force impact at the time of the normative act draft elaboration, and the evaluation of the public policies impact that the draft normative act implement.

The preliminary evaluation of the impact is realised by the initiator of the draft normative act. In the case of some complex normative acts drafts, the impact evaluation can be performed under a services contract, by scientific research institutes, by universities, by companies or by non-governmental organizations, in accordance with legal provisions in force regarding the public acquisitions.

In order to prepare the preliminary impact of the legislative proposals initiated by the deputies and the senators, as well as those based on citizens initiative, the Parliament members can request to the Government the assurance of the access to the data and information necessary to accomplish it[18].

The content of the presentation and reasoning instruments of the draft laws

The presentation and motivation instrument includes, according to the article 31 paragraph (1) from the republished Law no. 24/2000, the content of the impact evaluation of the normative acts, having the following sections:

a) *the reason for the issue of the normative act* – the requirements that need the normative intervention, with special reference to the inadequacies and inconsistencies of the regulations in force; the basic principles and the end of the proposed regulations, outlining the new elements; the results of the studies, of the research papers, of the statistical evaluations; references to the documents of public policies or to the normative act for whose implementation the respective draft is elaborated. For the emergency ordinances will be presented distinctly the objective elements of the extraordinary situation which imposes the immediate regulation, not being sufficient to use the emergency parliamentary procedure, and any consequences that might occur lest no legislative measures would be taken;

b) *the socio-economic impact* – the effects on the macroeconomic environment, on the business, social and environmental fields, including the evaluation of costs and benefits;

c) *the financial* impact *on the general consolidated budget, both in the short term, for the current year, and for long term (on 5 years), including information regarding the expenses and revenues;*

d) *the impact on legal system* – the implications of the new regulation on the legislation in force; the compatibility with the communal regulation in matter, their exact determination, and if necessary, further required harmonisation measures; decisions of the European Court of Justice and other relevant documents for the transposition or implementation of those legal provisions; implications for domestic legislation, the ratification or approval of some treaties or international agreements and the necessary adaptation measures; concern in the harmonization legislative matter;

e*) consultations undertaken for the drafting normative acts, the consulted* organizations *and experts, the essence of the received recommendations;*

f) *public* information *activities regarding the drafting and the implementation normative act*;

g) *implementation measures* - institutional and functional changes in the central and local administration.

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c) normative acts that do not present detailed information regarding the involved costs of the respective measures promoting or of the necessary administrative capacities to implement;

d) legislative and institutional overlaps;

e) poor strategic approach in setting priorities.

[18] The preliminary evaluation of the impact is not compulsory for the legislative initiatives of the deputies and senators, as well as those based on citizens' initiative.

We note that among the explanatory memorandum, the substantiation note, the approval report and the impact study, according to Law no. 24/2000, there are no differences in content, each of them will comply with the dispositions of the article 31 paragraph (l) of the law. As a consequence, all the 4 documents are presentation and reasoning papers of a normative actand their name varies depending on the normative acttype they are about[19].

Since for the ordinances and for the decisions of the Govern, the substantiation note that is both the base of their adoption in Government, and of the presentation of the ordinances before the two Chambers of Parliament, professor I. Vida wonders whether it is necessary or not that an exposures of reasons should accompany the draft law for approval of ordinance, knowing that the answer to this question is, by law, affirmative. This legal solution - underlines I. Vida - is more than formal, since the draft law for the approval of the ordinance shall be made after its approval by the Government and it contains a single sentence: "The Government Ordinance no. … from … is approved, published in the Official Journal of Romania, Part I, no. … from …", not being necessary, in his opinion, of a exposures of reasons to justify this sentence. In this case, the reasoning of ordinance results from its introductory formula, which will state its ground, respectively the enabling law or the requirements of the article 115 paragraph (4) of the Romanian Constitution. In such cases, the exposures of reasons is void in the event that a first notified Chamber rejects the approving draft law of the ordinance and sends to the other Chamber a rejecting draft law of the ordinance, accompanied by a exposures of reasons for approval of the ordinance. Taking into account the previous facts, I. Vida opines that, de *lege ferenda*, it should be exclusively taken into consideration the option of accompanying the draft approval law of the substantiation note ordinance[20].

In the situation in which the proposed regulation is elaborated when executing a normative act, the reasoning should content, according to the article 31 paragraph (2) from the republished Law 24/2000 references to the document based on and in execution of which it is emitted.

The final form of the presentation and reasoning instruments for the draft normative acts must contain, according to the article 31 paragraph (3) of Law no. 24/2000[21], references to the notification of the Legislative Council[22] and, where appropriate, notification of the Supreme Defense Council, the Court of Auditors or the Economic and Social Council[23].

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[19] *The exposures of reasons* is a document accompanying a draft law; *the substantiation note* accompanies a Government decision or an ordinance; *the approval report* is required for other draft normative acts (orders, instructions etc) and *the impact study* is necessary for important and great complexity draft laws, for draft laws for which the Government assumes its responsibility, and also for the approval draft laws of the ordinances emitted by the Govern under an enabling law submitted for approval to the Parliament.

[20] I. Vida, *Legistică formală (Introducere în tehnica şi procedura legislativă)*, third edition (Bucharest: "Lumina Lex" Publishing House, 2006), 124.

[21] This disposition [article 31 paragraph (3) of the republished Law no. 24/2000 is, according to professor I. Vida, impossible to be realized in practice, as the reasoning documents are elaborated at the same time with the draft by the drafting committee, commission that stops its activity at the draft elaborating date. The notification of these public authorities is previous to this date and cannot be operated in the exposures of reasons or in the substantiation note (*Ibidem*, 125).

[22] The republished Law no. 24/2000: Article 10 – "(1) The notification of the Legislative Council is formulated and transmitted in writing. It can be: favourable, favourable with objections or proposals or negative.

(2) The favourable notifications which include objections or proposals and also the negative ones are motivated and may be accompanied by the documents or the information that supports them.

(3) The notification of the Legislative Council is a specialized notification and has a consultative character.

(4) The observations and the proposals of the Legislative Council regarding the compliance of the law-making technique rules will be considered in finalizing the draft normative act. Their non-acceptance must be motivated in the content of the presentation document of the draft or in an accompanying note."

[23] The republished Law no. 24/2000: Article 8 – "(1) In the cases provided Regulation, during the drafting normative acts the initiator should seek notification from the authorities concerned in their implementation, depending on the scope of the regulation.

According to the dispositions of the article 2 paragraph (1) from the Government Decision no. 1361/2006 *regarding the content of the presentation and reasoning instruments for the draft normative acts subjected for the approval of the Government*[24], with the subsequent amendments and supplementations[25]; the presentation and reasoning instruments is compulsory[26] both for the draft laws proposed by the Government, for the ordinances drafts and for the emergency ordinances, and also for the decision drafts of the Government, with an impact on social, economic and environmental fields, on the general consolidated budget or on the legislation in force, and must be elaborated according with the following *structure*, including the next *8 sections*[27]:

I. Section 1 "The normative act title".

II. Section 2 "The normative act issuance reason" – which will include:

1. The description of the *present situation*:

a) presentation of the field by indicating the problems to solve through the draft normative act; for the problems regarding the main macroeconomic indicators and socio-economic it will be made a description of the business environment;

b) presentation of the normative acts in force and of the fields insufficiently regulated or not regulated at all;

c) conclusions of the studies, of the research papers, of the statistical evaluations;

d) for the emergency ordinances it will be presented separately the objective elements of the extraordinary situation, whose regulation cannot be postponed, and also the consequences of the non-adoption of the draft normative act urgently;

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(2) After their elaboration and completion of the notification procedure foreseen on paragraph (1), the draft laws, the legislative proposals and also the ordinances and the decisions with normative character of the Govern are compulsory subjected for approval of the Legislative Council.

(3) The notification procedure and the object of the notification of the Legislative Council are foreseen in its organic law and in its organization and operation Regulation."

[24] Government Decision no. 1361/2006 *regarding the content of the presentation and reasoning instruments of the draft normative acts subjected for the Govern approval* (published in the Official Journal of Romania, Part I, no. 843/12 October 2006).

[25] Government Decision no. 219/2010 *for the amending and the supplementing the annex to Government Decision no. 1.361/2006 regarding the content of the presentation and reasoning instruments of the draft normative acts subjected for the Govern approval* (published in the Official Journal of Romania, Part I, no. 227/12 April 2010).

[26] Article 2 paragraph (2) from the Government Decision no. 1361/2006 stipulates that for the Government decision drafts with no impact on social, economic and environmental field, on the general consolidated budget or on the legislation in force, the presentation and reasoning instruments will be elaborated according to the provisions of the Law no. 24/2000 regarding the law-making technique rules for drafting normative acts, republished, without being mandatory the observance of the structure foreseen in the annex of the Government Decision no. 1361/2006.

For the Government decision drafts, presented at the preparatory meetings of the Government session, along with the presentation and reasoning instrument, elaborated according to the article 2 paragraph (2) from the Government Decision no. 1361/2006, any representative, as secretary of state, secretary-general or similar to these, from the ministries and other from public authorities may require the restoration of presentation and reasoning instrument of the draft, in accordance with the structure foreseen in the annex of the Government Decision no. 1361/2006, in the situation in which, at the meeting, it appears that it has an impact on social, economic and environmental fields, on the general consolidated budget and on the legislation in force. The draft normative act is then forward to preparatory work meeting of the Government session, accompanied by the presentation and reasoning instrument reformulated according to the annex.

[27] If the draft normative act does not refer to a given topic in a given section and in the provisions of this decision, then in that section it will be made clear that "the draft normative act does not address this subject".

e) if the presentation and reasoning instruments is attached to the normative act elaborated according to Law no. 590/2003 regarding the treaties[28], the current section must include the information foreseen in article 23 of this law[29];

f) references to the relevant strategy document on which the draft normative act is based on.

2. Expected changes:

a) brief presentation of the scope and of the content of the draft normative act;

b) complete or partial resolution of the problems identified in section 2 point 1.

3. Other information[30]

III**. Section 3** "The socio-economic impact of the draft normative act" – which will include:

1. The Macroeconomic impact:

a) impact on volume production of goods and services;

b) impact on the prices level;

c) impact on the volume of imports and exports;

d) impact on the employment rate of labor and on the unemployment;

e) impact on the competitive environment.

2. Impact *on the business environment:*

a) direct and indirect expected benefits;

b) simplification of the administrative procedures;

c) direct and indirect costs of the economic operators.

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[28] Law no. 590/2003 *regarding the treaties* (published in the Official Journal of Romania, Part I, no. 23/12 January 2004).

[29] Law no. 590/2003: Article 23 – "(1) The exposures of reasons accompanying the ratification, accession or acceptance draft law, respectively the substantiation note accompanying the approval, accession or acceptance draft decision of the Government for approval, acceptance or accession or the Government emergency ordinance draft of ratification, accession or acceptance shall include the following ones:

a) the need to conclude the treaty for the Romanian side;

b) conclusion of the treaty for the Romanian side;

c) history of negotiations;

d) for the bilateral signed treaties, subjected to ratification or approval - date and place of the signature, details of the signing person the for Romanian side;

e) in the case of multilateral treaties signed by the Romanian side, subjected to ratification or approval - date and place of adoption and / or opening for signature, date and place of signing by the Romanian side, indicating the signing person, the date of entry into force, if necessary;

f) in the case of multilateral treaties subjected to accession or acceptance - date and place of adoption and / or opening for signature, the date of entry into force, if necessary;

g) presentation of the relevant provisions of the treaty in the light of the interests of the Romanian party, the implications that the treaty has on the international legal obligations and other commitments previously undertaken by the Romanian side, namely regarding the intern legislation, including in terms of compatibility with the communal law, and also the necessary adaptation measures;

h) presentation of the provisions that are intended to ensure the coordination of the intern legislative framework with the provisions of the treaty which are referred to paragraphs (6) and (7) of the article 22;

i) presentation and reasoning of the reservations or of the declarations to the treaty, if any, contained in the ratification, approval, accession or acceptance draft normative act;

j) in the exceptional case foreseen in the article 19 paragraph (3) and in the article 21 paragraph (2), a thorough justification of the urgency of ratification, accession or acceptance by the Government emergency ordinance, reference to the affected public interest in the absence of the ratification, accession or acceptance, and also the obtaining of the express approval of the President of Romania.

(2) For the treaties signed at state level, to the exposures of reasons ratification draft law is attached, in copy, the memorandum for the signing approval".

[30] Any other information about the content of the draft normative act, which are not required in the decision, but one wants them presented in the presentation and reasoning instrument, can be included under "Other information" rubric within each section.

3. Social *impact:*
a) target demographic and social affected groups;
b) direct or indirect effects, short or long term;
c) impact on income levels, changes in the social and working environment;
d) improvement, development, efficiency and quality of the network service;
e) expected impact on short and long term after the adoption.
4. Impact on the environment[31]*:*
a) impact on the use of the natural resource;
b) impact on protected species, natural habitats, protected areas and landscapes;
c) impact on the environmental quality, detailed on each of the environmental factors.
5. Other information.

IV. Section 4 "The financial impact on the general consolidated budget, both short term, for the current year, and long term (5 years)"[32] – which will include:
1. Changes in revenues, plus/minus, from which:
a) state budget, from it:
(i) profit tax;
(ii) income tax;
b) local budgets:
(i) profit tax;
c) social state security budget:
(i) insurance contributions.
2. Changes of the budgetary expenditure, plus/minus, from which:
a) state budget, from it:
(i) personnel costs;
(ii) goods and services;
b) local budgets:
(i) personnel costs;
(ii) goods and services;
c) social state security budget:
(i) personnel costs;
(ii) goods and services.
3. Financial impact, plus/minus, from which:
a) state budget;
b) local budgets.
4. Proposal to cover the increasing of the budgetary expenditure.
5. Proposals to offset the reduction of the revenues.
6. Detailed calculation regarding the amendments' substantiation of the revenues and/or of the budgetary expenditure.
7. Other information.

[31] For the draft normative acts aiming the adoption of plans and programs, including of those co-financed by the European Union, or of some amendments of them, it is required to refer to the completion of the procedure of execution of an environmental evaluation provided by Government Decision no. 1.076/2004 *regarding the determination of the procedure of environmental evaluation execution for plans and programs* (published in the Official Journal of Romania, Part I, no. 707/5 August 2004).

[32] Points 1, 2 and 3 of section 4 will be completed for all the component budgets of the general consolidated budget, as it is defined in Law no. 500/2002 regarding the public finances, with the subsequent amendments, where there are influences.

V. Section 5 "The effects of the draft normative act on the legislation in force"[33] – which will include:

1. Supplementary normative acts drafts:

a) normative acts that are modified as a consequence of the entry in force of the draft normative act;

b) normative acts that are repealed as a consequence of the entry in force of the draft normative act;

c) normative acts that follow to be elaborated for the implementations of the dispositions.

2. The compatibility of the draft normative act with the communal legislation in the matter:

a) the type, the title, the number and the date of the communal act whose requirements are implemented or transposed by the draft normative act;

b) the objectives of the communal act;

c) the degree of conformity of the normative act draft with the communal act in this field, indicating whether the provisions of these acts are totally or in part transposed; in case of the partial transposition, it will be specified the reason, the term and the way of the total transposition of the communal act;

d) the deadlines for the transposition or for the implementation of the concerned communal acts – the deadline for adopting the draft normative act and the justification of this term.

3. Decisions of the European Court of Justice and other documents (references to the legal doctrine) can be mentioned, indicating the Court's interpretations, relevant to the transposition or to the implementation of those legal provisions.

4. The conformity evaluation with the communal legislation:

a) normative acts and other communal documents; it is necessary to be indicated the number, the adoption and the publication date;

b) the conformity degree (complies/does not comply);

c) any comments.

5. Other normative acts and/or international committing documents, making reference to a certain agreement, resolution or international recommendation or to another document of some international organization:

a) the conformity degree of the draft normative act with the obligations arising from the normative act and/or the international document;

b) if the draft normative act complies with the commitments, it will be indicated the way in which the implementation of the draft normative act fulfils these commitments;

c) if the draft normative act partially complies with the commitments, the reason will be explained and it will be specified when and in what way a full compliance with the commitments is reached.

6. Other information.

VI. Section 6 "Consultations conducted to elaborate the draft normative act" – which will include:

1. Information on the consultation process with nongovernmental organizations, research institutes and other involved bodies[34]*:*

a) consultations that took place;

b) names of the consulted experts;

c) amendments proposed by the consulted organizations;

d) amendments included in the draft normative act.

[33] The section will be completed for compliance also by the integrator chapter ministry.

[34] It will be indicated, in short, the recommendations received from the consulted organizations, indicating if these recommendations were taken into account and if the appropriate amendments were made to the draft normative act.

2. Choice substantiation of the consulted organizations and of the way of working with these organizations which is related to the object of the draft normative act

3. Organised consultations with the public local administration's authorities, in situation in which the draft normative act has as an object activities of these authorities, in the Government Decision no. 521/2005 conditions regarding the consultation procedure with the associative structures of public local administration authorities in elaborating the draft normative acts[35].

4. Consultations within the inter-ministerial councils, according to the provisions of the Government Decision no. 750/2005 regarding the constitution of the permanent inter-ministerial councils[36].

5. Taking into account the dispositions of the Law no. 24/2000 *regarding the law-making technique rules for drafting normative acts*, republished and the dispositions of the Government Decision no. 561/2009 for the approval of the Regulation regarding the procedures, at the Government level, for the elaboration, the notification and for the presentation of the public policies documents, of the normative acts drafts and also of some other documents, for adoption/approval, must be noted such as *information*[37] *regarding the necessity of the draft normative act's notification* by the following institutions:

a) the Legislative Council;

b) the National Defense Supreme Council;

c) the Economic and Social Council;

d) the Competition Council;

e) the Court of Auditors.

6. Other information.

VII. Section 7 "Public information activities regarding the drafting and the implementation of the normative act" – which will include:

1. The information of the civil society on the need to drafting normative act.

2. The information of the civil society on the eventual impact on the environment as a consequence of the draft normative act implementation, and also the effects on health and *on the* safety of *the* citizens or *on the* biological diversity.

3. Other information.

VIII. Section 8 "Implementation measures" - which will include:

1. Implementing measures of the draft normative act by the authorities of the central public and/or local administration – the establishment of some new bodies or the competences' expanding of the existing institutions:

a) institutions that are about to be found, reorganized or abolished;

b) possibilities to obtain the wanted result, using the existing institutions (if this is possible, the reasons will be specified);

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[35] Government Decision no. 521/2005 *regarding the consultation procedure of the associative structures of the local public administration's authorities in drafting normative acts* (published in the Official Journal of Romania, Part I, no. 529/22 june 2005).

[36] Government Decision no. 750/2005 *regarding the establishment of the permanent inter-ministerial councils* (published in the Official Journal of Romania, Part I, no. 676/28 July 2005), amended and supplemented by the Government Decision no. 13/2009 *regarding the establishment of the inter-ministerial Council "Council for promotion the information society in Romania"* (published in the Official Journal of Romania, Part I, no. 100/19 February 2009) and by the Government Decision no. 98/2010 *regarding the establishment of the inter-ministerial Council "The Council for the application of the state aid policy"* (published in the Official Journal of Romania, Part I, no. 108/17 February 2010).

[37] Detailed information is required only where there were significant objections to the mentioned institutions, which were not taken into account.

c) the financing source of the institutions that are about to be found, and whether they can be financed on the basis of tax services;

d) functions of the existing institutions that are about to be modified or extended;

e) functions of the local public administration's authorities that will be modified or extended;

f) the specification of whether the functions that must be modified or extended are about to be met by the authorities of the public central and/or local administration or by their structures;

g) the specification of whether the implementation of the draft normative act may take place after its adoption or if a further period and a transition period is required for its implementation.

2. Other information.

The drafting and signing of the presentation and reasoning instruments

According to the dispositions of the article 32 paragraph (1) from the republished Law no. 24/2000, the reasoning documents are drawn up in an explanatory, clear style, using the terminology of the draft normative act they are representing.

Although in the content of the reasoning instruments are presented the basic ideas of the regulation, these must not represent a summary of the law, but to explain *ratio legis*[38].

The reasoning must be about the final form of the draft normative act; if along the way there have made some changes of the draft, as a result of the proposals and observations received from the advisory bodies, the initial reasoning should be properly reconsidered.

The exposures of reasons of the draft normative acts for which the legislative initiative is exercised by the Government, and also the exposures of reasons of the approval draft laws for some ordinance or emergency ordinances are signed, according to the article 34 of the republished Law no. 24/2000, by the prime minister after the adoption of the final form of the project in Government session.

The exposures of reasons of the legislative proposals made by deputies or senators are signed by the respective initiators.

If the legislative initiative is exercised by citizens, the exposures of reasons will be accompanied by the documents drafted according to the article 74 paragraph (l) from Constitution[39], republished[40], and also by the point of view of the Constitutional Court, established according to the provisions of the article 146 letter j) from Constitution[41], Law no. 189/1999 regarding the exercitation of the legislative initiative by the citizen[42], stating in article 3 paragraph (l) that the exposures of reasons that accompanies the legislative proposal must be signed by all the initiative committee's members, committee that must be composed from at least 10 citizen with the right to vote[43].

The substantiation notes of the ordinances and Government decisions drafts are signed by the minister or by the initiators ministers, and also by the ones who notified them.

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[38] I. Mrejeru, *Tehnica legislativă* (Bucharest: Romanian Academy Publishing House, 1979), 164.

[39] Constitution of Romania, republished: Article 74 –"(1) The legislative initiative belongs to, where appropriate, the Government, the deputies, the senators, or to at least 100,000 citizens entitled to vote. Citizens who exercise their right to legislative initiative must come from at least a quarter of the country's counties and each of those counties, respectively in Bucharest, must be registered at least 5.000 signatures in support of this initiative".

[40] Constitution of Romania (republished in the Official Journal of Romania, Part I, no. 767/31 October 2003).

[41] Constitution of Romania, republished: Article 146 – "The Constitutional Court has the following attributions:

.....

j) verifies the execution of the conditions to exercise the legislative initiative by the citizens;

[42] Law no. 189/1999 regarding the exercise of the legislative initiative by the citizens (republished in the Official Journal of Romania, Part I, no. 516/8 June 2004).

[43] The legislative proposal is elaborated by this committee in the required form for the draft laws.

The exposures of reasons of the laws and of the substantiation notes of the ordinances and Government decisions, elaborated by the initiator, are published together with the normative act in question in the Official Journal of Romania, Part I, or are featured on the Internet by the issuing authority[44].

If during the parliamentary debates the draft law or the legislative proposal has been changed in substance, the exposures of reasons will be remade, after the promulgation of the law, by the initiator, upon the notification of the general secretary of the Chamber of Deputies.

Conclusions

The presentation of the reasons that are on the basis of the adoption of a draft normative act represents an integrated part of the law-making process. The one who initiates a draft law must know that, through his actions, he will disturb the normative balance of the society or, more precisely, the right balance between the static and the dynamic of law. This legislative balance disorder is not without practical effect in terms of human existence, for the relations established between public authorities and citizens, and even for the human relationships, in general.

Therefore, the reasoning of the draft normative acts as an intellectual operation with the purpose to persuade the issuer of the normative act for the need of its adoption. It must present the reasons behind the new legal regulation, its configuration, the expected social impact and the costs involved in applying the new normative act.

The reasoning of the draft normative act plays a historical role too. Over the time, the reasoning will provide arguments for those who apply the law, for the understanding of the will of the legislator or of any other governing body issuing of the normative act.

References

- Ilariu Mrejeru, *Tehnica legislativă* (Bucharest: Romanian Academy Publishing House, 1979)
- Ioan Vida, *Legistică formală (Introducere în tehnica şi procedura legislativă)*, third edition (Bucharest: "Lumina Lex" Publishing House, 2006);
- Sorin Popescu and Victoria Țăndăreanu, "Modificările aduse Legii nr. 24/2000 privind normele de tehnică legislativă pentru elaborarea actelor normative", in *Aspecte practice de tehnică şi evidență şi legislativă*, edited by Sorin Popescu,, Cătălin Ciora and Victoria Țăndăreanu (Bucharest : "Monitorul Oficial" Publishing House, 2008);
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- Government Decision no. 521/2005 *regarding the consultation procedure of the associative structures of the local public administration's authorities in drafting normative acts* (published in the Official Journal of Romania, Part I, no. 529/22 June 2005);
- Government Decision no. 750/2005 *regarding the establishment of the permanent inter-ministerial councils* (published in the Official Journal of Romania, Part I, no. 676/28 July 2005);

[44] The promoted legislative solution is consistent with the principle of transparency, whereas those interested can use the Internet so that their information requirements are met.

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- Government Decision no. 870/2006 2006 *regarding the approval of the Strategy for improving the elaboration, coordination and planning system of the public policies for the public central administration* (published in the Official Journal of Romania, Part I, no. 637/24 July 2006);
- Government Decision no. 1361/2006 *regarding the content of the presentation and reasoning instruments of the draft normative acts subjected for the Govern approval* (published in the Official Journal of Romania, Part I, no. 843/12 October 2006);
- Government Decision no. 561/2009 *regarding the approval of the Regulation about the procedures, at Govern level, for the elaboration, submission and presentation of the draft public policies documents of the draft normative acts and of some other documents for adoption/approval* (published in the Official Journal of Romania, Part I, no. 319/14 May 2009).

POLITICAL IMPACT ON THE OBSERVANCE OF PENSION RIGHTS IN ROMANIA

MĂDĂLINA TOMESCU*

Abstract
The beginning of 2011 brought some questions for all the persons-romanian citizen – beneficiaries of the pension rights , but also for the middle age persons, which feel a threat for their right to pension. I propose to research the way that the pension right is influenced by the political decision taken by the party temporary governing. Also, I propose to identify the possible effects of these decisions.

Keywords*: political impact; pension; right; observance*

Introduction

This study talks about the problem of the impact that the decision taken to the political level, regarding the respecting of the pension rights has upon us.

We started this measure from the fact that human dignity is very imporant for every person, and we are all equal in dignity and rights. Dignity as a value recognized by all the international documents regarding human right, unfortunately it might be in the situation of being violated by wrong political decisions. Also, the equal rights is not the equalization of rights, however, because everyone of us is unique.

From this point of view, the present world society confronts to many and various cases of violating the human dignity, especially for of age persons. For this category/class to provide a decent livin, an financial independence, and involvement conditions in social activities that would bring satisfaction, represent a very important aspect. In this context, pension and pension rights after a work life, contributing to society's developement in this domain, constitute the essentil issue I want to discuss about. Also, when ordaining the pension amount is necessary to take into consideration all the reasons: social and intellectual value of carried out work, the minimum subscription period, special character of working, etc.

Me together with my colleagues, lawers consider that the pension represents an own right that was violated in Romania, by taking some political decisions of recalculation of these in a negative sense. Therefore, I have decided to demonstrate this miscarriage of justice, as well as the society (not only the Romanian society) needs trained and professional stimulated public servants, as well as servants with special status that must secure our public safety, order and peace that are needed/essential to create, to contribute to society's developement.

1. Human dignity

The 20th century was witness to propagating the idea of democracy from the political class towards the most of the domains of social life. The belief that **people are equals in dignity and rights** was confirmed by the institutions of mass societies, especially by the diversion industry that develops the ordinary person's ability of placing itself instead of others and watching the life as they would watch.

Dignity represented from 1948 an often treated subject, situated between theory and practice, sometimes with sympathy, other times disdainfully.

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Human dignity is guaranteed by the two important principles of international law that governs the object of human rights, **equality and undiscrimination.** Those principles postulate the right to exercise all the established rights and the ensuring of protection to every person when facing the possible abuses of the authorities. On the contrary , the unequality and discriminationare a negation of fundamental rights and liberties of the human person. *"If discrimination and its incontestably the most flagrant manifestation- the rasism- continue, it is shown in a ONU document, we will not hope to to build up* ***an international society founded on human being's dignity and value"***. Or, this 0bject is connected with the Nations' purposes and its constitutive act satates this triptych : equality, undiscrimination, dignity- in its many articles. The peoples from United Nations- shown in the second line from the preamble of the Chart- declare themselves decided to be reaffirmed "a) the belief in fundamental human rights, in dignity and value of human person, in equal rights of men and women as well as of large and small nations". Under Art.13, The General Meeting is authorized to initiate studies and to recommend in order to "b) promote human rights achievement and fundamental liberty for all, without discrimination of race, sex, language or religion". The principle of undiscrimination is enunciated in art.55 point c) and 76 point c).[1]

The transpotion of these priciples in daily life constituted one of the major concerns of te World Forum in New York and of some specialized institutions from its system, finding its materialization both in legal and diplomatic instruments and in various declarations and resolutions. In their synthetical formula they are found in **Universal Declaration of human rights** on 10 th of December 1948, which in the 1st article provides: ***"All the human beings era born free and equal in dignity and rights, they are gifted with intellect and conscience and they must behave one to each other in a fraternity spirit"***, and the 2nd article disposes that ***„every man can avail himself of all the rights and freedoms proclaimed in the present Declaration without any difference, for example of race, sex, language or religion, public opinion,or ay other opinion, of national or racial origin, of property, of birth or resulting from any other situation"***[2].

Regarding the definition of the concept of human dignity, this realised mostly approaching the fundamental human values, as well as through the discovery of the rapport between dignity and the right to a decent life.

The dignity shows the value, the honesty, the moral merits, the degree of appreciation as well as the achieved rank by a person in society. In the Christian teaching, human dignity in a divine gift, that irrespectue of the conditions in which the individual lives, he has the God's image as an aexample. Within society we understand dignity as the self-sufficincy and freedom of thinking and also the individual's behaviour[3].

The **human dignity** considered as fundamental and the sum of all the rights, it has been defined as **the sum of all the human values and of the respect towards the individual**, characteristics which man receives from the moment he is born and lasts tilll after his death. It is not and it cannot be considered an object irrespective of race, origin, etc. In the presence of "human dignity" as a fundamental right of freedom of the press and the right o f liberty itself, the propety rights, to life, the right of expressing opinions, of religious believes, the right to a decent life, the right to correspondence and all the pther rights are built on human dignity, the corner stone of the civilisation and the entire society[4]. Not by chance the dignity is considered **a right that protects the individual and the image of the individual** even after a person passed the limit between life and death.

Also, it can be said that the human dignity constitutes the keystone that puts together the right to exist, the right liberty and the social right of the community that are mentioned in the Universal

[1]Ionel Cloșcă, Ion Suceavă, *Tratat de drepturile omului*, (Ed. Europa Nova, București, 1995), p. 79.
[2] Ioan Vida, "*Drepturile omului în reglementări internaționale*",(Ed. Lumina Lex, București, 1999). p. 50.
[3] A se vedea Dicționarul explicativ al limbii române, precum și www.wikipedia ro .
[4] http://www.dingermania.com/2010/demnitatea-umana/

Declaration of Human Rights. Thus we find in this document affirmations according to whivh the human being is unique, irreplaceable, meant to a transcedent life, and not just a unity in a social entity. Thus, human destiny, the vocation of human being can fulfill only within society to all its levels: family, group, ethnicity, nation, etc. It has to be mentioned that the Universal Declaration of Human rights from 1948 recognises not only the individual rights of the human being, but the rights witih various human collectivities. The definition of the person as a being in communion, as a solidary entity, loving the neighbours, determines us not to dissociate the human rights by its duties or responsibilities. The art.1 of the Declaration of Human Rights states that all the human beings that are born free and equal in dignity and rights must behave one to each other in a fraternity spirit. And the art.29 of the same Declaration talks about the fact that "any person has duties towards the collectivity, because only within it the free nad absolute developement of his personality is possible."

So, the formal right on the other hand must be completed with the moral-spiritual dimension of human dignity. The dignity of freedom is conditioned by its ethic fondation, respectively of responsibility. From this point of view the person's rights corroborate with those of the neighbours'. The respect for our neighbour has to be at least equivalent to that we want for ourselves.

2. The aged persons' rights and protection

The problem of the person's rights and protection has represented a concern for various organs of the United Nations[5] even since 1948 when the Argentine Government proposed to the third Session of General Meeting of O.N.U. a project of the Declaration on aged persons. This project referred to the art.55 from United Nations' Charta, according to which the member states commited themselves "to create stability and welfare conditions necessary to a peaceful and friendly relation between nations..." favoring "the rising of living standards, total manpower utilization and conditions for economical am social progress and developement"[6].

The project of the Declararion was taken on agenda by the Committee for social problems and by the Committee of human rights, being under discussin till 1971, when this problem was retaken on the occasion of the debates concerning the application of the Declaration on progress and developement in the social domain. Also, the study on the aged persons' problems came into notice to the World Health Organisation and the Intenational Labour Organisation ans with other specialized institutions they got involved in this activity of attaining a rapport that contains guiding principles of nations politics and of international actions that must be carried on.

So, on the 16th of May 1973, the Economic Council recognized by Resolution no 1751/LIV "that an adequate social security is the most important for eged persons" and that " the aged persons' protection in an important item of any general system of social protection". In the same time , the Council recommended to Governments to assure to old persons sufficient allowances of social security, to create a sufficient minimum of institutions to provide medical attendance for these persons and to oversee by all means that the persons included in the social preotection programme to participate (according to their capacities) to creative activities that would moraly satisfy them[7].

On the 14th of December 1973, the General Assembly of U.N. adopted, after examining both a rapport of the General Secretary on the problem of the aged person and the old persons, and a Note of OMS, Resolution no. 3137/XXVIII[8] by which it attentioned the members states "*on the necessity of elaborating some politics and programmes on short and long term for eged persons.*"

Therewith it recommended that when they elaborate national politics and programmes to be respectful of the following principles:

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[5]This problem was a study object both of General Assembly of U.N. and ECOSOC, Human Rights Committee and Social Problems Committee.

[6] I.Cloşcă, I.Suceavă – *Tratat de drepturile omului*- (Ed. Europa Nova, Bucureşti, 1995), p. 200

[7] Ibidem

[8] Ibidem

- To edit programmes for the sged persons' welfare, health and protection, including measures to assure them to the utmost extent economical independence and social integration;
- To elaborate measures of social security to assure them a sufficient income;
- To intensify aged persons' contribution to economical and social developement;
- To dismay discriminating attitudes, politics and measures founded exclusively on age that the employment practices;
- To encourage the conclusion of cooperation agreements on social security for the aged persons;
- To encourage the creation of employment possibilities for eged persons, according to their needs.

Between the 26th of July and the 6th of August 1982, in Vienna, took place the World Meeting dedicated to aged persons and convoked in order to constitute a tribune destined to start a programme for an international activity meant to assure economical and social security in their own country for aged persons. This because the Meeting estimated that the numaber of these kind of persons would increase spectacularly in the following 20 years[9], but that these persons represent an important human resource, both in the economical- social domain and in what concerns the transmission of cultural patrimony[10].

3.The ensuring to respect the human dignity through pension rights

The pension represent the most important performance of social insurance given within the public system. Any type of pension is given to the person entitled to the requested of the entitled person, of the designated representative by this with special delegacy , of the tutor or of his curator[11].

It can thus be said that because of the contributions paid by every person employed during his active life, pension in constituted in a gained right, Thus the citizen exerts a property right on the pension and the pension right. Also, **pension both as right and element of private property, represents a claim of the state which forces it to pay and to protect[12]**. From this perspective the quantum of tehe pension is considered that it cannot be negatively modified, because it is a gained right. Even in the Criminal law domain there is the principle of criminal law more favorable, all the more so in the domain of constituting the quantum on person's pension, if a recalculation is effectuated the more favorable pension is kept with the bigger amount). It is natyral to be so, because it is proper for the society to be thus thankful to those who contributed to the society developement , in their way.

But in the same time , respecting the Resolution 3137/XXVIII from 1973 (Romania was member of O.N.U. in that moment), the obligation of the sate is that to assure the aged persons, on one side, a decent pension-to assure a financial independence and a decent living, and on the other side , the employment opportunity according to needs with the discouragement of the discriminating politics and measures.

These measures are meant to promote and to assure **the respect for dignity of aged persons**, because their brutal removal from the work system and the neglect or their creative capacities, because of the age has dramatical efects on the entire society.

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[9] Sice 1982 till nowadays (2011), third age population really multiplied, according with present statistics.

[10] I.Cloşcă, I.Suceavă – op.cit.- p. 201

[11] http://www.cnpas.org/portal/media-type/html/language/ro/user/anon/page/pensions;jsessionid=003C8E1F7316AF28E0EE1A07BB40C684

[12] http://www facias.org/documente/Petitie%20ONG%20Romania%20-%20abuzurile%20guvernului%20Boc.pdf

4.The impact of the political decision of recalculating negatively the special pensions

In the Romanian Official Gazette, Part 1, No. 527, from 28th of July 2010 was published the Government Decision no.735/2010 **to recalculate the established pensions according to the legislation regarding military state pension, police state pension and civil servant's pensions with a special statute in Prison Administration System,** according to Law no 119/2010 regarding the fixing of some masures in the pension domain.

Also, in the Romanian Official Gazette, Part 1, no 528 from 29th of July 2010 was published Government Decision no. 737/2010 regarding the methodology of recalculating the service pension categories provided in the art.1 points c)-h) from Law no 119/2010 regarding the fixing of some measures in the pensions domain.

The desicion regulates the recalculating methodology fo servive pensions provided by Law no 119/2010 regarding the fixing of some measures in the pensions domain. The envisaged categories of pensions are the following:

-service pensions of staff in the courts and of prosecutors' offices attached to them;
-service pensions of diplomatic and consular staff;
-service pensions of parliamentarian civil servants;
-service pensions of deputies and senators;
-service pensions of civil aviation professional stuff from civil aviation;
-service pensions of Accounts Court stuff.

According to those two normative documents, fixed under special laws, rightful, the service pensions **are recalculated by determining the annual average score and the quantum of every pension,** using the calculation algorithm provided by the Law no 19/2000 regarding the public pension system and other social insurance rights and respecting the methodology fixed by the decision[13].

This decision taken to a political level had an undeclared purpose-the pension reduction for the persons that activated in domain with a special character. The special character because of some special work conditions, that limitated the rights that they would in their civil life. In the case of militaty and police, as in that of the persons from the National Prison Administration, they made an allegiance to the Romanian people, so they were available all their active period. **I have to specify that the oath of allegiance was made in front of this people, not for those who have the power in the state temporary.** Also, it ia very important to consider the danger they faced during their activity, as military, policeman or civil servant in National Prison Administration.

Another specific and very important problem is that, acording to work legislation, military state pension, police state pension and civil servant's pensions with a special statute in Prison Administration System, **they didn't contribute in the Social Assurance System**! For all that, the law no. 119/2010 specifies in art. 3 alin.2 that „in the situation of the pensions (…) established based on special laws, the pension in public system makes considering carried out all the conditions specified by the Law no. 19/2000. In other words, even the legislator sanctions a lie, only for seeing made their political interest, meaning reduction the incomes of these categories of persons.[14]

Here's why, in my opinion, who I am not situated in none of these categories of persons, considering the fact that their work not only that was very important , but extremely dangerous, the Government should not even think of recalculating these pensions, especially negatively.

The inmates' reaction to sue the system is justified, a proved fact by the decision in the courts. **These decisions based on the reason that the pension is a gained right, with a patrimonial character.** Hence, the actual Government violates the property right, violating abusively, not only the Romanian Constitution that in the art.44 provides that *the property right, as*

[13] http://www.juridice ro/115777/metodologia-de-recalculare-a-pensiilor-speciale html

[14] **At the end of January 2011, Romanian Government adopted a new Government Order changing the methodology for calculate again these pensions. The law 119/2010 is still in force, so, the lie is still in force!!!**

well as the claims on state, are guaranteed, and the private property is equally guatanteed and protected by law, regardless the titular, and also the purviews of the Fundamental Rights Charta of European Union: art. 25, art. 17, 91), art. 41 line (2) point a), art. 34 line (1).

The position of international documents which Romania is part to, Lisbon Treaty from 13th of December 2007 specifies in the art. 45[15] the fact that the property right of member states will not be altered.

We also remind that the practice of the European Court of Human Rights (ECHR) in Strasbourg, as well as that of the Justice Court of European Union in Luxembourg stated that the pension represents a patrimonial right, and its reduction would injure this right and would be equivalent with an expropriation[16].

Thus, in situation gaygusuz vs Austria[17] (1996), The Court (ECHR) decided that *" the pension represents a patrimonal right as it is provided by the art. 1 from Protocol 1 of the Convention for the human rights and it is observed a discrimination as it is provided in the art. 14, if it is missing a reasonable objective justification for the diminuation of the complainant's patrimony"*.

In the famed situation of Akdeejeva vs. Letonia[18](2007), the European Court of Human Rights forced the Lettonian state to pay indemnities, fixing that the art. 16 from the Human Rights Convention was violated and the art.1 from the Protocol 1, in the case which the pension is diminuated by recalculation, being a gained right.

In the situation of Muller vs Austria, as well as in various cases like that, was decided that a reduction of the pension would affect the property right and the right to benefit by the insurance social system in the old age[19].

Besides, the high Court of Cassation and Justice appreciated by its decision from 7th of January 2011 that **"The pension is a patrimonial right and it cannot be recalculated by a Governmental Decision.[20]"**

The Romanian Government motivated this decision like any other measures regarding the inmates and budgetaries, relying on the art. 53 from Constitution : *the exercise of some rights or some indulgences might be restricted only by law and only if necessary, after case, for : defending the national security, of order, of health or of civil ethics, of the citizens' rights and indulgences; conducting a criminal investigation; preventing the consequences some natural calamities, of some disaster or of a very grave catastrophe.* Civil society considers that this motivation has no foundation, because the romanian state is not in any of these situations and, thus does not justify the annulation of a gained right. The social security right is violated also the priciple of law supremacy.

The motivation of restriction of the right as a measure for the national security is contrary to the concept of national security as in art. 1 from law no. 52 from 1991. According to this normative act, *" by Romanian national security is understoof the legal, equilibriumcand social stability state, economical and political necessary to living and Romanian national state developement, as a sovereign, unitary, independent and indivisible state, to maintain rule of law, as well as the climate to exert the rights, the indulgences and the citizens' fundamental duties, according the principles and the democratic norms settled by Constitution."* So, **the national security refers to the entire population and not only to inmates and budgetaries.**

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[15] http://europa.eu/lisbon_treaty/full_text/index_ro htm

[16] http://www realitatea net/cedo--pensia-este-un-drept-patrimonial--iar-diminuarea-ei-ar-leza-acest-drept_715423 html

[17] http://www humanrights.is/the-human-rights-rpoject/humanrightscasesandmaterials/comparativeanalysis/therighttoproperty/various/

[18] http://www facias.org/documente/Petitie%20ONG%20Romania%20-%20abuzurile%20guvernului%20Boc.pdf

[19] Ibidem

[20] http://www.citynews ro/cluj/eveniment-29/pensia-drept-patrimonial-in-dosarul-militarilor-clujeni-106186/

Romanian state makes thus a discrimination, violating the Amsterdam Treaty that accord a great importance to undiscrimination principle.

None of the state that reducted the people's income did not invoked reasons as national safety and ssecurity[21].

The inmates' reaction situated in special categories of celebrating the Unification Day protesting seemed natural as long as their rights were brutally violated by receiving some drastically diminuated pensions in January, without accounting for all the considerations that were basis for the real calculation of the pension.

5. Conclusions

We agree that the pension system and the social insurance system needs a refor. This reform must not outline n a political decision without coverage in real life. In our opinion, it has to regard a direct connection between the contribution that every active person deposits during his life and his pension. Also, it is important the fact that some categories, whose activity is extremely important not only for the citizens, but for the entire country, must benefits of a special abidance, because of the fact that their rights are not limited during his active life as employee. I personally consider, as a citizen, taht my safety is very important. The safety of every citizen from this country is also very important, because only in safe conditions and stability we can create, so we can contribute to society developement. Thus, one of the most important duty provided by Romanian Constitution- the fidelity to the country- would be solved from all the citizens' opinion. Here's why we need civil servants with a special status!

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[21] http://www facias.org/documente/Petitie%20ONG%20Romania%20-%20abuzurile%20guvernului%20Boc.pdf

”THE ACCESSION OF EU TO THE EUROPEAN CONVENTION OF HUMAN RIGHTS” - TECHNICAL ASPECTS

OANA-MĂRIUCA PETRESCU[*]

Abstract

“The continues changing of the European Communities [presently European Union, as resulted from the amendments brought in the last 16 years, and especially via the Treaty of Lisbon] has determinate the changing of the judicial system. The accession of the EU to the Convention will complete the EU system of protecting fundamental rights. The Declaration of Berlin on the occasion of the fiftieth anniversary of the signature of the Treaties of Rome, as it was signed on 25th of March 2007 by all 27 members of European Union, is providing among others the principles and values based on respect of fundamental rights, common traditions of the member states, as well as promoting the variety of languages, cultures and regions within the EU. European Union stresses out again its intention to protect the freedoms of citizens and their civil rights by all possible means, including in front of the courts. The reassessment, via the Treaty of Lisbon, of the role of European Charter of Fundamental Rights and the accession to European Convention of Human Rights highlight the importance that each of them have separately, but as a whole in a complex legal system of the protection of human rights”.

***Key words**: treaties, rights, legal protection, European system*

1. Introduction

Although it has not been legally regulated by means of the European Unions’ treaties, the principle of human rights protection has become since its regulation under the Treaties of Maastricht (1992), Amsterdam (1997) and Nice (2001), one of the most important principles.

The important value of the fundamental rights has been reiterated in 2007 in the Conference of Berlin, when the *“Berlin Declaration*[1]*”* was signed by the 27 member states of the European Union (including the last two states acceding to the European Union as of January 1st, 2007, namely Romania and Bulgaria), on the occasion of 50 years anniversary from the signing of the Treaty of Rome by the 6 countries founding the European Union (EU)[2]. This declaration occurred in a crisis moment faced by the European integration process, whereas the Constitutional Treaty had been rejected by France and Holland in 2005, as a result of the referendums performed in the said countries on the 29th of May 2005 with 69%, and 1st of June 2005 with 62% respectively.

The mentioned declaration reiterated principles and values of special meaning for the European Union and for the member states, among which we can mention as examples: freedom, democracy, rule of law, mutual respect, tolerance, justice etc, and also its undertaking of ensuring, respecting and protecting such, prohibiting any individual or member state from breaching them.

Also, Europe is reunified under the sign of European fundamental values, written in the EU Treaty, namely: freedom, democracy and respect for human fundamental rights and freedoms, as well as the rule of law.

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[1] The Conference was organized in Berlin by the German presidency, held between 1st of January – 30th of June 2007.

[2] France, Germany, Italy, Belgium, Luxembourg and the Netherlands.

Thus, the three Treaties by means of which the former European Communities (presently, European Union) were established[3] did not stipulated provisions regarding the human rights protection throughout the former Community's business, such that before the Court of Justice of the European Union (CJEU) numerous matters have been raised regarding the observance and application of the human rights on a European level, by referral to *"the general principles existent on a national level in the common European juridical patrimony"*[4].

Initially, the European Union did not have a catalogue of fundamental rights, the main sources being represented by the constitutional principles common to the member states and by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[5], the importance of which arises from the fact that being ratified by all member states[6], it represents the expression of their common values.

Although, the protection of the fundamental rights had not initially been a matter of specific concern for the European Union, presently bearing in mind the new economical, political, social, cultural and legal realities within the EU, this protection became one of the most important issue that concerns the main European institutions, the Court of Justice of the European Union[7] and not least, the Member States of the EU.

As concern the issue of the EU's accession, Viviane Reding, the Vice-President of the European Commission responsible for Justice, Fundamental Rights and Citizenship said during the Hearing of the European Parliament's Constitutional Affairs Committee, that took held in Brussels, 18 March 2010 that *"the accession of the EU to the Convention will complete the EU system of protecting fundamental rights. Also, the constitutional significance of this accession was already noted by the European Court of Justice in 1994.* […] *The Lisbon Treaty makes it clear that accession is not only an option, it is the destination*[8]*"*.

2. Enlarge on the matter

2.1. General aspects. The first referral on the *"human rights"* concept was introduced in the Preamble to the Single European Act signed on February 17th, 1986 and entering into effect as of July 1st, 1987, without stipulating the competency of the European Court of Justice (ECJ), in this respect. Subsequently articles 2 and 6 paragraph 1 of the Amsterdam Treaty (the former article F.2 of

[3] The Treaty creating the European Community of Coal and Steal of April 18th, 1951, signed in Paris and coming into effect on the January 1st, 1952, and the Treaties of Rome creating the European Community for Atomic Energy, and the European Economic Community, respectively, signed on the date of March 25th, 1957 and coming into effect on the date of January 1st, 1958.

[4] Gyula Fabian, *Drept institutional comunitar*, 2nd edition (Cluj-Napoca, Sfera Juridica Publishing House, 2006), p. 86; Damian Chalmers, Giorgio Monti, Adam Tomkins, *European Union Law, texts and materials* (Cambridge University Press, US, 2006), p. 232 and the following.

[5] Websites: http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf and http://www.echr.coe.int/NR/rdonlyres/E7126929-2E4A-43FB-91A3-B2B4F4D66BEC/0/ROU_CONV.pdf.

[6] Presently, 47 states ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms in accordance with their constitutional procedures.

[7] According to art.1 paragraph 1 of TEU (former art.1 of TEU) *"*[...] *The HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION* [...]*"*, which *„substitutes the European Community and succeeds it"* (art.1 paragraph 3 of TFEU). Moreover, on occasion of ruling judgment in Case C-345/08 Krzysztof Peśla / Justizministerium Mecklenburg-Vorpommern (published in OJEU, C series no.260 of 11.10.2008), the Court of Justice of the European Union used for the first time the phrase *„Union law"*, thus replacing the phrase *"community law"*. Taking into account the fact that it has not made a statement yet in respect of the courts of the CJEU, we think that by extrapolation the phrase *„community courts"* can be renamed as *"European Union courts"*.

[8] http://ec.europa.eu/commission_2010-2014/reding/pdf/speeches/speech_20100318_1_en.pdf.

the Treaty on European Union of 1993) consecrated the ensuring and protection of the fundamental rights within the European legal system[9].

Initially, the EU Charter on fundamental rights proclaimed at Nice in December 2000 which represents a catalogue of fundamental rights applicable within the European Union, was not an integrant part of the primary law. However, starting with 1st of December 2009 it becomes an integrant part of the Treaty of Lisbon, having legally binding status.

Through this document, the European Union confirms its commitment to one of its basic principles, namely protection and respecting the fundamental rights. EU Charter brings together for the first time, within a single text, the main rights (political, civil, economic, social etc.) for the *ressortissants* of the European Union, giving them greater visibility and highlighting the importance of the rights. Moreover, the Union must respect the fundamental rights guaranteed by the European Convention on Human Rights and resulted from constitutional traditions common to the Member States, as general principles of Union law[10].

The Treaty of Lisbon marks an important moment in the evolution of the European Union, because revises substantially article 6 of Treaty on European Union (TEU), as concern the legal status of the Charter by giving it the same legal value as the Treaties (art.6 para.1). Also, the article clarifies that *"the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties"*. Furthermore, it stipulates that the Charter rights are to be interpreted in accordance with the *"horizontal"* provisions[11] of the Charter and with *"due regard"* to the Explanations prepared by the Bureau of the Charter Convention.

An important provision of the Treaty of Lisbon is the accession of EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms, whilst the legal basis for the accession of the EU to the ECHR is art.6 para.2 of TEU[12] and Protocol No.8 relating to article 6 para.2 of the Treaty on European Union[13] on the accession of the Union to the European Convention on the protection of human rights and fundamental freedoms, which is annexed to the Treaty on European Union, according to which *"the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms[14]. Such accession shall not affect the Union's competences"* […] *"or the powers of its institutions"*. Moreover, the accession "[…] *shall ensure that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto* […]".

Further to this, the Stockholm Programme[15] calls for a *"rapid"* accession to the ECHR and invites the Commission to submit a recommendation to the Council *"as a matter of urgency"*. Thus,

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[9] Paul Craig and Grainne de Burga, *EU Law, text, cases and materials*, third edition (Oxford University Press, 2003, US) p.317; Thus, according to former art. 2 – The Union sets out its objectives "[…] *of enhancing rights protection* […]", former art. 6 para.1 of the EC Treaty – "*The Union is grounded on the principles of freedom […] human rights and fundamental freedoms protection […]* whilst par 2 of the same article stipulates that: "*The Union protects fundamental right as they are ensured by the European Convention on protecting the human rights and fundamental freedoms […]*". Website: http://www.venice.coe.int/docs/2003/CDL-DI(2003)001-e.pdf.

[10] Article 6 para.2 of TEU.

[11] Articles 51 to 54 of the Charter clarifying the Charter's scope and applicability.

[12] Ex - article 6 of TEU.

[13] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0201:0328:RO:PDF.

[14] The Treaty was signed on 4th of November 1950, in Rome, Italy. On 8th of December 2009 the European Commission issued a working paper in order to analyze the Agreement of EU accession to this Convention.

[15] In this context, point 2.1. "*A Europe built on fundamental rights"* from the Stockholm Programme stipulates that "[…] *After the entry into force of the Lisbon Treaty, the rapid accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is of key importance* […]". "*The European Council invites*:

- *the Commission to submit a proposal on the accession of the Union to the European Convention for Protection of Human Rights and Fundamental Freedoms as a matter of urgency,*

- *the Union institutions and the Member States to ensure that legal initiatives are and remain consistent with fundamental rights and freedoms throughout the legislative process by way of strengthening the application of the*

the EU would become the 48th Contracting Party of the Convention, without becoming a member of the Council of Europe (CoE).

The Treaty presents also the procedure for the accession to ECHR, namely "[…] *the Council shall also act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements*" (article 218 of TFEU[16]). Also, the accession to ECHR and the provisions of the Charter shall not enlarge the competences of the EU establish by the treaties en forced.

The advantages brought by the EU's accession to the Convention[17], which have a high political and legal significance, are as follows:

- **From the perspective of the citizens**, accession will guarantee that any person claiming to be a victim of a violation of the Convention by an institution or body of the Union can bring a complaint against the Union before the Strasbourg Court under the same conditions as those applying to complaints brought against Member States;
- **In political terms**, accession means that the European Union reaffirms the pivotal role played by the Convention system for the protection of human rights in Europe, beyond the borders of the 27 Member States
- **In legal terms**, accession will be important before:

- it complements the introduction of a legally binding Charter of Fundamental rights. Accession to the Convention will ensure that the case-law of both Courts evolves in step. It is therefore an opportunity to develop a coherent system of fundamental rights protection throughout the Europe;

- it opens the way for the Strasbourg Court to attribute acts adopted by the institutions or bodies of the Union directly to the Union instead of attributing them to 27 Member States collectively;

- the Union will have at its disposal all rights that the Convention gives to the Contracting Parties to defend the human rights conformity of its acts before the Strasbourg Court. The Union will also be able to be represented in the Strasbourg Court with **an EU judge**.

2.2. Principle elements of the EU's accession to ECHR. Starting with January 2010, the Spanish Presidency of the European Union[18] together with the European Commission and the representatives of the Member States of the EU and those of the Council of Europe (working group CDDH[19]) started the negotiations for the EU's accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms, including the debates on the agreement on the mandate gave by the Council to the European Commission in order to sign the treaty on EU accession to the ECHR.

After a public debate, the Council adopted a negotiating mandate for the EU's accession to the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms and

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methodology for a systematic and rigorous monitoring of compliance with the European Convention and the rights and freedoms set out in the Charter of Fundamental Rights"- http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:01:EN:HTML.

[16] Ex - article 300 of TEC.

[17] http://ec.europa.eu/commission_2010-2014/reding/pdf/speeches/speech_20100318_1_en.pdf.

[18] Spain held the rotating presidency of the European Union during 1st of January – 31st of July 2010. http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/114900.pdf.

[19] Steering Committee for Human Rights (CDDH) is composed of representatives from all forty seven member States and a number of observers (from other countries, International Organisations and Non-Governmental Organisations).

on 17th of March 2010 the Commission tabled its recommendation for a negotiating mandate[20]. Different Council working-groups have discussed the proposal since then.

The aforementioned mandate was adopted within the JHA Council that took place between 3-4 June 2010.

Regarding the principal elements of the negotiations, these are:

- *The institution which will act as a negotiator*

During the negotiations, the opinions of the Member States were different as regards the *institution who will act as a negotiator*, having regard to the various interpretation of article 218 of TFEU[21], according to which the rule is that the negotiations are conducted by the European Commission, unless the case when the agreement refers to, exclusively or predominantly, on issues of foreign policy, in which situation the negotiations are conducted by the High Representative of the Union for Foreign Affairs and Security Policy. Also, according to other opinions, the representatives of Member States should be involved in the negotiations process in a grater manner.

- *Principles of negotiation*

Regarding the paragraph from the principles of negotiation to which Romania has expressed its concern (which provided that the Strasbourg court shall not interpret the EU law not even *"indirectly or incidentally"* and, especially, the rules on separation of powers between the EU and Member States), it was filled with a phrase stating that this principle cannot be interpreted in order to prevent the evaluation of the conformity of EU law with human rights by the European Court of Human Rights (ECtHR).

- *The mechanism of "co-defendant"*

The purpose of the mechanism of *"co-defendant"* is to ensure that when a complaint is lodged to the ECtHR by citizen against a Member State on issues of law of the European Union, the Union shall have the possibility to become party in that case, as *"co-defendant"*. Also, the mechanism allows Member States, as well, to intervene in a situation where an action is brought against the EU on issues of primary law (which are beyond the control of the Union, as these treaties concluded between Member States).

Although some states have opposed to the provision of establishing a special mechanism, in the final phase of negotiations the question of the mechanism of *"co-defendant"* has not raised any special problems. The reason is a new paragraph included in the negotiation directives providing for the need to introduce this mechanism.

The agreement of the parties was that the mandate will include only what the EU will have to agree in relation with the Member States of the Council of Europe (namely *the possibility* that the EU should become part of the case), whilst the internal mechanisms (i.e. *the obligation* for EU to intervene or the modality for allocating the compensations in relation to the applicant) shall be determined by *binding rules of procedure adopted within the EU*. According to a statement attached to the negotiating mandate, these rules will be discussed in the same time with the negotiation process and will be adopted unanimously, when signing the accession treaty.

[20] http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/291&format=HTML&aged=0&language=EN&guiLanguage=en

[21] Ex-article 300 of Treaty establishing the European Community (TEC).

➢ *Competency of the Court of Justice of European Union*

The involvement of the Court of Justice of EU caused the most intense negotiations, the positions of the States being substantially opposite. Thus, one of these positions[22] considered that it is necessary to introduce a mechanism in order to bring a case before the Court of Justice of European Union *by suspending the procedure started before the European Court of Human Rights*.

Another element refers to keeping the Court of Justice of EU as a supreme court of a distinct legal system, which is not subject to any external control according to the international law (this provision shall be no longer a prerequisite after the accession to the ECHR)[23].

Another provision included in the final phase of the negotiating mandate referred to stipulating of certain provisions according to which the accession shall not affect a series of dispositions of TFEU[24] (especially art.275[25] of TFEU or 263 para.4[26] of TFUE), as well as to ensuring, through a separate declaration, that the mechanism for involving the European Court of Justice shall not modify the treaties.

Regarding **Romania** and taking into consideration the issue of EU's accession to ECHR, we want to highlight the following:

- during the negotiations, the Romanian's position was coordinated by the Ministry of Foreign Affairs and Ministry of Justice;

- regarding the principal elements of negotiations, the Romania has the following principles, namely:

a) the EU's accession to ECHR shall increase the respect for human rights *by the Union and its institutions* (as regards the Member States, they are already parties to the European Convention on Human Rights);

b) the EU's accession to ECHR shall serve the citizens and not necessarily the EU institutions so that the citizens can, in an efficient way, to file a petition before the Court in Strasbourg;

c) the mechanism requested imperative by France (at the suggestion of the EU institutions - the Court of Justice and the European Commission) regarding the involvement of the Court of Justice of EU, in the cases when this court did not have the occasion to rule upon a case brought already in front of ECtHR, shall be made without any procedural delays, which would be a disadvantageous to citizens;

d) as regards the mechanism of *"co-defendant"*, Romania considered that it is necessary the mechanism could be triggered *not only by the European Union, but also by the Member States*, Romania being very interesting about this issue;

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[22] The opinion of France was supported by the Czech Republic.

[23] This point of view was expressed by France, which supported the position of the judges of the Court of Justice of the European Union. This opinion have been presented both by the Court's representative within the FREMP working-group and by non-paper containing a proposal for a mechanism submitted by judge Timmermans. The compromise was to include the phrase *"without causing unreasonable delays"* (starting from the formulation of the ECHR relating to implementation of article 6 - right to a fair trial).

[24] Treaty on the Functioning of the European Union.

[25] Article 275 of TFEU: *„The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions. However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union"*.

[26] Art. 263 para.4 of TFEU stipulates that *"any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures"*.

e) as *the involvement of the Court of Justice of the European Union* is concern, Romania accepted a mechanism to involve the court in Luxembourg, but insisted that the proceedings before the ECtHR should not be suspended because of the inconveniences for the citizens. In this context, the procedure should be conducted in a reasonable time[27].

2.3. Other technical details. At the level of the Council of Europe a working-group composed of 14 states has been established (7 Member States of EU *which includes Romania*, and 7 third countries to the EU), which assists CDDH[28] ("delegation" of the Council of Europe) in negotiating process with the EU.

The compromise provided that the negotiation of the EU's accession to ECHR by the European Commission and the establishing a special committee (in this case being appointed the working - group FREMP) which the Commission is obliged to consult it during the negotiations.

As concern the EU, during these negotiations the Commission informs and consults the working party on Fundamental Rights, Citizens Rights and Free Movement of Persons (FREMP)[29], as the special committee appointed by the Council, in accordance with article 218 para.4 of TFEU[30]. Also, the Commission shall report regularly to the special committee on the progress of the negotiations and shall forward all negotiating documents without delay to this special committee.

In order to establish the working program, on 23 of June 2010, the first meeting of FREMP working-group took place at the request of the Belgium presidency of the European Union, situation in which the presidency asked the negotiator (the European Commission) to present a project to be send to the CoE *before starting the negotiations*. Also, after each meeting the Commission shall report and discuss all the elements of the negotiating mandate for the next meeting.

During July 2010 - February 2011 several meetings took place between the representatives of European Commission and the CoE, whilst the first formal meeting of the FREMP Working-Group for analyzing the future policy on this topic took place in September 2010. The representative of the European Commission informed the Working Party FREMP that the next meetings of the CDDH-UE will take place on 15-18 March 2011.

As regards Romania, the presence of the Romanian representative in the working – group composed by 14 states for assisting CDDH can be very valuable, both in terms of knowledge by Romania the proposals sent by the Commission and the dissemination of the information to other Member States.

3. Conclusions

EU's accession to the Convention is one of four key components of an ambitious and comprehensive fundamental rights policy at the level of the European Union.

With the entry into force of the Lisbon Treaty, the EU's Charter of Fundamental Rights is legally binding for 27 countries and represents the most modern codification of fundamental rights in the world. This legally binding Charter represents a major step forward in terms of our political commitment to fundamental rights. It entrenches all the rights found in the Convention.

The Charter goes further, enshrining other rights and principles, including economic and social rights that come from the common constitutional traditions of the EU Member States, the case law of the European Court of Justice and other international instruments. In the Charter, we also find

[27] This aspect was proposed by Romania during the JHA Council that took place between 3 – 4 May 2010.
[28] Steering Committee for Human Rights (CDDH).
[29] This group is composed of counselors of justice and home affairs.
[30] According to art.218 para.4 of TFEU (ex-article 300 of TEC)*"the Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted."*

the so-called "third generation" fundamental rights, such as data protection, guarantees on bioethics and on good administration.

Furthermore, the matter of human rights is of extreme importance and has been reiterated upon the Conference organized by the in force German presidency of the European Union in the document of strong political and juridical value – the Berlin Declaration, signed and undertaken by the 27 member states of the European Union. In this context, "*peace and freedom*", "*democracy and the (ideal) rule of law*", "*mutual respect and shared responsibility*", "*tolerance, justice and participation*", "*equality in rights and social solidarity*" are some of the principles and values of the EU listed in the anniversary Berlin Declaration.

In the end, we want to highlight the fact that the promotion of fundamental rights is one of the priorities of the Stockholm programme setting the strategic guidelines for developing an area of freedom, security and justice in Europe.

The European Commission is seeking a smooth insertion of the European Union into the system of the Convention of Protection of Human Rights. The accession should therefore preserve the substantive and procedural features of that system also with respect to the Union as a new Contracting Party.

Protecting fundamental rights is about upholding human dignity and the full enjoyment of rights. In view of the strength of the EU Charter – which is in many instances more ambitious than the Convention – the European Union will not find it difficult to meet the standards required by the Convention. The accession of the European Union to the Convention is an incentive to develop the policies that strengthen the effectiveness of the fundamental rights that people enjoy in Europe.

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Abbreviations

- Art. - article
- CDDH - Steering Committee for Human Rights

- CJEU – Court of Justice of the European Union, the Court of Luxemburg
- CoE – Council of Europe
- ECHR - European Convention for the Protection of Human Rights and Fundamental Freedoms
- ECtHR – European Court for Human Rights
- EU - European Union
- FREMP - Fundamental Rights, Citizens Rights and Free Movement of Persons
- JHA – Justice and Home Affairs
- No. - number
- OJEU – Official Journal of the European Union
- P. – page
- Para – paragraph
- TEC - Treaty establishing the European Community
- TEU - Treaty on European Union
- TFEU - Treaty on the Functioning of the European Union

REVOCATION OF ADMINISTRATIVE ACTS - THEORETICAL AND PRACTICAL CONSIDERATIONS

ELENA EMILIA ŞTEFAN[*]

Abstract
Revocation is a method of terminating the legal effects of an administrative act.
Just like the general theory of law admits that any subject of law, author of a manifestation of will, is able to withdraw it, in the administrative law there is also possibility for the authority that issued the administrative act to abrogate its own act under certain circumstances.
Thus, this study aims at making a presentation of the legal regime of the revocation of administrative acts, starting from aspects such as terminology, legal grounds, reasons, term, and ending with the analysis of the applicable legislation on revocation, particularly of the law on administrative disputes, and much more. Hence, revocability appears to be the fundamental principle of the legal regime of administrative acts, in close connection with the principle of stability of legal relationships.

Keywords: *administrative act, revocation, principle of stability of legal relationships, Constitutional Court, principle of legality*

Introduction

This study purposes to present the institution of revocation of administrative acts in the Romanian legal system, both as a theoretical and practical approach.

Before the actual analysis of the proposed subject, the first part of this study will provide an overview of the legislative framework that justifies the existence of this method of terminating the effects of an administrative act in the Romanian administrative law.

We begin treating this subject by quoting a fragment from the Constitution of Romania that sanctions, in its article 1 par. (5), the principle according to which "in Romania, the observance of the Constitution, its supremacy and the laws shall be mandatory".

The principle of legality is sanctioned in any legal system, therefore the Romanian legislation is also generous from this point of view, thus establishing, according to the fragment quoted above from the fundamental law of the country, a general obligation imposed to all subjects of law, public authorities or not, to observe the law while conducting their activities.

The general principles of law, as the professor Nicolae Popa[1] used to say, are the substantiated regulations that channel the creation of law and its application.

The principle of legality[2], which is a constant of the modern system of administrative law, is currently the fundamental principle of organization and operation of the public administration in any democratic rule of law.

It is important to emphasize that, in the western political acceptation[3], the mandatory observance of the law refers equally to the individual and to the public authorities, including the State. In other words, all the authorities of the State must observe the law, just like any citizen.

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[1] Nicolae Popa, *General Theory of Law*, 3rd edition, (Bucharest, C.H. Beck Publishing House, 2008), p.95.

[2] J. Scwarze, *Droit administratif européen*, (Editions Bruylant et Office des publications des Communautés européennes, vol.1), p.111, quoted by Dana Apostol Tofan in *European Administrative Institutions)*, (Bucharest, C.H. Beck Publishing House, 2006), p.34.

[3] Cristian Ionescu, *Comparative Constitutional Law*, (Bucharest, C.H. Beck Publishing House, 2008), p.36.

The content[4] of legality includes three essential requirements, which correspond to three fundamental coordinates, namely: legality is the limit of the administrative action, legality is the foundation of the administrative action, and legality is the administration's obligation of acting so as to effectively observe the law.

From this[5] last requirement derive certain obligations devolving upon the administration, such as: the administration's obligation of advertising legality, of informing everybody about the rules of law, by means of publication or by any modern form of communication; in the event the administration itself impinged on legality, it must immediately put an end to the illegal situation that it created, either by abrogating the administrative act or by revoking it... etc.

An important complement of subjecting the administration[6] to the law was born, in time, from the development of certain principles of law, such as equality of citizens before the law, legal certainty, and protection of individual rights by independent courts of law.

The principle of legal certainty refers not only to the lawmaking operation that must observe certain strict rules[7], but it also refers to the "possibility offered to any citizen of evolving in a certain legal environment, protected from the vagueness and sudden changes that effect the legal standards"[8].

Section 1. General considerations; terminology used in case of a revocation of administrative acts

André de Laubadère defined the administration as being the "assembly of authorities, agencies and bodies having the duty, under the impulse of political power, of ensuring multiple interventions of the modern state"[9].

Since the process of issuing administrative acts may also contain errors, there must be a possibility of correcting them, which was indeed succeeded by introducing the principle of revocability of administrative acts in the activity of the public administration bodies.

Seeing that[10] the administrative authorities act under time pressure, the solution of social needs must be prompt.

Whereas the administrative act is the main legal form of action of the public administration, it goes without saying that the rules of the legal regime can only be established based on the rules underlying the organizational structure of the public administration. This way, we come to understand revocability of administrative acts as a rule (a principle) of the functional structure of the public administration.

The administrative acts cause legal effects until they are rescinded, which is usually ordered by the issuing authority or by the higher authority in the hierarchy or by a court of law. As the public administration[11] is organized according to the principle of hierarchy, it also features the possibility of revoking administrative acts in order not to prejudice the system itself.

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[4] Dana Apostol Tofan *op. cit*, p.36

[5] C.C. Manda, *Comparative Administrative Law. The Administrative Control in the European Judicial Context*, (Bucharest, Ed. Lumina Lex, 2005), p.54 et seq.

[6] Dana Apostol Tofan, *op. cit*, p.36.

[7] Law no. 24/2000 establishing the legislative technique rules for drafting pieces of legislation, published in the Official Gazette no. 139/2000, as subsequently amended by Law no. 60/2010, republished in the Official Gazette no. 260 / 21 April 2010.

[8] M. Heers, *La securité juridique en droit administratif français: vers une consécration du principe de confiance légitime?* (RFDA 1995), p.963, quoted by Ion Brad in *Revocation of Administrative Acts*, (Bucharest, Universul Juridic Publishing House, 2009), p. 123 et seq.

[9] André de Laubadere, *Traité de droit administratif*, 6ème édition, vol. I (Paris, L.G.D.J., 1973), p.11

[10] Ion Corbeanu, *Administrative Law)*, 2nd Edition revised and supplemented, (Bucharest, Lumina Lex Publishing House, 2010), p.107.

[11] Ion Corbeanu, *op.cit.* p.107.

In terms of cessation of the legal effects of the administrative act, some authors[12] treat revocation jointly with rescission. Thus, it is said that: "in the legislation of our country, administrative acts are, as a general rule, *revocable, which means that they can be rescinded or revoked*".

Professor Antonie Iorgovan[13] believes that revocation is a particular case of nullity.

The author Dana Apostol Tofan[14] is also of the opinion that revocation is a particular case of nullity but also a rule, a fundamental principle of the legal regime of administrative acts.

On the contrary, other authors[15] definitely reject the assertion that revocation is a kind of rescission, believing that the two methods are different kinds of the abrogation of administrative acts, being seen as two independent methods.

In cases when the revocation was ordered by the issuing body, the term of *retraction* has been used, which is unanimously adopted by almost all the theoreticians of law.

Section 2. Legal grounds; reasons of revocation, time limit

Subsection 2.1. Legal grounds of revocation of administrative acts and time limit

This principle of revocability of administrative acts derives from the Constitution and from the Law nr. 554/2004 on administrative disputes[16]. Although the Constitution of Romania does not make express provisions in this respect, this principle results from several articles read together, i.e. 52, 21, 126, etc.

This survey does not aim to deal also with the categories of irrevocable administrative acts, as their number varies depending on the author who analyses them.

According to article 7 of the Law on administrative disputes, before approaching the competent administrative litigations court, the person who considers that its right or legitimate interest has been violated by an individual administrative act must ask the issuing public authority or the superior authority in the hierarchy, if applicable, within 30 days as of receiving the document, *to revoke it, in full or in particle*

Also, even the right of the public authority who issued the document to challenge it before the administrative litigations court in view of acknowledging its nullity, has been sanctioned in situations when *the document can no longer be revoked because it has entered the civil circuit and has caused legal effects*, according to article 1 par. (6) of the same law. The action must be brought within one year as of the issue date of the document.

It is worth mentioning that the one-year time limit for the legal action observes the principle of certainty of legal relationships that derives from the provisions of article 6 of the European Convention on Human Rights (Convention), ratified by Romania by Law no. 30 / 18 May 1994. This principle requires, among others, the observance of the finality of an act that has not been challenged in court within the time limit of a common law action in the field or, failing such time limit, within a reasonable time – before being construed as "final".

The possibility to challenge, without having to observe a time limit, a unilateral administrative act referring to an individual endangers the legal order, meaning that the legal relationships and the social ones ordered by the former ones may be changed at any time, thus affecting the social order itself. However, any social relationship and any legal relationship must dispose of a sufficient time

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[12] Dumitru Brezoianu. Mariana Oprican, *The Public Administration in Romania*, (Bucharest, C.H. Beck Publishing House, 2008), p. 90 et seq.

[13] Antonie Iorgovan, *Treatise of Administrative Law)*, vol. I, (Bucharest, Biblioteca Juridică Nemira, 1996) p.332-333.

[14] Dana Apostol Tofan, *Administrative Law*, vol. II, (Bucharest, All Beck Publishing House, 2004), p.58.

[15] Ion Brad, *Revocation of Administrative Acts*, (Bucharest, Universul Juridic Publishing House, 2009), p.63.

[16] Law no. 554/2004 on administrative disputes, published in the Official Gazette no. 1154/2004 (with its last amendment by Law no. 202/2010 on certain measures for accelerating the solution of trials).

limit in order to be, if necessary, sanctioned in justice, a time limit beyond which no changes are allowed, by checking the legality or other aspects characterizing that legal relationship.

It is also worth mentioning that the same considerations are valid also for the possibility of revoking the administrative act by its issuer, therefore this measure cannot be taken at any time, but within a time limit that observes the principle of certainty of legal relationships, a principle already detailed above.

Subsection 2.2. Reasons of revocation of the administrative act

If in the introductory part of this survey we mentioned "legality", another term is worth mentioning as well, namely "opportunity"[17], both terms being closely connected to the principle of revocability of administrative acts.

The opportunity[18] of the administrative act derives from the capacity of the issuing body of choosing, among several possible and equal solutions, the one that best suits the public interests that must be satisfied.

Thus, it indicates the quality of the administrative act of satisfying both the strict rigors of the law and an especially determined need, at a given time and place. Whereas legality evokes the fact that the act complies exactly with the law, opportunity is the conformity of the administrative act mainly with the spirit of the law, without identifying the two notions.

Hence, revocation intervenes for all reasons of illegality, but particularly for reasons regarding opportunity[19].

In terms of the moment they intervene after the issue of the administrative act, regardless of whether they are due to its illegality or to its inopportunity, the reasons of revocation can be anterior, simultaneous or subsequent to the issue of the administrative act, as follows:

1) anterior reasons, causing the legal effects of revocation to be *ex tunc*, for the past, as if the act had never existed;

2) simultaneous reasons, causing legal effects of the same nature (*ex tunc*);

3) reasons subsequent to the issue of the act, causing legal effects in the future (*ex nunc*), having as consequence the termination of the legal effects caused by that act upon its revocation.

Section 3. Examples of revocation, regulated in the Romanian legislation

In the following, we are going to make some references to the legislation with regard to revocation and we shall start by nominating those in the Constitution of Romania; however, there are many other examples besides the ones we shall mention here:

- Article 64 par. 2 regarding the internal organization of the Parliament: "Each Chamber shall elect its Standing Bureau. The President of the Chamber of Deputies and the President of the Senate shall be elected for the Chambers' term of office. The other members of the Standing Bureaus shall be elected at the opening of each session. The members of the Standing Bureaus *may be dismissed* before the expiry of the term of office."
- Article 85 par. 2 regarding the appointment of the Government: "(2) In the event of government reshuffle or vacancy of office, the President shall *dismiss* and appoint, on the proposal of the Prime Minister, some members of the Government."
- Article 107 par. 2 and 3 regarding the Prime Minister:

"(2) The President of Romania *cannot dismiss* the Prime Minister.

(3) If the Prime Minister finds himself in one of the situations stipulated under Article 106, *except for him being dismissed*, or if it is impossible for him to exercise his powers, the President of

[17] In the doctrine, the term "opportunity" has also been analysed in connection with the excess of power.

[18] Verginia Vedinaş, *Administrative Law*, 4th Edition revised and updated (Universul Juridic Publishing House, 2009), p.91.

[19] Antonie Iorgovan, *op.cit*, p.334.

Romania shall designate another member of the Government as Acting Prime Minister, in order to carry out the powers of the Prime Minister, until a new Government is formed. The interim, during the Prime Minister's impossibility to exercise the powers of the said office, shall cease if the Prime Minister resumes his activity within the Government."

- Article 110 par. 2 regarding the end of the term of office of members of the Government: "(2) The Government shall be dismissed on the date the Parliament withdraws the confidence granted to it, or if the Prime Minister finds himself in one of the situations stipulated under article 106, *except for him being dismissed*, or in case of his impossibility to exercise his powers for more than 45 days."

Other examples:

- *revocation* and abolishment of the patent of invention[20],
- *revocation* of the administration right[21]
- *dismissal* of the Ombudsman[22], as a result of violating the Constitution and the laws
- *revocation* of the right of abode[23]
- *revocation of the authorization for tax warehouse*[24]
- *revocation* of the right to hold weapons[25] etc.

By the examples given above, we tried to highlight that the term of "revocability" is expressly used in the Romanian legislation.

Section 4. Revocation of administrative acts reflected in the ECHR case law

As regards the projection of the principle of legality in the European legislation, we would like to mention that, at the European level, there is a right to good administration[26] in the operation of the public authorities.

The right to good administration is set forth in the Charter of Fundamental Rights of the European Union[27], promulgated at the Summit of Nice of December 2000, as well as in the European Code of Good Administrative Behaviour[28], approved by the Parliament on 6 September 2001, and currently it serves as a guide and source of information[29] for the personnel of all the institutions and bodies of the Community.

Therefore, in the light of the recent evolutions within the Community, one can distinguish a special interest for the protection of rights, legitimate interests, and civic liberties, the leverages for their factual accomplishment having been created. We would also like to mention the procedure of

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[20] (For details, refer to the procedure of revoking and abolishing the patent of invention in Cristian ŞTRENG, *Revocarea şi anularea brevetului de invenţie (Revocation and Abolishment of the Patent of Invention)*, (Bucharest, Revista Română de Proprietate industrială nr. 1/2008) p. 07-17, with elements of Romanian legislation and much more).

http://www.osim ro/publicatii/rrpi/nr1_08/Revocarea%20si%20anularea%20BI.pdf.

[21] Law no. 213/1998 on public property and its legal regime, published in the Official Gazette no. 448/24 November 1998, updated.

[22] Law no. 35/1997 on the organization and operation of the institution of the Ombudsman, published in the Official Gazette no. 844/2004, updated.

[23] Government Emergency Ordinance (OUG) no. 194/2002 on the regime of aliens in Romania, published in the Official Gazette no. 955/2002.

[24] Law no. 571/2003 of the Internal Revenue Code, published in the Official Gazette no. 927/2003, updated

[25] Law no. 295/2004 on the regime of weapons and ammunition, published in the Official Gazette no. 583/2004, updated.

[26] For full details, refer to Elena Ştefan, *The European Ombudsman in the Light of the European Constitution)*, RDP no.1/2006, (CH Beck Publishing House, Bucharest, 2006), p.106.

[27] Charter of Fundamental Rights, published in the Official Journal 2007 C 303.

See http://eur-lex.europa.eu/ro/treaties/dat/32007X1214/htm/C2007303RO.01000101 htm.

[28] Le Code européen de bonne conduite administrative, Office des publications officielles des Communautés européennes, L- 2985 Luxembourg 2002, ISBN 92-95010-42-6.

[29] For full details, refer to http://www.ombudsman.europa.eu/activities/home faces.

the prior complaint which, besides the principle of legality and of stability of legal relationships, is an efficient means of fighting bad administration and was created in order to offer the interested parties the possibility of solving their complaint within a shorter period of time and more effectively, as the notified administrative body is able to revert to the act it has issued and to issue another one, accepted by the claimant.[30]

The author Ovidiu Podaru[31] analyses several decisions of the Strasbourg Court, connected to the principle of certainty of legal relationships, cases in which the solution of the Court was against Romania, and so does another author[32], as follows:

- case Păduraru[33] versus Romania
- case Brumărescu[34] versus Romania
- case Viaşu versus Romania, of 09 December 2008
- case Beian[35] versus Romania

After an analysis of these decisions is follows that legal certainty involves the same dimensions: clarity of the right and stability of the right. These decisions do not explicitly refer to the issues regarding the revocation of administrative acts.

The Constitutional Court of Romania has acknowledged the European trend of punishing the violation of this principle and, to that effect, we would like to mention two decisions:

1.) In its Decision no. 404 of 10 April 2008, it asserted that: "the principle of stability of legal relationships, although it is not expressly sanctioned by the Constitution of Romania, is inferred both from the provisions of article 1 par. (3), according to which Romania is a State of law, a democratic and social State, and from the preamble to the Convention on Human Rights, as interpreted by the European Court of Human Rights in its case law. "

2.) In its Decision no. 1352 of 10 December 2008, the Court decided that: "The European Court of Human Rights, by its decision given in the case of Brumărescu versus Romania, 1999, ruled that: The right to a fair hearing by a court, guaranteed by article 6, 1st paragraph of the Convention, must be interpreted in the light of the preamble to the Convention, which asserts the supremacy of law as an item of the joint patrimony of the contracting states. One of the fundamental elements of the supremacy of law is the principle of certainty of legal relationships, which claims, among others, that the final solution given to any dispute must not be subject to a new judgment."

Conclusions

In this study, we have tried to highlight the fact that the activity of the public administration is based on an entire range of principles, that the revocability of administrative acts was born from the need of limiting the damages for the administration and from the need of not prejudicing the system itself.

Towards the end of the study, our analysis referred to the ECHR case law in the field, bringing to attention certain aspects connected to the principles of operation of the public administration and insisting on the fact that a sustainable administration relies on laws.

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[30] Iulia Rîciu, *Procedure of Administrative Disputes*, (Bucharest, Hamangiu Publishing House, 2009), p. 219.

[31] Ovidiu Podaru, *Administrative Law*, vol. 1, *The Administrative Act. (I) Guidelines for a Different Theory*, (Bucharest, Hamangiu Publishing House, 2010), p.300 et seq.

[32] Ion Brad, *op.cit.* p.160 et seq.

[33] Published in the Official Gazette, Part I, no. 514 of 14 June 2006.

[34] On this subject: Iuliana Rîciu, *Theoretical Examination of Judicial Practice regarding the Actions Brought before the Administrative Litigations Court by the Public Authority that issued the Illegal Administrative Act*, Bucharest, RDP no. 1/2008, p.131.

[35] Published in the Official Gazette, Part I, no. 616/21 August 2008.

Unlike[36] other legal systems, the Romanian system contains an imbalance in this respect: the very short timeframe in which the administrative authorities may revoke their illegal acts clearly favours the principle of legal security as opposed to the principle of legality.

In conclusion[37], at the European level there is a concern for the revocation of administrative acts, considering the dynamics of the administrative phenomenon and the importance that the administrative appeal may have as a procedural means of prejudicial solution of administrative conflicts.

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[36] Ion Brad, *op. cit.* p.221.
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WOMEN'S RIGHTS VIOLATION: HONOUR KILLINGS

CRISTINA OTOVESCU FRĂSIE *

Abstract
In this study I have presented the domestic violence concept and the situation regarding the observing of woman's rights in Syria. We have also evidenced the juridical aspects regarding the honor killing directed against women after the modification of the article 548 from the Penal Code changed by the President al-Asad on July the 1st 2009. The data offered by NGOs have been of great help for the elaboration of the study as also the statistic data presented in Thara E-Magazine regarding the cities where had been done the honor killings and their number, the instrument of the murder, the age of the victim, and the motives for the murders. It must be noticed that, lately, the Government fought for the observing of the woman's rights and promoted the gender equality by appointing women in leading positions, including the vice-president one.

Keywords*: human rights, domestic violence, honor killing, Penal Code, woman's rights*

1. Introduction

In the Arab world, women have no rights and are perceived as "the property" of the man. The legislation from these countries is starting to change, adapting to the occidental system. A recent example is represented by some Islamic Sunnite laws (fatwa), though which women gain the right to hit their husbands. Actually, the wife aggressed in the family have the right, from this date on, to hit their husband if they are in self defense. "Any person has the right to defend himself/herself, either man or woman, because all the human beings are equal in front of God", said the sheik Abdel Hamid al-Atrach, the president Al-Azhar, the highest authority of the Sunnite Islam. He declared that women have the right to respond in the same way they are treated by men. The Turkish leader Fathallah Jouloun added that women "can even answer with two hits for one received", in the situation of conjugal violence. The legislative changes that took place after it was ascertain a high rate of mortality among the Arab women. For example, in Egypt, 35% amongst women are killed by their husbands every year[1].

In Syria there isn't a legislation made especially to forbid the domestic violence[2]. According to a study made in 2006, one of four women who participated on an interview had been a victim of the domestic violence. Most of the cases, women don't announce the domestic violence acts because they are excluded from the society. The observers noticed that when certain women had been the victims of abuses and tried to make a complaint at the police, the policemen didn't answer to their declarations in an active way or they didn't answer at all. In the police stations, women faced situations of sexual harassment, verbal abuses and slapping in the face from the police officers when they made the complaint; these situation happened in the department Bab Musallah from Damascus. Few victims of the domestic violence sought their justice in the court, having as a consequence the social stigma of this action[3].

According to the legislation in force, the legal age for marriage is 18 years old for men and 17 years old for women. But, there is also the situation when a 15 years old or even more men and a 13

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[1] The source: www.Antena3 ro, (Oct 29th 2008).

[2] The domestic violence is mostly met in the rural areas.

[3] The source: US Department of State – Syrian Arab Republic (2009): *Country Report on Human Rights Practices*, 11.III.2010, apud http://www.portal-ito ro/.

years old or more woman can get married if they both agree in the presence of a judge and if they are considered "physically mature"; they have to have the consent of the father or grandfather. In the last period of time, the number of minors' marriages decreased but there still are some regions, such are the rural, less developed areas[4]. In Syria there aren't any civil laws regarding the marriage, inheritance and divorce. The problems regarding the status of a person are judged by the sharia courts for Sunnites and Shiites Muslims that represent almost 75% of the population and other religious courts for the Christian, Jewish and Druze communities[5].

2. INTRODUCTORY NOTIONS REGARDING THE DOMESTIC VIOLENCE AND THE WOMAN'S RIGHTS IN SYRIA

November 25th is the International Day for the Elimination of Violence Against Women. Therefore, it is desired for every woman not to be discriminated, not to be the victim of violence and to live in an environment proper for their development, without fear or constraints. Violence against women can be avoided though the instrumentality both of the community where she lives and of the families because the attitudes, the behavior and the social norms can't be modified. It is very important for the state to help the communities in which the violence is widely spread through the adopting and applying of stricter laws. Through the establishing of the international agencies that promote the human rights is wished to be stopped the violence against women and they benefit by the rights (for example: the right to education, to health, to work an equal remuneration as the man for the same job etc.) and equal chances in society and the aggressors to put under accusation.

According to Pangelow, "the interfamilial violence is referring to any act committed or omitted by the family members and any consequences of these actions or inactions, through which other members of the family are deprived by their equal rights or freedoms and/or which infringe upon their optimal development and upon the exercising of the freedom to choose"[6]. "The strategies on which depend the development of programs and services that are centered on the problems regarding the domestic violence are determined by the actual tendencies in the internal and international social policies. The ways of approaching the domestic violence follow two major tendencies such are: the promoting of the human rights model and the redefinition of the domestic violence as a public health problem.[7]"

The marital violence refers to any act or behavior, aggressive manifestation against husband/wife, with the purpose to:

- enforce the control and the power into the relation;
- reaffirm the rolls and the responsibilities in the family;
- discharge, in the case of a crisis created by external or internal factors;
- fulfill certain expectations created through the model of socialization;
- hurt/injure the partner.

The forms of manifestation of the marital violence are diverse: physical, psycho-emotional, verbal and sexual[8].

During the last period of time, the Government fought for the observing of the woman's rights and promoted the gender equality by naming the women in leading positions, including the vice-president position. We must notice that Syria has the highest rate of parliamentary women from the

[4] *Ibidem.*

[5] Institute for War and Peace Reporting (12.VI.2009), *Activists Warn of Blow for Women's Rights*, apud http://www.portal-ito ro/.

[6] M. D. Pagelow, *Family violence*, New York, Praeger, 1984, p. 21, apud L.M.Pop-coord. (2002), *Dicționar de politici sociale*, (Expert Publishing House, Bucharest), 811.

[7] L.M.Pop-coord. (2002), *Dicționar de politici sociale*, (Expert Publishing House, Bucharest), 811

[8] *Ibidem*, p.812

Arab world. As regarding the observing of the right to education, the Government offers to women equal access, but there are also many discriminatory laws that are in force. If the women wish to travel in another country together with their children without having the proof of the husband's agreement, he can ask to the Ministry of Interior to stop her leaving. The person accused of rape can be discharged if he will marry his victim. It must be taken in that the law isn't so drastic and stipulates reduced sentences for "the honor killing" committed by men against the feminine relatives for alleged infidelities. An important Syrian mufti declared "the honor killing" as non-Islamic in 2007 and, with the help of the Government, was opened the first shelter for the abused women in September 2008. The sharia law governs the law of the personal quality for the Muslim women and it is discriminatory as regarding the marriage, the divorce and the heritages; the church law governs the personal statute for Christians, leading sometimes to the forbidding of the divorce[9].

"The Government condemned to prison several important members that promoted the human rights among the communities and in the civil society. The Government infringed the citizens' right to the private life and imposed significant restrictions for the right to free speech, the freedom of the press, the freedom of reunion, association and travelling. A corrupt atmosphere spread into the Government. The violence and the discrimination against women continued, and so did the sexual exploitation, more and more heading towards the Iraqi refugees, including the under age children. The Government practiced the minorities' discrimination, especially against the Kurds and the Ahvazians and restricted the worker's rights"[10].

3. THE HONOR KILLING IN SYRIA

Nowadays, the domestic violence takes also the shape of the honor killing.

„An *honor killing* or *honour killing* (also called a *customary killing*) is the murder of a member of a family or social group by other members, due to the belief of the perpetrators (and potentially the wider community) that the victim has brought dishonour upon the family or community. Honour killings are directed mostly against women and girls. The perceived dishonor is normally the result of one of the following behaviors, or the suspicion of such behaviors: (a) dressing in a manner unacceptable to the family or community, (b) wanting to terminate or prevent an arranged marriage or desiring to marry by own choice, (c) engaging in heterosexual sexual acts outside marriage, or even due to a non-sexual relationship perceived as inappropriate, and (d) engaging in homosexual acts. Women and girls are killed at a much higher rate than men. The United Nations Population Fund (UNFPA) estimates that perhaps as many as 5,000 women and girls a year are murdered by members of their own families. Many women's groups in the Middle East and Southwest Asia suspect the victims are at least four times more"[11].

The killings for defending the honor (honor killings) are often met in the east and south-east of Turkey, practically in the entire Mediterranean space, in the Near East, but also in Asia and Africa. In these spaces there are communities where the families kill their daughters if they lost their virginity, if the dare to have an affair, if they wish to break the marriage with a partner that they don't love or if they escape from an arranged marriage, even if they don't leave their husband for another man, but also even if they were sexually abused or they were raped. Rarely, it might happen to be excluded from the family, most of the time they are killed. By killing the victims of the abuses, from the traditional point of view, the authors of the murder reestablish the honor of the family. The way they do the murder varies: the victims are shot, stabbed, drowned, sprinkled with gas and set of fire, driven over (by the men from the family) or poisoned (by their mothers of mothers-in-law, the victim

[9] Freedom House, Freedom in the World, (16.VII.2009), apud http://www.portal-ito ro/

[10] UK Border Agency (Home Office), Syrian Arab Republic (2010): *Country of Origin Information Report; The Syrian Arab Republic*, Country report of September [ID 145757], 03.IX.2010, apud http://www.portal-ito ro/

[11] http://en.wikipedia.org/wiki/Honor_killing

couldn't rely on the support of the other women from the family because they too must contribute to the reestablishing of the honor). Sometimes, these "tainted" women are compelled to get married quickly, but even in the new family the life of these young women is endangered if it is revealed that they had been "dishonored"[12].

In the south-eastern Anatolian area, two thirds from al the marriages are arranged by the family, even if in the actual period most of the young people choose their partner. The sum of money they have to pay for buying the bride it is very important for the prestige of the family. In most of the cases, this sum is too large for many young people, who would have to save money for many years in order to afford to get married. Thus, the young girls have to marry older men who they accept without loving them. As a consequence, the young people migrate towards the big cities for not respecting the tradition anymore[13].

"In April 2008 it came to light that a woman had been killed in Saudi Arabia by her father a few months before for "chatting" to a man on the social networking Internet site Facebook. The murder became public only when a Saudi cleric referred to the case to criticise Facebook for the strife it caused[14]. A June 2008 report by the Turkish Prime Ministry's Human Rights Directorate said that in Istanbul alone there was one honor killing every week, and reported over 1,000 during the previous five years. It added that metropolitan cities were the location of many of these, due to growing Kurdish immigration to these cities from the East. In 2009 a Turkish news agency reported that a 2-day-old boy who was born out of wedlock had been killed for honor. The maternal grandmother of the infant, along with six other persons, including a doctor who had reportedly accepted a bribe to not report the birth, were arrested. The grandmother is suspected of fatally suffocating the infant. The child's mother, 25, was also arrested; she stated that her family had made the decision to kill the child[15]. A girl in Turkey was killed after her family heard a song and thought she had a boyfriend. In 2010 a 16-year-old girl was buried alive by relatives for befriending boys in Southeast Turkey; her corpse was found 40 days after she went missing[16]. Ahmet Yildiz, 26, a Turkish physics student who represented his country at an international gay conference in the United States in 2008, was shot leaving a cafe in Istanbul. It is believed Yildiz was the victim of the country's first gay honour killing[17]. There are no exact official numbers about honour killings of women in Lebanon; many honour killings are arranged to look like accidents, but the figure is believed to be 40 to 50 per year. A 2007 report by Amnesty International said that the Lebanese media in 2001 reported 2-3 honour killings per month in Lebanon, although the number is believed by lawyers to be higher. Most killings in the Gaza Strip and the West Bank are carried out by villagers; honor killing is extremely rare in Palestinian cities and larger towns. The Palestinian authority uses Jordanian law, which gives men reduced punishment for killing a female relative if she has brought dishonour to the family. Due to Palestinian protests, Mahmoud Abbas, President of the Palestinian Authority, promised to change the discriminatory law by the year 2010, but As of November 2010 this has not happened. According to UNICEF two-thirds of all murders in the Palestinian territories are honor killings"[18].

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[12] The author: Dorette Wesemann, Redactare: Ragnar Müller, http://www.dadalos.org/rom/menschenrechte/grundkurs_3/frauenrechte/warum/ehrenmorde htm

[13] *Ibidem*

[14] Cf. *Saudi woman killed for chatting on Facebook*, (*The Telegraph*, 31.III.2008), apud http://en.wikipedia.org/wiki/Honor_killing

[15] Cf. *Un bébé de 2 jours victime d'un "crime d'honneur" en Turquie*, (www.lemonde fr, 16.IV.10), apud http://en.wikipedia.org/wiki/Honor_killing

[16] *Girl buried alive in honour killing in Turkey*: Report, (www montrealgazette.com, February 4, 2010), apud http://en.wikipedia.org/wiki/Honor_killing

[17] *Was Ahmet Yildiz the victim of Turkey's first gay honour killing?*, (www.independent.co.uk, *19 July 2008)*, apud http://en.wikipedia.org/wiki/Honor_killing

[18] http://en.wikipedia.org/wiki/Honor_killing

In Syria, the article 548 from the *Penal Code* was modified by the president al-Asad on the 1st of July 2009. Through this article was allowed to instances to reduce and to renounce the punishments for the authors of the honor killings. The new dispositions of the article stipulate a punishment of maximum two years of prison for any person condemned for the honor killing. It can be mentioned that the minimal sentence is less severe than the sentences stipulated for other forms of homicide. The Government doesn't have an official statistics of the honor killing. Most of the times there weren't offered the complete names because it was desired the protection of the victim by the groups that defended the human rights. According to the provided data, the Ministry of Interior estimated that a number of 38 honor killings took place between June 2008 – June 2009, while the Syrian Women Observatory (SWO) estimated that actually 200 to 300 killings took place every year. It is known that the number of the honor killings is very big, but the reporting of these murders is rare; the exact data of the honor killings were difficult to obtain. The families or the friends who were willing to discuss the cases refused to say any name motivating the wish for intimacy or the fear for revenge[19].

Case studies[20]

1. According to the information held by the Syrian Women Observatory on the 2nd of February, two men killed their sister (a married woman) in Aleppo, because she wore a hijab, in concordance with the tradition of her husband, instead of a burka, which she wore formally according to the desires of her family.

2. The group SWO, according to a report from July the 20th of IWPR[21], reported that a man killed his sister, Soad, mother of two children, who lived in Damascus, after he suspected that she worked as a prostitute, having the permission of her husband. Later, there were no information regarding the catching of the author or if the police investigated the case.

3. The data from a report registered on December the 12th, made by the observers of the human rights, point out that two brothers from Aleppo killed their sister, Khadija, because she married a man from Homs to work in a tavern. In the next period no information appeared that would concern the investigation of the case or if the two brothers had been caught by the police.

<<**The situation of media monitoring of the crimes committed under the pretext of honor in Syria** (2010)[22]

- *Data monitoring:*

The total number of crimes: 61 crime 62 victim of a "crime of which claimed the lives of two girls together,"

- *Distribution according to provinces:* Aleppo: 17 crime; Idlib: 13 crimes; Homs: 6 crimes; Hasakah: 5 crimes; Damascus Suburb: 4 crimes; Hama: 4 crimes; Lattakia: 4 crimes; Al Raqaa: 2 crimes; Al Swida: 2 crimes; Daraa: 2 crimes; Damascus: 2 crimes;1 crime that has never been documented.
- *Degree of relativeness between the killer and its victim:*37crime committed by brother; 7 crimes carried out by the husband; 5 crimes carried out by the father; 4 crimes carried out by the uncle of the victim; 3 crimes carried out by siblings or family together; 2 crime carried out by the mother; 2 crime to force or push to suicide; a crime carried out by the son.

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[19] US Department of State – Syrian Arab Republic (*2009)*: *Country Report on Human Rights Practices*, 11.III.2010, apud http://www.portal-ito ro/

[20] *Ibidem*

[21] Institute for War and Peace Reporting

[22]The information were taken from *Thara E- Magazine* No. 266,8/1/2011, *The outcome of media monitoring of the crimes committed under the pretext of honor in Syria 2010* - 61 crimes. 62 victims Aleppo and its countryside have the largest share, by: Yahya Al Aous, translated by: Suzan Abadi

www.thara-sy.com/

• *Instrument of crime:* 17 crime by firing squad; 17 crime stabbing with a knife;12 crimes strangled; 8 mixed crimes committed with more than a tool such as stabbing and then shooting , or stabbing and then strangling or by using a hammer, or another tool; 3 crimes where the head were separated from the body; 2 crimes forced to commit suicide; 1crime electrocuted;1 crime of burning fire; 1 crime of poisoning the victim.

• *Age of the victim:* 13 victims were under the age of 18; 33 victims between the ages of 18 to 30; 16 victims over the age of thirty.

• *Causes of death:*14 crimes because the victim is absent from the home of her parents; 12 crimes because of the rumors and suspicions morality of the victim; 10 crimes due to marriage without parental consent; 10 crimes because of suspicion of a sexual relationship for the girl with a man; 5 crimes because of the mishandling of suspicion of immoral acts; 3 crimes by forcing incest and then killing her; 2 crimes because of pregnancy illegally; 2 crimes because of the divorce; 2 crimes of rape; 1 crime is not clear why.>>

4. Conclusions

The militants for the human rights promoted, during the last period of time, the shifting of the problems regarding the personal statute to the jurisdiction of the civil instances. Through the numerous petitions and campaigns of making people aware in media and on the field, the groups regarding the human rights wished the mobilization of the Syrians against the legislation, because it is repressive against woman. In the opinion of the legal experts, the new law regarding the personal statute in not accordingly to the international law because it breaks all the treaties concerning the women and children's rights that Syria ratified. "They say that the bill maintains most of the restrictive articles from the legislation about the personal statute, in force since 1953 that is based on the Islamic law. For example, the propositions keep an existent stipulation according to which can be taken the children of the divorced women if they work without the permission of their ex-husbands and also one which stipulates that the violator who would agree to marry their victims can be exonerated from penalty. The bill also keeps the amnesty for the men accused with honor killing. In some rural communities from Syria, it is considered legal that the mail members of a family to kill their female relatives in case of adultery or pre-marriage sex. More than that, the bill interdicts to the married women to travel without a previous approval from their husbands – a stipulation that lacks from the law in force. According to Younes, the proposals represent a radical interpretation of the Islamic legislation.[23]"

There are no certain data regarding the number of the honor killings, by the Syrian Women's Observatory, an unofficial group, discovered at least 12 such murders in 2009. In August 2009, a father killed his 18 years old daughter because a neighbor tried to rape her[24].

Acknowledgment

„This work was supported by the strategic grant POSDRU/89/1.5/S/61968, Project ID 61968(2009), co-financed by the European Social Fund within the Sectorial Program Human Resources Development 2007-2013"

[23] Institute for War and Peace Reporting, Activists Warn of Blow for Women's Rights, 12.VI.2009, apud http://www.portal-ito ro/

[24] Human Rights Watch –Syrian Arab Republic (*2010*): *World Report*, 20.I.2010, apud http://www.portal-ito ro/

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THE LEGISLATIVE CONSTRUCTION OF REALITY. A SHORT REFLECTION

RAMONA DUMINICĂ*

Abstract

In today's Romanian society, characterized by radical economic and political changes, we are witnessing a veritable „law crisis" mainly generated by the inadequate manner in which the law is devised. The law no longer seems necessary to regulate reality and to ensure the protection of the individual and his rights, rather it has become an easy solution amongst so many others, an element of the policies imposed by the ruling party or parties.

The enactment of law no longer seems based on the two conditions considered essential to the drawing up of legislation: knowledge of reality and an adequate application of the legislative technique so that the social reality matches the reality reflected by the law. The law is no longer created to regulate a certain reality, rather through laws most often a parallel reality is created. The legislator no longer makes decisions concerning reality itself, but becomes a simple „fabricator" of reality.

All these assessments constitute the fundamental reason that has determined us to reflect in this study upon what we call „the legislative construction of reality". Thus, in this present article we try to bring forward for discussion no only the causes of this phenomenon, but also to propose solutions to remedy the problem.

Keywords: *law crisis, legislative construction, social reality, juridical reality, real sources of law*

Introduction

If traditionally the law was placed at the top of the legal hierarchy, as in the XIX century when it was considered the "holy ark", at present it seems to have lost its key role within the framework of the internal legal order. The law has become less and less accessible to the citizens and more difficult for the legal practitioners to apply. We therefore appreciate that the law is in a significant and growing crisis.

The intelligible quality of the law, the negative influence of emergency governmental ordinances, the growing role of other sources of law, the pressure applied by European and international law, the legislative inflation, the current parliamentary crisis, but especially the violation of the fundamental rules in the process of elaborating legal acts are only a few of the causes that have led to the declining authority of the law that we are witnessing at present.

In the present study, we seek to bring up to date the role that the social, economic and political factors play within the legislative construction, by starting from the assessment that in contemporary Romanian society the laws are created regardless of what reality requires, given that reality is forced to assimilate more rules than it is capable of absorbing or that these rules contravene social realities, thus seriously endangering not only the stability of the legislative system, but even its own foundation.

We consider that the process of elaborating laws should be, at the same time, both an intellectual as well as a determined operation, since creating laws without any scientific knowledge of the social realities can only lead to the creation of an unjust and arbitrary legal norm.

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1. The relation between reality and the regulated reality

Naturally, in the theoretic approach of the relation between reality and the regulated reality we must start by defining the concepts, to which we make reference. We discuss daily the social, economic, political and juridical realities, but what do these actually represent?

Obviously, throughout time the concept of reality has represented the main theme of reflection in philosophy, which has tried to find elaborate explanations for it, and has sketched out two generally accepted views: according to the first, everything that is independent of the consciousness is "real", and according to the second, everything that is active and acts and interrelates with everything else is "real".

When we say that something exists, what we understand is that it really exists. More precisely, we consider reality as a fundamental form of existence. The concept of reality describes "everything that exists in itself, independent of another's thoughts. Reality exists regardless whether it is perceived or understood by anybody."[1]

By analyzing the notion of reality, we distinguish between two types: objective reality and subjective reality.

Objective reality consists of all the areas of existence, independent of the human consciousness and will. It covers the entire sphere of material existence outside the consciousness and it is completely independent of the actions of humans and nature. Therefore it is exterior and previous to humanity.[2]

As for subjective reality, it consists of all the cognitive, affective, voluntary and attitudinal processes, the states of mind, concepts and theories and so forth, which form the human consciousness. This form of reality exists only through the activity of the human brain and it derives from the objective reality.

Looking beyond these two "pure" forms of reality, we can identify realities that do not belong to either category as they contain both objective and subjective elements, such as social reality. Simply put, social reality describes everything that happens in society from an economic, political, moral, spiritual, demographic, technological and juridical point of view.

All these social realities closely interrelate with what we call the "regulated reality". Speaking for ourselves, simply put, by regulated reality we understand all the aspects of existence conveyed or reflected in the law. Legal norms are either processed from social rules or regulations conceived outside the law or they are created or developed through the express will of competent public bodies.

The law does not define reality, it does not proclaim any general or abstract norm wherefrom we deduce that "this thing" is real and the "other thing" is not. The law distinguishes only what is social in reality, it can only perceive reality in terms of persons and things: on one side we have the existence of persons, and the relations between them, and on the other side we have the existence of things – private property, public property and objects without owners, etc.[3]

From a historical point of view, if in the initial stage of conceiving the law the predominant form of borrowing was either integral, either through adaptation or sanction of certain rules from the social reality, such as moral, economic, religious, familial rules, in modernity and in the present times, the norms of positive law are almost exclusively the result of legislative development activity by the authorities invested with lawmaking prerogatives.

Ideally, the elaboration of legal norms should be founded on two conditions, which one must always meet: knowledge of reality and the necessity to regulate, identifying the priorities by using scientific criteria and subsequently, the adequate application of the legislative technique. The relation

[1] Peter K. McInerney, *Introducere în filosofia dreptului* (Bucureşti: Ed. Lider, 1998), 43.
[2] C. Stroe, *Compendiu de filosofia dreptului* (Bucureşti: Ed. Lumina Lex, 1999), 36.
[3] Bernard Edelman, *Quand les jurists inventent le reel* (Paris: Éd. Hermann, 2007), 170.

between these two conditions is formed through the interdependence between reality and the regulation of reality. Thus, the elaboration of normative solutions by the legislator appears conditioned by complex realities – social, economic, spiritual, domestic or international realities.

Evidently, in contemporary society these two conditions that we consider essential for the creation of a proper legislation, are not always met and practically, we are witnessing the creation through legislature of another reality, a parallel reality, thus current discussions focus on the legislative "fabrication of reality".

2. Normative Construction – an action conditioned by complex relations

As we have previously shown, the creation of law must be visualized as an action conditioned by complex realities of a social, economic, political, spiritual, domestic or international nature that constitute the so-called "given", which determines the "constructing".

All of these realities constitute the real sources of law, which determine the object, the subjects, the content, the ends and to some extent even the form of the law. Considering these aspects, their role must not be exaggerated, nor overlooked because, as M. Djuvara stated "the entire history, the entire past, all social forces, language, the economy of the respective country, industry, commerce, agriculture, politics, moral and scientific concepts, compete to exert a strong influence over the evolution of law, just as the law exerts a strong influence over their own evolution."[4]

As the law lies at the centre of the legal reality, it has a complex foundation, characterized without a doubt by multi-foundationalism.

When criticizing mono-foundationalism, H. Rottleuthner distinguished between logical and epistemological fundaments; moral and historical fundaments; the naturally extra human, economic, political, extralegal, and proposed the safeguarding of unity and identity, explaining the law through different dimensions and connections with external variables, but also pleading for coherence and a systematic approach of the fundaments of law.[5]

Starting from these assessments, we further will discuss some of the relations considered by us and others, as the real sources of law, meaning those objective or subjective factors that determine the appearance and evolution of law and whose role must always be observed by the legislator.

2.1. The role of the natural environment in the creation of law

The natural environment, in which people live, represents a complex factor that influences the socio-economic and political activities and behaviours of people, which are regulated in their turn by legal norms.

The diverse juridical, philosophical or sociological systems have highlighted the importance of one of the elements of the natural environment: the geographic environment, biologic, physiological and demographic factors and so on.

For example, Hegel shows us that there are "two types of law: natural laws and positive law". The natural laws "are absolute and valid as they are". It is necessary to learn to recognize them because "the measure of these laws surpasses us."[6]

Montesquieu also grants the geographical factor a prevalent role in the political and legal organization of society and in the development of legal norms that must match some of the particularities of the area: "the laws must be in accordance with nature, the geography of the country,

[4] Mircea Djuvara, *Teoria generală a dreptului. Drept raţional, izvoare şi drept pozitiv* (Bucureşti: Ed. All Beck, 1999), 300.

[5] Enrico Pattaro (edit.) et al, *A Treatise of legal Philosophy and General Jurisprudence*, (teoretical part) Vol. 2, Foundations of law, vol. 2 (Springer, 2005), 1-7, 31-161.

[6] G. W. F. Hegel, *Principes de la philosophie du droit ou droit naturel et science de l'état en abrégé* (1821), 9.

the cold, warm or temperate climate, its quality, its size, the type of life of the people, the ploughmen, the huntsmen or shepherds (…)."[7]

We will not exaggerate the role of this factor in the development of law and history, demonstrating that an exaggeration of demographic and biological factors have led to the passing of preposterous laws, with a racist quality, retrograde or anti-humanistic, yet still, the law cannot avoid being influenced by the physical environment since it is in this space that people exercise their rights and assume responsibilities.

The natural environment has manifested its influence and continues to exercise it on the legislation, for example by creating laws that combat pollution and the degradation of nature, by establishing certain laws to protect the land, the territorial waters, airspace or to fight against nuclear radiation. For example, in our country laws have been sanctioned that establish the juridical system of the Danube Delta Biosphere Reservation (Law 82/1993); the Law of the Land Fund (Law 1/1991); as well as other legislative acts for the protection of the waters, the hunting and fishing fund, for the exploitation of natural deposits etc. Today there are talks about a new branch of law, environmental law.

In the literature[8] it is shown that in the process of creating the law, the biological and physiological factors gain a particular relevance in point of the repercussions that the natural qualities of people, both biological and physiological, have on their states of consciousness and their attitudes in society. The well-known distinction in law between the capacity to use (to have rights and obligations) and to exercise (to exercise the subjective rights and to assume responsibilities through proper legal acts), is based just on the existing relation between the physical development of the human being and the development of his mental faculties. Another fundamental juridical institution, namely the legal liability, is configured by the relevance that the physiological and biological qualities of people obtain. The idea of legal liability is founded on the discernment that people use when they act. The biological and physiological qualities of people are imposed upon the legislator and on other levels, for example, children, the infirm and disabled persons require a special legal treatment, thus special laws are created, whereby these groups are protected.

Legislative measures concerning the stimulation of demographic growth, the protection of married couples, have also been created and regulations meant to limit the growth of the population have been adopted, wherefrom originates the influence of the demographic factor exercised on the creation of regulations.

The profound changes generated by biological progress and the medical sciences have given the law new challenges, such as human cloning, eugenics, medical interventions meant to modify the lineage, thus both the international and domestic legislative authorities have promptly reacted and condemned such experiments. Such an example is the Romanian New Civil Code, which thorough article 62 prohibits any type of genetic modification that might result in encroachments upon the human species, or article 63 that prohibit any intervention that might result in cloning human beings or creating human embryos for research purposes.

In conclusion, the manifestation of the force of these factors does not appear as an inevitable negative circumstance, their presence does not automatically produce legal consequences. It is precisely for this reason that certain opinions[9] are well-founded, opinions according to which the action of these factors is always correlated with a social interest, and is present only to the extent to which a social necessity requires that it be taken into consideration.

In the same way, doctrine also shows us that "by acknowledging this double meaning, namely determining the object of the regulation and influencing the solutions adopted within the framework

[7] Charles Montesquieu, *Despre spiritul legilor* (Bucureşti: Ed. Ştiinţifică, 1964), 17.

[8] C. Voicu, *Teoria generală a dreptului* (Bucureşti: Ed. Universul Juridic, 2006), 48-49.

[9] In this sense: Ion Dogaru (coordonator) et al, *Drept civil. Ideea curgerii timpului şi consecinţele ei juridice*, (Bucureşti: Ed. All Beck, 2002).

of these regulations, the regulating force, at times coercive, of factors that constitute the natural environment wherein social interactions take place, cannot be comprehended except to the extent to which the mentioned factors are considered related with social interests."[10]

2.2. The influence of the national and international socio-political environment on the legislative process

The social-political factor refers to the complexity of life in the community, the concrete components of society: the economic environment, the political, ideological, cultural and even religious environment.

As the law is a product of society, it must also be in a permanent and constructive relation with the social interests.

The economic component of the social environment is an active force in the development and modification of any objective right.

The law is imposed by the economic environment with certain conditions of the material life, dimensions that finally ensure its normative essence. The economic factors influence or determine the elaboration of certain legal norms, by exerting their authority on every component of the social system. These factors allow the law to adapt to economic requirements, depending on the social ends and interests. Economic phenomena such as: production, reparation, circulation and consumption, economic reforms, the change to the market economy take shape through the law, through adopted laws, and create the framework of development of the economy. In this sense, W. Lippman said that "no man can own property, nor openly and securely enjoy its benefits, if it is not by virtue of the fact that the state is disposed to have his legal right respected.

Without a legal title man has no property, he is nothing but a possessor deprived of possibilities to fight against those powerful enough to appropriate what is his."[11]

Within any type of society the economic component is decisive and it bears the mark of the ideologies typical of the respective period.

For example, Marxist ideology, materialist-dialectic in essence, as exemplified by totalitarian socialist and communist societies, considers that the law should correspond to the general economic situation and the economic model imposed by this ideology and also that the economy constitutes the decisive factor of the law.

On the other hand, liberal and neo-liberal ideologies sanction the thesis according to which the law must acknowledge the economic rights and liberties (the right to accumulate riches and capital, the freedom to produce and to commercialise what is produced etc.), it must guarantee contractual economy and create an adequate framework for this type of development.

The Romanian revolution of 1989 has generated radical changes in Romanian society. The economy has shifted from the old, excessively centralized economy to the market economy, whose main driving force is the free initiative of manufacturers and the autonomy of economic agents. All these principles have been sanctioned by the country's Constitution and special laws.

The transformations that have occurred in these last years have led to the advent of certain fundamental laws meant to regulate commercial relations and to guarantee: freedom of trade, loyal competition and the stimulation of foreign investments.

The current economic crisis plaguing Europe and the rest of the world is also an example of how the economy exerts considerable influence over the development of not only domestic but also community and international law: laws have been passed to limit the effect of this crisis. For example, the Law for a Sustainable Economy has been passed in Spain, while in Romania there is Law 118/2010 concerning certain measures, which are necessary for reestablishing the budgetary

[10] Anita Naschitz, *Teorie şi tehnică în procesul de creare a dreptului* (Bucureşti: Ed. Academiei, 1969), 66.
[11] Walter Lippmann, *The Good Society* (New York: Grossef s Universal Library, 1943), 278.

balance. Therefore, all these efforts made to create and perfect the legal framework of the economic reform constitute clear evidence of the connection between the law and the requirements of the economic transformations.

Last but not least, we must not neglect the role of the financial and banking environment in the development and functioning of the objective law currently in force. "No society has any chance of success if it does not combine the interests and the credit enjoyed by the wealthy with those of the state. A national debt, if not an excessively large one, will be a true blessing for the nation." As such, starting from these statements, it is clear that not any positive law, but also public and private international law depend to a subtly assessable extent on the interests of internal and international financial and banking groups.[12]

The political environment is another component that exerts influence over the law, on which we shall focus our discussions further. The relation between this factor and the law is remarkably emphasized by Professor Gheorghe C. Mihai who states: "The legal language is in a particular relation with the political language; thus, there is no one single truth for one or the other but many truths, from which one can choose and decide by majority of the vote. (…) There is no love in the political language and in the case of positive law it means something completely different (loyalty in legitimate sexual relationships, solidarity between citizens, between members of a syndicate) to "surpassing oneself". In the case of positive law, the church (institutionalized religious faith) is the one acknowledged to work, even though, on the other hand, it acknowledges the right to choose one's religion. In the case of politics, the church has no relevance if it does not serve its ends. In the case of positive law, marriage represents the institutionalized family, in which the partners can be: mature persons of different sexes. In the case of politics, the family, even an institutionalized one, is an outdated entity."[13]

The problem posed by the influence of the political factor over the creation of law is an old one, but it is just as pressing and current today as ever.

Speaking for ourselves, any legal norm shall be protected from the supremacy of the political as long as it relates to its own criteria of value that make it more stable and credible as a reflection of the social reality, however without understanding thereby an isolation of the law from the political, wherefrom it claims its paternity and with which it exists in a inter-dependence, but only that the law must keep its own essence.

The concept of political power, simply but relevantly put, designates the power of the polis, in the sense of power "of the community of members of the community that are conscious of belonging to it."

Lato sensu, political power implies besides the power exercise by the state, i.e. the institutionalized part, the characteristics of the political power.

It is clear that exercising political power is not possible without passing certain laws to regulate the organization and functioning of the authorities.

At the same time, the development of state law is the responsibility of a national body, as a component of the institutionalized part of the political power in society, and it is owed to the initiatives with a political under-layer of the existent political parties. The limitation of restituted agricultural properties to ten hectares, through Law 18/1991, the current regulations concerning the acquisition of Romanian citizenship or the electoral law in force in Romania, the decriminalization of homosexuality etc., all of these have a political side, given by the political variety of the parliamentary majority at a certain moment in history. However, the form of the regulation and its application is greatly relieved by the partisan political interest, because thus it cannot impose itself as

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[12] J. Marrs, *Rule by Secrecy*, trad. Rom. (Bucureşti, 2000), 49 *apud* Gh. C. Mihai, *Fundamentele Dreptului. Teoria izvoarelor dreptului obiectiv*, vol. III, (Bucureşti: Editura All Beck, 2004), 81.

[13] Gheorghe C. Mihai, *Fundamentele Dreptului. Ştiinţa dreptului şi ordinea juridică*, vol. I, (Bucureşti: Editura C.H. Beck, 2009), 283-284.

a general obligation. At the same time, the authority of the positive law ensures the law of the political force, which values it and adjusts its legitimacy.[14]

The positive law is also influenced by interest groups, meaning "those group structures that on the basis of a common attitude can transmit to other social structures the intention to reach certain ends that aim to stabilize, maintain or intensify the forms of behaviour that involve common attitudes. Such groups, based on a system of stable interactions, which respect the general and balanced distribution of interests (for an organized reaction to the external pressures on these interests), and act for a maximization of the interests of its members. They make the causes that they defend, public and they support or reject the candidacies in elections, debate law projects, influence the legislative through lobbying etc."[15]

The pressure groups play an ever more important role in the political game besides the political parties. Depending on their legal status, there are compulsory groups (e.g. administrative councils of territorial communities in districts, cities, counties) or voluntary groups, pertaining to the private law (e.g. industrial and commercial societies, syndicates and others). As a rule, the practices of these groups are: propaganda, influence games (corruption is the limit of this practice) as well as through direct actions: strikes, street blockades and so on.

One must not neglect the power of the minorities, defined as "a group inferior in number to the rest of the population of a state, which possesses certain ethnic, religious or linguistic characteristics that set it apart from the rest of the population and which manifests, in an implicit manner, a feeling of solidarity, in order to preserve its culture, traditions, religion and language."[16]

In some states, such groups are organized in political parties, unions or associations legally registered and recognized by the state authorities and fight through a great diversity of means and methods to force the state to adopt the requested legal regulations (the use of the mother tongue in schools, the administration and in justice, the increase of autonomy of settlements where they form a majority etc.).

People's lives take place not only within the national socio-political framework, their existence involves their belonging to the members of a regional and international communities.

The relations formed at the level of the international community, consisting mostly of relations between states, create a certain international climate, which materializes in different categories of laws and principles, which form the international legal system. The principles at the foundation of the contemporary international law are a relevant example of the power to influence the domestic law by the existing human particularities at the level of the international structures, by the forms of organization of the relations at this level as well as the specific characteristic of the social ideology. These principles include the principle of cooperation between states, the principle of a peaceful solution of international differences; not resorting to force or threats to use force; noninvolvement in the domestic matters of other countries; the right of the peoples to lead themselves; the equal sovereignty of all nations; the inviolability of national boarders; territorial integrity; the respect for basic human rights and liberties and last but not least the respect in good faith for the obligations assumed in accordance with international law.

It is indisputable that in contemporary society the structure of the national legal systems is influenced by the international and European socio-political environment.

Thus, the status of Romania as a member state of the European Union and as a part of the great family of the states of the world (the United Nations) generates the obligation to harmonize Romanian law with the international and UN law.

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[14] Gheorghe C. Mihai, *Fundamentele Dreptului. Ştiinţa dreptului şi ordinea juridică*, vol. I (Bucureşti: Editura C.H. Beck, 2009), 277-278.

[15] N. Popa, "Consideraţii privind dimensiunea socială a dreptului şi factorii de configurare a acestuia", *Revista de Ştiinţe Juridice nr. 2* (2007): 12.

[16] A. Lajoie, *Quand les minorites font la loi* (Paris: P.U.F., 2002), 23.

At present, the creation of domestic legislation involves not only an effort to achieve technical organization, national correlation, but also one to achieve community and international correlation. In this sense, article 12 from Law 24/2000 concerning the norms of legislative technique for the development of normative acts, republished in 2004, established that the normative act must be organically integrated into the legislative system, for which purpose: a) the bill must be correlated with the stipulations of laws of the same or a higher level, with which it is connected; b) the bill, drawn up on the basis of a higher level act, cannot surpass the limits of competence instituted through this act and cannot contravene its principles and stipulations; c) the bill must be correlated with the community regulations and the international treaties, of which Romania is a signatory.

Therefore, the development of a legal project involves the harmonization of the stipulations from international treaties, of which our country is a signatory and intervenes on the basis of the principle of respecting international treaties. There can be no discrepancies between a domestic law and an international treaty, because in such a case the domestic law would render the stipulations of the treaty inoperable, which would lead to breaking the obligations assumed and of the principle *pacta sunt servanda* stipulated in the Romanian Constitution. Also, the correlation of a law project with the international treaties intervenes on the basis of the principle of priority of international treaties concerning human rights, as sanctioned by article 20 from the Romanian Constitution.[17]

More than that, as a consequence of the adherence and finally of the integration of Romania in the European Union, from a legal point of view, a new interference was created between the national and community law. As any other member of the European Union, Romania has assumed the obligation to correlate the national legislation with the community legislation through the translation and implementation of the community acquis into the domestic legal system. This acquis consists of domestic laws that must be in accordance with the regulations of community law.

2.3. The human factor in the process of developing of the law

At present, the promotion and protection of the fundamental human rights and liberties, the regulation of the human conduct, in the effort to sustain the integration of the individual in society and the attempt to respond to the social realities and human necessities constitute desiderata of the legislative process.

The legal norms, which represent the substance of law, have not only a role to regulate, but also to regularize the human conduct and the socializing role, to shape and stimulate the behaviours corresponding to the values defended by the law.

In modern law, the human factor constitutes or should constitute the main area of interest for any legislator.

Regulating human behaviour within the framework the diverse categories of social relations, the law permanently relate to the presence of man in society, his capacity to influence and even transform society. Since birth, man goes through a long and complex process of socialization, a concept that signifies his integration in society, learning the social way to coexist, subordination to the conduct-type, prescribed by the social etiquette. Socialization involves the process whereby the individual becomes a human (the assimilation of the rules of social coexistence) and forms his system of response to different social requirements. The law represents an important factor of socialization, by shaping and stimulating those behaviours that are adequate to the respective values. The law exists in a wholly social and human framework. As such, nothing that is social can escape the law, because the law perceives human actions within a given system of relations.[18]

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[17] Mihai Grigore, *Tehnica normativă* (Bucureşti: Ed. C. H. Beck, 2009), 286.

[18] N. Popa, "Consideraţii privind dimensiunea socială a dreptului şi factorii de configurare a acestuia", *Revista de Ştiinţe Juridice nr. 2* (2007): 13.

The regulation of human conduct involves the analysis of the human factor in the dynamism and complexity of the features and relations, to which are added knowledge of needs, interests and goals of the actions of humans observed in different situations: citizen, hunter, worker, owner, teacher and others. At the same time, the regulation of human conduct clearly involves the adaptation of certain laws that discourage or punish antisocial actions and to diminish lawbreaking. The legislator is supposed to keep in mind that fact that whoever breaks the law is still human and for this reason there are institutions with legal responsibilities to reestablish the order of law, on one hand, and on the other to re-socialize the lawbreaker.

We appreciate that before anything else the human dimension of the law concerns the fundamental rights of a person, the rights guaranteeing complete equality for all people, the right to manifest themselves in an unhindered manner on the basis of their dignity and freedom, because humans, by their nature, are free and dignified beings. It is precisely these rights that should constitute the final purpose of any regulation.[19]

Discussing the relation between the authority and the individual, Professor Dan Claudiu Danisor appreciates that "The human person must be instated as the centre of the state and the judicial structure, a person that is understood as a universal entity, deprived of all the particular features that result from its allegiance to a primary identification group and who is free to develop their personality without the abusive intervention of authority."[20]

As such, the human factor is the one that determines the development and adoption of some of the most important international documents for promoting, defending and guaranteeing human rights and liberties: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

Thus, modern national and international law is influenced, as regards its whole structure, by the problem of respecting the fundamental human rights by the state authorities. The European Court of Human Rights in Strasbourg, founded in 1954, is the first European jurisdiction for the protection of the fundamental human rights.

Therefore, humans represent the most active force in the development, modification and the evolution of positive law. The legislator, by regulating certain types of conduct must not ignore the fact that they are destined for people who must assimilate and respect them on the basis of certain values, ideals of coexistence, hopes and beliefs.

Humans will accept to have their freedom limited only in favour of an order necessary to them and others and under the condition that the law not deform the interests and values, they will submit only to the law, who consider it just.

Conclusions

The social reality is characterized by extremely fast transformations. It seems like a mosaic, in which every element has a different genesis, development and evolution, which correlates with a specific dynamics, in order to form a whole.

The law, as a constitutive and functional element of any society is influenced by the social changes and transformations, which it tries to regulate through legal norms.

At present, in our country, the legislator tends to devaluate the role of these factors, thus, the creation of legislation does not seem to be founded on the two conditions that we consider essential for the development of a law: knowledge of realities and their adequate application of the legislative technique so that there is a correspondence between social reality and the reality reflected through the

[19] In this sense: Dan Claudiu Dănişor, *Drept constituţional şi instituţii politice*, vol. I (Bucureşti: Ed. C.H. Beck, 2007), 540-620; Ioan Muraru, E. S. Tănăsescu, *Drept constituţional şi instituţii politice* (Bucureşti: Ed. All Beck, 2005), 172-253.

[20] Dan Claudiu Dănişor, *Drept constituţional şi instituţii politice*, vol. I (Bucureşti: Ed. C.H. Beck, 2007), 551.

legal act and to finally bring reality to order and to protect the individual and his rights. We are witnessing a true "law crisis", generated amongst other things by the fact that in the legislative activity does not begin with through scientific research of social realities. We can easily observe how, instead of regulating reality, we are witnessing the legislative construction of a parallel reality.

Speaking for ourselves, we consider that the role of the social realities in the legislative activity must not be ignored, nor overlooked. That is why, we appreciate that the creation of law should be, simultaneously, an intellectual and a determined activity. We must not lose sight of the complexity of the social given reality, of the fact that it comprises of numerous elements that pertain both to the material as well as the spiritual world, since creating law without acknowledging the existence of the social "given reality" can only lead to the creation of an unjust and arbitrary law.

On the other hand, the development of the law must not be reduced to its social determining only because then we reach a wrongful and mistaken understanding of the relation between social conditioning and the rational creation of law, thus hiving us the impression of a passive legislator, who does nothing but copy the social realities, without being capable of accounting for his regulating activities.

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COLLECTIVE BARGAINING – WAY OF PREVENTING LABOR DISPUTES

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Abstract
Labor disputes are triggered, in most cases, by claims of economic or professional interests. Employees may have the belief that they are frustrated due to the granting of rights, ensuring optimal labor conditions or compliance with the terms of the collective agreement, becoming thus concerned about claims or even the onset of labor disputes. Through collective bargaining, these conflictive guidelines can be prevented or resolved at the optimum time.

Keywords*: collective bargaining, labor disputes, employees, rights*

Introduction

Economic and professional motivations (incentives) include: salary, bonuses, profit sharing, lending, the existence of a health insurance system, facilities for career development, ensuring compatibility between the qualifications, skills and abilities of the employee and the job characteristics etc.

- Why should the manager get involved in the knowledge and materialization of his own employees' motivation?

The answer to this question has been given from totally opposed points of view. Therefore, according to the theory of D. Mc Gregor[1], the manager has to use the motivational lever because in the employees' personality structure there are negative traits that have to be correlated. For example: people do not like work; people are reluctant to work, if possible; people are less ambitious; people prefer to be led, directed; people are selfish and indifferent to the needs of the organization they belong to; people do not take responsibilities; they are concerned about their safety in work processes; people are opposed to changes; people must be controlled and, if appropriate, punished; people only want to maximize their material gains, neglecting the psycho-social needs.

Paper content

1. Identifying organizational priorities

Labor disputes can be prevented if the manager tries to systematically identify priorities established to meet organizational objectives through the practical use of the following guiding principles or ideas[2]:

1. labor division – specialization of functions and separation of powers which allow each person to work in a particular area and thereby increase efficiency;

2. authority and responsibility – right to give orders and responsibility for using this right;

3. *discipline* – understood as submission, diligence, respect; it is practiced by subordinates only if their bosses exercise their roles in a competent way;

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[1] See also Mc Gregor Douglas, *Leadership and Motivation*, (M. I. T. Press, 1966), p. 76 and the following.

[2] See Gazier, B., *Strategiile resurselor umane*, (Institutul European, Bucureşti, 2003), p. 79.

4. unit of command and action – embodied in what is called "linear hierarchical management", according to which a subordinate doesn't receive orders from more than one boss;

5. direction unit –people engaged in the same type of activities should be reported to the same objective, under a single plan that special programs can be derived from; in a more direct way, as Fayol's own words: "one boss and one program for an amount of operations having the same body ... a body with two heads is a monster ";

6. the staff's rightful remuneration – is a highly important motivational factor, although there is not a perfect remuneration system;

7.centralization and decentralization – decided by the type of company and the quality of its employed personnel; their aim is „the best possible use of the whole staff's knowledge";

8. hierarchy – the same hierarchical level but belonging to a different hierarchical line necessary to ensure unity; important is also the presence of cooperation or bridging ties between the departments / individuals from the same hierarchical level but belonging to a different hierarchical line;

9. order – concerns the rational use of materials and human resources and is achieved by means of plans for using time and materials or by selecting and organizing people; "a place for each person and each person in his place";

10. equity – involves a combination of goodwill and spirit of justice in the treatment of subordinates;

2. Avoiding authority abuse in favor of harmony

Normally, managers are assigned a degree of formal authority by the top echelon of their leaders. In the spirit of this authority, the manager can make decisions and employ the organization's resources. However, the authority over personnel is relevant to the granting of rewards and imposing of penalties. Because the authority is officially sanctioned by the organization through labor disputes, it is very important for managers to substitute to the formal authority an authority derived from personal competence. In this sense, Max Weber has become an author recognized for contributions to the development of management, one of the reference names for organizational psychology, his contribution to the foundation of a formal type of organization, "bureaucratic organization", being essential. What causes people to obey orders, do what is required? – Weber asked himself. In this context, he operates the distinction between *power* (the ability to force people to obey in spite of their resistance) and *authority* (voluntary fulfillment of orders received by people under consideration of their superiors' legitimacy). Based on how the authority is recognized, Weber described three types of authority, organization and default organization. The first type was called *charismatic* authority - from the Greek *charisma* which means grace, exceptional personality traits - accepted and respected by people because of their faith in the supernatural, extraordinary powers of a certain person. The second type of authority is the *traditional* one, based on the common past, tradition and customs. The third type is the *rational-legal* authority, founded on the belief in the value of laws and regulations. The practice of one or other of these types of authority determines the appearance of distinct forms of organization and management. For example, charismatic authority relationships usually lead to organizational hierarchies based on leaders and their followers or disciples, lack of orders and commands, which are the inspiration of the leader, irrational decisions are frequently met, the subordinates' behavior is dependent on the leadership.

Organizational efficiency and optimum climate in which conflicts of interest can be avoided are ensured in Max Weber's conception by meeting the following general principles of management:

- *express principle of division* of work between members of the organization which allows each person to know their responsibilities and specialization as a result of their enforcement;

- *principle of authority's hierarchy* in the virtue of which authority is given by position, each inferior position being under the control and leadership of the superior one;

- *principle of formal rules and regulations rationally established* (laws, decrees, regulations) which ensure the transformation of the authority's legitimacy into the legality of the general rule ;

- *principle of impersonality and impartiality* derives from the fact that the relationships between the members of organization and those between them and clients or beneficiaries are formal, official and based on rules unlike the impersonal activity, where the hatred and lack of passion, affection or enthusiasm derive not from a person's qualities, but from the hierarchical position and the system of formal rules;

- *principle of promotion* ensures the career ladder, the promotion being made according to the criterion of age, competence proved during the activity's performance or by combining these two criteria;

- *principle of efficiency* appears as a corollary of all the others, the efficiency of bureaucratic organization resulting from, as Weber himself says, its technical superiority versus any other kind of organization.

Compliance with these principles of bureaucratic organization leads to the emergence of numerous *positive effects*: increasing focus from the members on short segments of activity, but clearly demarcated between them, fact which fosters accurate and quick decisions; disciplining the organization's members (through the establishment of official contacts); reducing conflicts (if formal rules are respected); protecting the organization's members against abuse of authority (by prescribing behaviors); creating a feeling of safety (by anticipating behaviors regulated by rules, norms and not by intuition, improvisation); promoting objectivity (through impartiality).

3. Use of economic and professional motivation

Meeting the organization's strategic objective implies making a positive motivation for all employees, i.e. performing successful management concerning human resources[3].

Motivation is achieved through participatory management, knowing that major management decisions taken only in an authoritarian manner are subject to critical comments, generate dissatisfaction and are disputed.

A manager is efficient if he uses the interaction and masters the science of motivating the personnel.

Motivation is the sum of internal and external energies that initiate and direct human behavior towards a goal which, once attained, will result in satisfying a need. The reasons which animate people are an expression of their needs and expectations. Needs are defined as deficiencies that an individual feels at a time, and expectations are individual beliefs in the existence of opportunities that can be obtained by a certain level of effort and performance.

Primary internal energies that determine the motivation are simple: basic or primary needs (food, sleep, shelter), need for security and the need for recognition and belonging to the group; the internal energies are psychological self-esteem, self-affirmation and self-determination. These needs are highly variable in type and intensity, they are incentives for group work, though people don't always aware them and are strongly influenced by the environment in which individuals operate. External energies that influence motivation are the result of the manager-employee connection and are characterized by a pronounced dynamism that both "sides" can and should seize. On the other hand, social conditions and processes in general, the influences of friends, family, particularly natural and cultural factors, including organizational ones, can determine the magnitude of motivation for professional achievements of each employee.

In practice, people are characterized by very different levels of aspiration, what motivates one employee may not be sufficient for another.

[3] See also Stanciu, Șt., *Managementul resuselor umane*, 2001, p. 160 and the following.

Therefore, the motivation process must be strictly personal, which represents an important effort for the employer. Typically, basic needs, once satisfied, leave open the expression of the higher-order needs that are the real means of affirming the human personality.

It was concluded that motivating factors, exclusively pecuniary, which could increase the subjective value of work, taking into account the particularities of situations and persons to whom the successful business managers focus, are: appreciating the employees' success, the permanent information about the organization's performance, establishing professional goals which should incite, encourage initiative, the statutory teamwork climate, increasing the degree of autonomy and decision of the working teams, attract gifted staff etc. Among these factors, recognition of individual success and encouragement of communication in the workplace are critical in obtaining the successful participation of employees.

Negative motivation was based on threats, punishment, blame, financial penalties etc. Applying these tools should be limited, because there are a number of issues that reduce their efficiency:

- the sanctions have low motivational effects because they are considered by employees to be exaggerated;
- the sanctions cannot be applied in an objective way with the same intensity for individuals being in different situations, but having made the same mistake;
- the frequently application of sanctions induces a state of tension;
- the organization cannot be developed on a culture with negative valences.

It was demonstrated that the application of negative motivational factors led systematically to reduced job performance of individuals; the expected results have been obtained only by applying the means of positive stimulation.

In C. Lane's opinion[4], factors determining job satisfaction can be classified as: economic and professional motivations; social reasons; motivations related to self-realization; psychological motivations; psycho-social reasons.

Economic and professional motivations (incentives) include: salary, bonuses, profit sharing, lending, the existence of a health insurance system, facilities for career development, ensuring compatibility between the qualifications, skills and abilities of the employee and the job characteristics etc.

- Why should the manager get involved in the knowledge and materialization of his own employees' motivation?

The answer to this question has been given from totally opposed points of view. Therefore, according to the theory of D. Mc Gregor[5], the manager has to use the motivational lever because in the employees' personality structure there are negative traits that have to be correlated. For example: people do not like work; people are reluctant to work, if possible; people are less ambitious; people prefer to be led, directed; people are selfish and indifferent to the needs of the organization they belong to; people do not take responsibilities; they are concerned about their safety in work processes; people are opposed to changes; people must be controlled and, if appropriate, punished; people only want to maximize their material gains, neglecting the psycho-social needs.

Same D. McGregor leaves this slightly fatalistic theory and encourages the manager to use, however, work motivation if he wants performance and to prevent conflicts because: people are not lazy; people do not dislike working; people have the ability to automotive; people are stimulated by responsibilities; people are involved in changes, having the ability to imagine and create; people do not like to be controlled; in addition to basic needs and security, individuals also need self-determination and self-improvement; physical effort and intellectual effort at work are just as necessary as recreation and entertainment.

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[4] Quoted in Bosche, M. , *Les salaries et la participation*, (Paris, 1992), p. 85

[5] See also Mc Gregor Douglas, *Leadership and Motivation*, (M. I. T. Press, 1966), p. 76 and the following.

Another opinion (Gelenier)[6], considers that motivational procedures of the employed staff must be determined by knowing the following principles: employee performance is dependent on job satisfaction; people prefer to work in autonomous groups; people prefer to take decisions by consensus; people accept participatory management; people prefer informal associations.

These findings have established a distinct theory called the theory of expectations (V. H. Vroom is one of its representatives), which received two types of modeling:

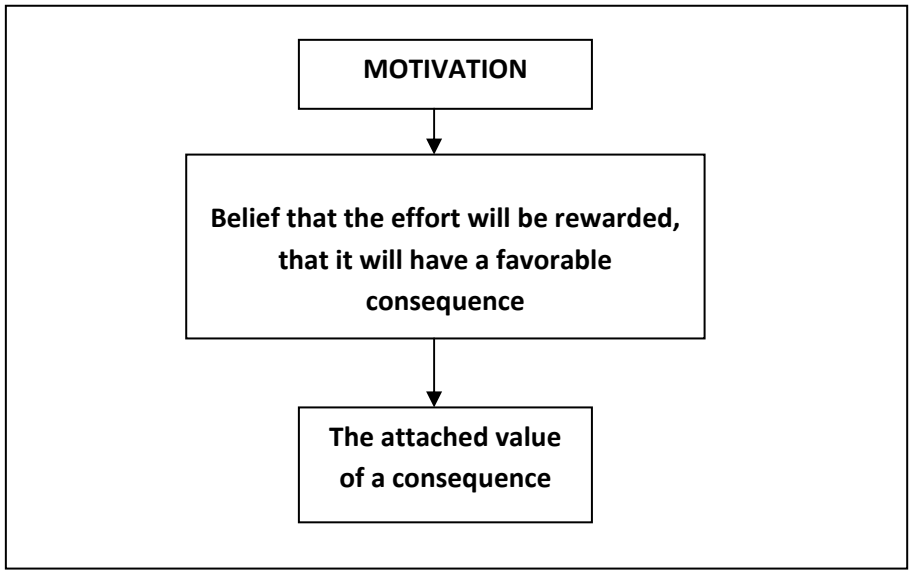

Fig. no. 1 – Adapted after Variant no. 1 regarding the "Waiting modeling" in the opinion of V. H. Vroom, quoted by Gelenier in *Strategie de l enreprise et motivation des hommes, p. 183*

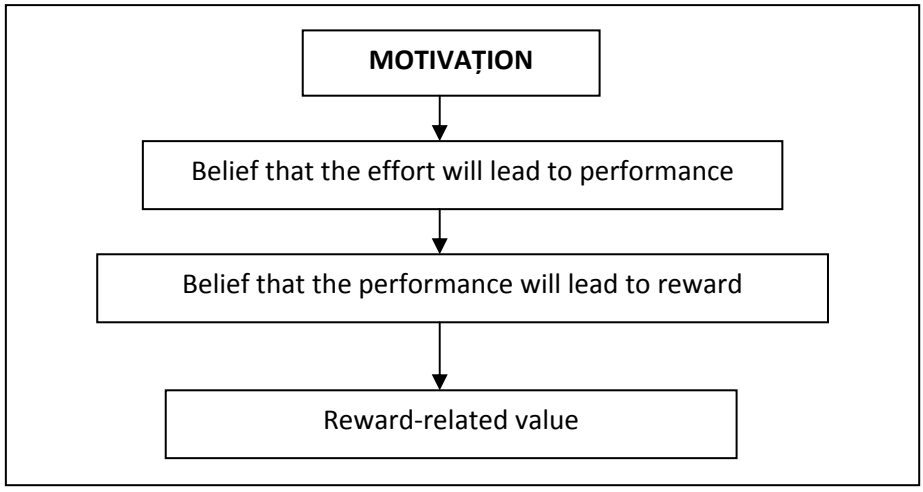

Fig. no. 2 – Adapted after Variant no. 2 regarding the "Waiting modeling" in the opinion of V. H. Vroom, quoted by Gelenier in *Strategie de l enreprise et motivation des hommes, p. 185*

[6] See also Gelenier, O., *Strategie de l'entreprise et motivation des hommes, (*Edition Hommes et tehniques, Paris, 1984), p. 171

In contrast, in a theory of efficacious conditioning, along with objective stimuli, the subjective ones were also highly appreciated, leading the assessment model to be expressed by the following causal relationship:

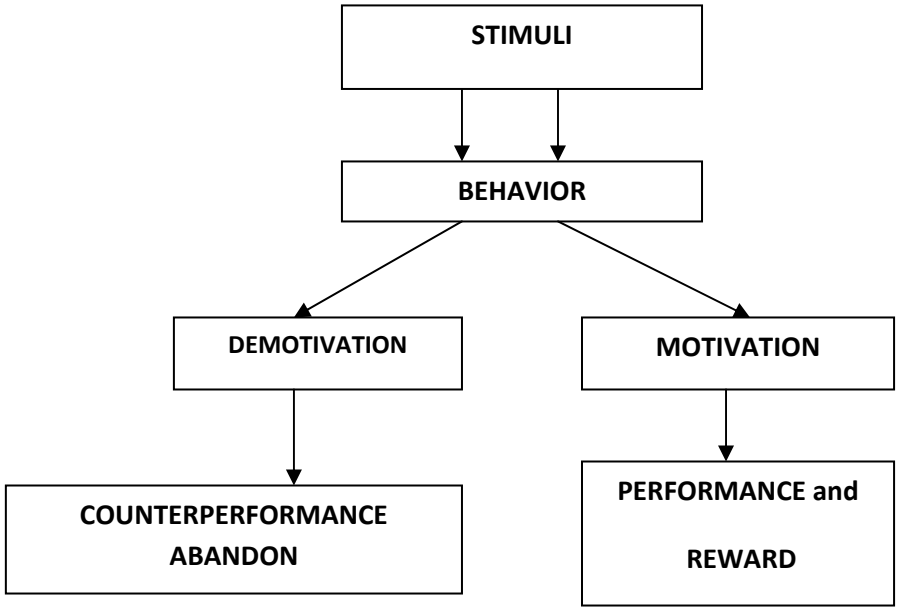

Fig. no. 3 – Waiting modeling according to the efficacious conditioning by Mc Gregor Douglas, *Leadership and Motivation, p. 172*

The equity theory[7] operates with input quantities (qualifications, skills, abilities, experience, talent, leadership, productivity etc.) and output values (rewards, recognition, prestige, esteem etc.).

According to the employees, the output has to be consistent with the input as a measure of their own activity, but also compared to the balance of other employees. The stability of their own balance (input quantity – output values) is the premise of the positive motivation, and the stability of the others' balance represents the equity confirmation in the personnel policy practiced by the organization - which reinforces positive motivation.

4. Negotiation efficiency

Negotiation involves a series of discussions and talks, a verbal communication between two partners with equal rights and correlative obligations.

The manager achieves by means of negotiation a series of operations: obtaining information, claims or demands, giving information and solutions, developing proposals, expressing opinions, accepting compromises. In order to make the negotiation efficient, the manager has to master the art of verbal communication[8], as resulted from the following specifications.

Triggered communication process gives hope to the discussion partners who achieve the following goals[9]: the received message is correctly received; the content of the message is understood and integrated to their own information sphere; the proposals made in the message are

[7] See Nothstine, W. L. , *Arta convingerii*, CODECS, (Bucureşti, 1998), p. 161

[8] See Voiculescu, D., *Negocierea – formă de comunicare în relaţiile interumane*, (Editura Ştiinţa, Bucureşti, 2002), p. 24

[9] See Belu, C., Belu A., *Negocierea contractului colectiv de muncă*, (Editura Reprograph, Craiova, 2002), p, 34-49

reported to the "landmark" data of the field and eventually accepted; the partner reacts as to the anticipated direction: changes point of view, position, attitude etc.

Each social dialogue partner can make use of a range of strategies to win the adherence of the other and hence the transformation of his own goal into a common one:

a) how he summarizes and argues the message in order to gain the partner's confidence ;

b) to ensure the partner that his interests are not affected by the content of the proposed message, there are no disadvantages that would mark his socio-economic balance but, on the contrary, he only has to gain through peace and social harmony which condition the economic performance;

c) depending on the stage reached in the communication process he should know when to say: "I wish to inform you," I wish to consult you"," want to work with you" or "want you to be convinced".

d) Communication style and strategy determine with certainty the success or failure, disappointment or fulfilling within the complex process of negotiating the social dialogue. The talent to negotiate inevitably implies two capabilities: the ability to know the man and the ability to use information. Taken in interaction, these capabilities mean "can" and by solving the equation of negotiation we do not except anything else rather than "want."

Under the first landmark, participants in the negotiations must take into account the following:

- formulate a correct view on the level of knowledge, sphere and depth of information of your partners on the issue that is the object of the negotiation;
- establishing an order, a logical sequence in presenting ideas statements, proposals, avoiding the mixture of words, the chaos of ideas;
- the clarity of statement or proposal must be accompanied by a coherent argument and approval;
- avoid staining the language or using neologisms that are difficult to understand.

Communication must take place within the time limits and by respecting the partner who is expected to provide "something." This requirement includes the following:

- each partner must know that there is a certain way to tell a word, to use a particular formula or expression and that is called common sense or civility, and 'civility is not money that enriches him who receives it, but he who gives it';
- tone, speech, expression, irony can result in a state of tension and anger and can thus transform the negotiating into an unnecessary and messy discussion;
- argument and demonstration through various means to induce the partner into a state of appreciation and fair assessment of his social position when negotiating;
- consistency in carrying out the negotiation, trust in the communication process, so that the partner feels the want to end the discussion with a common target and not stop in a spontaneous way the social dialogue.

The series of discussions and negotiations, proposals and counter-proposals, interruptions and reversals, justify the understanding of the term negotiation as a "transaction whose terms have not yet been fixed, but are due to be fixed[10]".

Negotiation technique includes the following requirements as well, which the partners have neglected at the moment of triggering the conflicts of interest within the health organizations we have studied:

- social dialogue, namely negotiation, must start in a moment considered optimal by both partners, that is, when social and economic context does not disturb by nature of the problems the content of negotiations, when partners were relieved of other tasks that could mark the availability for negotiation, when the legal norms of negotiation work through disposition and coercion;

[10] See S. Ghimpu, Al. Țiclea, *Dreptul muncii, (*Editura All-Beck, București, 2001), p. 761

- at the negotiating table all documentation relevant to matters subject to negotiation must be provided. Collection and submission of complete and accurate information is a prerequisite for concluding the agreement and particularly for its observance;

- because the conduct of negotiations may cause changes in the content of ideas, proposals and arguments, each partner must set a realistic limit of possibilities, depending on which they may or may not accept the compromise;

- differences in views and meanings in an argument are inherent during a negotiation, therefore, in such cases, the following methods are recommended: using an objection to bring into question the argument used by another partner in a different meaning; reformulating the objection by means of a gradual analysis and approach, trying in this order to get a punctual settlement as well; postponing the resolution of disagreements for another time or for a later stage, when other tangential proposals will be cleared and accepted; predisposition to reward, i.e. providing equivalent benefits, which otherwise would not have been obtained.

Mayer has elaborated a model of trust moderators[11]. Thus, he considered that when a person assumes the risk of investing confidence and the result is positive, then each other's appreciation increases, while if the result is negative, the conclusions are clearly unfavorable to the person who invested in that trust.

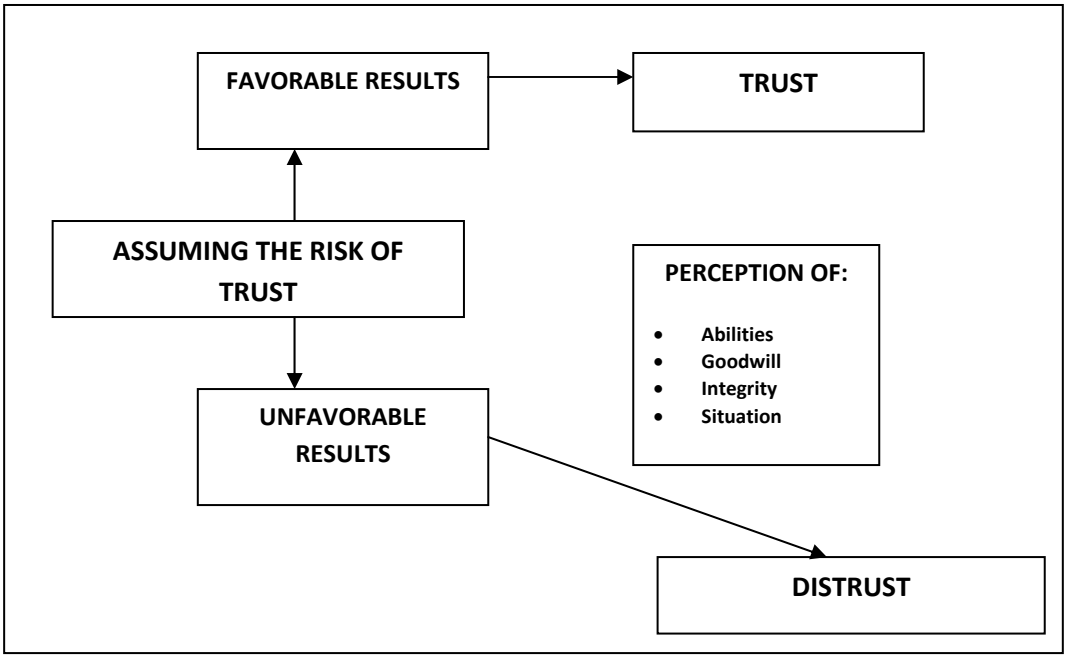

Fig. no. 4. – Adapted after ***Model of trust moderators*** (by Mayer, Davis and Schooman, in the paper *"An integration model of organizational trust"* vol. 20, p. 547)

Trust is an inherent result of communication and interpretation processes being a known fact that in the context of confidence the manager and employees are likely to negotiate and accept apparent compromises.

[11] See Mayer, R. C., Davis J. H., Schoorman F. D., *„An integration model of organizational trust" The Academy of Management Review*, (Briarcliff Manor, vol. 20, 1995), p. 709-835

Bargaining laws in this matter – By means of art. 2 of Convention no. 154/1981 of the International Labor Organization, collective bargaining is a term applicable to all negotiations which take place between a person who employs, a group of persons who employ or more organizations of employers, on the one hand, and one or more workers' organizations, on the other hand, in order to: fix the working conditions and employment setting, and / or regulate the relations between those who employ and / or regulate the relations between employers or their organizations and those engaged in one or more workers' organizations.

The collective bargaining agreement to which I refer requires measures adapted to national circumstances, in order to promote collective bargaining for achieving the following objectives (art. 5):

- the collective negotiation has to be possible for all those who employ and for all categories of workers engaged in the targeted branches of activity;
- the collective bargaining has to be progressively extended to all fields covered by this term's definition;
- to encourage the development of procedure rules agreed by both employers and employees organizations;
- the collective bargaining should not be impeded by the inexistence of some regulatory rules or the insufficiency or improper character;
- regulatory bodies and procedures of labor conflicts should be conceived in such a manner that would allow them to contribute to the promotion of collective bargaining.

Moving from the bipartite system was done by means of the regulation contained in art. 7 of the Convention: "The measures taken by public authorities to encourage and promote the development of collective bargaining will be subject to prior consultation and, whenever this is possible, to agreements between public authorities and organizations of employers and workers".

Stages of collective bargaining - Collective bargaining process is complex and can be analyzed on separate stages: preparation of negotiations, the initiative and start of negotiations, progress and conduct of negotiations, completion of collective bargaining.

a) *Preparation of negotiation* - is a step that must stand out in the mind of each participant in collective bargaining, being achieved through a thorough documentation and information relating to: external developments (if possible) and the internal structure of the economic or social life, which relate to the subject of negotiation; the techniques and procedures for conducting the communication and negotiation process; the clause terms upon which has been decided to be carefully changed (if they existed in the old contract in an inconvenient text, which is disadvantageous) or inserted (ascertained over time that their presence could be beneficial); the objectives that might concern the employer and their compatibility with his own interests; the frame in which the negotiations take place, the component of the negotiators' team, the evidence that could be invoked in support of proposals etc.

b) *Initiative and start of negotiations* – According to the text art. 3 par. 1 of Law. 130/1996 which states: "Collective bargaining at enterprise level is compulsory unless the unit has fewer than 21 employees", we deduce: collective bargaining is binding at one level, between the four levels at which collective agreements can be concluded: establishment level (not the branch level, or national group of units); mandatory collective bargaining is required by units law, and at their level, only those units that have a flock of more than 21 employees can make use of it; collective bargaining is possible - not required - at the level of professional branches, group of units, as well as at the level of a unit with a flock of less than 21 employees.

c) *Commencement of collective bargaining*. The start of collective bargaining, meaning the first meeting of the parties, seeks to define the immediate benefit: the information which the employer must provide the union delegates or employees and when he will meet these obligations; the information required has to enable a comparative analysis of the employment situation, the classification of occupations and professions, the salary level, the length and organization of working

time (we consider that the comparative analysis referred to in Art. 4 par. 2 letter A of the Act targets the already existing 'variables' and the estimated ones concerning the employer); the place where meetings will take place and a schedule of these meetings (i.e. dates and times agreed for dialogue). Running of negotiations is the dialogue core, the essential part of the negotiation process. According to the schedule established during the first meeting, each party attempts to synchronize their views, to present their arguments in a favorable atmosphere for the negotiation, to create a "plan" of the clauses, to confirm their availability for mutual understanding.

After a phase of probing and exploring, each side "dares" to submit their application or claim, after which they 'surrender' themselves to the negotiation, demonstrating from time to time that they can give up as well, seeking compensatory options or raising awareness towards the "subjective areas" with really optimistic and realistic promises.

Deferrals of sensitive issues are not excluded nor arrangements between partners, so that every one should be able to achieve at least one goal (the one which is thought to bring maximum benefits). The effort of persuasions is materialized in clauses.

Conclusions:

Negotiation necessarily involves meetings, consultations and negotiations between partners, which can not be held otherwise than through communication.

The agreement, convention or understandings as purposes of negotiation within the social dialogue involve the cooperation of social partners, i.e. a process of communication.

The language used in negotiation must be reported to two landmarks: the correct use of information and the avoidance of ambiguity; civility and respect towards your partner.

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VALUES OF THE EUROPEAN FINANCIAL SPACE

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Abstract
This paper aims to analyze the perspective of the European financial space which should allow the professional intermediaries – the credit establishments, the insurance companies or investment services, to propose their services to the entire community of customers. Actually, here are considered the traditional banking services, such as those that provide insurance, especially those relating to life insurance.
The access to regulated markets, it takes place in the perspective of this financial space, especially after coming into circulation of Euro coin. It should be insight, that the access to these markets, often requires the using of intermediaries. We can not speak about the existence of the financial space, without the freedom of action of these professional intermediaries. Concerning the freedom of these services, we can say that they depend on the movement of capital, and the movement capital is engaged since the directive of May 11, 1966, and subsequently is required after the June 24, 1988 and was confirmed by the Maastricht Treaty. Thus, we can discuss about the liberty of movement of capital, through angle the coordination of national legislation in matters of banks, the insurance and the investment services through a significant number of directives adopted. Nowadays, the European financial space is overtake, the EU borders and the internationalization of operations is require the extensive possible legal framework of application, also all the directives issued in matters of banks and insurance are covered by Annex VIII of the Agreement on the European Financial Space. The agreement also provides the interdictions of restrictions or discrimination concerning the movements of capital.
As a consequence, the study is approach both to aspects concerning the European financial space and the interdictictions of restrictions or discrimination concerning the movements of capital.

Keywords*: Financial Space, European Union, rights, investments, capital*

Introduction

The unprecedented development of international trade, growing mobility of capital and people, remarkable progress of science and technology and adaptation, by almost all villages of the world, the market economy system, generated starting and accelerating regional and global integration. A feature of modern market economy is the continued opening of outward and in those circumstances, national economies and, consequently, public and private finance in each state can not occur in a closed, is increasingly dependent on context International.

The fund finances the study of the internationalization of markets has expanded continuously, international finance, representing today a complex and highly topical. They include taxation as an essential component, which is based on two key levers: one such policy - fiscal policy (as a set of decisions that define and determine the sampling requirements) and other, legal - tax law (as a whole the legal rules of the tax).

Fiscal policy is so important for all countries, but it becomes essential when it comes to a group of countries (like the European Union) which aim to acționaze and develop together. This is

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because under such circumstances, action in a country usually have effects that propagate in other states, which requires that each country's tax system is as simple and as neutral as possible.

The major objective of the work and proposed was to show that there was need to remove barriers to the free movement of goods and services, capital and presoanelor to ensure proper functioning of the single market.

EUROPEAN FINANCIAL SPACE

Noting the existence of numerous and profound heterogeneity in some areas of public actions taken in tax measures were based on subsudiarității principle, under which taxation is an area of Community competence in tax matters and allocation policies will override national decisions. However, European Uniiunea could not ignore the tax for the simple reason that the tax measures taken by Member States may hamper the mobility of goods, capital and people and create economic distortions incompatible with the establishment of a unified economic space.A common market can be defined as a unique geographical area, substitute the diversity of national markets that have merged and is governed by the same rules of market economy (Tinca 2003).

It involves the disappearance of all barriers to free movement of goods within this unique geographical area and unique application of competition rules. Suppression of customs barriers and tariffs and the implementation of a national common customs tariff in relations between Member States and third countries differ fundamentally specific customs union common market free trade zones. In these latter products circulate freely, but each state retains its own customs regime, which we apply to sovereign import or export products. Eliminating all taxes and contigentarilor with protectionist measures and eliminating all discrimination by public or private nature, based on nationality are characteristic of the Common Market.

All this and attracted to establish the four freedoms within the common market: free movement of persons, services, capital and goods, freedom to ensure real and effective economic integration (Augustin 2006, p.160).

We conclude by stating that the common market is the essential component of international economic integration and also the primary means of achieving the common goals of countries that compose. The economic benefits that justify the existence of a common market are: fostering productivity growth and the general level of life, being more intense competition, consumers benefit from lower prices, as well as a greater variety of goods, superior quality, allows a production large numbers, leading to lower production costs, may help to optimize capital investments, allowing more rational and efficient use of manpower.

Therefore, both the EEC and other economic organizations integrationist, on other continents have placed in the center of the single market concerns and their actions that they consider the main unifying element for progress. European financial space beyond, today's EU borders and the internationalization of operations require the broadest possible legal framework of the scope, as well as all directives issued to banks and insurance matters are covered by Annex VIII of the Agreement on the European Economic Area. The agreement also provides for restrictions or discrimination in terms of capital movements.

Also it should allow profesioanisti intermediaries, respectively, credit establishments, societatatile insurance or investment services, to propose their services to the entire community of customers. Are taken into account traditional banking services, such as those that provide insurance, especially those relating to life insurance (Catherine 2000).

Access to regulated markets takes place in perspective the financial space, especially after the entry into circulation of euro. It should be borne in mind that access to these markets requires the use of intermediaries often.

We can not speak of the existence of the financial space without the freedom of action of these professional intermediaries. Regarding the freedom of these services we can say that they depend on the movement of capital and capital movement is engaged since the directive of 11 May 1966, and subsequently is required after the 24 June 1988 and confirmed by the Treaty of Maastricht. We can talk this through the coordination of capital movement libertatatea national legislation for banks, insurance and investment services through a significant number of directives adopted. Freedom of movement shall entail the abolition of capital controls on capital transactions. It should go up to ensure fair competition between countries with low tax and high tax ones. Liberalization of capital movements, while the rest was done faster than freedoms stipulated by the EEC Treaty, it is still partial, primarily due to different modes of taxation adopted by Member States. Treaty of Rome was inspired by the Bretton Woods agreements and made the difference between current payments and capital movements. Since the movement of capital may affect the traditional sovereignty of the state and can upset the economy, it has not been liberalized only gradually (Anghel 1993).

The acceptance date of a decision of the Court of Justice, current payments are transfers of foreign currency which is under consideration Underlying transaction. Must fit as distinguish between the circulation of capital, which represents the financial operations whose main purpose is to invest or make investments and current payments. Thus, the payment of insurance premiums in the event of liability or damages are paid current, while life insurance premiums paid is a capital change. Upon expiration of the transition period, current payments were liberalized, but states can check to see if the transfer is not a disguised capital transfer operation.

Transfers that have a connection with an investment capital are displacements, their diversity is uncertain, examples being the purchase-sale or subscription of securities, long-term investments or capital transfers in the execution of insurance contracts. Freedom of establishment includes the right of the investor community to have shares in a company established in a Member State. Similarly, freedom of performance involves liberalization in sensitive sectors in the short term movements and transfers, in order to undertake investments.

This Directive seeks to free movement of capital. This involves the removal of all permits for transfer between states. It is produced in this way, the unification of exchange markets.

Member States are free under specific laws, to take measures to regulate bank liquidity, even if they may affect the transfer of capital. Also, actions are allowed and administrative control, especially to deter tax fraud and to comply with the prudential banking. Moreover, the legislation contains a specific safeguard clause. When disturbances affect one or more Member States (there are high value transfers affecting domestic markets and the evolution of money) are permitted to limit measures the transfer of capital. Erga omnes liberalization of capital transfers was made by the Maastricht Treaty.

The principle does not only liberalization between EU Member States but also in relations with third countries. Capital transfers are free, provided not to mask money laundering operations or produce tax fraud. Union may, if public interest so requires, restrictions on capital movements. Over time, creating the single market has produced remarkable economic and social effects, for shaping the single market that has a vocation of becoming more pan-European Commission proposes that priority actions: preparing for the enlargement of the EU single market to new countries States, completing the legislative framework and improving his tighter tracking of how the application of Community law in Member States, strengthening the PU as the Economic and Monetary Union; improving the social dimensions of PU and adapt it to changes in technology (Favret 2000) (Information Society, Networks trans).

This paper aims to analyze the regulation of free movement of capital between Member States. Are envisaged abolition of transfer of all permits, even those who intervened automatically drive leading to the exchange markets: capital movements should be possible under the same conditions as the current payments. Also the work is meant to show spatiulului European financial perspective should allow professional intermediaries - credit establishments, insurance companies or

investment services, to propose their services to the entire community of customers. Considered here are traditional banking services, such as those that provide insurance, especially those relating to life insurance.

The international insurance market is characterized by a high degree of heterogeneity due to the diversity of events and activities causing damage that may affect them. As a consequence, practically no one can delineate the insurance and reinsurance market, each being characterized by the preponderance of certain types of insurance, the existence of certain companies insurance and reinsurance, specific rules and regulations, covering larger or more extensive exclusions.

The European level can be characterized by the fact that the world has seen an evolution of security as a whole, with certain common characteristics, but with considerable differences from one country to another (Muraru 2001).

To mention first is that Europe is the appearance of modern security remains a critical global market, with particularly rapid growth in the branches of life insurance and savings, but it occupies second place after the United States. We appreciate the fact that, currently, we are witnessing a maturation process of the single European insurance market, with accomplishments, but also its difficulties, still unsurpassed. Developing a single European insurance market has been a gradual process that lasted several years. European Union Directives on insurance is generally accepted principles in the European Community in order to standardize the rules for insurance and to facilitate international trade, referring primarily to the insurance business, but also the insurance. Today, there really is not a homogeneous pan-European insurance market, although France, Germany and England continue to hold this sector both in terms of number of insurance companies, as well as the income derived from insurance premiums. You can not talk about reconciliation of the legislative framework at EU level, as member countries, as well as those who join their national character keeps some laws that depend on cultural and financial markets of the country. The pan with the basic principles of the Treaty of Rome them, namely free circulation of people, goods, and services of the capital between Member States.

To constitute a single insurance market in the European Union, several directives have been promulgated within 35 years, cumulating with the introduction of the single European passport in the insurance sector. Application of these measures was extended by agreement with the countries forming the European Economic Area, and on Iceland, Liechtenstein and Norway, because the rules stipulated in the agreement include all directives that are based on the European insurance market (Schappira j,Le Tellec, Balisa j 1994).

Since Switzerland has withdrawn from the European Economic Area agreement, she signed an agreement with the European Union on 1 ianuarie1994 A in terms of property insurance. This agreement guarantees them non-life insurance companies in the EU and Switzerland, each entitled to one another and create a branch or agency to the other under conditions identical to those which, before July 1, 1994, were applied between EU member countries according to the first European directive on non-life insurance. If we refer to the smaller territories of Europe, Gibraltar is part of the European Union under the Treaty of Rome, so the insurance directives will apply in its territory. Isle of Man, Jersey Guersney and not part of a single European insurance market. Directives do not apply to insurance and insurance companies wishing to operate in this area will require obtaining a permit from the appropriate local institutions.

Construction of single insurance market has been achieved in three stages from the early 1970s. The first set of directives was to the right of establishment in non-life insurance (1973) and life (1979). The second generation of directives has considered issuing of conditions for free supply of non-life insurance services (1988) and in the life (1990). The last set of directives to refer, in essence, to establish a single licensing system, pine insurance companies admitted by a Member State, is authorized to operate both the establishment (agencies and branches) and through the free provision of services (activities occasional or temporary) in the entire space community. They were both apoB in 1992 for insurance and came into force in 1994. This has created a framework for

action insurance European directives regarding insurance constituted a unique example of integration. Nowhere in the world, even in a federal state like the United States, formulated no freedom of establishment and provision of services or a single license system, comparable to those achieved at the European scale. CEA (European Insurance Committee) is one of the prestigious institutions with interests in insurance.

It was established in 1953 and currently has 29 members, based in Paris. The purpose of founding this institution is to be Europe's insurers, and to promote their interests by providing qualified opinions of European or international organizations, public or private insurance or reinsurance, to facilitate exchange of information and experience between markets, developing studies in the interests of European insurance companies or to respond to their needs (Cosmin Costas Flavius, Minea Mircea 2009).

CEA periodically publishes various studies and statistics aimed at informing the issue in the context of the European single market, in parallel with the phenomenon of globalization increasingly stronger and more visible in recent years.

This notice some changes in several directions: between insurers, reinsurers and insured: large multinational companies tend to raise the threshold and to transfer risks autoasigurarii and some of them directly or reinsurers; choice is increasingly on the principle overall financial management between state and private sector, given its reduced share in the insurance field, opens up new opportunities for private sector insurers and bankers from the so-called "bancassurance", which gets more than an extension, so that before long we see that, without using the bank as a distribution channel for insurance products, neither of the two types of institutions will not survive.

Of course, of paramount importance in the present and certainly in the next decade, globalization of financial services will continue to mark the entire evolution of the insurance and reinsurance.

In Europe, the single insurance market covering 27 countries forming the European Economic Area (European Economic Area). With economic growth, insurance continued to grow in 1997, differences between life insurance, which increased by 14.1% and non-life that it grows slower by 8.8% over 1996. EU insurance market recorded a growth of 8.8% in 1997 compared to 1996, total insurance premiums accounting for more than ECU 543.7 billion GDP growth (2.7% in 1997 compared to 1996). In 1998, the CEA said that the three largest insurance markets in Europe (France, Germany, United Kingdom) accounted for 67.1% of total life insurance and 64.9 of the total non-life insurance. Seven other markets are in total 87% of each second type of insurance (Italy, Netherlands, Switzerland, Spain, France, Germany, United Kingdom). Even if there was more of an increase in life insurance, there was interest and other types of insurance, taking into account the damage of disasters (industrial risks, liability and damage to property, credit). Insurance is a key sector of the European economy, whose influence is felt both in the protection against economic and social risks in the member countries, the idea of stimulating role of medium and long term savings, as well as providing funds for financial markets. Moreover, another role is fulfilled by ensuring the development of asset management techniques and risk management. An important distinction must be made between life insurance and life insurance is not. Insurance is not traditional sectors of life insurance cover for damage and ensure accountability. These forms of deposit insurance does not affect the public, they are not a form of investment or plasamanet. Moreover, the community market in these branches of insurance is relatively saturated, not the same thing can be said about life insurance. In other news, presumes need insurance and reinsurance business, which can occur only in a professional manner. Reinsurance market is growing throughout Europe and even worldwide. We need to specify the bank and insurance are two distinct materials in the production. Also, even if common principles translate directives, let arminizare term substitute difference between credit establishments and insurance companies also prudential rules are clearly differentiated.

Thus, credit institutions may, in principle, operators provide insurance services, while insurance companies can not do this than banks. A decompartimentare is thus established between

the two types of activities: "bancasusurance" is not, possible within the same company. Distribution operators bank or insurance is separate from the main exercise of these activities. You can talk here, according to national laws about mixing a so yis the distribution.

Very schematically, the directives issued, whether in banking or insurance sector, is based on the sole control of the state authorities of the establishment of a bank or an insurance company. This is the principle of Home Country Control, as opposed to that of Country Risk Control. Place a headquarters location has become so very important, because this is the place to be centralized administrative controls. Even if there is harmonization in particular the prudential rules, it is not total.

Conclusions

In conclusion, we can say that within the European Union (EU) has intensified the debate on budgetary constraints due to the policies of globalization, as it is expected a further increase in real and financial capital mobility.

In these circumstances, we consider the liberalization as a threat to domestic policy goals, especially on social security. In response to these developments, some advocates for international coordination in the field of taxes, including weighing the possibility of creating the prospect of a World Tax Organization, while others pronounce to impose restrictions on international capital mobility. On the other hand, the findings of recent empirical studies (based on experience in OECD countries since 1970) show that while globalization shrinks the space for maneuver for national budgetary policy, but is still plenty of room for individual national policies.

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SOME ASPECTS ON THE CITIZEN'S RIGHTS. FREEDOM OF EXPRESSION AND PRESS (ARC OVER TIME: 1866 - 1991)

ANDREI TINU[*]
CĂTĂLIN BOBOC[*]

Abstract
The enuntiation principles of the French Revolution of 1789 , equality , liberty and fraternity , have penetrated all the European countries of the nineteenth century, and continue to be the basic principles of all democratic societies even now, more than two centuries after the fall of the Bastille (July 14, 1789), symbol of the old regime , obtuse and dominating the world , with reminiscence of medieval Europe. Declaration of Human Rights and Citizen, developed and edited on 26 of August 1789 , provides in its preamble that "... ignoring, forgetting or disregarding human rights are the only causes of public evils and corruption of governments ...", thus showing that man and his rights were to become the center of the universe.
It is necessary to start the analysis of political, cultural and constitutional life of Romania of the nineteenth century from these principles, because only thus will we will understand how the modern Romanian state formed , developed and evolved , first under the scepter of „The beloved prince of the Union", Alexandru Ioan Cuza and then ,during the great reign of King Carol 1st, during which , it was adopted on 1st of July 1866, the first deed with the status and name of the Constitution.
Over the years, exactly two hundred years after the French Revolution, Romanians cried their desire to live free in a country where human rights are respected and where access to information and freedom of expression must be met by fundamental Law . Our study comes to show the developments in the Romanian press of the two crucial moments in the historical development of Romania, respectively the first decade after the Constitution was adopted in 1866 and the first decade after December(1989).

Keywords*: history, law, Constitution, freedom, press*

Introduction

The enuntiation principles of the French Revolution of 1789, equality, liberty and fraternity, have penetrated all the European countries of the nineteenth century, and continue to be the basic principles of all democratic societies even now, more than two centuries after the fall of the Bastille, symbol of the old regime, obtuse and dominating the world, with reminiscence of medieval Europe. Declaration of Human Rights and Citizen, developed and edited on 26 of August 1789, provides in its preamble that "...ignoring, forgetting or disregarding human rights are the only causes of public evils and corruption of governments..."[2], thus showing that man and his rights were to become the center of the universe.

It is necessary to start the analysis of political, cultural and constitutional life of Romania of the nineteenth century from these principles, because only thus will we will understand how the modern Romanian state formed, developed and evolved, first under the scepter of Alexandru Ioan Cuza and then, during the great reign of King Carol 1st, during which, it was adopted on 1st of July 1866, the first deed with the status and name of the Constitution. The 1866 Constitution shows interests to civil rights, freedom of expression and, especially, freedom of the press. In this context we have to look at the huge number of publications that have appeared in the first decade after the

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[2] Apud Eleonor Focşeneanu, *Constitutional History of Romania, 1959 - 1991*, second edition, (Bucharest: Humanitas 1998), 7.

adoption of the Constitution, and to the emergence of writers as well, who would contribute to the affirmation of the Romanian spirit, if we think only Mihai Eminescu.

Over the years, exactly two hundred years after the French Revolution, Romanians cried their desire to live free in a country where human rights are respected and where access to information and freedom of expression must be met by fundamental Law. Our study comes to show the developments in the Romanian press of the two crucial moments in the historical development of Romania, respectively the first decade after the Constitution was adopted in 1866 and the first decade after December (1989).

The questions, justified, are related to similarities and differences between the two important moments of our national history - Alexandru Ioan Cuza's departure and the arrival of Prince Carol of Hohenzollern (Singmaringen branch)[3], respectively the fall of the Ceausescu regime and the establishment, after more than four decades, of a democratic regime.

As a result of the blood tribute given by the young generation in December 1989 due to the courage and determination of young people dead in Timisoara, Brasov and Bucharest, the Romanians could manage to talk, meet and freely express themselves in free writing.

Undoubtedly, though hard to believe, there are strong similarities between the two important moments of the Romanian historical evolution , similarities related to the causes that led to the *outbreak of the need for freedom*, either if we talk about anti-democratic drift of the beloved prince of the Union, Alexandru Ioan Cuza, or if we refer to those 70 years of dictatorship of the last century (Royal dictatorship, between 1930 and 1940, military dictatorship of Antonescu, between 1940 and 1944, and especially the communism one ,that ended in a brutal and bloody way , in December 1989). Both regimes have wanted - and managed more or less - to eliminate any obstacle, any barrier, any critical voice.

Prohibition of the three editorials in the last years of the reign of Alexandru Ioan Cuza and pressures to which journalists were subjected between 1864 and 1866 have found correspondence especially in the years of communist dictatorship, where any grind against those in power were simple night dreams .

It is true that dictatorial abuses of colonel Cuza are insignificant comparing to the communist totalitarian regime, just as it's true that, keeping the proportions (historical time, population, social and technical developments) the similarity is very high. Therefore, the will of freedom, the desire to be informed and to express yourself freely were equally legitimate both in the second half of the twentieth century, and in the panel's final of the second Christian millennium.

Because the freedom refers to spirit, and the spirit refers to God. Talking about civil liberties and freedom of the press at the time of 1855, Mihail Kogălniceanu said that "the press is the extended echo of the human speech, is the tribune of the voice of the crowd resounded to the ends of the civilized world; everything is done, everything they say, in the press, all that is discovered in any part of the world it is spreaded throughout the world and it is owned by the extent of mankind"[4]. In 1859, Dimitrie Bolintineanu considered that "freedom of thoughts it is a right that man is born with, it is for the spirit what is the free movement for the body, and the nation and the laws established by the men adjust the course and sets its limits"[5].

1.1. CONSTITUTION OF 1866 AND PRESS FREEDOM

Constitution of 1866 it is considered as one of the most democratic and visionary fundamental laws of Europe in the second half of nations, inspired by the Belgian Constitution of 7 February

[3] Mihai Bărbulescu et al., *History of Romanians* (Bucharest: Corinthian Publishing 2003), 311.
[4] Mihail Kogălniceanu, *Profession of Faith* (Bucharest-Chisinau: Litera International, 2003), 174.
[5] Marian Petcu, *History of the Romanian press* (Bucharest: Triton, 2002), 53.

1831.[6] Entry into force of the Constitution on 1 July 1866, introduces for the first time the provision according to which "Romanians enjoy freedom of conscience, freedom of education, press freedom, freedom of assembly"[7]. That was the evidence of the fact that European and reformist spirit of the nineteenth century entered the Romanian territory too, through the Constitution of the new state, which hasn't gained its independence yet, but that acts independently.

Constitution of 1866 enshrines the Romanian national state, proclaiming a constitutional monarchy on the grounds of separation of powers as well as the rights and freedoms of the citizens. By means of its content and form, it can be considered the first Constitution of Romania. By means of its essence, it is a modern, democratic constitution.[8] The emergence of the two major political parties - the conservative and liberal - was a consequence of the fundamental ideas of the French Revolution and guaranteed by the fundamental act of the new state until the development of the Constitution of 1923.

The most sensitive areas of constitutional amendments were undoubtedly those of freedom of opinion and freedom expressed especially through the press.

Evolution of the daily press would highlight the ascendant trend of Romanian society, although attempts to suppress freedom of expression, due to political passions have existed even after 1 July 1866.[9] However, we cannot say that abuses were widespread and that freedom of expression of Romanians was restricted. As a result of the Constitutional provision, the Romanian press was becoming one of the power of the young state, freedom of the press being inspired "by the formula of Thiers, who qualify the intention of undermining press freedom as a <<murder>> because <<the civilization is its creation>>"[10]. Constitutional guarantees were given by the provisions of Article 24 according to which “the Constitution guarantees to all citizens the freedom to communicate ideas and options and publish them through speech, through writing and through the press,"[11] each citizen being responsible for his actions before the law, but "no censorship or other preventive measure for the development, sale or distribution of any publications will be able to re-establish it"[12]. Therefore, the right to free speech was guaranteed by the Fundamental Law. These provisions were put into practice by the emergence of an impressive number of publications; approximately 250 magazines and editorials made their appearance on the Romanian market in the period 1866-1877, even if it was a change of name or recurrence of the same title.[13]

At first shy appearances only in Bucharest and Iasi, and shortly, to expand in most major cities in more than 26 centers.[14] Also during this period, some major national periodicals have come on the market with provincial editions, such as "Informatia Bucurestiului" newspaper published between 1869 and 1872, which had editions in Iasi and Galati. In 1872, appears the first evening editorial at Focsani, entitled "Patria". Some periodicals have had a short life, being published between half a year and, in the happiest situation, few years, depending on the quality of journalists and the interest or potency of their owners. There have been few publications that have resisted and had continuous appearances. Political press demanded their rights of suzerain power, especially as a result of crystallization of the two major political poles: conservative and liberal.

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[6] Focşeneanu, *Constitutional History of Romania*, 7.

[7] ***1866 Constitution.

[8] Emil Cernea and Emil Molcuț, *History of the Romanian State and Law* (Bucharest: Juridical Univers, 2006), 275.

[9] Vasile Pasailă, *Press in the modern history of the Romanians* (Bucharest: PRO Foundation, 2004), 84.

[10] *Ibidem*, 83.

[11] ***1866 Constitution.

[12] *Ibidem.*

[13] ***, *History of Romanians Vol VII, Tom I: Formation of Modern Romania* (Bucharest: Encyclopedic, 2003), 842

[14] *Ibidem.*

Political struggle moved in a short time in press area not just on the political scene but in the street as well. Thus, the main editorial of the radical liberal became the newspaper "Romania", reappeared after 1866, a redoubt against the power, either liberal-moderate or conservative.[15]

"Romanul" was followed in the support of the liberal ideas by the "Perseverenta" appeared between 1867 and 1869, and "Democratia" liberal newspaper appeared, in Ploiesti, between 1869-1871. Both newspapers were edited by Al. Candiano - Popescu.[16] Political conservatism was served by the "Pressa", published between 1868 - 1881, "Terra" (1867 - 1870) and, especially, "Timpul", edited from 15 March 1876 where pillars of the Romanian culture went to journalism school - Slavici, Caragiale and Eminescu, who was editor of "Timpul" between 1880 and 1883.[17] "Trompeta Carpatilor", edited by Cezar Bolliac, "the Telegraful de Bucuresti" of I.C Fundescu, or "Reforma" of Valentineanu were left-wing newspapers. Also on the left wing were the workers periodicals "Analele tipografice", "Uvrier", "Lucratorul roman" or "Lucratorul", with sporadic appearances between 1869 and 1872. In 1877, the year when Romania declared its independence from the Ottoman Empire, appeared on the Romanian press the newspaper "Socialistul", the first socialist newspaper, but after just three numbers, had ceased operations. The newspapers belonging to national minorities have been published due to the freedom of expression guaranteed by the Constitution of 1866, in Bucharest and small Romania there were newspapers in French, German, Hungarian and Italian, Hebrew newspaper, three titles published by the Greek minority and 23 titles of the Bulgarian media. Scientific media, cultural and humoristic had a great evolution. Thus, by courtesy of the legislature, were found over 30 titles of humorist newspapers and 80 cultural and scientific newspaper, among which has been noted "Convorbiri literare", a journal published on 1 March 1867, in Iasi, under "Junimea" and that will dominate for two decades, the entire Romanian cultural press.

Ancient Mother of the Romanian people-as Mihai Eminescu called the Orthodox Church-could not stand aside to express herself through the written word; At 1 / 13 October 1874 it began its long existence, "the Romanian Orthodox Church", newspaper of our national Church.

But political power, either conservative or moderate, could not sit idly by, expressing itself, apart from periodicals which supported one or the other political poles, through 30 newspapers official and unofficial as well.[18] As a conclusion of the first period analyzed, we may say that press freedom has played an important role in the crystallization of national consciousness of the Romanians in the second half of the nineteenth century, in the foundation of the national state, in gaining the state independence, which was earned due to the brilliant writers that have served their apprenticeship in the press emanating as a result of the Constitution of 1866.

Because the spirit of a nation and, especially, the educating of this spirit , is given by mass culture and mass culture can be done only through the media, for "periodical press, which in democratic countries is called the fourth power of the state, and in all over the world, even in the places ruled in the most despotic way, came to be a need for governments and peoples"[19], being a manifestation of the spirit, which "came to be such great power and sometimes more terrible than any other".[20]

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[15] Pasailă, *Press*, 85.
[16] ***, *History of Romanians*, 842 - 843.
[17] Pasailă, *Press*, 85.
[18] ***, *History of Romanians*, 842 - 843.
[19] Kogălniceanu, *Profession*, 174.
[20] *Ibidem.*

2.2. ELEMENTS OF THE RIGHT TO FREEDOM OF EXPRESSION AFTER THE 1989 REVOLUTION

After 123 years of the adoption of the Constitution of 1866, which allowed the explosion of the number of newspapers and magazines, another important moment in Romanian history was to come. Gorbachev's Glasnost and Perestroika brought the debate of the very existence of the Soviet Union and Communist Bloc. The year 1989 was to produce, one by one, the change of the socialist regimes in Eastern Europe and the fall of the Iron Curtain, about which Winston Churchill talked about in 1946. Romania was part of the trajectory of change imposed by those times, too.

Revolutionary events of December 1989 would end 45 years of communist dictatorship, would break ties with a past that has meant, at least in its first part, an era of destruction of Romanian values, an era of national culture harvest peak. The causes that led to the outburst of feelings of freedom and democracy, to the blast of the end of the year 1989 in Romania, were even more widely, the same as those which have led to the forced abdication of Cuza, to the foreigner coming to the throne and Constitution adopted in 1866. A relevant and objective analysis of the Revolution may not yet be made, requiring the passing of the time, the emergence of yet secret documents, the exchange of generations ... What we can do however is to note that the Revolution (by some), or coup d'etat (by others), contributed decisively to change the course of history of the Romanian people. An important aspect of the revolutionary conquests was the right to liberty.

Romanians fought in December 1989 not only for bread, cola or chewing gum, but especially for DEMOCRACY and FREEDOM. The 2-hour television program of the only existing television, the tributes to the dictator's couple and the amputation of any nerve of resistance were the decisive elements of triggering events in the late '80s. Among the freedoms gained by the Revolution, freedom of expression was perhaps the most important gain of all.

Since the days of the events of December 1989, the power legitimized by the revolutionars - the National Salvation Front - issued legally binding provisions, which provided, inter alia, "the promotion of a humanistic and democratic ideology, the true values of humanity. Remove the untruth and the imposture, deciding the criteria of competence and justice in all spheres of activity"[21], especially "freedom of press, radio and television, shifting it in people's hands"[22], provisions which were taken after from the Constitution then validated by referendum on 8 December 1991.[23]

Under Article 80 of Decree - Law no. 92/1990, the Parliament elected in Romania on May 20, 1990 had an important task to develop the new Constitution of Romania after the removal of the communist regime. The new Parliament, elected on 20 May 1990 in the Constituent Assembly was formed and preceded to editing the new Constitution which was approved by referendum on December 8, 1991. 1991 Constitution is the Constitution of a democratic and social state of law, in which the dignity of human personality, the rights and freedoms, the development of human personality, the justice and political pluralism represent supreme values and are guaranteed.[24]

Through the development, adoption and entry into force of the Constitution, Romania broke the connection with its past, whether the democratic interwar period, or its Communist period. Despite appeals and sometimes confusing provisions, the Constitution of 1991 brought a new pulse in Romanian life, especially concerning freedom of expression. Freedom of expression is the ability of citizens to express through speech, writing, pictures, by sounds or other means of public communication, thoughts, opinions or beliefs and creations of any kind. However, the formulation of broad constitutional matters covered expresses the impossibility of all spiritual creations of the

[21] Decree – Law no. 2/1989.
[22] *Ibidem.*
[23] Focşeneanu, *Constitutional History of Romania*, 148.
[24] 1991 Constitution.

inquisitive human mind can imagine and realize.[25]1991 Constitution forbids censorship of any kind; this prohibition is not applicable to professional censure, which remains desirable to educate the nation.

However, freedom of expression is not absolute and as such is subject to restrictions relating to defamation of the country and the nation, any instigation to a war of aggression, hatred, racial, class, religious incitement to discrimination, separatism or territorial public violence and obscene contrary to morality.[26] Thus, Article 30 and 31 of the post-revolutionary Constitution were fully dedicated to freedom of expression[27] and right to information[28]. Paragraphs (a),according to which "freedom of expression of thoughts, opinions or beliefs and freedom of any creation, by words, writing, pictures, by sounds or other means of communication in public are inviolable" (2), which stated that the censorship is prohibited, both in Article 30 and paragraph (a) of Article 31, which stated that "the right person to have access to any information of public interest can not be restricted "are considered to be legislative instruments related to the development of unprecedented post-revolutionary Romanian media.

Long expected freedom was to find in the first decade after 1989 the largest manifestation in the pages of the newspapers, and since 1990s, newspapers gave away its place to the TV, observing in the same time, a collapse of the newspapers. Now, the only publications capable to support themselves are the tabloids. Thus, in 1990 or 1992 media provided broad social and political spaces to analysis, cultural differences, the debate between the old and the new generation, among poets and anticommunists, in a word, the space was intended for discussion of substantive journalism. Soon, however, the freedom was to go, either from economic interest or the desire to create the rating into filthy areas of pseudo-journalism, turning now into an instrument of stupidity that Sartori was talking about.

Evolution of the Romanian press, in the titles and circulation, would know a winding course from the 1468 titles in 1990, at 1205 in 1992, to reach, in 1994 to 967 titles, then climbed in 1997 to 1855 titles, but with continuing declines in the circulation of material media ("The Truth" - from 2 million copies in 1990 to about 200,000 in 1992, while "Romania Libera" went down from 1, 5 million to just over 100,000 copies, and all other newspapers as "Dreptatea", "Azi" or "Tineretul liber" collapsed from over half a million copies a circulation below 100,000 copies).[29]The important names of the daily press are: "Adevarul", "Libertatea", "Evenimentul Zilei", and the weekly will remain "Academia Catavencu", "Formula AS", "Romania Mare" (with over 1 million copies in the period 1990 - 1992), names that remain today, despite the economic pressures imposed by the taste of the reader.

A special segment of the Romanian press was the post-revolutionary audio-visual media. Shy at first, the appearance of private television at the national and local level were to change completely the need for informing and educating the population. Thus, TVs like Pro TV, Antena 1, OTV, Prima TV or B1 TV will be imposed, assuming control of Romanian media. It is noteworthy that the Junimea generation and the epigones of Eminescu of the nineteenth century is now the generation PRO or generation "From Love".

A major chapter of the written press since December 1989 is for confessional media, especially those published by the Romanian Orthodox Church, whether we talk about newspapers and magazines of the Holy Synod of the Romanian Christian Church, or those issued by the Metropolitan, Archbishops and Orthodox Bishops in the country or abroad - a total of 50 titles. Since

[25] Gheorghe Iancu, *Constitutional Law and Political Institutions* (Bucharest: Lumina Lex, 2002), 175.
[26] 1991 Constitution.
[27] 1991 Constitution.
[28] 1991 Constitution.
[29] Pasailă, *Press*, 266.

December 29, 1989 comes the periodical of the Church, theology and spirituality "Vestitorul Ortodoxiei" published by the Romanian Patriarchy.[30]

Other titles that have been noted were: "Ortodoxia", journal published by the Romanian Patriarchy, whose new series was published from January to March 1990, "Tomisul ortodox", published by the Archdiocese of Tomis from April 1990 "Glasul adevarului", which appears in Buzau, "Candela Moldovei", publications of the Metropolitan Archdiocese of Moldova and Bucovina and Suceava and Radauti, occurring in Science, since 1992 and Suceava, in 1991, "Renaissance" of the Archdiocese of Vad, Feleac and Cluj, which occurs in 1991, or "Christian fortress", edited since 2002 by the Archdiocese of Craiova, etc..[31]

Conclusions

Discussions related to freedom in general and freedom of the press, in particular, will continue without to exhausted the subject. Through this study, with its good and bad, we try to mirror two worlds, two basic stages of historical evolution of the Romanian people. Although separated by more than a century, the two Constitutions are guided by the same principles that have their origin in the principles of the French Revolution enuntiation of 1789 - equality, fraternity, liberty.

We can easily see that freedom is the fundamental need, regardless of time and space, regardless of age group or social class from which these freedom seekers come. On two conditions: that the informant is honest and informative (container) to be educated and know what to choose, because, otherwise, both will become tools of manipulation.

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[30] Ilie Rad, *Cultural journalism in actuality* (Cluj-Napoca: Tribune, 2005), 23.
[31] *Ibidem* 24-41.

THE INDIVIDUAL RIGHTS AND THE STATE

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Abstract
The concept of man's individual rights appeared a long time ago as a means of the individual's protection in relationship with the others. Living in a society, man interacts with other people, and these relations are regulated by certain rules. Once the state was formed, these rules become increasingly powerful while the concept of freedom is differently acknowledged.
What actually lay at the basis of individual rights' development was the concept of natural right which appeared in ancient Greece, and which can be traced throughout history like Ariadne's thread, guiding different thought schools. Human's fundamental rights are sanctioned only after being put down in the constitutions of different states, and once regional and international protection instruments are created. Nevertheless, in countries controlled by totalitarian regimes, human rights were infringed, the individual having to obey the collective community.
These regimes having collapsed, individual rights underwent a change for the better, but they also came to a standstill due to 9/11 or Ground Zero. After this event, and in the context of the fight against terrorism, individual freedom was limited in the name of freedom itself, and individual rights are currently regressing as to the possibility of being exercised.

Key words: *individual rights, fundamental rights, state, terrorism, private life*

Introduction

The fundamental human rights are an expression of the tremendous effort made to achieve the highest ideal of justice and good for everybody. Those rights came into being basing on the concept of natural law as a form of eternal truth, spread all over the universe and perceptive by the help of the reason of the human minds like the axioms in geometry.

Legal protection of human rights, a central idea to many current legal systems, has experienced a long and sinuous process of evolution throughout history, its purpose being that fact that today no one can deny their existence and their need for their defense.

From a historical perspective, "the human Rights (...) emerged as a tool to protect the individual in his relations with the community, whose primary function was the restriction of the political power in order to allow a free and full expression of the human being."[1]

The individual lives in the society by establishing relationships with its peers, due to either natural aspects or forced by circumstances. Wherever people met, there have always been conflicts among them, resulting from the opposition of the ideas that people have, or the rivalry of desires. Therefore people reached the conclusion that there must be a sort of a moral code and some generally recognized rules followed by everybody, even by those who violate them and that those rules should represent both an impulse and a compulsion. These "rules" were originally various taboos, beliefs and practices, all gathered under the name of tradition, later on established through a powerful tool designed to protect the rules and to punish those who violate them - namely the State.

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[1] Muraru, I., Tănăsescu, E., S., *Constitutional and Political Institutions*, (All Beck Publishing House, Bucharest, tome I, 2005) p. 136.

The state is an indispensable tool to serve as an arbitrator, which must ensure compliance with the rules and punish violations. The state has an "historic mission"[2] to produce the right, then being itself subject to.

The State, as well as the law, is the product of an evolution in time and space, the individual giving up its own initial freedom in exchange of a body of laws that would ensure peace and its legal status. As society was divided into classes, the ruling minority was the one who took the prerogatives of designing and enforcing the law.

Paper content

It is said that, both the right, and the state, were born in the Ancient East, specifically in the region between the Tigris and the Euphrates rivers, nearly 6,000 years ago.

In fact, there were found the first written records of decrees carved on clay tablets by priests, found in the ruins of Ur.

Here, there was also discovered the first comprehensive body of law known in history, proclaimed by King Ur-Enguri (2112 BC-2095 BC), in the great Sumer, which regulates the habits of Ur. This code prepared the material from which Hammurabi, king of Babylon (1730-1686 BC), inspired in drawing of his more famous code.

Then the ancient Egypt, Babylon, Israel, the Persian Empire, the Ancient India and China followed, with various forms of state organization and also with the regulations, which revealed the fact that the state as well as the law depend on the social– historical changes.

In Europe, the first states and law based communities are in Sparta - The Laws of Lycurg (The Spartan code), in Greece - Dracon and Salon's Laws, in the Roman Empire - The Law of 12 slates.

In The Ancient Greece, by the help of its great thinkers - Aristotle and Plato - for the first time the natural law is mentioned and the fact that people have rights, they are free, of course not all concepts in the sense that we know today. Influenced by their thinking, Roman jurists develop ideas on human rights, an important step in the process of their establishment, being a creation of jus gentium as a system of rules by which certain rights are acknowledged to all people.

Subsequently, the ideas about existence and the need to protect the fundamental human rights are taken up by the School of the natural law thinkers (H. Grotius, Pufendorf S.) which implement them into the people's consciousness, grafted on the fight against the monarchical absolutism.

The crystallization of the idea of fundamental human rights and its legal recognition were obvious after the French Revolution, whose ideals were based on the concept of natural law, social contract and on the same necessity of resistance against the absolute monarchy and its arbitrariness.

Ideas about the fundamental rights were then taken over by the fighters for independence in North America, these ideas being at the basis of the struggle to establish and develop the United States of America.

Subsequently, the concept of fundamental rights was accepted and reproduced in most of the systems of law.

Even if the human rights exist and act as such, in a natural way, the legal, political or economic mechanisms, cannot be created, through which their protection to be ensured. A first step in solving this problem is to put these rights into national and international legal documents as an effective protection is only where there are legal mechanisms of protection and enforcement against their violation.

"Their establishment (n n. of the essential rights) at the normative constitutional, level, guarantees them the most effective legal insurance, since they benefit both of the mechanisms of

[2] Kelsen, H., *Pure Theory of Law*, (Humanitas Publishing House, Bucharest, 2000), p. 339.

ensuring the supremacy of the constitutional standards and the legal mechanisms specific to the subjective rights protection".[3]

By signing the Constitution, the essential (fundamental) nature is acknowledged to these rights and guaranties are created as regards their exercise and protection.

As a definition, we call the fundamental rights as "those subjective rights of citizens, essential to their life, liberty and dignity, indispensable to the free development of the human personality, rights established by the Constitution and guaranteed by the Constitution and laws."[4]

What is worth mentioning about them is that both the national laws and the international instruments are recorded as "recognitions" or "statements", the concept of human rights being beyond their recognition through the texts.

As regards the two source – statements of the fundamental human rights protection (The Declaration of Independence of the United States of America, 1776 and The French Declaration of Human Rights and Citizen, 1789), it "deeply imbued with the ideology defined by Locke and Rousseau , ascertain the inherent rights of the human being and previous to the establishment of the society: they recognize <<rights to>> (live, movement, have an opinion) and not <<rights to>> (employment, social protection, a satisfactory standard of living) <<rights of resistance>>, which involve freedom of choice and individual action and abstention of the state, and not <<claim-rights>>, involving a claim of the individual against society and the positive allowance of the state."[5] These rights cannot consist of debts from the state because they are pre-existent to the state.

The fundamental human rights are classified into several categories according to certain criteria. Thus, depending on the coverage, there are systems and hence regional rights (which apply in a given territory) and the rights of universal application (in the whole world). Depending on the recipient of their essential rights, they are classified into general (applicable to all individuals) and specific (applicable only to certain groups - women, children, employed persons). According to the same criterion, one can distinguish between individual rights (of every individual) and collective rights (which protect people communities, such as the minorities). As regards these latter rights we should specify that " the collective rights holders do not have mechanisms enabling them to guarantee their exercise, and on the other hand, it is no less true that by following the collective rights, such as the right to peace, the right to development, the right of peoples to a healthy environment, the essential premises of observing the individual rights are ensured".[6]

According to the criterion of content, the human rights are classified as civil and political rights and economic, social and cultural rights. From a historical perspective, the civil and political rights are those which imposed in the fight against the absolutism, being considered first generation rights, while the economic, social and political rights are considered as being part of the second generation.

Depending on the criterion of content we can also distinguish several categories, a first class being the one of inviolabilities[7], which are those powers ensuring life, the possibility of free movement, physical and psychological safety and that of home safety, being part of the first generation of fundamental human rights. Besides these, depending on the chronological establishment through instruments of protection of the human rights, we can speak of first, second or third generation.

Although well known, established and individualized by protection instruments whose legitimacy is beyond doubt, there are many cases of restriction or infringement of individual rights, even in these circumstances.

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[3] Kelsen, H., [4], p. 138;

[4] Muraru, I., Tănăsescu, E., S., [3], p. 140;

[5] Sudre, Fr., *European Law and International Human Rights*, (Polirom Publishing House, Iaşi, 2006), p. 46;

[6] Bîrsan, C., *European Convention on Human Rights. Comment on articles*, tome I *Rights and Liberties*, (All Beck Publishig House, Bucharest, 2005), p. 31;

[7] Muraru, I., Tănăsescu, E., S., [3], pp.156-158;

In this context the communist and fascist regime should be mentioned and a new situation known by the generic name of fighting against terrorism.

Paradoxically, fascism and communism are antagonistic but similar and complementary movements. We believe that the analysis of the fascist regime and especially the communist one should be remade, taking into account the new data provided by the Soviet archives becoming public.

There are situations in human history, events that are not only exceptional but seem completely incredible and incomprehensible. Such events as the Holocaust or the Gulag have been maintained in a current of consciousness, the living memory of mankind, to prevent their repetition. If, in the case of the horrors of fascism, the infringement of individual rights is unanimously recognized, the crimes of Socialism in the Eastern European countries are far from acknowledging the negative role of the communist ideology and even further from recognizing the murderous nature of the communist regimes in Europe, the fact that these regimes turned terror into a method of government[8].

While Fascism and especially the so called Nazism are characterized by a lack of ideal, Communism was very generous in this regard. The Communist discourse, from the early period of the Soviet Union, appears as one supporting the popular or socialist democracy describing itself as a regime that respects the individual rights and freedoms. The Communist totalitarian regimes proclaim the individual rights and freedoms without providing the means of protection, without creating those tools to provide effective legal protection. Although all the constitutions issued during the communist era, proclaimed the freedom of conscience, freedom of expression and choice of religion, the right to privacy and due process, many acts of lower legal force sanctioned any event of this type and the practice of the state institutions was towards this goal. Thus, the protection of the fundamental individual human rights and freedoms provided by the Constitutions adopted by communist regimes is a formal one, purely declaratory and contradicted by the actions of the state, having only a propaganda purpose. The totalitarian regimes defy all the positive laws going to those which it had promulgated itself or those that had not been taken the trouble to abolish[9].

Beyond the particularities of each totalitarian system, there are common elements whose identification is required in order to characterize a regime as being considered totalitarian. What are the mechanisms helping a totalitarian party to gain the power, to hold the power in spite of the installed terror regime, what causes the collapse of these regimes, are all questions that we try to find answers. The formulation of these responses depends on preventing the recurrence of such phenomena, and consequently on ensuring the individual rights and freedoms.

The ideologies are not a sufficient explanation to determine the causes triggering the totalitarian passion. All in all the totalitarianism - in this case the fascism and the communism - have in common the priority given to the local communities against the individual, his rights and freedoms. The totalitarian regimes gain power and maintain it by the help of the masses. Hitler's coming to power was made possible by the help of the majority of population and he could not have kept this authority, neither him nor Stalin, if he would not have enjoyed the confidence of the masses. Theoretically, there are masses in every country and they make up the majority of those neutral people, seemingly indifferent, without the conscious of a common interest or of some specific objectives, a system of values. The mass individual is not a mere unskilled beast; it just lives in isolation without the normal social relationships, without belonging to a class consciousness.

Each totalitarian regime has its favorite victims. The Communism eliminated the “exploiters”, in the Nazi regime “blood and race” prevails. What is characteristic is the lack of a strict doctrine or ignoring it so that a totalitarian regime can always change the criteria by which it identifies the victims without thereby alter the doctrine.

[8] Furet, F., Nolte, E., *Fascism and Communism*, (Art Publishing House, Bucureşti, 2007), p. 23;
[9] Arendt, H., *The Origins of Totalitarianism*, (Humanitas Publishing House, Bucharest, 2006), p. 569;

The totalitarian regimes use propaganda to access the power, propaganda being replaced by indoctrination, as soon as a regime reached for the hoarding power, and violence being replaced by fear. The totalitarian movements, before conquering power, create a false and coherent world, in agreement with their doctrines, which is more responsive to the needs of the human mind than the reality itself[10].

Regarding violence, it always accompanied the rise to power of the totalitarian movements and what is even more incomprehensible is that this violence was accepted. After coming to power the totalitarian forms of government establish a regime of terror where murders, hints and threats were present. These are the tools by which a totalitarian regime achieves and maintains power.

Currently, a new form of "totalitarianism" marks its presence, the Muslim one. Beyond the specific features, we can identify in its actions those elements characterizing such a system, its effects still being a restriction of the fundamental rights and freedoms of the individual.

Currently, a universal standard of time is predicted: before and after Ground Zero - World Trade Center destruction. Starting from this point we need to adjust our watches to see it as a new Greenwich meridian, which must adjust our mental pendulum. After September 11th, freedom became a sine qua non for peace and the protection of the future of humanity. Freedom became an international imperative, the coexistence pivot of peoples in the era of borderless terrorism. If you want to get rid of it, we should unite the world and not let it die.

In the name of freedom, each state tries to take the best steps to protect its citizens and their property. In the name of freedom different measures are taken in order to limit the fundamental rights recognized by international instruments of protection. In the name of freedom, freedom itself is limited. The entire process of recognition and standardization of the individual rights seems to know a setback, due to the invisible and impossible to locate danger of terrorism.

The international organizations are powerless in the face of the danger, being unable to protect the people against terrorism, coming from the fact that the war is not against a state, but against individuals, located anywhere in the world, communicating each other via the Internet, with all the benefits of democracy, to destroy it

The United States of America established a national security strategy, with the purpose of fighting and winning the war against the terrorism, of promoting and defending freedom, as an alternative to dictatorship and despair. "The idea - force that comes out of the contents of this document is thus formulated:" America is now before an alternative of choosing between fear and confidence, America chose the path of trust".[11]

This excludes the isolationism and protectionism, the withdrawal, and limitation of the budget; this means taking over of the leading helms instead of isolation, a continuous encouragement and the development of the free trade and leading the fight against all the major challenges, primarily against terrorism".[12]

In the area of the human rights protection, all this fight against terrorism is grafted on the limitations of the exercise of certain recognized options the human being: the right to life, freedom of movement, freedom of conscience and expression, right of privacy.

As regards the European Convention on Human Rights, in Article 2, § 2, it contains an exception clause that is not included in the similar general agreements according to which" the use of force “that became absolutely necessary "to protect the public order (in some cases) and which caused death, is not a violation of the Convention."[13] This exception was used in practice, checking

[10] Arendt, H., [11], p. 438;

[11] Voicu, C. *Terrorism and Globalization*, in the volume “Globalization and National Identity”, (Editura Ministerului Administrației şi Internelor, Bucharest, 2006), p. 302;

[12] Idem, pp. 302-303;

[13] Sudre, Fr., [7], p. 215;

whether the use of force was excessive, but strictly proportionate to achieving the authorized purpose:[14] the terrorists suspected of planning to commit an attack were killed by the security forces during the actions of arresting them.

As regards restrictions on the right to freedom of movement, each state has the possibility to regulate how and to whom they apply, but "these restrictions must be" necessary in a democratic society "and to satisfy the requirement of proportionality."[15] In the area covered by this law there are the restrictions and limitations which are subject to the citizens of certain countries that wish to enter the territory of another state, the imperative of getting an entry visa before leaving the national territory, the ban for certain people to enter the territory of another State.

The right to privacy and family is also marked by a series of violations and limitations, in the same context of the fight against terrorism. Knowing that the terrorists use the most updated means of communication, the legal tapping made on mobile phones, the interception of pager messages, of the messages sent over the Internet or the conversations of prisoners through the speaker, are considered as legal. All these violations and limitations must be firstly subject to the principle of proportionality and secondly, the need of doing all these for the sake of the national security to be established with certainty. Also, "national authorities are positively obliged to take steps in order to prevent their disclosure (by the mass- media)."[16]

Conclusions

The terrorism, the one imposing the states such measures as limiting the exercise of the fundamental rights of its citizens is an important issue as regards the following of the individual's legal sphere. As long as the terrorist - who deliberately kill civilians, relying on the defense of a cause - cannot be precisely identified in order to maintain the safety and security of each and every citizen, the states limit the rights and freedoms of the latter one, those rights and freedoms established before.

Given the purpose for which these limitations are imposed, namely the dismantling of the terrorist networks and regaining of freedom, we consider them as necessary, with the only amendment that the principle of proportionality between the measures taken and limited right should always be respected in taking these measures,. The fight against terrorism seems to have two phases: a short term one, the fight involves using the military force and other instruments of national power "to kill or capture the terrorists." On the long term, winning the war is conditioned by winning the battle of ideas."[17]

This battle of ideas, of imposition those man centered ones, with its fundamental rights and liberties, coming from the natural law, cannot be fully won but in democracy and "the democracy cannot be imposed by the help of guns ..." it does not rise from the ashes of the war and a history of endeavors, civic action and economic development. It is unlikely that democracy can be built with materials exported by a conquering, liberating, American army, or in the shadow of the American private sector companies and U.S. nongovernmental organizations. Democracy grows slowly and needs indigenous endeavors, the cultivation of local civil institutions and a healthy citizenship, which mainly depends on education."[18]

[14] Case *McCann v. United Kingdom*, September 27, 1995, cited in Sudre, Fr., [7], p. 215;
[15] Sudre, Fr., [7], p. 248;
[16] Sudre, Fr., [7], p. 319;
[17] Voicu, C. [13], p. 308;
[18] Voicu, C. [13], pp. 311-312.

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FREE MOVEMENT OF EU CITIZENS: LIMITATIONS ON GROUNDS OF PUBLIC POLICY, PUBLIC SECURITY AND PUBLIC HEALTH

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Abstract

Free movement of persons represents one of the four essential freedoms of the internal market. At the beginning the rights attached to this freedom were granted only to economically active persons. Nowadays, according to Article 21 of the Treaty on the Functioning of the European Union (former Article 18 of the Treaty establishing the European Community), all Union citizens are entitled to move and reside freely within the territory of the Member States "subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect". The purpose of this study is to analyze the distinct category of limitations on the free movement of persons based on grounds of public policy, public security or public health. The main objectives pursued to this end consist of outlining the legal basis for these derogations, including primary and secondary legislation of the European Union, describing the circumstances in which Member States may legitimately impose restrictions on free movement rights, as well as presenting the safeguards provided for individuals when such measures are taken against them. In order to achieve the above mentioned aim the important role of European Court of Justice's case-law will be considered, emphasizing the fact that most of the principles held in its decisions concerning this topic are presently incorporated in the secondary legislation in force.

Keywords: *free movement of person, restrictions, public policy, safeguards, serious threat*

1. Introduction

Although they enjoy stipulation in EU primary law, becoming, by successive amendments to the Treaty establishing the European Economic Community[1], rights of "constitutional" nature of all EU citizens[2], from rights of "economic nature" of certain restricted categories of persons, the right to free movement and the right of residence on the territory of EU Member States are subject to Treaty and secondary legislation limitations and conditions.

The object of this paper is represented by the exceptions to the principle of free movement of persons, consisting of restrictions grounded on reasons of public policy, public security and public health, that can be determined by Member States, originally provided in the Treaty of Rome, and kept in the modified versions of the above mentioned treaty, including in the Treaty on the Functioning of the European Union.

The importance of our scientific study lies in revealing the balance that the primary and secondary law of the European Union, and especially the jurisprudence of the Luxembourg Court

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[1] The Treaty establishing the European Economic Community was signed at Rome in 1957 and came into force in 1958. Throughout this paper, the references made to the Treaty of Rome, the EEC Treaty and the TEEC Treaty concern the originating treaty, above mentioned. After the entry into force of the Treaty of Maastricht (the Treaty on the European Union - TEU), the name of the same treaty was changed into the Treaty establishing the European Community, abbreviated in this paper as the EC Treaty and TEC Treaty. From December 1st, 2009, the date of entry into force of the Treaty of Lisbon, TEC was renamed the *Treaty on the Functioning of the European Union* (TFEU), under article 2, paragraph 1 of the Treaty of Lisbon. The Treaty of Lisbon amending the Treaty on the European Union and the Treaty establishing the European Community, signed on December 13, 2007 is also known as the *Reform Treaty*.

[2] See A. Iliopoulou, *Le nouveau droit de séjour des citoyens de l' Union et des membres de leur famille : la directive 2004/38/CE,* Revue du Droit de L'Union européenne, no.4/2003 p.525.

were able to establish between the exercise, by EU citizens and their families, of the right to free movement and the limitations that Member States would want to impose[3] in order to hold back the excessive flow of foreign nationals on their territory.

We shall approach the issue of derogations based on grounds of public policy, public security and public health aiming, mainly at: synthesizing the legal framework and clarifying the meaning of some terms and phrases, such as "justified restrictions" or "public policy"; analyzing the reasons for which Member States would be entitled to restrict the freedom of movement; presenting the material and procedural safeguards established in favour of holders of entry, exit and residence rights, as well as highlighting the role of the European Court of Justice, whose principles formulated in some of the decisions on the free movement of persons have been, in time, incorporated in the secondary legislation.

To get a clearer picture of restrictions arising from the limitation of public policy, public security and public health, we intend, in the present work, to capitalize on the doctrine related to the topic, presenting analyses and points of view expressed in the studied specialized literature.

1.2. The legal framework. Rights covered by derogation. What are the *justified restrictions*?

2.1. The legal framework for derogations from the free movement of persons justified on grounds of public policy, public security and public health is represented, in terms of primary law, by the provisions of the Treaty on the Functioning of the European Union - article 21 paragraph (1) (former article 18 TEC) targeting all EU citizens, as well as article 45 paragraph (3)[4], article 52 paragraph (1)[5] and article 62[6] - keeping the same wording of rules previously contained in articles 39, 46 and 55 TEC, and initially in articles 48, 56 and 66 TEEC.

Under article 21 TFEU, the right to free movement and to reside on the territory of another Member State knows exceptions and may be subject to limitations and conditions provided by Treaties and by the secondary legislation adopted in order to implement them.

N. Foster[7] noticed that the restrictions and their scope need to be determined, because the Treaty makes reference to limitations, without expressly formulating them. For the author, it is clear that the provisions on restrictive measures for reasons of public policy, public security and public health contained in article 39 TEC (now article 45 TFEU) are applicable to limitations referred to in article 21 TFEU. We agree with the previously expressed view and we appreciate that the scope of exceptions under consideration can be correctly determined, only by the corroborated reading of articles: 21 paragraph (1), 45 paragraph (3), 52 paragraph (1) and 62 TFEU.

C. Barnard reported that the "derogations list", the same for free movement of workers, freedom of establishment and free movement of services, "is exhaustive and the Court is not prepared to add any further headings to it". However, "derogations will not apply where Community directives provide for exhaustive harmonization of the field"[8].

The notions of public policy, public security and public health being insufficiently clear, were therefore, susceptible to divergent interpretations, which could vary, depending on the time or place.

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[3] Usually for economic reasons or for reasons related to social protection.

[4] „3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health ….".

[5] "1. The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health."

[6] "The provisions of Articles 51 to 54 shall apply to the matters covered by this Chapter."

[7] In *Foster on EU Law*, second edition, Oxford University Press, 2009, p. 344.

[8] In *The substantive law of the EU. The four freedoms*, Oxford University Press, 2007, p.461.

The Council adopted Directive 64/221/EEC[9] in order to specify the scope of those derogations. Currently, its text was repealed by Directive 2004/38/EC of April 29, 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States[10], in order to ensure a more strict definition of conditions and procedural guarantees established for Union citizens and their family members in cases of refusal of rights of free movement in another Member State.

Therefore, as for the secondary legislation, the essential texts are currently to be found in Chapter VI[11] of Directive 2004/38/EC entitled *Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health.*

2.2. Concerning the field of **rights covered by the derogation** under review, the Court of Justice stated that it is composed, among others, from rights of entry and residence on the territory of a Member State, and from their inherent rights, such as the right to respond to real offers for employment and the right to travel freely for that purpose[12].

In this context, it is necessary to remind the preliminary ruling delivered at the request of Dambovita Tribunal, in *Jipa* case[13]. From the analysis of the reasoning expressed in paragraph 18[14] of the decision according to which "the right of freedom of movement includes both the right for citizens of the European Union to enter a Member State other than the one of origin and the right to leave the State of origin" and "the fundamental freedoms guaranteed by the EC Treaty would be rendered meaningless if the Member State of origin could, without valid justification, prohibit its own nationals from leaving its territory in order to enter the territory of another Member State" it results that the provisions of the secondary legislation contained in Chapter VI of Directive 2004/38/EC shall also apply to the right of exit from the home state, in order to exercise the fundamental freedom of movement on the territory of another Union State, even if the title of the chapter mentioned is drawn up differently.

In order to support our statement, we bring the Advocate-General Ján Mazák' opinion from *Jipa* case, who, at point 40, shows that "the provisions of Chapter VI of Directive 2004/38 … regulate the circumstances in which Member States may restrict the right of Union citizens to move and reside freely within the territory of the Member States. While the title to Chapter VI of Directive 2004/38 does not specifically refer to the right to leave, and indeed many of the provisions of that chapter address questions relating to the right of entry … and the right of residence, … it is clear from the wording of Article 27(1) and the 22nd recital in the preamble to that directive that Chapter VI thereof regulates restrictions on the 'freedom of movement of Union citizens', a matter which undoubtedly relates to both the right to leave the territory of a Member State to travel to another Member State and the right to enter another Member State".

Thus, we see that at this moment, within the European Union, restrictions on the freedom of movement of persons, justified on grounds of public security, policy and health can target the right to entry and the right to reside in another Member State, the right to exit from one's own state, but also other rights that are consequences of the principle of free movement.

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[9] Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ 56, 4.4.1964).

[10] Entered into force on the date of its publication in Official Journal of European Union (OJ L 158 / 30.04.2004, p. 77-123) and having as final date of transposition 30.04.2006.

[11] Art. 27 -33.

[12] Judgment of 04/12/1974, *Van Duyn / Home Office*, C-41/74 *(ECR.1974, p.1337)*, para.21.

[13] Judgment of 10/07/2008, *Jipa*, C-33/07, (*ECR 2008 p. I-5157*).

[14] Reiterating paragraph 35 of the Advocate-General Jan Mazák's opinion. The Court calls for an analysis, by analogy with the freedom of establishment and free movement of workers sending to Case 81/87 *Daily Mail and General Trust* [1988] ECR 5483, paragraph 16; Case C-379/92 *Peralta* [1994] ECR I-3453, paragraph 31; and Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 97).

Regarding the persons against whom measures may be ordered, they can be both EU citizens - employees or service providers, inactive persons or students – as well as their family members.

The restrictive measures can take various forms, such as: the prohibition of leaving the home state, the prohibition of getting visas (in the case of family members that are citizens of third countries), denying the entry, refusing to issue the registration certificate or residence permit or expulsion.

2.3. What do "justified restrictions" mean?

The meaning of the expression *justified restrictions* from article 45 paragraph (3) TFEU[15] has been clarified by the Court of Justice, through the preliminary ruling delivered in the *Rutili* case[16]. The Court stated[17] that "only limitations which fulfil the requirements of the law, including those contained in Community law, are permissible with regard, in particular, to the right of nationals of member states to freedom of movement and residence. In this context, regard must be had both to the rules of substantive law and to the formal or procedural rules subject to which member states exercise the powers reserved under article 48 (3) in respect of public policy and public security".

Also in the *Rutili* case, the Luxembourg Court stopped upon the meaning of the phrase *"subject to limitations justified on grounds of public policy"* from the beginning of paragraph 3 of article 48 TEEC[18] (18), and appreciated that it applied not only to the legal provisions (regulations) adopted by each Member State in order to limit the freedom of movement and residence of nationals of other Member States, on its territory, but also to individual decisions (issued individual acts) delivered in the application of such legal provisions[19].

3. Grounds for restricting the right to free movement.

The Treaty of Rome provided three grounds that might legitimize the restrictions on the free movement of persons, namely: public policy, public security and public health[20] which also became the object of Directive 64/221/EEC[21], adopted to harmonize the laws of Member States. Although those reasons received express provision for all forms of free movement of persons, both in the Community primary law and in the secondary law, the absence of clarification on the meaning of the notions of public policy, public security and public health has allowed the national authorities to use them sometimes, abusively, by extending their scope. We mention that the infringements of public morals[22] have not been accepted as a justification for restrictions on the right of free movement within the Union.

3.1. Public policy and public security.

Of the three reasons, **public policy** was considered the most sensitive aspect on which both the Community legislator[23] and the Luxembourg Court bended, with great caution, for an obvious reason: to prevent abuses in claiming the limitation provided under the Treaty.

Thus, given the characteristics of each act of the Community institutions - in particular, the scope of addressees or the completeness of rules - at Community level, the regulation of the exception of public policy, public security and public health, through a directive, was chosen, and not

[15] Ex art.39 TEC, respective ex art.48 TEEC.
[16] Judgement of 28/10/1975, *Rutili / Ministre de l'intérieur* C-36/75, (Rec.1975, p.1219).
[17] Paras.23 and 24 of *Rutili* judgment, cited above.
[18] Art. 45 TFUE.
[19] *Rutili* judgment, cited above, para.21.
[20] Stipulated also in article 12, paragraph 3 of the International Covenant on Civil and Political Rights.
[21] Council Directive 64/221/EEC on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health.
[22] Although provided for in article 12, paragraph 3 of International Covenant on Civil and Political Rights
[23] Initially the Council, and then the Council and Parliament.

its provision into a regulation or decision. Directive 64/221/EEC, as it clearly results from its title, was meant to coordinate the invocation of reasons that could justify restrictions on movement and residence of foreign citizens; the assessment of situations that might be considered prejudicial to the public policy was left to Member States, under the condition that they respect the criteria set out in the Community Act, in order for restrictive measures taken by national authorities to be legitimate.

A definition of the concept of *public policy* was included neither in Directive 64/221/EEC, nor in Directive 2004/38/EC; establishing its meaning, in a manner appropriate to internal realities, remained an attribute of each Member State.

For measures taken by national authorities not to be discriminatory, the Court of Justice was given the mission to clear the concept of *public policy*. The first occasion was the decision delivered in *Van Duyn* case[24], when the Court stated that, "in the context of the Community and where, in particular, it is used as a justification for derogating from a fundamental principle of Community law", the concept of *public policy* "must be interpreted strictly, so that its scope cannot be determined unilaterally by each member state without being subject to control by the institutions of the Community". Unfortunately, further arguments did not lead to shaping the defining elements of *public policy*, the Court finding that, they will be analyzed, from case to case by the national authorities to which the Treaty has left an area of discretion, because "the particular circumstances justifying recourse to the concept of *public policy* may vary from one country to another and from one period to another".

W. Cairns criticized the Court's wording that he appreciated as inconclusive, and too little useful to national jurisdictions which addressed a preliminary question to the Community Court, as long as the Community law, even at that time (December 1974, when the decision was delivered), contained a number of indications regarding the meaning and scope of the concept of public policy[25]. Thus, the author continues, article 3, paragraph (1) of Directive 64/221/EEC provides that measures taken on grounds of public policy and public security must be based exclusively on the personal conduct of the individual concerned, and according to paragraph (2); the existence of previous convictions can not be a justification in itself for the adoption of such measures.

The concept of **public security**, although used by Directive 64/221/EEC, and now, by Directive 2004/38/EC, also does not receive a legal explanation for its meaning. C. Barnard noted that, although the text of the Treaty suggests that public policy and public security constituted distinct derogations, "the Court's case law has largely subsumed, public security under the heading of public policy"[26].

In this regard, decisions of the Union's judicial institution do not provide too many elements of differentiation between the concepts of public policy and public security, especially since, no national law of Member States separates them clearly, and the Community regulation on restrictions to the free movement of persons determined for reasons of public security and order sets that they will be grounded on the individual's *personal conduct.*

A. Fuerea[27] considered that "the notion of public security is ambivalent" because it can be "understood as national security and also as national defence".

The relation between public policy and public security was synthesized by S. Deleanu as it follows: "Although in the texts of Community provisions, there are references to public policy and also to public security, the European Court of Justice generally prefers to consider these concepts together. It could be argued that public policy concerns the foundations of society, freedom and personal security, and public security concerns the foundations of the state and its security. Drawing

[24] Judgment of 04/12/1974, *Van Duyn / Home Office*, C-41/74 *(Rec.1974,p.1337)*.

[25] In *Introduction to European Union Law*, second edition, Cavendish Publishing Limited, London, 2002, p.194-196.

[26] *Op.cit.*, p.462.

[27] In *Drept comunitar al afacerilor*, Universul Juridic Publishing House, Bucharest, 2005, p.137.

a dividing line between these two concepts is, however, difficult because of the connections that exist between them. A person who disregards the rules of public policy may also affect the public security, and vice versa. Just remember that if public peace and social harmony are seriously affected or if laws or legitimate decisions of the public authorities are violated, both the system organized upon relationships between persons who constitute the population of a state, as well as the foundations of the state can be affected" [28].

3.2. Public health. Public health reasons that may justify the restriction of the right to free movement are the object of article 29 of Directive 2004/38/EC[29], under which the only diseases that may ground such measures are the diseases with epidemic potential as defined in the relevant documents of the World Health Organisation, as well as other infectious or contagious parasitic diseases if they are the subject of protective provisions applied to nationals of the host Member State. Compared to those aspects under Directive 64/221/EEC, the number of diseases as reasons for restriction has been substantially reduced.

Under paragraph (2) of article 29, diseases occurring after a period of three months from the date of arrival shall not constitute grounds for expulsion from that territory. The repealed text from which it is inspired - article 4, paragraph (2) of Directive 64/221/EEC - refers to the first residence permit, the release of which could have been refused if public health reasons had been identified. Under the regulation in force, the right of residence can not be challenged anymore, after three months, for reasons pertaining to public health protection; diseases referred to only justify a measure for restricting the right of entry and the right of residence for a period up to three months.

The last paragraph of article 29 was introduced in order to stop the practice of certain Member States to submit beneficiaries of the right of residence to medical checks. Medical examinations proving that people do not suffer from any of the diseases referred to in paragraph (1) can be freely carried, under three conditions:

a) if there are serious indications that this is necessary,

b) within three months from the date of arrival,

c) the examinations must not acquire a systematic character which would compromise the effectiveness of provisions related to the release of the registration certificate or of the residence permit, as appropriate. This last text is similar to that contained in article 27, paragraph (4) on the request for information about the person's criminal record only when the information is absolutely necessary for justifying the refusal to allow entry or stay on that territory.

In the *Gül* case[30], the Court of Justice stated that the possibility for Member States to restrict freedom of movement on public health grounds could not justify the exclusion of the public health sector from the scope of economic sectors, but it could only substantiate the refusal to access or residence on their territory for people whose access or residence in itself would constitute a danger to public health[31] (31).

4. Material guarantees. Features of a restrictive measure under EU law

Partially provided for previously in Directive 64/221/EEC, highlighted and interpreted by the Luxembourg Court, the defining elements of restrictive measures compatible with Community law can be now drawn easily from the provisions of article 27 of Directive 2004/38/EC, dedicated to the general principles that must be taken into consideration by Member States authorities when they want to limit free movement of persons within the country.

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[28] Sergiu Deleanu, Gyula Fabian, Cosmin Flavius Costaș, Bogdan Ionita, ***Curtea de Justitie Europeana***, Wolters Kluwer Publishing House, 2007, p.106-107 (our translation).

[29] Which is based on the provision contained in article 4 of Directive 64/221/EEC, now repealed.

[30] Judgment of 07/05/1986, *Gül / Regierungspräsident Düsseldorf*, C-131/85, *(Rec.1986, p.1573)*.

[31] C-131/85, *Gül*, above mentioned, paras. 15-17.

a. The measures may be taken against EU nationals and their family members, Union citizens or not.

b. The measures may be based solely on grounds of public policy, public security and public health.

c. The reasons listed above, stipulated by the primary provisions and initially reiterated by Directive 64/221/EEC - can not be relied upon or used for the safeguard of some economic interests or purposes of Member States[32].

d. The measure will respect the principle of proportionality[33].

The reference to the principle of proportionality, which the Court of Justice applied in its numerous decisions, was inserted into the final text of the Directive[34]. "A measure restricting one of the fundamental freedoms guaranteed by the Treaty may be justified only if it complies with the principle of proportionality" meaning that the "measure must be appropriate for securing the attainment of the objective which it pursues and must not go beyond what is necessary in order to attain it", stated the Court in *Olazabal* decision[35]. On the same occasion, it was appreciated that for the given situation, the principle of proportionality would have been respected if a measure of territorial limitation of the residence permit validity had been taken, instead of a deportation decision[36].

Applying the principle of proportionality in relation to restrictions on the free movement can be summarized as: "the obligation imposed to national authorities to analyze the overall situation of the person concerned"[37]. To this end, Directive 2004/38/EC dedicated article 28, with innovative character, to the protection against expulsion.

Since the expulsion of Union citizens and their families, for reasons of public policy or public security is a measure that can seriously affect people who, by using the rights and freedoms conferred by the Treaty, were effectively integrated into the host Member State before that state disposed such measure, it would be compelled to restrict its scope, in accordance with the principle of proportionality. Under the provisions of article 28, paragraph (1), the host Member State is required to examine issues aimed at cultural and social integration of the person concerned in the host Member State, the duration of their stay in the host country, age, state of health, family and economic situation and their connections with their country of origin[38].

Therefore, the degree of integration of Union citizens and their families in the host country will also determine their degree of protection against expulsion.

For EU citizens, holders of the right of permanent residence in the receiving state, Directive 2004/38/EC[39] provides additional guarantees relating to the right to free movement. No expulsion decision can be delivered against them or their family members, regardless of nationality; only in cases where there are imperative reasons of public policy or public security, such measure can be taken.

In addition, an expulsion measure against Union citizens who have lived many years in the host Member State and, in particular if they were born and have resided there their whole life, should be taken only under exceptional circumstances, for imperative reasons related only to public security[40] and that are defined by Member States.

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[32] See art.27 (1), second sentence, of Directive 2004/38/CE.

[33] See art.27 (2), first sentence, of Directive 2004/38/CE.

[34] See, e.g., in the field of free movement of persons, judgment of 19/01/1999, *Calfa*, C-348/96 , *(Rec.1999, p.I-11)* and judgment of din 26/11/2002, *Oteiza Olazabal*, C-100/01, *(Rec.2002, p.I-10981)*.

[35] C-100/01, *Oteiza Olazabal*, above mentioned para.43.

[36] C-100/01, *Oteiza Olazabal*, above mentioned para.21.

[37] A.Iliopoulou, *op.cit*., p.548 (our translation).

[38] See, also judgment of 29/04/2004, *Orfanopoulos and Oliveri*, C-482/01 *(Rec.2004, p.I-5257)*.

[39] Art. 28 (2).

[40] Directive 2004/38/CE preambles, recital 24.

As provided in article 28 paragraph (3), it is the case of Union citizens who (a) have resided in the host country in the previous ten years, - and therefore their degree of integration in the host country is high - (b) are a minor, except if the expulsion is necessary for the best interests of the child, according to United Nations Convention on the Rights of the Child of 20 November 1989.

Paul P. Craig and Gráinne De Bùrca[41] pointed out, in this context, one of the innovations of Directive 2004/38/EC, namely, the introduction of three levels of protection against expulsion on grounds of public policy, public security and public health, as it follows: "(i) a general level of protection for all individuals covered by EU law; (ii) an enhanced level of protection for individuals who have already gain the right of permanent residence on the territory of a Member State; and (iii) and a super-enhanced level of protection for minors or for those who have resided for ten years in a host state".

e. The restriction will be based **solely** on the **personal behaviour**, but previous convictions - although, obviously, constituting an important factor in determining the personal behaviour – can not justify the limitation of the right to free movement[42].

The danger represented by the individual's behaviour towards the Member State concerned must be established, in order for the measure to be legitimate, before being ordered. Thus, if only by analyzing the personal conduct, it is found that this **constitutes** "a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society"[43], the measure is justified. In the *Rutili* case, the Luxembourg Court stated that restrictions on the right of a citizen of any Member State to enter, stay and move on the territory of another Member State could not be imposed, unless his presence or conduct constitutes a genuine and sufficiently serious threat to the public policy[44].

The wording was reiterated and developed in the decision delivered in *Bouchereau* case[45]. The French citizen Bouchereau was a worker in Great Britain, since 1975. Having earlier been convicted in the United Kingdom, for illegal possession of narcotics in 1976, Bouchereau recognized that he was guilty, again, of committing the same offence, punishable by English law. In that context, the Court was asked to interpret the concept of *public policy*, since the procedure for expulsion from Great Britain, against Bouchereau had started. The Court stated that "In so far as it may justify certain restrictions on the free movement of persons subject to community law, recourse by a national authority to the concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of **a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society**"[46].

In *Adoui and Cornuaille* case[47], the Court attempted[48], on the one hand, to clarify the notion of *serious threat* and, on the other hand, to ensure the principle of equal treatment for nationals of other Member State s in relation to their own citizens. Thus, the decision of the Court shows "although Community law does not impose upon the Member States a uniform scale of values as regards the assessment of conduct which may be considered as contrary to public policy, it should nevertheless be stated that conduct may not be considered as being of a sufficiently serious nature to justify restrictions on the admission to or residence within the territory of a Member State of a national of another member state in a case where the former member state does not adopt, with

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[41] In *EU law: text, cases, and materials*, Oxford University Press, 2007, p.783

[42] See article 27, paragraph (2), first sentence which resumes the text of article 3, paragraphs (1) and (2) of Directive 64/221/EEC.

[43] See art.27 (2), second sentence, of Directive 2004/38/CE.

[44] Judgment of 28/10/1975, *Rutili*, above mentioned, para. 28.

[45] Judgment of 27/10/1977, *Regina / Bouchereau*, C-30/77 *(Rec.1977, p.1999)*.

[46] C-30/77, *Regina / Bouchereau*, above mentioned, para. 35.

[47] Judgment of 18/05/1982, *Adoui and Cornuaille / Belgian State*, C-115/81, *(Rec.1982, p.1665).*

[48] See para.8 of *Adoui and Cornuaille*.

respect to the same conduct on the part of its own nationals repressive measures or other genuine and effective measures intended to combat such conduct".

f. Considerations of general prevention or reasons that are not directly related to the case can not constitute grounds for restricting the freedom of movement[49].

The best illustration of this material guarantee for free movement of persons is "the retreat from *Van Duyn*", as the Court's decision in *Bonsignore*[50] case is being called in the doctrine[51]. The Italian citizen Carmelo Angelo Bonsignore who was working and had the residence in Cologne, Germany, accidentally killed his brother while cleaning his gun. Although he was found guilty both of the offence of manslaughter and of illegal possession of a weapon, he was sentenced only for the last, to pay a fine. As for the offence of manslaughter, the German court did not consider that it would impose another sentence, since it would not have served any purpose under the given circumstances, moreover, it would have caused additional distress unnecessary for the person who already had lost his brother. However, the German authority for foreigners decided Bonsignore's expulsion, arguing that the illegal possession of a weapon was circumscribed in the sphere of *personal conduct* referred to in article 3, paragraph (1) of Directive 64/221/EEC. The Luxembourg Court noticed[52] that the Directive provisions had to be interpreted like this: the measures taken for reasons related to maintaining the public policy and public security against nationals of Member State s of the Community **could not be justified** through **reasons apart from the case**; only **the personal conduct** of those affected by these measures should be considered as conclusive. In addition, the concept of *personal conduct* gives substance to the requirement that expulsion could be imposed only for violations of public policy and security by the individual affected by the measure of restriction. Therefore, the correct interpretation of article 3, paragraphs (2) and (3) of Directive 64/221/EEC is the one according to which the decision for expulsion can not be delivered if it is only based on considerations of general prevention[53].

Unlike the above interpretation given to the expression of *personal conduct*, earlier, in the *Van Duyn* case, the Court of Justice had stated that the membership of a person in an organization considered to be dangerous in the host country, fell under the concept of *personal conduct*, within the meaning of Directive 64 / 221/CEE, entitling the national authorities to invoke the exception of public policy or security in order to expel that person.

With regard to **previous criminal convictions**, their mere existence is not the equivalent of an individual threat against public policy and security. There should not be any direct connection between previous conviction and expulsion, and the conclusion of the threat represented by the individual must result from an overall assessment of his facts and personality[54].

To check the degree of danger, posed by a particular individual, to the public policy or public security, the text of article 27 paragraph (3) of Directive 2004/38/EC provides to the host Member State, a legal instrument, consisting of legitimizing the request for information on previous convictions.

Thus, at the issuance of the registration certificate or in the absence of a registration system, not later than three months after the person concerned has entered its territory or from the date the person has reported her presence on its territory, under article 5, paragraph (5) of the Directive or when issuing the residence permit, the host Member State can, if deemed indispensable**,** request the Member State of origin or, if necessary, other Member States, to provide information concerning any

[49] See art.27 (2), the end of second sentence of Directive 2004/38/CE.

[50] Judgment of 26/02/1975, *Bonsignore/Oberstadtdirektor der Stadt Köln*, C-67/74, *(*Rec.1975, p.297).

[51] See Anthony M. Arnull, *Article 177 and the Retreat from Van Duyn,* 8 European Law Review (1983), p. 365-382 and W. Cairns, *op.cit*., p.196.

[52] C-67/74, *Bonsignore*, para.6.

[53] C-67/74, *Bonsignore*, para.7.

[54] A. Fuerea, *op.cit.*, Bucharest, 2005, p.132 (our translation).

previous police record the person concerned may have; the consultation can not have a systematic character. The response of the Member State consulted must be sent within two months.

5. Procedural requirements in order for the measure to limit the right to free movement not to be contrary to European Union law

Restrictions that Member State s can apply to the free movement of persons may be subject to judicial review[55] which is intended to guarantee to persons affected by measures of limiting the right to free movement that they were not improperly taken or if they were illegal, that they can be cancelled. The control covers regulations adopted, as well as individual ones given in the application of restriction measures[56].

Directive 2004/38/EC simplifies the procedural requirements of Directive 64/221/EEC referred to above, and ensuring the access to judicial or administrative means of questioning the decision delivered against a person on grounds of public policy, public security and public health becomes an obligation for the host Member State and previous references to comparable national procedures are eliminated[57].

5.1. Notification of decisions

Under the provision contained in article 30 paragraph (1) of Directive 2004/38/EC, those persons concerned must be informed in writing of any decision on the restriction of the right to free movement, for reasons of public policy, public security or public health so that they could understand its content and implications. The text takes as its starting point the provision of first sentence of article 7 from Directive 64/221/EEC that was referring to the notification of any decision on the refusal of the issuance or renewal of the residence permit and to those decisions concerning expulsion. In addition, the provision in force mentions **the way** the notification will be made - **in writing**, so that courts could exercise an effective judicial review if it is necessary - and it integrates[58] considerations that constituted the basis for delivering the decision in *Adoui and Cornuaille* joined cases[59]. The Court stated that, "the notification of the grounds must be **sufficiently detailed and precise** to enable the person concerned to defend his interests. As regards the language to be used, it appears from the file on the case that the plaintiffs in the main proceedings are of French nationality and that the decisions affecting them were drawn up in French … It is sufficient in any event if the notification is made in such a way as to enable the person concerned to comprehend the content and effect thereof"[60].

In a similar manner, paragraph (2) of article 30 incorporates, starting from the wording of article 6 of Directive 64/221/EEC, the principles drawn from the Court's decision in *Rutili* case[61] and has the following wording: „The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security".

Therefore, the Member State must communicate to the person, immediately or at the moment of notifying the restrictive measure taken against her, the accurate and complete reasons that grounded the decision, in order for her to be able to prepare the defence.

At the same time, the same notification lets the person against whom the sentence was given know the court or administrative authority where the decision may be appealed, the time limit for the appeal, and if it is the case, the time allowed for the person to leave the territory. The latter can not be less than one month from the notification date; exceptions are admitted only in cases of emergency,

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[55] Judgment of 04/12/1974, *Van Duyn*, para. 7.
[56] Judgment of 28/10/1975, *Rutili*, paras. 17 -21.
[57] Paul P. Craig şi Gráinne De Búrca, *EU law: text, cases, and materials*, Oxford University Press, 2007, p.786
[58] See Commission proposal, COM 2001/0257 Final; OJ C 270E/2001 P 150.
[59] Judgment of 18/05/1982, *Adoui and Cornuaille* cited above.
[60] Judgment of din 18/05/1982, *Adoui and Cornuaille*, para.13.
[61] Judgment of 28/10/1975, *Rutili*, para.39.

properly motivated[62]. (62) The stated rule amends the text of article 7, the final thesis of Directive 64/221/EEC, which stipulates that the deadline for leaving the territory shall not be less than 15 days if the person has not yet received a residence permit and can not be less than a month, in other cases.

5.2. Procedural guarantees

Jean-Yves Carlier[63] observed that "whatever the reasons for expulsion would be, procedural guarantees[64] must be respected" and that "the Court of Justice has already stopped on this issue[65] and stated that both for the expulsion of a citizen of the Union and for the expulsion of a Turkish citizen, beneficiary of an association agreement, in the absence of a notice given by an independent tribunal, previously to the expulsion, the legal appeal must be suspensive and can not be limited to a legality control that would exclude the control of opportunity"[66].

A.Iliopoulou showed[67] that through the new Community provisions contained in article 31 of Directive 2004/38/EC, substantial changes were made to the system created by the provisions of articles 8 and 9 of Directive 64/221/EEC for ensuring a "comprehensive and effective" judicial protection. "The very nature of the right to free movement of persons" determines the regulation of a judicial control of legislative measures that restrict it. Given its character of fundamental freedom, the freedom of movement must be accompanied by "strong guarantees against arbitrary interferences". Moreover, an effective control corresponds to requirements of the general principle of Community law on effective judicial protection of individuals. This principle was judicially established[68], being inspired by the constitutional traditions" of Member States "and by articles 6 and 13 of the European Convention on Human Rights. Its recognition in the Community legal order was achieved by article 47[69] of the Charter of Fundamental Rights" of the European Union.

The first procedural safeguard covered by article 31 of Directive 2004/38/EC consists of *the right of redress* against a restrictive measure. "The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health"[70].

It results from this wording, that a person has **always** guaranteed the access to a legal appeal, and moreover, if the law of the receiving Member State provides it, to an administrative appeal.

When challenging an expulsion measure is accompanied by a request for suspension of the decision, the person's effective expulsion from the territory can not be pursued before the delivery of an ordinance on the provisional measures of suspension. Exceptions are the situations when: the decision of expulsion is based on a previous judicial decision or the person affected had previous

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[62] Art.30 (3) of Directive 2004/38/CE.

[63] In *Le devenir de la libre circulation des personnes dans l'Union européenne: regard sur la directive 2004/38*, Cahiers de Droit Européen (CDE), no.1-2, 2006, p. 31 (our translation).

[64] Provided currently by article 31 of Directive 2004/38/EC.

[65] Judgment of 05/03/1980, *Pecastaing / Belgian State*, C-98/79, *(Rec.1980,p.691)*.

[66] Judgment of 02/06/2005, *Dörr and Ünal*, C-136/03 *(Rec.2005,p.I-4759)*.

[67] In *„Le nouveau droit de séjour ..."* op.cit., p.550.

[68] Judgment of 19/06/1990, *The Queen / Secretary of State for Transport, ex parte Factortame*, C-213/89 *(Rec.1990,p.I-2433)*; Judgment of 15/10/1987, *Unectef / Heylens*,C-222/86 *(Rec.1987,p.4097)*; Judgment of 15/05/1986, *Johnston / Chief Constable of the Royal Ulster Constabulary*, C-222/84 *(Rec.1986,p.1651)*.

[69] Art.47, *Right to an effective remedy and to a fair trial*:

„Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.".

[70] Art.31 (1) of Directive 2004/38/CE.

access to a judicial way of appeal or the expulsion decision is based on imperative grounds of public security, under article 28, paragraph (3)[71].

The legal review of the measure to restrict the right to free movement will concern the legality of the decision, the facts and circumstances that have grounded the measure and the principle of proportionality[72].

Another procedural safeguard is introduced by the provision contained in paragraph (4) of article 31. Although Member States can deny the concerned individual's presence on their territory during the appeal procedures, they can not prevent him from personally formulating his defence, unless his presence could seriously cause troubles to public policy or public security or when the appeal regards the denial of access on that territory. In this way, **the right to a fair trial is guaranteed**[73], because, even if during appeal proceedings, the person concerned is denied the presence on the territory from which she was expelled, her right to personally present evidence can be restricted only when her presence on the territory of the host Member State would endanger the public policy and safety or when the measure aimed at restricting the right of entry.

5.3. Duration and effects of the prohibition of entry on the territory of a Member State.

After a reasonable period of time, related to circumstances, but in any case not earlier than three years after the enforcement of the final decision of prohibiting the entry, validly sentenced in accordance with European Union law, persons affected by a decision that prohibits the access on a territory may submit a request to suspend the prohibition. To this end, they will present evidence for effective changes in the circumstances that led to the decision of prohibiting the entry, sentenced against them. Within six months from the moment of submitting the application, the competent authorities of the Member State concerned shall deliver a decision on the possibility of suspending the prohibition[74].

Article 32 paragraph (1) of Directive 2004/38/EC gives legislative character to a consideration from a decision of the Court of Justice[75], through the prohibition of permanent interdictions of entry on the territory from which a person was expelled, on grounds of public policy and public security. However, people have no right to enter the territory of the Member State concerned while their application is being considered[76].

In the event of expulsion on grounds of public policy, public security or public health from the territory of a Member State, a Union citizen has the right to re-enter the Member State which issued his passport or identity card, without having to fulfil any formality, even if the document is no longer valid or if the holder's citizenship is disputed. This provision of article 27 paragraph (4) of Directive 2004/38/EC resumes the text of article 3, paragraph (4) of Directive 64/221/EEC and constitutes the Community expression of the principle of international law, under which a state can not refuse their own citizens the right to access and the right of residence on its territory[77] .

Conclusions

At present, the benefit of rights of free residence and movement within a Member State may be denied to the nationals of another Member State, for reasons expressly and exhaustively covered by the Treaty on the Functioning of the European Union - public policy, public security and public health - developed in Directive 2004/38/CE, and broadly interpreted in Luxembourg Court's rulings.

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[71] Art.31 (2) of Directive 2004/38/CE.

[72] A.Iliopoulou in *„Le nouveau droit de séjour ..."*, op.cit., p.554.

[73] Judgment of 05/03/1980, *Pecastaing / Belgian State*, C- 98/79, *(Rec.1980,p.691)*.

[74] Art.32 of Directive 2004/38/CE

[75] Judgment of 18/05/1982, *Adoui and Cornuaille*, para.12.

[76] Art.32 (2) of Directive 2004/38/CE. The provision was inspired by de Judgment of 18/05/1982, *Adoui and Cornuaille* and included in the directive's text in order to avoid abuse of rights.

[77] Judgment of 04/12/1974, *Van Duyn*, para.22.

Our analysis revealed the dual nature of the limitation based on grounds of *public policy, public security and public health*. First, the limitation has Community nature, meaning it is specific to European Union law, because: (a) has been explicitly provided in its texts - primary and secondary; (b) its limits are set specifically under the form of material and procedural guarantees through derived rules, (c) its scope was restricted through the interpretative jurisprudence of the Court of Justice. Secondly, the limitation has also national character, because it aims at safeguarding the fundamental values of society, closely connected to national sovereignty and the concepts are defined through the national legislation.

Measures restricting the right to free movement must comply with certain material and procedural requirements in order to be in accordance with EU law. Thus, the exception cannot be invoked for economic purposes. The restrictive measures based on reasons of public policy and public security must comply with the principle of proportionality and can be taken only after having considered the behaviour of the person concerned, which should represent a present threat, sufficiently serious and real to the fundamental interests of society. As for the grounds of public health, national authorities may refuse the entry or stay on their territory, but only for a limited number of diseases. Member States may require beneficiaries of the right of residence to undergo a free medical examination, but only if there are serious indications about its necessity and only in the first three months from their arrival on the territory of the receiving state.

From a procedural perspective, we mention that the person concerned must be informed in writing and in a manner that would allow the understanding of the decision that restricts her freedom of movement and residence in a Member State, and she has the right to appeal against or seek review of any decision taken against her in front of the competent judicial or administrative authorities of that state; she may be required to leave the territory, with some exceptions, not earlier than one month after the notification. In addition, the prohibition to enter the territory of a state can not be permanent. The interested persons are entitled to request its suspension, after a reasonable period of time, but after at least three years from the execution of the final decision through which it was ordered.

Summarizing, we see that the European Union legislation in force, valuing the relevant jurisprudential *acquis*, allows Member States to adopt, for reasons of public policy, public security and public health, measures that restrict the movement and residence of nationals of other Member States on their territory, but at the same time, it establishes a complex system of guarantees conceived to protect the holders of rights.

Since our study aimed to approach the limitations of the free movement of persons on grounds of public policy, public security and public health, mainly from legal and theoretical perspective, we consider that the theme may be subject to further research focused on the analysis of concrete ways through which Member States would comply with the provisions of EU law, in this area.

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THE UNITED NATIONS'NEW SYSTEM FOR SETTLEMENT THE DISPUTES BETWEEN ORGANIZATION AND ITS EMPLOYEES

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Abstract
In accordance with the Resolution of the UN General Assembly A/RES/61/261 in 30 April 2007 within the United Nations was established a new system in order to settle the internal disputes and disciplinary matters between Organization and its employees designed to meet the current needs of the Organization and which became operational on 1 July 2009. The establishment of this system was based on the conclusions of several reports of the UN Secretary - General, of the Panel on the Redesign of the UN system of administration of justice, of the Advisory Committee on Administrative and Budgetary Questions what pointed out that the old system of administration of justice at UN became a slow, heavy, ineffective and lacking professionalism and that the system of administrative review has no longer corresponded to current needs of this important international Organization. Given these considerations and based on the premise that a transparent, impartial, independent and efficient system of administration of justice is essential for each of the employees of the Organization to be guaranteed a fair and equitable treatment in the performance of professional duties and taking into account the need to reform the management of human resources at the UN, the Organization has decided to establish a new, independent, transparent, professionalized, adequately resourced and decentralized system of administration of justice who comply the rules of International Law and the right to a fair trial and to ensure the implementation of rights and obligations of the employees but also to establish the liability for their actions. Taking into account those mentioned above this study goals are to present the organization and functioning of this new system for settlement disputes between UN staff and administration and to make a brief comparative analysis with the old system.

***Keywords**: international litigations, international employees, international jurisdictions, rights and obligations of the employees, United Nations*

Introduction

The diversification of the international relations and, at the same time, the increase of their complexity degree has necessarily led to a proliferation of the international organizations whose number has exponentially increased[1]. The efficient operation of these international organizations, according to the constitutive act and to the orientations of the member states, also imposes a permanent activity, material, but also some human means to accomplish it. Considering these aspects, after the second world war, there was registered a spectacular increase of the number of persons working for these organizations[2].The term designing the persons working in frame of the international organizations is international employee by means of which we understand any person having targets given by an international organization to exert determined functions[3] in the interest of

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[1] Năstase, A., *Economical International Law*, (Bucharest, Autonomous Overhead "Official Gazette", 1996), p.31.

[2] Beşteliu, R. M., *International Law – Introduction in Public International Law*, (Bucharest, All Beck Press, 1997), 128.

[3] The staff of the international organizations consists of permanent employees recruited based on a contest, contractual employees employed for a determined or undetermined time and employees detached from the member states.

the ensemble of the member states of the respective organization[4]. The most important international organization (both by its universal feature – containing almost all the states of the world, and by the purposes that were offered to it, by the extent and the multitude of its activity) – the United Nations Organization[5] - counted in frame of its Secretariat, on June, 30th 2010, 44134 employees[6] representing 187 states. The Secretariat of the United Nations Organization[7] includes both the international employees working at the central headquarters of the organization (New-York), and the ones employed at UNO subordinated organs, including the regional economical commissions[8]. But, no matter the location of the activities development, in any organization, inclusively in frame of UN, the existence of certain harmonious work conditions is essential for productivity. Therefore, the institution of certain systems, norms and procedures meant to provide a climate necessary for the development of the employees' activity in good conditions contributes to the efficient reaching of the organization purposes and objectives. At UN level, there is a series of regulations, like the ones contained in UN Charter, in UN Regulations and Staff Status, regarding the employees' behaviour and actions and that define the exertion of their essential rights. Also, there are regulations regarding deontology, gender equality, policies referring to human resources. Other aspects following the providing of the employees' integrity, equity and equality are established by means of the circulars of UN General Secretary[9] allowing the organization to accomplish its current attributions in the most efficient way. However, the work litigations that may appear between the organization and its employees are about the same as the ones that may appear in every work place and that may regard aspects related to contracts renewal, to an equitable treatment, to promotion, discrimination, harassment or institution of disciplinary measures. But, this time, in UN case, we must add an additional size, namely the cultural and geographical diversity. In this context and considering the fact that both UN and its employees, according to art. 105 of UN Charter, benefit from the privileges and immunities needed for the accomplishment of the organization purposes, at its level it was created an intern justice system[10] in order to be responsible for those situations where the UN

(http://www.diplomatie.gouv fr/fr/ministere_817/emplois-stages-concours_825/70.-mission-fonctionnaires-internationaux_4338/travailler-oi_20037/votre statut_20420/fonctionnaireinternational_61828 html#sommaire_1).

[4] In other words, the international employee must work for the organization, its activity must have a certain permanence and continuity and he must obey the rules resulting from "his international status". (Beşteliu, R. M., Intergovernmental International Organizations, Bucharest, All Beck Press, 2000, 97-98). An extended definition of the international employee may also be found in the Notice of the International Justice Court since April, 11th 1949 – CIJ, reparation des dommages…, avis du 11 avril 1949, Rec. 1949, p. 177- where it is shown that the international employee is a employee waged or not, employed for an indefinite time or not, employed by an organ of the organization in order to exert or to support the exertion of its functions, shortly any person by means of which the organization acts in accomplishing its purposes. (Combacau, J., Sur, S., Droit international public, Paris, Montchrestien, 2006, 738).

[5] Bolintineanu, Al., Năstase A., Aurescu, B., Contemporary International Law,(Bucharest, All Beck Press, 2000), 104.

[6] Considering all the employees, no matter the type of employment: for an indefinite or definite time or for a stage time and no matter the type of recruitment (local or international). For the year 2010, at the mentioned number we add 1450 employees who activated in frame of the United Nations Development Programme (UNDP) unregistered in the integrated administration system. At the same time, to these numbers we must add 189 more employees in leave without pay and 60 employees detached from other international organizations. (The Report of the UN General Secretary regarding the composition of the Secretariat: demographical data referring to the staff since September, 8th 2010 - A/65/350- http://www.un.org/french/documents/view_doc.asp?symbol=A/65/350)

[7] Further, we will refer to the United Nations Organization by using the abbreviation UN.

[8] Beşteliu, R. M., Intergovernmental International …., 202.

[9] For example, the Circular of the UN General Secretary regarding the Employees' status, rights and obligations since November, 1st 2002.

(http://www.un.org/french/documents/view_doc.asp?symbol=ST/SGB/2002/13), The circular of the UN General Secretary regarding Special Stipulations related to the prevention of the exploitation and of the sexual abuses since March, 22nd 2005

(http://www.un.org/french/documents/view_doc.asp?symbol=ST/SGB/2003/13).

[10] http://www.un.org/fr/oaj/unjs/why.shtml

employees consider their rights were disrespected and the organization regulations were not complied with. This system is considered to be the angular stone of the global effort meant to reinforce the principle of responsibility and of providing the fact that everybody is responsible for the way of accomplishment of the entrusted targets[11]. At the same time, the access to this system is a fundamental right of all the UN employees.

Presentation of the new United Nations' system for settling the litigations between the organization and its employees.

In accordance with the Resolution of the UN General Assembly A/RES/61/261 in 30 April 2007 within the United Nations was established a new system in order to settle the internal disputes and disciplinary matters between Organization and its employees [12] designed to meet the current needs of the Organization and which became operational on 1 July 2009. The establishment of this system was based on the conclusions of several reports of the UN Secretary - General[13], of the Panel on the Redesign of the UN system of administration of justice [14], of the Advisory Committee on Administrative and Budgetary Questions [15] what pointed out that the old system of administration of justice at UN became a slow, heavy, ineffective and lacking professionalism and that the system of administrative review has no longer corresponded to current needs of this important international Organization. Given these considerations and based on the premise that a transparent, impartial, independent and efficient system of administration of justice is essential for each of the employees of the Organization to be guaranteed a fair and equitable treatment in the performance of professional duties and taking into account the need to reform the management of human resources at the UN, the Organization has decided to establish a new, independent, transparent, professionalized, adequately resourced and decentralized system of administration of justice who comply the rules of International Law and the right to a fair trial and to ensure the implementation of rights and obligations of the employees but also to establish the liability for their actions. The way the new system was thought follows both the improvement of the UN employees' performances and the ones of the reports between them and the organization administration[16].

According to the current regulations, within UN there are two procedures operating in relation to the management of the internal litigations and the disciplinary matters: an informal one and a formal one.

Therefore, UN employees are encouraged to try, at first, to settle the litigation by using the informal procedure, considering the fact that the litigation settlement by negotiation, mediation and other methods of this kind has a shorter extension and it is much easier than an informal procedure[17]. Considering that the amicable regulation of the litigations is a basic element of the system of justice administration, it proceeded to the reorganization of the Ombudsman Office for UN Secretariat that

[11] http://www.un.org/fr/oaj/unjs/why.shtml

[12] In the reports between the states, and also in the reports between other international law subjects, there may be contrary interests, misunderstandings or litigious problems. In order to design different states of misunderstanding that may appear in the international relations, the special literature and the documents in matter use a varied terminology, namely: legal dispute, litigation, crisis etc. in report to the seriousness of the misunderstanding state and its implications on the reports between the respective subjects.

(Popescu, D., Năstase, A., Public International Law, Bucharest, "Şansa" Publishing House, 1997, 320). The creation of the international organizations has determined the creation of the specific procedures of settling the legal disputes that may appear in the relations between the member states, between a member state and the organization as such, or between the organization and its employees. (Bolintineanu, Al., Năstase, A., Aurescu, B., Contemporary International Law, Bucharest, All Beck Press, 2000, 207).

[13] A/61/342

[14] A/61/205.

[15] A/61/815.

[16] http://www.un.org/french/documents/view_doc.asp?symbol=A/RES/61/261

[17] http://www.un.org/fr/oaj/unjs/informalres.shtml

also serves all the UN funds and programmes, having three locations: Geneva, Vienne and Nairobi. Also, for the efficient materialization of the informal procedure, the organization considers, at the same time with the implementation of the new system of settling the litigations, mediation – as an important component of this type of procedure – that should be opened to all the parties placed in litigation.

In this sense, within the Ombudsman Office, it was instituted a Department of mediation in order to provide mediation services both to the UNO Secretariat[18], and to the organization funds and programmes[19].

The formal procedure of justice administrative contains a double degree of jurisdiction: a basic court named The United Nations Dispute Tribunal and an appeal court named The United Nations Appeals Tribunal, jurisdictions preceded, in some cases, by the existence of a prior procedure, namely the one of the hierarchical control.

Thus, if a UN employee considers he is prejudiced in one of his rights by an administrative decision and the litigation could not be settled amicably, he may contest the respective decision, by appealing to the formal procedure with the strict respect of the stags and the terms stipulated in this sense.

In a 60-day term from the date he was notified regarding the administrative decision by means of which he considers he was prejudiced, the employee must require a hierarchical control[20]. This hierarchical control that lasts maximum 45 days (30 days for the headquarters in New-York) wants to identify if the contested decision was emitted with the respect of the regulations incident in the field. Within the UN General Secretariat, the hierarchical controls are made in the Hierarchical Control Group placed under the coordination of the Office of the Under-Secretary-General for Management, and the UN funds and programmes exert the hierarchical control in frame of their own administrative structures. The objective of this prior procedure is to give the administration the possibility to rectify certain errors when their existence is found or to suggest acceptable remediation measures and also to reduce the number of cases submitted to the formal contentious procedures.

A hierarchical control is not required if the contested decision regards the imposing of a disciplinary measure or if this decision was taken by the administration based on the notice of an expert or of a consultative body such as the Consultative Committee regarding the compensating requirements. In this case, the action may be directly submitted to the United Nations Dispute Tribunal[21].

If they fail to reach an amicable agreement and the conclusions of the hierarchical control are not satisfying for the employee, he may submit an action the United Nations Dispute Tribunal[22].

The solution of the United Nations Dispute Tribunal may be attacked by appeal at the United Nations Appeals Tribunal that is competent to judge the litigations for which the United Nations Dispute Tribunal crosses its competence, did not correspondingly exert the competence it was invested with or pronounced wrongly on a factual, legal or procedural element[23].

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[18] Mediation is an alternative for the judicial procedures, having the purpose to help the parties to amicably settle the litigation by means of mediation within the Department of mediation. It is a voluntary process involving the consent of the parties that, even if the process is at the jurisdictional courts, may require sending the cause to mediation, a situation where the process is suspended during the mediation development. There is also the possibility for the judge to suggest to the parties the use of the mediation, but he cannot impose this. (http://www.un.org/fr/oaj/dispute/faq.shtml#faq6)

[19] http://www.un.org/french/documents/view_doc.asp?symbol=A/RES/61/261

[20] This term may be suspended during the appeal to the services of Ombudsman Office and of the Direction of mediation.

[21] http://www.un.org/fr/oaj/unjs/formalres.shtml

[22] According to the new system of the United Nations of settling the litigations between the organization and the employees – the UN Administrative Contentious Court will replace the consultative bodies of the old administrative system, the par appeal commissions and the par disciplinary committees and also other organs, if it is needed.

[23] http://www.un.org/fr/oaj/unjs/formalres.shtml

A new element brought by the changes regarding the system of settling the litigations between the organization and its members is given by the fact that an Office of Administration of Justice managed by an executive assigned by the UN General Secretary that will have the mission to coordinate the UN administration system of the intern justice[24] and to compete for the equitable, efficient and transparent functioning of the system[25].

Short comparison between the new and the old system of the United Nations litigations settlement between the Organization and its employees.

A comparative analysis of the two systems of justice administration spotlights the following aspects:

- if the old system was mainly financially administrated by the Management Department improved by taking decisions regarding the matters related to the human resources and the disciplinary questions, the new system is independent, being coordinated only by the Office of Administration of Justice[26].

- if, in the past, there was the United Nations Administrative Tribunal – established by Resolution 351 A (IV) of the UN General Assembly from November, 24th 1949, consisting of seven members of different nationalities assigned by the UN General Assembly for a four-year mandate renewable only once – that worked like an independent organ settling the complaints for disrespecting the stipulations of the work contracts of UN employees and whose decisions were definitive and with no appeal right[27], nowadays, there is a judicial system with two degrees of jurisdiction: the United Nations Dispute Tribunal and the United Nations Appeals Tribunal, in whose frame the judges act[28]. The United Nations Dispute Tribunal [29] is the first instance court of the new internal system of justice administration in whose competence there are the actions introduced by UN active employees or by former employees against the administrative decisions[30] related to employment or against the decisions contracting the rights involved by the employee's quality in the United Nations system (for example, the lack of promotions or of selections, matters related to the job attribution, the refusal to renew the mandate, non-granting benefits and rights, firing and other disciplinary measures etc[31].). The court may be announced only after the requirement addressed to the General Secretary (actually, to the Hierarchical Control Group of the UN Secretariat or to the office that received such an attribution delegation for the UN funds or programmes) in order to accomplish a hierarchical control for those decisions that cannot be attacked directly at the Court.

[24] http://www.un.org/french/documents/view_doc.asp?symbol=A/RES/61/261

[25] Circular of the UN General Secretary regarding the organization and the mandate of the Office of justice administration - ST/SGB/2010/3 since April, 7th 2010.
(http://www.un.org/french/documents/view_doc.asp?symbol=ST/SGB/2010/3).

[26] http://www.un.org/fr/oaj/unjs/oldnew.shtml

[27] However, according to art. 12 of the Status of the Administrative Court of the United Nations, one of the parties could require the review of a decision if it was discovered a fact able to exert a decisive influence and that, before the pronouncement of the decision, had not been known by the Court or by the party demanding the review. The review could be required in a 30 days term since the date when the fact is discovered, but not later than a year since the decision is pronounced.
(http://untreaty.un.org/unat/FAQ_French htm)

[28] http://www.un.org/fr/oaj/unjs/oldnew.shtml

[29] The UN Dispute Tribunal works at Geneva, Nairobi and New-York, having binds in all these locations.

[30] In the absence of an express definition of the phrase of administrative decision and by means of it we will understand any decision taken in the United Nations system, wither it is taken by the UN General Secretariat, by a UN mission, by a UN fund or programme, by a UN specialized institution or by other organism accepting the jurisdiction of the UN Dispute Tribunal.
(http://www.un.org/fr/oaj/dispute/decisions.shtml)

[31] Art. 2 and 8 of the Status of the UN Dispute Tribunal.
(http://www.un.org/french/documents/view_doc.asp?symbol=A/RES/63/253)

The court consists of five permanent judges, 3 of them with full-time jobs[32] and 2 of them with part-time job[33]. The UN General Assembly temporarily decided to assign three more temporary judges in order to support the settling of the causes taken over from the old system of justice administration[34]. The candidates for the judge job are nationals of different member states of UN that should enjoy a high moral consideration and justify at least ten years of experience in the administrative law field. The judges are assigned by the UN General Assembly from the list of the candidates recommended by the Council of the internal justice for a seven-year mandate, without the possibility to renew it. At the same time, at the expiring date of the mandate for a five years term they are forbidden to have a non-judicial job in the United Nations system[35]. The employees and the administration may contest the decision of the United Nations Dispute Tribunal at the United Nations Appeals Tribunal [36]. Beside the competence to pronounce regarding the decisions of the United Nations Dispute Tribunal, this also has the competence to pronounce regarding the decisions taken by the permanent Committee acting in the name of the Joint Committee of the Common House of Pensions of the United Nations staff and the leaders of other organisms and entities acknowledging its competence[37]. The United Nations Appeals Tribunal consists of seven judges[38] working in panels of 3 judges. The decisions of this court are final and binding for both of the parties. The main headquarters is in New-York, where there is also the bind, but it also has secondary headquarters in Geneva, Nairobi.

- if, in the past, the par appeal commissions and the par disciplinary committees formulated only recommendations that could be considered or not by the UN General Secretary, now the decisions pronounced by the two courts are binding for the parties[39].

- if, according to the old system, the employees could attack the decisions of the General Secretary at the UN Administrative Tribunal, now the UN employees and administration may attack a decision of the United Nations Dispute Tribunal at the United Nations Appeals Tribunal [40].

- in the past, the General Secretary could impose a disciplinary measure only after a recommendation formulated by the Par Discipline Committee, a situation totally different from the current one, when it directly has this possibility[41].

- if, in the past, legal assistance was provided to UN employees wanting to contest an administrative decision or a disciplinary by volunteer appearing on the Counsellor List, juridical counselling is currently provided by jurists with acknowledged professional competences working within the Office of Juridical Assistance of the UN staff settled within the Office of Administration of Justice on July, 1st 2009 by the materialization of the Resolution of the General Assembly from December, 24th 2008[42]. But we should say that the appeal to the juridical assistance provided by the

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[32] Thomas Laker (Germania), Vinod Boolell (Maurice), Memooda Ebrahim-Carstens (Botswana). (http://www.un.org/fr/oaj/dispute/judges.shtml)

[33] Goolam Hoosen Kader-Meeran (Anglia), Coral Shaw (New Zeeland). (http://www.un.org/fr/oaj/dispute/judges.shtml)

[34] Jean-François Cousin (France), Nkemdilim Amelia Izuako (Nigeria), Marilyn J. Kaman (USA). (http://www.un.org/fr/oaj/dispute/judges.shtml)

[35] Art. 4, paragraph 6 of the Status of the UN Dispute Tribunal.

[36] http://www.un.org/fr/oaj/dispute/

[37] The International Civil Aviation Organization, the International Sea Organization, the Supporting Agency of the United Nations for the Refugees from Palestine in the Middle East and the International Authority of the Submarine Territories. (http://www.un.org/fr/oaj/appeals/jurisdiction.shtml).

[38] Jean Courtial, Court President (France), Sophia Adinyira, Court Vice-president (Ghana), Kamaljit Singh Garewal, Court Vice-president (India), Mark P. Painter (USA), Inés Weinberg de Roca (Argentina), Rose Boyko (Canada), Luis María Simón (Uruguay)

[39] http://www.un.org/fr/oaj/unjs/oldnew.shtml

[40] http://www.un.org/fr/oaj/unjs/oldnew.shtml

[41] http://www.un.org/fr/oaj/unjs/oldnew.shtml

[42] http://www.un.org/fr/oaj/unjs/oldnew.shtml. Willing to support the UN employees (including the former employees) who have the intention to contest an administrative decision or a disciplinary measure taken against them, the UN General Assembly settled the Office of juridical assistance of the UN staff formed of qualified jurists full-time

jurists of the Office is not mandatory for the UN workers contesting a certain disciplinary measure or decision, as they have the possibility to require juridical counselling also outside UN but this time there is the mandatory feature of personally supporting the costs. Also, there is the possibility for the personal representation in the procedures within the internal system of justice administration. The juridical counselling requirement may be accomplished at any moment of the litigation, even before the litigation occurs, and the juridical assistance consists of granting notices regarding the juridical validity of the employees' pretentions and indicating the options offered by the legal regulations. If an employee decides to announce the formal justice system, the Office will determine whether there is the possibility to support and represent it during the entire time of the procedures[43].

- if, in the old system, the Ombudsman Office worked only in New-York, according to the new regulations it was reorganized, being offered several locations and including a Department of mediation[44].

- if, in the past, the judges of the UN Administrative Tribunal were assigned by the member states and chosen by the General Assembly without going through a special selecting procedure, nowadays, in order to be a judge at the United Nations Dispute Tribunal and the United Nations Appeals Tribunal, one must prove a professional experience of 10, respectively 15 years and the candidatures are evaluated by the Internal Justice Council, an independent organism[45], before being recommended to the General Assembly in order to be assigned[46].

- if, in the past, an employee wanted to officially contest a decision, in the first place he had to demand a review of the administrative decision that was entrusted to the Administration Office of the human resources, nowadays the employee wanting to contest an administrative decision has to demand, at first, a hierarchical control made by the Hierarchical Control Group within the Office of the Under-Secretary-General for Management [47].

- if, in the past, the procedure of reviewing the administrative decisions was criticisable based on the existence of a long time, nowadays the hierarchical control is accomplished in strict terms[48].

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employee who develop their activity both at the central headquarters of the organization in New-York, but also in Addis-Abeba, Beirut, Geneva and Nairobi. The office works independently from the syndicates of the UN staff and administration. In exerting their attributions, the employees of this Office must respect the legal, deontological and professional stipulations and they have to respect a behaviour code review on March, 10th 2010, and they can claim or accept no kind of material compensation or no other type of payment (in addition to the wage received for the activity they performed in frame of the Office) from their clients or from other parties in exchange for the services of juridical counselling.

(http://www.un.org/fr/oaj/legalassist/)

[43] http://www.un.org/fr/oaj/legalassist/

[44] http://www.un.org/fr/oaj/unjs/oldnew.shtml

[45] The Council of the intern justice is a new organ having a very important role in the UN system of justice administration composed of three independent experts and two employees whose main target consists of presenting recommendations to the UN General Assembly regarding the candidates to the judge job at the UN Administrative Contentious Court and at the Appeal Court of the United Nations. At the same time, it received the mandate to elaborate the Behaviour Code for judges and to communicate its viewpoint regarding the implementation of the new system of justice administration in frame of UNO. (http://www.un.org/fr/oaj/unjs/internal.shtml)

[46] http://www.un.org/fr/oaj/unjs/oldnew.shtml

[47] http://www.un.org/fr/oaj/unjs/oldnew.shtml

[48] http://www.un.org/fr/oaj/unjs/oldnew.shtml. The hierarchical control must be demanded in a 60-day term since the employee was notified regarding the decision he contests, the answer of the UN administration to the demand of accomplishing a hierarchical control must be accomplished in a 30 days term for the employees developing their activity at the UN central headquarters and a 45 days term for the employees not developing their activity at the UN central headquarters, a 90 days term – since the employee received the answer for the requirement of accomplishing the hierarchical control or since he should have received this answer – for introducing the action on the role of the UN Dispute Tribunal, the contestation of the decision of the UN Dispute Tribunal at the UN Appeals Tribunal must be accomplished in a 45 days term since the employee received the decision.

(http://www.un.org/fr/oaj/unjs/timelines.shtml).

Conclusions.

Created in 1945 and applied in a time when UN counted only a few hundred employees, its system of internal justice has been often criticized and made the object of several reforms, across the years. Being governed by the principle of depleting the internal appeals, the system of internal justice that worked until 2009 contained two permanent bodies – the Par Appeal Commission and the Par Discipline Commission with headquarters in New-York, Vienne and Nairobi – and the Administrative Tribunal of the United Nations with the headquarters in New-York and it crossed, with no doubt, a legitimacy crisis.

The litigations were solved by the two par commissions formed of employees activating on volunteering principles and that owned neither the expertise nor the impartiality needed for the settling of the entrusted cases. Also, the appearance of the interest conflicts was frequent. The cases presented to the par commissions were tergiversated also up to four years, getting to situations where the plaintiffs left the UN system for another work place even before being given the final decision. The legitimacy crisis had got so far that they spoke about the existence of an apparent system of internal justice administration within UN. A general climate of scepticism often encouraged the UN employees to elude the organization system of settling the litigations[49].

At the same time, they got to a paradoxical situation: while UN gave lessons to some countries for the way of respecting the civil rights, it was proved that the Organization did not apply its own principles in the matter of the human rights at the internal level, as there were no independent judicial courts or appeal courts at its level[50]. No doubt, all of these spotlighted the need to reform the system of justice administration within UN, a change that would be accomplished in the context of the ensemble reform of the entire organization. Being initiated in 1997 by the former General Secretary of UN, Kofi Annan, the UN reform – that was necessarily imposed considering the fact that the organization was settled in 1945 in a historical and political context totally different from the one at the end of the 90s – it refers to major changes at the institutional and operation level in order to increase the organization efficiency, considering the numerous challenges faced by the world in the 21st century. In this context, at the World Summit of the United Nations in 2005[51] the world leaders decided to develop many analyses on the UN operation and organization.

As a consequence of this decision, there were elaborated several considered reports – historical reports – that outlined a modern vision reforming on the administration of the UN intern problems. Regarding the examination of the justice administrating way in UN, in July 2006, the Redesign Group formed of judicial experts outside the Organization presented its conclusions regarding this problem that spotlighted the fact that the system was old, had different dysfunctions, was inefficient and had deficiencies regarding its independence. Considering these aspects, the Group recommended the creation of a completely new, professional, independent and decentralized system.

The UN General Secretary received with satisfaction this report that was presented at the first session of the General Assembly in 2007, after tight consultations with the Secretariat staff and after doing some math regarding the total cost of implementing a new system[52]. The way the current system was thought creates the premises for implementing a real system of justice administration in UN and contributes to the creation of a new culture of responsibility, proceeding to the removal of the par commissions and containing two procedures regarding the administration of the internal litigations and disciplinary matters: an informal one and a formal one. The informal procedure is

[49] http://www.ledevoir.com/societe/justice/150315/repenser-la-justice

[50] http://www.ledevoir.com/societe/justice/150315/repenser-la-justice

[51] Developed between September, 14th – 16th 2005 at the UN headquarters in New-York. (http://www.amosnews ro/2005/Summit_ul_Mondial_al_Natiunilor_Unite_cea_mai_mare_reuniune_a_liderilor_lumii-109039)

[52] http://www.un.org.sn/spip.php?rubrique4

reinforced around the ombudsman and the mediation[53], and the formal one contains a double degree of jurisdiction, being distinguished by the settlement of an appeal court for reviewing the decisions pronounced firstly by the UN Dispute Tribunal.

The new system of internal justice offers a rare occasion of reinforcing the employees' rights[54], being at the same time meant to allow the organization to accomplish its missions as efficiently as possible, respecting at the same time its staff's rights. At the same time, we must say that the analyses of some famous specialists accomplished on the way the current system was thought also determined the formulation of certain opinions supporting that, if there is a response as it is expected and the system pertinently responds to the current needs of the organization, in ten years the new system of justice administration within UN will have a larger sphere regarding the competence, that will not be limited only to the work litigations and administrative relations, but it will extend towards the civil litigations and, in time, there is the possibility to transform it in a supreme world court[55].

How much this fact will be expressed is something that remains to be found out in the future, but it is certain that the system of justice administration in UN will not be able to operate efficiently in the absence of a real reform of the entire international institutional edifice, quite hard to accomplish, considering significant organizing and financing problems[56]. Although, the creation of this system has become imperative, considering the UN decisive actions for elaborating, promoting and developing the international norms in the field of human rights and of the realities of the 21st century[57].

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[53] Radi, Y., La réforme du système de justice interne de l'Organisation des Nations Unies, (http://www.cairn.info/revue-francaise-d-administration-publique-2008-2-p-307 htm)

[54] http://www.unspecial.org/UNS672/t31 html

[55] http://www.ledevoir.com/societe/justice/150315/repenser-la-justice

[56] http://www.un.org.sn/spip.php?rubrique4

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THE CHALLENGES OF THE NEXT EUROPEAN UNION ENLARGEMENT

DAN VĂTĂMAN*

Abstract
After nearly six decades of evolution marked by five successive waves of enlargement, today's EU with 27 Member States, totaling a population of close 500 million people, is a prosperous and powerful entity that exercises a growing influence on the international arena. The EU's commitment to the enlargement process reflects the Member States' conviction that it is in the mutual interest of the Union and the aspirant countries, thereby contributing to stability, development and prosperity throughout Europe. Under these conditions, the EU's enlargement process has gained new momentum, the entry into force of the Lisbon Treaty ensures that the EU can pursue its enlargement agenda, while maintaining the momentum of European integration. Starting from the fact that the EU's current enlargement process takes place against the background of a deep and widespread recession, this study aims to analyze the main challenges facing countries in the process of enlargement and also to highlight their progress with political and economic reforms as well as their capacity to assume the obligations of membership in accordance with the Copenhagen criteria.

Keywords: *accession, enlargement, European integration, negotiations, candidate countries.*

1. Introduction

The European Union today is the result of integration and enlargement process evolving continuously, process that has contributed to stability, development and prosperity throughout Europe and thus represents one of the most important phenomena that the European continent has known.

If the initial integration process aimed at preserving peace and eliminate the danger of another war, there were later identified many benefits of increased cooperation between European states. By establishing a common market and the gradual approximation of economic policies of Member States aimed to promote a harmonious development of economic activities, sustainable and balanced growth, increased stability, accelerated growth in living standards and closer relations between Member States. Thus, increasing cooperation between Member States of the European Communities resulted in significant benefits, not only in terms of security, and prosperity.

The success of the EU construction has determined other European countries to want to get integrated, the prospect of integration helping them to engage in comprehensive reforms to fulfill conditions imposed by pluralist democracy and market economy.

As a result, since 1990, following the major changes occurring in Central and Eastern Europe, the countries of this region have seen in the European Union a foothold, and in the process of European integration, an opportunity for reviving their economy. On the other hand, being consistent with the ambitious objectives promoted in the Treaty of Rome and the Single European Act, the European Union was concerned about the deepening of integration, this being evident throughout the '90s. In this respect, European policymakers have expressed a genuine consensus on the possibility of European Union enlargement, of course in a time frame and after the candidate countries have completed well-defined criteria.

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2. History of European Union enlargement

As it is known, the founding members of the three European Communities were six (Belgium, France, West Germany, Italy, Luxembourg and the Netherlands), but the possibility of extension of the new community construction by including new members was provided in the instituting Treaties[1]. As a result, over time, the six founding members were joined by another twenty-one countries in five waves of enlargement: Denmark, Ireland and the United Kingdom (January 1st, 1973), Greece (January 1st, 1981), Portugal and Spain (January 1st , 1986), Austria, Finland and Sweden (January 1st , 1995), Cyprus, Estonia, Latvia, Lithuania, Malta, Poland, Czech Republic, Slovakia, Slovenia and Hungary (May 1st , 2004), Bulgaria and Romania (January 1st 2007)[2].

The five waves of extension of the Community construction required a series of amendments to the Treaties, each time a reform being necessary to allow absorption of new members and ability of the institutions of the Union so that they can continue to function properly. Also, since in most cases the states that had joined, had a development level lower than the EU average, every enlargement of the Union, required financial efforts from both the Union and the countries that have joined.

These difficulties have not prevented successive enlargements of the Community construction since the new EU Member States were consistently pursuing its objectives.

Thus, at the accession of Portugal and Spain, the European Commission led by Jacques Delors has developed a White Book which set out a timetable for steps to complete the single market by 31 December 1992.[3] Moreover, in the second half of 1985 were held the Intergovernmental Conference which finalized the Single European Act (signed in February 1986) by which the European Communities have committed to adopt measures for the internal market as a central element of building a strategy to revive the community. Also, the adoption of Single European Act has been a crucial step in shaping EU environmental policy, economic and social cohesion, research and technological development or social problems.[4]

In the early '90s, along with the completion of the internal market and in line with ambitious ideas promoted by the Single European Act, European policymakers have considered that revisions to the treaties were necessary to meet the priorities and challenges facing the European Community. These concerns were reflected in the Treaty of Maastricht (Treaty on European Union - TEU), which summed up the efforts made in the two intergovernmental conferences aiming to finalize the text of a Reform Treaty, namely "political union" and "the economic and monetary union".

Given the fairly significant costs of previous enlargements and the costly experience of Germany reunification[5], the EU has maintained the policy of opening to other countries (developed in art. 49 TEU), but imposed some conditions that a State had to meet to join the Union. Consequently, the Copenhagen European Council (June 1993), defined the criteria that candidate countries must fulfill to become EU members; they are referring to: the stability of institutions guaranteeing democracy, rule of law, human rights, respect for and protection of minorities (political criterion), the existence of a functioning market economy and the ability to cope with competitive pressure and market forces within the European Union (economic criterion), the ability to assume

[1] This situation was provided both in ECSC Treaty (Article 98), EEC Treaty (Article 237) and EAEC Treaty (Article 205).

[2] The accession of Bulgaria and Romania to the European Union is not considered as a separate wave of enlargement, but a complement to the fifth wave which began in 2004.

[3] Completing the Internal Market - 14/6/1985, COM (85) 310.

[4] Dan Vătăman, *History of the European Union* (Bucharest: Pro Universitaria Publishing House, 2011) 38-39.

[5] On 28th April 1990, it was held a special European Council in Dublin (Ireland) where they agreed upon a common position on German unification and the Community relations with countries in Central and Eastern Europe. Following the reunification of the two German states, the German Democratic Republic was included in the European Communities on 30th October 1990, without being regarded as a new member, but only as a result of unification.

obligations of EU membership, including the aims of political, economic and monetary union (criterion concerning adoption of the *acquis communautaire*)[6].

Even if these conditions were imposed, the EU commitment to enlargement is demonstrated by the fact that alongside with the efforts to refocus and restructure the community construction, there were ongoing negotiations for the fourth EU enlargement, concluded with Austria, Finland and Sweden (January 1st, 1995).

To implement the decisions taken at Copenhagen and to maintain the momentum of the integration process, it was needed to outline a realistic strategy that will help interested states to join the European Union to prepare for accession and to strengthen their capacity to assume the responsibilities of a Member State. As a result, the Essen European Council (December 1994) reaffirmed the need for a multilateral framework for dialogue and consultations, and in this regard, adopted a pre-accession strategy designed to prepare countries which had signed an association agreement with EU to obtain membership.

Given that in the following period a number of countries have applied for accession to the European Union, the prospect of an unprecedented scale of expansion generated discussions about the entire configuration of European integrationist approach, both in terms of institutional structure and the other Community policies, which required amendment of the Community Treaties. To adopt the changes to be made on 29th March 1996 in Turin, it was opened an Intergovernmental Conference, its negotiations focusing, among other things, on reforming EU institutions in order to make them more democratic and more efficient in terms preparations for EU enlargement that would include countries in Central and Eastern Europe, as well as Malta and Cyprus.

Also, the Dublin European Council (December 1996) adopted a new improved pre-accession strategy, addressed to all the candidate countries of Central and Eastern Europe that exploited both instruments existing at that time (the Europe Agreements, the White Book on the internal market, structured dialogue and PHARE program) and a new instrument representing the cornerstone of the strategy - the accession partnerships.

With the adoption of the Treaty of Amsterdam, it was conducted a reform of the EU in light of EU enlargement. Moreover, based on the Commission views on the expansion and the readiness of each candidate, contained in Agenda 2000[7], the Luxembourg European Council (December 1997) outlined the task for the coming years, namely preparing candidate countries for EU membership and the Union Enlargement.

Given the dynamics of community building, the Helsinki European Council (December 1999) confirmed the importance of the enlargement process to ensure stability and prosperity in Europe and decided to convene an intergovernmental conference as early as February 2000, to raise questions on further enlargement of the Union, namely: the size and composition of the distribution of votes in the Council, a possible extension of qualified majority decisions and other aspects of the Community institutions resulting from the Treaty of Amsterdam. The European Council also reiterated that the fulfillment of the Copenhagen political criteria is a precondition for opening accession negotiations.

By the adoption of the Treaty of Nice (considered essential for enlargement) it was performed an institutional reform aimed at ensuring the proper functioning of an enlarged Union of 27 Member States; the three-pronged institutional reform aimed at: the composition and functioning of European institutions, the decision-making by the Council of Ministers and the strengthening of cooperation between institutions. Thus, the Treaty of Nice has prepared future EU enlargement, the implementation stake of such process consisting in reforming the functioning of the Union.

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[6] Conclusions of the Presidency - Copenhagen, June 21-22 1993, SN 180/1/93 REV 1

[7] "Agenda 2000" was published in July 1997 and relates to future EU policies, EU enlargement, and the EU's financial perspectives for 2000-2006. The document is attached to the Commission's views, based on the Copenhagen accession criteria, the applications for membership made by Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia.

The next important step towards European integration was made at the Copenhagen European Council meeting (December 2002), on which occasion were concluded accession negotiations with Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Republic Slovakia and Slovenia, these countries being invited to join the EU on May 1st, 2004. On the same occasion, the European Council stressed that the successful conclusion of accession negotiations with ten candidate countries leads to a new dynamism to the accession of Romania and Bulgaria as part of the same inclusive and irreversible enlargement process and also showed that, depending on future developments in the application of membership criteria, the objective is to welcome in 2007 Romania and Bulgaria as EU members.

After the fifth enlargement of the Union (held in two stages: May 1st 2004 and January 1st , 2007) the number of Member States increased to 27, which caused the need for a new amending treaties which will provide the European Union modern institutions and optimized working methods to tackle effectively the challenges today. This was the objective of the Treaty signed at Lisbon on December 13th 2007. Thus, taking into account the political, economic, social changes and desiring the same time, to meet the aspirations and hopes of the Europeans, the Lisbon Treaty established the EU's powers and means that can be used and modified the structure of institutions and their operation.

3. The current enlargement of the European Union

In an enlarged European Union of 27 Member States, convinced that the successive enlargements have been a success both for the European Union and the Member States which acceded to it, thus contributing to stability, development and prosperity throughout Europe, the leaders of Member States considered that this process must continue, ensuring the success of future enlargement of the Union, for a better response to the many challenges they face.

Currently the EU enlargement process is ongoing, with five candidate countries: Croatia, Former Yugoslav Republic of Macedonia, Iceland, Montenegro, Turkey and four potential candidate countries: Albania, Bosnia and Herzegovina, Serbia and Kosovo.

3.1. The main challenges in the process of European Union enlargement

3.1.1. Overcoming the economic crisis

The economic crisis has affected all countries involved in the enlargement process. However, the impact was different according to each country's economic structure. Albania, Kosovo and the Former Yugoslav Republic of Macedonia were the least affected, because their economy depends to a lesser extent by exports and domestic markets faced their crisis. By contrast, Croatia, Serbia and Turkey, which are more integrated on the global market, were heavily affected. Montenegro was severely hit, due to its dependence on external financing and few sectors. In Bosnia and Herzegovina the impact of the crisis has been exacerbated by pro-cyclical fiscal policies with a high share of subsidies and social transfers in the budget.

Although the Western Balkan countries have implemented fiscal austerity measures, including rebalancing the budget, they were not sufficient to prevent a widening of budget deficits; Iceland, Serbia, Kosovo and Bosnia and Herzegovina were forced to rely on support from International Monetary Fund (IMF). In these circumstances, the Union has provided support to mitigate the impact of the crisis, the IPA[8] assistance being reprogrammed to support investment in infrastructure and competitiveness.

[8] Financial assistance under the Instrument of Pre-accession Assistance (IPA) is designed to help candidate countries and potential candidates in their efforts to meet accession criteria, to align with EU policies and standards and to foster socio-economic development.

According to the enlargement strategy presented by the European Commission[9] to achieve sustainable growth rates and real convergence, there will be required further structural reforms and prudent fiscal policies. Internal sources of growth should be exploited more effectively, in order to improve productive capacity, job creation and competitiveness, being necessary to increase the volume of domestic and foreign investment in new projects ("greenfield"), particularly in export-oriented activities. To increase the volume of domestic and foreign investment, governments must improve the business environment, this means increasing the efficiency of public administration and the independence of judiciary, removing informal barriers to trade and strengthening the rule of law. Ensuring sound and sustainable public finances is crucial for the countries involved in the enlargement process, which is an essential part of preparation for accession to the European Union. Recent experience has demonstrated the interdependence of European economies and the destabilizing potential of major macroeconomic imbalances, even in the small economies.

3.1.2. Social inclusion

The economic crisis had a negative impact on social welfare in the countries involved in the enlargement process, vulnerable groups, including minorities, disadvantaged communities and persons with disabilities, were particularly affected.

Therefore, the European Commission is committed to assisting countries involved in the enlargement process in efforts to improve the living conditions of vulnerable groups, including the economic and social inclusion of gypsies. In this regard, the Commission provides substantial support of IPA assistance for vulnerable groups through education and employment services to strengthen employment and social services in order to integrate disadvantaged people into the labor market. The Commission also finances the modernization of gypsies living in camps. This support will be strengthened to improve living conditions in the countries most affected, helping them to adopt a comprehensive approach to issues of social inclusion. In the case of Croatia, it has already been signed a Joint Inclusion Memorandum, thus offering a framework for action in this area.

The countries involved in the enlargement process have adopted some measures to address the problems outlined above, but further efforts are needed in this regard, those States must consider the establishment of explicit and ambitious goals in terms of employment, education and poverty reduction in disadvantaged communities, particularly in the case of gypsies.

3.1.3. Strengthening the rule of law and public administration

Strengthening the rule of law, particularly the judiciary system, and combating corruption and organized crime is a crucial challenge for most countries involved in the enlargement process. Thus, tangible results that will provide lasting improvements in the rule of law are an important element to move to the next stages of the process of the EU accession process.

The renewed consensus on enlargement, on which the European Council agreed in December 2006, requires that the rule of law issues to be addressed in an early stage of the accession process. Therefore, full priority has been given to the treatment of these issues and to the use of all the instruments available; the use of benchmarks in the accession negotiations are an important catalyst for reform and sending a clear message regarding the need to address seriously, issues of rule of law before accession. Given the importance of strengthening the rule of law, the EU has closely monitored the progress of the candidate or potential candidate, particularly through joint bodies established by the Stabilization and Association or Interim Agreements and evaluation missions.

3.1.4. Freedom of expression and media

Freedom of expression and of the media, which is an integral part of any democratic system, remains a concern in most countries involved in the enlargement process. Therefore, this issue requires an urgent solution; emphasis should be put on areas such as legal framework and its conformity with European standards, especially with regard to defamation, the appropriate

[9] Communication from the Commission to the European Parliament and the Council - COM (2010) 660 final, *Enlargement Strategy and main challenges 2010-2011*, Bruxelles, 9.11.2010.

prosecution of all cases of attack on journalists, creating self-regulatory bodies and their contribution to enhance professionalism, public service broadcasting role in pluralistic democracies, cross-border networks to improve the flow of reports throughout the region, thus contributing to better mutual understanding.

3.1.5. Reconciliation, regional cooperation and bilateral issues in the Western Balkans

In the last decade, Western Balkan countries have made substantial progress in terms of stability and regional cooperation, however, a number of problems stemming from conflicts in the region remain unresolved and affect both the internal workings of states and the relations between them. Therefore, the European Union is working with parties in the region to overcome these problems, with the conviction that lasting reconciliation requires efforts at all levels (of government, the judiciary and civil society), reconciliation is linked also to solving problems related to poverty and social exclusion.

Reconciliation is closely related to regional cooperation, which helps to maintain good neighborly relations and an environment ready to address outstanding bilateral issues. Also in the Western Balkans, regional cooperation is crucial for economic development and to identify solutions to common problems, such as organized crime, border management, climate change and environmental pollution. Moreover, regional cooperation is essential to record progress towards EU accession in areas such as public safety, energy, transport. Regional cooperation has been hampered by differences over Kosovo, which affected, in particular the functioning of CEFTA, the extension of the Pan-Euro-Med system of diagonal cumulation and the signing of the Transport Community agreement. Also, a number of other bilateral issues remain unresolved, such as the problem between Greece and the Former Yugoslav Republic of Macedonia on the name of the country.

3.2. Progress in countries involved in accession to the European Union

3.2.1. Candidate countries

a) Croatia

Croatia has made steady progress towards meeting the accession criteria for the accession negotiations have reached the final stage. As regards economic criteria, Croatia is a functioning market economy which should be able to cope with competitive pressure and market forces within the Union, provided that it vigorously implements its comprehensive reform program to reduce structural weaknesses. Regarding the *acquis* criteria, Croatia has made good progress, of the 33 chapters opened for accession negotiations it provisionally closed 25.

Croatia has had positive results as regards the conditions for concluding the negotiation chapters with financial implications[10], however, efforts are still needed to fully establish the necessary administrative structures to manage and control funds. Also, Croatia has to meet the benchmarks that need to be met in order to close a chapter, in particular as regards the judiciary and fundamental rights, including combating corruption, as no longer necessary for the EU to consider imposing any cooperation and verification mechanism after the accession.

b) Former Yugoslav Republic of Macedonia

Former Yugoslav Republic of Macedonia continues to meet sufficiently the political criteria and, as a result of reforms in 2009, there were further progress, albeit in an uneven pace in the reform of Parliament, the police, the judiciary system, public administration and protection of minorities. Former Yugoslav Republic of Macedonia must continue to make progress on the dialogue among political actors to reform the judiciary and public administration, fighting corruption, freedom of expression and to improve the business environment. It is also essential to maintain good neighborly relations and finding, under the UN umbrella, a negotiated solution accepted on both sides of the

[10] Agriculture and rural development, Regional policy and coordination of structural instruments, Financial and budgetary provisions.

country's name issue[11]. Since the Former Yugoslav Republic of Macedonia has continued to fulfill its commitments to its obligations under the Stabilization and Association Agreement (SAA) in October 2009, the Commission proposed to move to the second stage of association, namely the opening of SAA accession negotiations, but so far the Council had not yet taken a position on the Commission's recommendation.

c) Iceland

Considering that Iceland has a long tradition in terms of democracy and good governance, and the fact that this country is a member of the European Economic Area (EEA) of 1994 and the Schengen Area in 2001, was launched in 2010 the accession process with Iceland. Thus, following the Commission's recommendation made in its opinion of 24 February 2010, the European Council decided on June 27th, 2010, the opening of negotiations with this state, the first intergovernmental conference on Iceland's accession to the European Union taking place in Brussels on July 27th, 2010.

The first progress report from Iceland confirms the information contained in the opinion of Iceland in February 2010 according to which Iceland fulfills the political criteria, being a functioning democracy with strong institutions and deep-rooted traditions of representative democracy. The judiciary system in this country is strengthened, and the magistrates have a very high level. As regards human rights and minority protection, Iceland continues to respect fundamental rights and ensure a high level of cooperation with international mechanisms aimed at protecting human rights. The opinion, however, identified a number of problems, but the report confirms the fact that Iceland has taken measures to solve them.

Also, progress has been satisfactory in terms of further improving the legal framework on conflicts of interest and political party financing. Have been modified the norms for the appointment of judges, to a greater consolidation of judicial independence. Important steps have been taken to stabilize the economy. There has been progress in terms of enhancing the recovery of public finances and financial system. The International Monetary Fund programme is on track. However, there remains uncertainty and economic challenges. Iceland will have to meet its obligations, such as those identified by the EFTA Surveillance Authority (ESA) under the European Economic Area Agreement. Significant efforts are needed as well, to ensure that citizens of Iceland are adequately informed on the implications of EU accession.

d) Montenegro

Montenegro has made progress towards meeting the political criteria set by the Copenhagen European Council in 1993 about the stability of institutions guaranteeing democracy, rule of law, human rights and respect for and protection of minorities and on the conditions of the Stabilization and Association, however, further efforts are needed.

As regards economic criteria, Montenegro has achieved a certain degree of macroeconomic stability. However, to become a functioning market economy, Montenegro needs to eliminate internal and external imbalances and weaknesses, particularly in the financial sector and in the functioning of markets, and strengthen the rule of law. To cope with competitive pressure and medium-term market forces within the Union, Montenegro needs to strengthen its physical infrastructure and human capital and to continue implementing structural reforms. Overall, the balance of Montenegro regarding the implementation of its obligations under the Stabilization and Association Agreement (SAA) is positive, which is why, on 9th November 2010; the Commission adopted its Opinion on the request of Montenegro Accession to the European Union. In this opinion, it shows that Montenegro would have an overall limited impact on EU policy and would not affect the Union's ability to maintain and deepen the development, which is why the Commission recommended the Council to grant candidate country status of Montenegro. On

[11] The name issue, on which there are differences of opinion with Greece, remain unresolved. The two countries under UN had talks to solve this problem and held a series of bilateral contacts, including the level of prime ministers, but the momentum created by taking these actions has not yet led to concrete results.

December 14th, 2010 Council submitted a number of conclusions on enlargement, which were adopted at the European Council meeting of 16-17 December 2010, an occasion on which was agreed to grant Montenegro the candidate country status.

e) Turkey

Although Turkey has long been involved in the process of accession to the European Union, the pace of progress in meeting the requirements of membership is very low. Accession negotiations have moved on, even if slowly, reaching a demanding stage in which Turkey should intensify its efforts to meet the established conditions.

As regards political criteria, according to reports on Turkey's progress, constitutional reforms adopted on 12th September 2010, there have been created the necessary conditions for progress in a number of areas, such as the judiciary system and fundamental rights. These changes correspond to the Accession Partnership priorities; however, drafting and adoption of constitutional reforms were not preceded by a consultation process which will be attended by political parties and civil society in general. It is therefore essential to implementing this package of amendments in accordance with European standards and in a transparent manner with participation of all stakeholders.

As regards economic criteria, the European Commission found that Turkey is a functioning market economy, which should be able to cope with competitive pressure and medium-term market forces within the Union, provided they continue to implement its comprehensive reform program to eliminate structural weaknesses. Overall, Turkey has improved its ability to assume the obligations of membership, making progress, sometimes uneven, in most areas. Thus, alignment is advanced in some areas, such as free movement of goods, intellectual property, antitrust, energy, enterprise and industrial policy, consumer protection, statistics, trans-European networks, and science and research. Efforts to align must be continued in such areas as environment, company law, public procurement, establishment and free movement of services. It is also very important for Turkey to improve in most areas, the administrative capacity for implementing the *acquis* criteria.

Regarding regional issues and international obligations, Turkey has continued to publicly express their support to the negotiations taking place under the UN between the Greek and Turkish Cypriot community leaders to address global Cyprus problem, however, there have not been achieved progress in the normalization of bilateral relations with Cyprus. Despite calls launched by the Council and the Commission, Turkey has not complied with their obligation to implement fully and without discrimination to the Additional Protocol to the Association Agreement and has not removed all obstacles to free movement of goods, including restrictions on direct links transport to Cyprus. For this reason, the Commission recommended continuation of the measures adopted in December 2006 the EU Council, which decided not to open eight relevant negotiating chapters[12], and not to close temporarily any other chapter, so long as Turkey will not meet their commitment[13].

3.2.2. Potential candidates for membership

a) Albania

Albania has made progress towards meeting the criteria set by the Copenhagen European Council in 1993 about the stability of institutions guaranteeing democracy, rule of law, human rights and respect for and protection of minorities, and on the conditions of the Stabilization and Association , however, considerable efforts are still needed.

As regards economic criteria, Albania has achieved a certain degree of macroeconomic stability. However, to become a functioning market economy, Albania should continue to strengthen governance, improve labor market performance, to ensure recognition of property rights and strengthen rule of law. To cope with competitive pressure and medium-term market forces within the

[12] The eight chapters are: free movement of goods, right of establishment and freedom to provide services, financial services, agriculture and rural development, fisheries, transport policy, customs union and external relations.

[13] COM (2010) 660 final

Union, Albania needs to strengthen its physical infrastructure and human capital and make further structural reforms.

Overall, Albania's balance sheet in terms of implementing its obligations under the Stabilization and Association Agreement (SAA) is positive, which is why, on 9th November 2010, the Commission adopted its Opinion on the application Albania Accession to the European Union. This opinion shows that Albania would have limited overall impact on EU policy and would not affect the Union's ability to maintain and deepen the development. Accordingly, the Commission considered that it should open negotiations with the European Union in Albania when the country will have reached the required degree of compliance with membership criteria, particularly the Copenhagen political criteria which require stability of institutions guaranteeing especially democracy and the rule of law.

b) Bosnia and Herzegovina

Bosnia and Herzegovina has made limited progress in addressing the political criteria, and recorded some progress on the rule of law, mainly in areas such as border management and migration policy as a result of reforms to meet the requirements for visa liberalization. Also, important steps were made to promote reconciliation and regional cooperation, particularly with regard to refugee return. However, overall, the application of reforms was insufficient and internal political climate of pre-election period was dominated by nationalist rhetoric. The lack of a shared vision of political leaders regarding the direction to which the country is heading, blocks key reforms and prevents further progress towards European Union.

Consequently, Bosnia and Herzegovina should speed up its efforts to achieve a satisfactory balance on the implementation of the provisions of the Interim Agreement. Also, Bosnia and Herzegovina should immediately take the first steps to align its constitution to the European Convention on Human Rights (ECHR) and to improve efficiency and functioning of its institutions. However, this country should be able to adopt, implement and enforce EU laws and standards. Overall, the implementation of the Interim Agreement has been uneven.

Bosnia and Herzegovina were in violation of the agreement as a result of non-compliance with the European Convention on Human Rights regarding the right to equal treatment without discrimination and failure to establish a monitoring authority on state aid. As a result, the Commission stressed that further strengthening of administrative capacity is needed in order to achieve satisfactory results in applying the Stabilization and Association Agreement (SAA).

c) Serbia

Serbia has made progress towards meeting the Copenhagen criteria and also has made further progress in fulfilling its obligations under the Stabilisation and Association Agreement (SAA). Regarding regional issues and international obligations, Serbia has made great strides in terms of reconciliation in the region, particularly with Croatia and Bosnia and Herzegovina.

Serbia has continued to participate actively in regional initiatives such as Process of Cooperation in South-East Europe Cooperation Process (SEECP), the Regional Cooperation Council (RCC) and the Central European Free Trade Agreement (CEFTA. However, regional cooperation was affected by lack of agreement between Serbia and Kosovo in connection with regional meetings. As a result it must be agreed as soon as possible on an acceptable and viable solution for the participation of both Serbia and Kosovo in regional fora, this thing being essential for a functional Regional cooperation.

As regards the economic criteria, further progress to establish a functioning market economy was limited, which is why Serbia should make more efforts in restructuring its economy in order to meet the medium term, competitive pressure and market forces EU market.

d) Kosovo

With regard to paragraph 17 of resolution 1244 adopted by the UN Security Council, where the Council welcomes the work of the European Union and other international organizations to adopt an integrated approach to economic development and stability in the region affected by the crisis in

Kosovo, the European Council in Brussels on 14th December 2007 stressed that the EU is ready to play a leading role in strengthening stability in the region in accordance with its European perspective, and in the implementation of a solution to define the future status of Kosovo. After Kosovo declared its independence (February 2008), the EU Council took note of the declaration of independence and stressed that each EU member state will decide whether to recognize the new state[14]. However, the EU Council Joint Action 2008/124/CFSP[15] adopted by the European Union mission was set up a Rule of Law Mission in Kosovo - EULEX KOSOVO, designed to assist the Kosovo institutions, the judicial authorities and the law enforcement bodies in their progress towards sustainability and accountability and to continue developing and strengthening an independent multiethnic justice system and a multiethnic police and customs system, ensuring that these institutions are free from political interference and adhering to internationally recognized standards and best European practices.

European Council in Brussels on 19th -20th June 2008 reaffirmed the European Union leading role in ensuring stability in Kosovo, recalling its readiness to assist economic and political development of Kosovo through a clear European perspective, in accordance with the European perspective of the region. On the same occasion, the Heads of State or Government of EU Member States have welcomed Kosovo's commitments on the principles of democracy and equality of all citizens, protection of minority Serb and other minorities, religious and cultural heritage conservation, and international presence.

As it is evident from the enlargement strategy presented by the European Commission[1], Kosovo has made progress lately in terms of political criteria. It has strengthened its commitment to European policy, the reform agenda and it established a ministry for European integration. However, important challenges remain in terms of public administration reform and the rule of law, including the judiciary system. Additional efforts need to be done to combat corruption, organized crime and money laundering. Dialogue and reconciliation between communities and the protection and integration of minorities, particularly Kosovo Serbs continue to be areas on which there are persistent concerns.

As regards economic criteria, Kosovo has made limited progress towards establishing a functioning market economy, so there must be carried out reforms and investments to enable the country to cope with long-term competitive pressures and market forces within the Union. Progress in aligning the legislation and policies in Kosovo, to European standards continue to be uneven. The legal framework was further developed in the fields of customs, taxation, and free movement of goods, statistics, migration, education and combating terrorism. Approximation is in its infancy as regards competition, intellectual property, environment, agriculture and food security, integrated border management, asylum, money laundering and protection of personal data. Alignment to European norms remains limited in the field of employment and social policies, financial control, drug trafficking, human trafficking and organized crime.

4. Conclusions

After nearly six decades of evolution marked by five successive waves of enlargement, the European Union today is a successful model based on values of respect for human dignity, freedom, democracy, equality, rule of law and respect for human rights, values were common to the Member States in a society characterized by pluralism, nondiscrimination, tolerance, justice, solidarity and equality between women and men.

[14] Kosovo unilaterally declared independence was not recognized by five European Union member states: Cyprus, Greece, Romania, Slovakia and Spain.

[15] Official Journal of the European Union L 42/92 of 16.2.2008.

Significant benefits in terms of security and prosperity that flow from EU member states have determined over time a number of European countries to want to get integrated, the prospect of integration helping them to engage in comprehensive reforms to fulfill conditions imposed by pluralistic democracy and market economy.

Convinced that the extension also serves the interests of the Union and those of the countries wishing to join, thus contributing to stability, development and prosperity throughout Europe, European policymakers have considered that the enlargement process must continue, but not in any conditions. In this regard, states involved in the accession process should take political and economic reforms, the goal being to bring these countries to the European standards in all areas covered by the treaties on which the EU, which would support the Union in achieving their objectives in a number of key areas for economic recovery and sustainable growth, such as energy, transport, environmental protection and efforts to tackle climate change.

Thus, the European Union showed openness to the idea of joining of any democratic European country, which has a market economy and administrative capacity to manage the rights and obligations arising from membership. For the future EU enlargement to be successful, the candidate and potential candidate applies a rigorous set of conditions, their possible accession date depending on progress in political and economic reforms, each country being judged on its own merits. Moreover, success depends on winning the enlargement policy support from citizens of both the EU Member States and of the candidate and potential candidate countries being essential for the public to have confidence that future accessions are well prepared and that they are subject to rigorous conditions.

Overall, the future enlargement of the European Union depends mainly on the demonstrated ability of countries wishing to accede to assume obligations of membership, requiring sustainable reforms, and legislative and credible and convincing institutional adjustments.

As a result, the transition to the next stages of the accession process will be achieved when the countries concerned will meet established standards, including those related to democracy, the rule of law and fundamental rights and freedoms.

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CONSIDERATIONS UPON ASSIMILATED ADMINISTRATIVE ACTS

MARTA CLAUDIA CLIZA *

Abstract
Although the classic administrative courts know as object the acts against classic administrative acts, it should not be lost sight of the assimilated administrative acts, which also may be subject to acts in this litigation. Taking in consideration this category of acts, this study will examine the documents falling into this category and the impact that such acts have on public authorities. Given the significant increase of administrative cases that have as object assimilated administrative acts and the way the public authorities acts with power abuse, violating the rights of citizens, the importance of the juridical control over assimilated acts can not be denied any more.

Keywords*: administrative acts, assimilated administrative acts, unjustified refusal, Administrative Court Law.*

1. Introduction

This study intends to draw attention upon the administrative court act subject to assimilated administrative acts, as a species of administrative acts. If as regards the administrative court acts aiming at administrative acts we find a lot of information on the theoretical level, but also at the jurisprudential level, acts subject to assimilated administrative acts are less approached and analyzed by the doctrine, for which reason we consider as appropriate a study on this subject. Because, why should we not admit it, the government inaction in responding to citizens must be penalized in the same way as the illegally issued document, both being dimensions of violating the principles of administrative acts legal regime, as well as of legality and opportunity.

2. Theoretical and practical considerations on assimilated administrative acts

In the specific language of the administrative court, when we talk about assimilated acts, we originally consider the unjustified refusal to settle a claim, which would represent an explicit expression, with abuse of power, of the will not to solve the request of a person; it is assimilated to the unjustified refusal and non-enforcement of the administrative act issued as a result of the favorable resolution of the request or, where appropriate, of the prior complaint [art. 2, paragraph 1, letter i) of Law no.554/2004 of the administrative court]. As non-settlement of an application within the legal deadline, it is part of the assimilated administrative acts, a result of assimilating an administrative deed, by the consequences produced to an administrative act due to the effects of injury to a subjective right or legitimate interest. In the theory, these two forms of assimilated administrative act are also treated by the phrase administrative silence and lateness.

3. Special mentions on Law no. 554/2004, as amended, regarding the concept of administrative act

In our legal literature, discussions on administrative act are old and varied, beginning with issues of terminology and ending with content elements of the applicable legal regime. For example, in an essay substantiated by Prof. Tudor Draganu, in his monograph of 1970[1], the concept of

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[1] T. Drăganu, *Administrative acts and assimilated deeds subject to judicial review, according to Law no.1/1967*, (Dacia Publishing House, Cluj-Napoca, 1970).

administrative act is to be used to evoke the express manifestation of will in order to produce legal effects, while refusing to settle, i.e. unjustified refusal, as well as the administration silence would have only the meaning "***assimilated deeds to administrative acts***". Other theorists, opinion to which has also been rallied one of the authors of this paper (Prof. Antonie Iorgovan), prefers to speak of typical administrative acts and atypical administrative acts, the essays being attested by the regulations issued in recent years[2]), which, according to Western models[3], assimilates the public administration silence with tacit approval.

In this context, we mention that ***French administrative law stipulates***[4], in principle, that ***silence of administration is equivalent to a refusal***: at the expiry of a two months period[5], the silence of administration notified by a request silence is assimilated with the issuance of a default refusal decision, against which it is possible to promote an appeal for abuse of power[6]. That period of two months - a common- law term - may be also replaced with other terms. Moreover, in a certain number of situations, silence is assimilated to a default acceptance decision[7].

French Constitutional Council estimated that the rule of administrative silence, which amounts to a tacit rejection, is a general principle of law, while the Government Council has refused such quality[8].

Compared to these legislative realities, the new Administrative Court Law in our country gives a ***broad definition*** to the notion of an administrative act, introducing in its scope, along with the specific unilateral manifestation of will (***typical administrative act***) and silence, which is the unjustified refusal (***atypical administrative acts***) .

Moreover, the commented law assimilates, as regards the legal nature of the dispute, administrative acts and certain ***administrative contracts***, expressly mentioned, being a matter of contracts signed by public authorities dealing with the evaluation of public assets, the execution of public works, provision of public services, public procurement.

In addition, Art. 2, 1st paragraph, letter c) of Law no. 554/2004, as amended, states that by special laws may also be provided other administrative contracts subject to the administrative courts jurisdiction.

4. The notion of unjustified refusal and the concept of power abuse.

In our legal literature it has been often used the concept of "unjustified refusal", but it has not been outlined a clear definition of it. Since the legislator did not dared to perform it, a specific meaning has been required in the practice of the administrative courts. Instead, the notion of "abuse

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[2] See GEO no. 27/2003 on the tacit approval procedure (published in Official Gazette no. 291/25.04.2003 and entered into force on 19.09.2003) approved with amendments by Law no. 486/2003 (published in Official Gazette no. 827/22.11.2003).

[3] See Daiana Vesmaş, Nicolae Scutea, *Problem of government passivity in German law. Substantive and procedural issues* in R.D.Pb. no. 3 / 2003, p. 2 7-44. Also, as regards the tacit approval procedure, see Ana Rozalia Lazar, Procedural aspects of the issue of administrative acts. Some considerations on the tacit approval procedure in R.D.Pb. no. 3 / 2003, p. 84-102. See for the opposite concept of the need to motivate decisions: Liliana Visan, *Reasoning principle in matters of administrative procedure. Aspects of comparative law*, in RDPb. no. 4 / 2005, pp 24-40.

[4] Jacqueline Morand-Deviller, op. tit., p. 354; on the same idea, see: Georges Dupuis, Marie-Jose Guedon, Patrice Chretien, *Droit admirdstratif, 10e edition*, (Sirey Universite, Paris, 2007), p. 472 et sequens

[5] Established by Law of 12.04.2000.

[6] Decrees of 20/06/2001 and 03/10/2001 establish the list of cases in which the term exceeds 2 months, especially in the case of some complex procedures.

[7] We can illustrate to this end: the tacit approval of building and deforestation.

[8] Jean Rivero, Jean Waline, *Droit administratif, 21e edition*,(Editions Dalloz, Paris, 2006), p. 569 and pp. 357-358.

of power", it appears in our doctrine as a key- concept in a monographic research, only in the last decade.[9]

Law no. 554/2004, as amended, understood to relate the notion of unjustified refusal of the power abuse concept.

The abuse of power occurs when the administration has assessment right, when the law allows it to adopt a solution from several possible ones, issue discussed in our literature since the Second World War under the form " opportunity of administrative acts". Hence, the known dispute between the Cluj School of Prof. Tudor Drăganu and Bucharest School of Professor Romulus Ionescu on the idea "opportunity is a condition of validity of the administrative act, along with legality, or is it a dimension of legality?"

Beyond the theoretical disputes, compared to the principles established by art. 16 2nd paragraph of Constitution, it is not conceivable to exercise the right of assessment beyond the law. As government seeks to provide more efficient public services for "those administered", it is inherent that the limits of its assessment right are given precisely by the limits of the rights of citizens, provided by Constitution and law. Where the right of the citizen begins is the point where it finishes the assessment right of administration. Issuance of an administrative according to the assessment right, but by infringing one right, for example, ownership of a citizen, is, of course, an abuse of law, which is an excess of power.

On this direction of ideas, the High Court of Cassation and Justice held that[10] in a constitutional state, the discretionary power granted to public authority can not be regarded as an absolute and unrestrained power, whereas the exercise of assessment right by violation of the rights and freedoms of the citizens, provided by the Constitution or law, constitutes abuse of power, in accordance with the provisions of art. 2 of the Administrative Court Law. Concurrently, the Supreme Court noted that the opportunity expresses an element of legality, which derives from the ability of the issuing authority to choose between several possible solutions the one that best matches the will of the legislator. Therefore, even if the legislator uses phrases meaning the discretionary power of the administration (for example: "is able", "is allowed", "it should"), it can not be interpreted as a freedom beyond the law, but one within its limits[11].

Both national and community courts do not exclude the control of judicial power over administrative acts issued within the margin of freedom granted to public authorities, often the error showed by the assessment or non-reasonableness being used by judges within a minimum control of discretionary power held by the Authority.

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[9] D.A. Tofan, *Discretionary power and power abuse of public authorities*, (All Beck Publishing House, Bucharest, 1990.

[10] Decision no. 4868 of 14.12.2007 pronounced by ICC] - Department of Administrative and Fiscal Court (unpublished).

[11] In the test case subject to trial, it was considered the existence or not of a granting right of a professional rank. On this issue, the Constitutional Court ruled that the text of art. 73 paragraph (3) of Law no. 360/2002 provides that, upon termination of employment, in case of cumulative fulfillment of several conditions, the police chief commissioners should be granted the professional rank of police quaestors. The constitutional court considered that such commissioners have only a vocation and not a right which they automatically enjoy and competent public authorities are entitled, not obliged to grant such professional rank. The same Court noted that obtaining and providing superior military or professional rank is not a fundamental right provided by the Constitution and does not require a corresponding obligation for the authorities. Based on these considerations, the administrative court considered that following the interpretation of the legal text under discussion, there is no any right to benefit those in the area of its addressability. On the other hand, the High Court pointed out that the interpretation given to the phrase "it may be granted" means exactly the discretionary power of the public authority, which, as previously stated, may not exceed the limits of legality. In other words, the managed people have the legitimate vocation and interest in the fair application of the assessment right of administration and may, in their turn, require the punishment of the misuse or misapplication of discretionary power. In this case, the High Court considered that the court of first instance had to obliged the authority to motivate its option within the legal permissiveness provided by art. 73 paragraph (3) of Law no. 360 / 2002 and to show whether the appellant-plaintiff meets or not the legal requirements materialized in order to be proposed.

However, in order to perform an audit of the administrative act issued within the margin of freedom granted by the legislator to the issuing authority, such act must contain the reasons for choosing one of the options allowed by the legislator.

A breakdown of reasons is also required when the issuing authority has a broad assessment power, as motivation gives transparency to the act and that individuals can check if the document is fundamentally correct.

Not every refusal to favorably resolve a request is an unjustified refusal; the refusal is unjustified only when it is based on the excess of power.

A simple letter from the issuing authority, by which the petitioner is notified that his request was not favorably resolved, is not "proof" of unjustified refusal. However, "the proof" must result from reasoning, if it is communicated to the applicant. Moreover, these notices related to the position of public authority is to be subject to the rules of evidence to be given before the administrative court.

We remember, however, that in case of an unjustified refusal, we must face an express statement of the position of public authority to which the request was addressed, so in the presence of an authentic notification, on the one hand, and on the other hand the refusal to settle favorably the request should be based on overcoming the limits of assessment rights, which is the excess of power. It is understood that only the court will ultimately decide, following the settlement of substance of administrative proceedings, whether the refusal to settle favorably the applicant's request was really an unjustified refusal; until now, that refusal appears as unjustified only in the opinion of the petitioner, the rule outlining this definition helping him to make an assessment as close to reality as possible. However, the existence of this concept is not without practical relevance, because once the unjustified refusal has been proven, the action is to be admitted in whole or in part. Motivation of court decision must state the reasons for which the refusal of the administrative authority appears unjustified, according to the competent court. Proof of the unjustified refusal is the evidence of the administration guilt and (legal nature of contested act when action is subject to an individual administrative act, being a matter of the unjustified refusal to revoke or amend the contested action. In such cases, practically, it is attacked a proper administrative act (typical act) and not an atypical administrative act (unjustified refusal).

If the object of application to administration is represented exactly by the request for issuing an administrative act, for example, an authorization and the public authority unjustifiably refuses to issue such act, in the administrative court, logically, it will be attacked only the atypical administrative act (refusal). The court, if it considers that the refusal is unjustified, by a disposition it shall require the defendant authority to issue the administrative act (authorization), possibly within a certain deadline and with the sanction of a fine for the head of the administrative body for each day of delay.

Last, but not the least, it should be noted that Law no. 262/2007 has extended the scope of the concept of "abuse of power", since it has provided that it means to exercise the assessment right of the public authorities, by violating the limits of competence provided by law or by violation of the rights and freedoms of citizens[12].

Therefore, we must stress the idea that any right or freedom of the citizens, stipulated by law, should be considered when reviewing an excess of power and not just a fundamental right or freedom, as was stated in the previous regulation.

On the other hand, the novelty brought by Law no. 262/2007 in defining the analyzed concept is represented by the inclusion within its scope of the exercise of assessment right of public authorities by violating the limits of legal competence.

In addition, the Romanian legislator has changed its optics as regards the concept of "unjustified refusal to settle a claim" by inserting therein the situation of non-enforcement of

[12] See art.2 paragraph.(1) letter n) of Law no..554/2004, as amended.

administrative act issued following the favorable resolution of the application or, where appropriate, of the preliminary complaint. [13]

Consequently, the assumption of non-enforcement of an administrative act issued by the public authority, in response to petitioner's request, was classified in the notion of unjustified refusal.

In addition, we can detach the two sides of the unjustified refusal, which are also maintained under the new administrative court law, namely the unjustified procedural refusal (namely the refusal to reasonably respond to the citizen's request) and substantially unjustified refusal (namely refusal to favorably resolve the citizens request). The problem of the relationship between unjustified refusal, subjective right and the excess of power appears only in this latter situation.

From the practice of the High Court of Cassation and Justice Decision, it draws the attention Decision no. 4096 of 13th November 2008[14], in which this court has shown to be unjustified refusal, within the meaning of art. 2, 1st paragraph, letter i) of Law no. 554/2004, the fact that the competent authority refuses to issue to the entitled person the standardized certificate provided by the rules of implementation of the Emergency Ordinance no. 36/2003, arguing that the position of permanent representative is not a diplomatic or consular position. So, by not issuing this certificate, which attests a seniority in the labor activity, the individual is directly injured.

Another issue resulted from the practice of courts on the unjustified refusal, can be drawn from the application of Law no. 290/2003 as regards the grant of indemnities or compensations to Romanian citizens for their own property goods, seized, retained or remained in Bessarabia, Northern Bucovina and Herta region, following the war situation and the application of the Peace Treaty between Romania and the Allied and Associated Forces, signed at Paris on 10th February 1947.

Thus, the application of this law led to two situations, in practice: if the refusal of execution of the administrative act by which that person has been established right to compensation is assimilated as unjustified refusal to settle a request addressed to a public authority, which in its turn is assimilated to the administrative act and which would be the competent courts to rule on such requests, to the extent that such refusal derives from a public authority located at the central level.

Thus, in the decision no. 1030 of October 21st, 2009, Pitesti Court of Appeal stated the following: by sentence no.152/CA/30th April 2009, Arges Court ignored the action filed by the plaintiff L.M. by which it obliged the National Authority for Property Restitution to pay damages based on Law no. 290/2003.

In order to pronounce in the meaning of the above, the Court considered that pursuant to decisions no.178/19th December 2006 and no. 264 / 6th July 2007, the defendant is to pay the plaintiff the amount of 192,006.71 lei for the outbuildings and related land and the amount of 429.057,28 lei for the area of 50 ha., property that belonged to its authors.

It has also been considered by the first court that the provisions of art. 18 of Government Decision no. 1120/2006 on approving the Methodological Norms for applying Law no. 290/2003 regulating the payment scheduling during two consecutive years are applicable only in the event that sufficient funds are allocated from state budget for the payment of damages established under Law no. 290/2003.

In the case, it was considered that by paying the first installment of compensation set by the decision no. 278/2007, the defendant has fulfilled its obligations. Failure to pay the first installment representing 40% of the amount established by decision no. 264/2007 is not attributable to the defendant, because there were not allocated sufficient funds from the state budget for this purpose, on the other hand, by an eventual acceptance of this action, the plaintiff would create two titles for the same debt, which is inadmissible.

[13] See art.2, paragraph.(1) letter i) of Law no.554/2004, as amended.

[14] See, I.C.C.J.,s. administrative and tax accounts., dec. no. 4096 of 13th November 2008, in J.S.C.A.F. semester II/2008, (Hamangiu Publishing House, Bucharest, 2010), p. 84

Against the sentence within the statutory term, an appeal was lodged by the plaintiff, by which it has been asserted that the action was rejected by an unlawful interpretation of the provisions of article 18, paragraph 5 of GD 1120/2006, as the retention of existence of sufficient funds is equivalent to the undertaking of an obligation under a mere potestative condition of the debtor, which is absolutely void. Even in this assumption, there has not made any test to certify that the necessary funds have not been allocated but, on the contrary, by notice of 26th May 2008 it was notified by the Ministry of Finance that the amounts claimed paid by the National Authority for Property Restitution had been paid.

Moreover, it received 40% of compensation set by the decision no. 278/2007 even in 2007, not for decision no.264/2007 decision and this action has been introduced to obtain a writ of execution.

On October 8th, 2009 it was recorded the statement of defense motioned by the National Authority for Property Restitution, by which it was requested the rejection of appeal as unfounded, with the main motivation that it has not available the necessary funds for paying installments.

On the hearing of 14th October 2009, the Court of Appeals invoked ex officio and put into the discussion of the parties the objection of material incapacity of the court in the settlement of actions based on the provisions of Law no.290/2003 and the Government Decision no. 1120/2006.

Examining this exception prevalently (which makes useless the investigation of the other grounds of appeal), the Court finds the following: according to provisions of article 8, paragraph 5 of Law no.290/2003 on granting compensations or damages to Romanian citizens for their property assets which have been seized, retained or remained in Bessarabia, Northern Bukovina and Herta region, due to a belligerence condition and applying the Peace Treaty between the Allied and Associated Force and Romania, signed at Paris on 10th February 1947, updated (regulation on which the plaintiff's right is based), the decisions of the National Authority for Property Restitution shall be subject to judicial control and can be brought before the administrative court in terms of Law no. 554/2004, as amended. By the methodological rules for the application of this law, approved by GD no.1120/2006, amended by GD no.57/2008 (in force at this time) it was established that the resolutions of authority, as well as decisions issued by the Vice President for certain situations, are subject to means of appealing to the tribunal in whose jurisdiction resides the petitioner.

Provided that the application object, as indicated therein, does not aim any resolution or decision of the Vice-president of the National Authority for Property Restitution – Department for enforcing Law no. 290/2003, but exclusively regards the obligation to pay compensation (subsequent operation of the administrative act, by which it has been admitted the right to compensation), obviously the provisions of law relating to the competence of the tribunal are not incidental and the rules of jurisdiction laid down by Article 10, 1st paragraph of Law no. 554/2004 are to be applied-framework-law in the matters of administrative court.

Refusal to execute administrative act by which that person has been established the right to compensation is treated as unjustified refusal to settle a request submitted to a public authority, which in its turn is assimilated to administrative act under art. 2, 1st paragraph, letter i), second sentence and 2nd paragraph of administrative court law. As a consequence, the trial actions to follow is that of administrative court.

In consideration of the special law, of administrative court no. 554/2004, the jurisdiction of settling this case is incumbent to Pitesti Court of Appeal, considering the central rank of such sued public authority.

5. Conclusions

This study desired to emphasize the importance of the assimilated acts, along with the proper administrative acts - in censoring the abuses committed by the administration. Therefore, starting from the idea of power abuse, it has been analyzed the impact of unjustified refusal to settle a request

on the individual, who may be thus injured in a right or interest recognized by law. Once the conditions of an unjustified refusal are met, the individual is required to sanction the defendant authority by taking legal action before the administrative court, by which this refusal should be penalized and the authority should be obliged to issue the document.

Also, it was considered the other side of the unjustified refusal, namely the refusal of execution of the administrative act, also prosecuted by the court.

The conclusion that emerges is that the individual confronted with an attitude arising of excessive power of authority needs to go to court in order to censor this type of behavior, because the activity of public authorities should be primarily subject to the legality principle.

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AMENDMENTS TO LAW NO.47/1992 REGARDING THE ORGANIZATION AND THE FUNCTIONING OF THE CONSTITUTIONAL COURT - IMPLICATIONS REGARDING THE DISPOSITIONS OF THE CONSTITUTION OF ROMANIA

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Abstract
In 2010, Law no. 47/1992 regarding the organization and the functioning of the Constitutional Court has suffered some amendments, some of which we believe indirectly affect the provisions of the Constitution of Romania of 1991, revised and republished in 2003. This survey aims at expounding these modifications and at presenting their implications on the constitutional text, raising some legitimate questions for law professionals. Therefore, we will approach the question of suspension from office of the President of Romania, a procedure stipulated in article 95 of the Constitution, as well as the ways in which the stages of the suspension procedure provided therein suffer an alteration because of the amendments to Law no. 47/1992.

Keywords: *Constitutional Court, suspension, referendum, unconstitutionality, revision of the Constitution*

Introduction

This study aims at presenting certain aspects regarding the procedure of suspension from office of the President of Romania, in accordance with the provisions of article 95 of the Constitution.

Thus, in its two sections, this study will deal with the theoretical notions of the proposed subject matter and will provide interpretations as a result of the recent legislative modifications in the field caused to the organic law of the Constitutional Court.

Also, in the final part of this study, we aim at making a synthesis of the relevant conclusions as a result of the analysis we are going to conduct.

1. Procedure of suspension from office of the Romanian President, according to the provisions of the Constitution of Romania

The President of Romania, according to article 84 par. (2) phrase I of the Constitution, "the President of Romania shall enjoy immunity". By interpreting this text, we can say that the President of Romania, unlike the members of the Parliament, cannot be held responsible for any acts other than the opinions he expresses while executing his commission.

The Constitution expressly establishes two exceptions from the immunity rule, detailed in terms of substance and procedure in article 96 on *"suspension from office"* and article 96 on *"impeachment"*.

Also, in this context, we notice an indirect regulation of the liability of the President of Romania for his legal acts, based on article 21 on the "free access to justice" and on article 52 on the "right of a person aggrieved by a public authority".

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However, for the purpose of this survey, we are interested in the content of article 95 of the Constitution that regulates what the administrative law doctrine calls the "administrative-disciplinary liability of the President of Romania or his political liability".

There are authors[2] who believe that the political liability of the President of Romania actually consists of two distinct phases.

The first phase could be called the *political liability per se*, that the head of state assumes according to article 95 par. (1) of the Constitution, towards the Chamber of Deputies and the Senate.

The second phase materializes into liability towards the people, completed through the referendum organized for the dismissal of the President.[3]

This type of liability is connected to the parliamentary initiative, to the position of the authority exercising the constitutional jurisdiction, and finally to the vote of the people.

The procedure of holding accountable for grave acts by which the President infringes upon the constitutional provisions may be initiated by at least 1/3 of the number of deputies and senators, which means, according to the Constitution, a "proposal of suspension from office". This proposal must be well-founded since the President is suspected of having committed grave acts by which he infringed upon the constitutional provisions.

Considering the wording of article 95 par. (2), it follows that the one third of parliamentarians who are entitled to initiate the procedure of holding the President politically accountable relates to the total number of parliamentarians, not to the members of one of the chambers. The list of parliamentarians shall be lodged with the secretary general of the chamber and the lodging date shall officially mark the initiation of the procedure for impeaching the President in view of his suspension from office. The Secretary General shall submit a copy of the list and the reasons of intimation to the President. The chamber with which the proposal of suspension from office shall be officially recorded shall be determined based on the weight the deputies or senators have on the list.

In any case, the Secretary General of the chamber the proposal was recorded with must inform the other chamber, as soon as possible, about the content of the proposal of suspension from office, since the competence of debating and voting on this proposal devolves upon both chambers reunited in a joint session.

The following step in this procedure is to notify the Constitutional Court to issue the consultative opinion. The administrative law theoreticians classify this opinion into three categories, namely: facultative, consultative and compliant. In our case, it would be a consultative opinion, whose features are as follows: the issuing body must request the opinion, but is not forced to give in to it.

Only after receiving the opinion of the Constitutional Court one may pass on to discussing the proposal of suspension from office, the content of the opinion being a substantial reference criterion. Please note that the opinion of the Constitutional Court is consultative in nature, as the Parliament is forced to request it; however, upon casting their votes, the Parliament may decide differently than the Constitutional Court. Therefore, the Constitutional Court may find that the acts of the President of Romania are not serious infringements upon the Constitution, thus issuing a negative opinion; however, the Parliament may decide to suspend the President, despite of the Constitutional Court's opinion. The basic idea is that we are under a form of political liability, so that the Parliament has its

[2] Refer to Claudia Gilia, *Manual of Constitutional Law and Political Institutions*, (Bucharest, Hamangiu Publishing House), p. 212 et seq.; Verginia Vedinaş, *Administrative Law*, 4th Edition revised and updated, (Bucharest, Universul Juridic Publishing House, 2009), p. 317-320; Dana Apostol Tofan, *Administrative Law*, Vol. 1, 2nd Edition, (Bucharest, C.H. Beck Publishing House, 2008), p.143 et seq.; Ion Corbeanu, *Administrative Law. University Course.* 2nd Edition revised and supplemented, (Bucharest, Lumina Lex Publishing House, 2010); p.257-260, Marta Claudia Cliza, *Administrative Law. Part I*, (Bucharest, Pro Universitaria Publishing House, 2010, p.106-111. etc.

[3] Ioan Alexandru, Mihaela Carausan, Sorin Bucur, *Administrative Law*, Lumina Lex Publishing House, Bucharest, 2005.

own political filter when it comes to qualifying the President's acts as serious infringements upon the Constitution and when they cast their vote for or against.

However, the wording of the Constitution leaves it up to the President to appear before the Parliament or not, as it provides for no obligation to that effect. The consultative opinion of the Constitutional Court must be notified to the President, who may be invited to provide certain information before the Constitutional Court before issuing the opinion.

The Parliament debates the proposal of suspension from office of the President according to the procedure established in the Regulation of the joint sessions, and the majority[4] of the deputies and senators must vote for the proposal of suspension from office.

We may wonder why in this situation the majority of parliamentarians must vote, and not 2/3 of the parliamentarians (as for the criminal liability set forth under article 96). The explanation consists in the different nature of the facts with regards which one form of liability or the other is engaged. The political liability is engaged for generic acts qualified as a serious infringement upon the constitutional provisions, whereas criminal liability is engaged for a particularly grave act which is generically established by the criminal legislation and which determines the final conviction of the President, which makes the procedure of dismissal by referendum to become useless.

In legal terms, the acts for which the suspension procedure is triggered are administrative defaults of the President while executing a political commission. That is particularly why the suspension measure, which triggers the interim, must be subject to approval by the people by means of referendum, as the President is elected by casting of a universal, direct vote.

The referendum[5] for the dismissal of the President must be organized within 30 days after the vote of the Parliament and the obligation to organize it devolves upon the Government.

Since the referendum evokes the idea of direct democracy, a potential refusal by the people to vote the dismissal of the President would equate to a withdrawal of the trust placed in the Parliament, and such a withdrawal of the trust[6] should entail the election of a new Parliament.

The 3-month period set forth under article 63 par. 2 of the Constitution for the election of a new Parliament should start on the referendum date. On the contrary, if at the referendum the people voted for the dismissal of the President, then the position will become vacant and within 3 months the Government will organize presidential elections.

The referendum is the primary legal form of manifestation of the national sovereignty, it evokes direct democracy, and in case of article 95 of the Constitution it will also appear as a means of solving the political conflict between the Parliament and the President, both being authorities legitimated by popular vote. [7]

2. Considerations on the amendment of the Law on the Constitutional Court, caused by Law no. 177/2010

According to article 142 par. (1) of the Constitution, the Constitutional Court is *"the guarantor for the supremacy of the Constitution"*.

Title V of the Constitution[8] is dedicated to the Constitutional Court, regulating its structure, the qualification for appointment of the judges of the Court, their statute, the powers of the

[4] Meaning an absolute majority.

[5] The referendum conducting procedure is detailed in Law no. 3/2000 on organizing and conducting the referendum, published in the Official Gazette no. 84/2000, updated.

[6] In this case, we are witnessing a void in the regulation of the Constitution of Romania because one could consider dissolving the Parliament *de jure*; however, according to article 89 of the Constitution, this is subject to very restrictive conditions counting to six.

[7] A. Iorgovan, *Treatise of Administrative Law*, vol. I, 4th Edition (Bucharest, All Beck Publishing House, 2005), p. 334.

[8] Ioan Deleanu, *Constitutional Justice*, (Bucharest, Lumina Lex Publishing House),p.183.

Constitutional Court and the decisions issued based on such powers. Law no. 47/1992, the organic law of the Constitutional Court, was enacted based on this constitutional regulation.

According to the provisions of article 146 point c) of the Constitution, the Constitutional Court has the following powers, among others: *"to adjudicate on the constitutionality of the Standing Orders of Parliament, upon notification by the president of either Chamber, by a parliamentary group or a number of at least 50 Deputies or at least 25 Senators"*.

Recently, Law no. 177/2010 amended and supplemented Law no. 47/1992 on the organization and operation of the Constitutional Court, of the Civil Procedure Code and of the Criminal Procedure Code of Romania, published in the Official Gazette no. 672 / 04 October 2010.

The last[9] amendment of the organic law of the Constitutional Court brought **two essential changes** with regard to this public authority:

a) the measure of the *de jure* suspension from office, which used to be triggered while settling the plea of unconstitutionality and which was regulated by article 29 par. (5) of Law no. 47/1992 was eliminated by abrogating this piece of legislation;

b) the competence of the Constitutional Court was supplemented with the power of adjudicating on the constitutionality of the decisions issued in the plenary sessions of each Chamber of the Parliament and of the decisions issued in the plenary sessions of the two Chambers reunited, by amending article 27 par. (1) of Law no. 47/1992.

Thus, article 27 par. (1) establishes the Constitutional Court' power to adjudicate also on decisions issued in the plenary sessions of the reunited Chambers of the Parliament, having the following content:

"The Constitutional Court adjudicates on the constitutionality of the regulations of the Parliament, of the decisions issued in the plenary sessions of the Chamber of Deputies, of the decisions issued in the plenary sessions of the Senate, and on the decisions issued in the plenary sessions of the two Chambers reunited of the Parliament, upon notification by the president of either of the two Chambers, by a parliamentary group or a number of at least 50 Deputies or at least 25 Senators."

For the purpose of this survey, we are going to look into this legal text and analyze it in terms of its implications on the procedure regarding the political liability of the President of Romania, a procedure set forth in article 95 of the Constitution.

This addition to article 27 par. (1) aims at subjecting all the decisions of the Parliament of Romania, namely of the plenary session of the Senate, of the Chamber of Deputies and of the Reunited Chambers to a check in terms of constitutionality.

The difference from the procedure applied until the publication of Law no. 177/2010 in the Official Gazette is that, before this amendment, only decisions dealing with the Regulations of the Chambers were subject to a check in terms of constitutionality, whereas from now on all the decisions of the Parliament are to be subject to such check.

As regards the impact of the amendment[10] of Law no. 47/1992 on the procedure for the suspension from office of the President of Romania, there are several aspects to bear in mind:

- Until the amendment in 2010, the Constitutional Court was only checking the reasons why the President of Romania was suspended from office, having the duty to establish whether they were grave acts of infringement upon the Constitution or not. In such case, the opinion was a consultative one, as we have already specified in the first part of this survey. Regardless of the findings of the Constitutional Court, the reunited Chambers may suspend the President without any restraints, as this is a political kind of decision upon which the Constitutional Court could not intervene. We would

[9] Verginia Vedinaş, *Several Considerations on the Unconstitutionality of Law no. 177/2010 enacted by the Senate on 24 August 2010* (RDP no. 3/ 2010, Bucharest) p.100.

[10] Elena Emilia Ştefan, *Manual of Administrative Law. Part I. Seminar Exercise Book*, (Bucharest, Pro Universitaria Publishing House, 2010) p.77.

like to remind our reader that earlier, in 2007[11], the opinion of the Constitutional Court was negative).

- The recent amendment allows the Constitutional Court to also check the compliance with the constitutional procedures, after the issue of a decision to suspend the President from office. More specifically, in terms of the suspension procedure, the check in terms of constitutionality shall consider both the substance of the issue (i.e. the reasons) before the vote of the reunited Chambers, for consultation purposes – since, as we all know, the Constitution of Romania was only amended in 2003 –, and the procedural aspects *per se* (e.g. the number of deputies who initiated the procedure, the majority qualifying for the cast of votes, etc., according to article 95 and article 67 of the Constitution), however, in the latter situation, only after the vote of the reunited Chambers.

- This second check, which regards only the procedure itself, can be performed by the Constitutional Court upon the request of one of the parties concerned (that we will list below), following the vote for the suspension from office.

The holders of the right to request the check of the decisions of the Parliament in terms of constitutionality are the following:

1) presidents of the two Chambers,
2) a parliamentary group, or
3) a number of at least 50 deputies or at least 25 senators, thus keeping the three categories of holders as set forth in the Constitution, making no addition to or elimination from them.

Considering the above, we believe that this amendment of Law no. 47/1992 is unconstitutional because this piece of legislation actually dissimulates an attempt to revise the Constitution of Romania.

It is true that there are theoreticians of the constitutional law asserting that a constitution can be revised according to the revision procedures or implicitly[12]. According to this theory[13], the case we are now analyzing would be the second case, i.e. the implicit revision of the Constitution.

Thus, the revision[14] of the Constitution consists of its amendment by rewording or abrogating certain articles, or by adding new text.

The implicit revision of the Constitution may result from the adoption of a judicial norm whose content derogates from the constitutional provisions. In such case, such norm must not have been adopted by a law amending the Constitution, but by a simple ordinary law or even by an organic law.

In conclusion, the implicit amendment[15] of the Constitution consists of the change of some of its provisions, without resorting to the revision procedure set forth in the fundamental Law itself, but to some other procedure. Virtually, the implicit revision, whatever the reasons and the procedure used, results in the infringement upon the Constitution.

It is well known that any law system establishes the principle of legality, therefore the Romanian legislation is also generous from this point of view, thus establishing, at constitutional level, a general obligation for all the holders of a right, public authorities or not, to observe the law while conducting their activity.

Also, it is important to underline that, in the western[16] political mentality, the compulsoriness of the law refers both to the individual and to the public authorities, including the State. In other words, all the State authorities must observe the law, just like any citizen.

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[11] In 2007, Romania witnessed the first attempt to engage the political liability of the President of Romania, which failed as a result of the vote of the population, cast by referendum, although the Parliament had decided to suspend the President from office.

[12] Cristian Ionescu, *Treatise of Comparative Constitutional Law*, 2nd Edition, (Bucharest, C.H. Beck Publishing House, 2008), p. 915.

[13] This is a personal theoretical opinion

[14] Cristian Ionescu, *op.cit.* p.203

[15] Cristian Ionescu, *op.cit.* p.204

[16] Cristian Ionescu, *Comparative Constitutional Law*, (Bucharest, C.H. Beck Publishing House, 2008), p.36

Conclusions

In close connection with the principle of legality, the principle of the stability of legal relationships is consecrated at the European level. Thus, the principle of legal certainty refers not only to the lawmaking operation that must observe certain strict rules[17], but also to the "possibility offered to any citizen of evolving in a certain legal environment, protected from the vagueness and sudden changes that effect the legal standards"[18].

Returning to the provisions of Law no. 177/2010 amending the organic law of the Constitutional Court, we believe that the principle of legal certainty is violated, thus creating a general uncertainty at the level of the public perception of the trust put in the political life of a country.

Moreover, the procedure of suspension of the President from office, as recently amended, has virtually become almost impossible during the same commission, thus giving the possibility both to the governing parties and to the opposition to "bother each other" by this constitutionality questioning game.

In conclusion, we believe that the recent amendment of Law no. 177/2010, considered in terms of the procedures of suspending the President of Romania from office, is an "unconstitutional solution due to its wording and an anti-constitutional solution due to its effects" and we subscribe to the opinion of the reputed author Verginia Vedinaş[19] recently expressed in a specialized study.

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[18] M. Heers, *La securité juridique en droit administratif français: vers une consécration du principe de confiance légitime?* (RFDA 1995), p.963, quoted by Ion Brad in *Revocarea actelor administrative (Revocation of Administrative Acts)*, (Bucharest, Universul Juridic Publishing House, 2009), p. 123 et seq.

[19] Verginia Vedinaş, *op.cit.*, p.104

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ECOLOGICAL EDUCATION

GABRIELA GYONGY MIHUT*

Abstract
While in most emerging and developing countries, the population has a lower ecological footprint in the developed countries have a larger footprint.
There is also an alarming contrast between a person perception of her liability for damages to its environment and its actual size. These misconceptions may have their source in the absence of awareness of risks from climate change, culture or religion.
The purpose of this study is to analyze the situation at the international and Romanian level and to draw attention on the necessity of un ecological education.

Keywords: *environment, sustainability, ecology, education, liability*

I. Introduction

If the life of our ancestors left few footprints on the nature, contemporary prints have become dangerously large. [1]

National Geographic published the study "Greendex Study 2009"[2] regarding the sustainability behavior of consumers, *Globe Scan Research Institute.*

The study finds that while in the emerging and developing countries the population has a lower ecological footprint, in developed countries the footprint is larger. The explanation lies in the fact that consumer behavior is affected not only by people's choices but also by external factors such as income, climate and infrastructure from that country.

For example, consumers in developed countries often decide to buy their own car, travels alone in the car, buy bottled water, etc.

It was also found that there is an alarming contrast between the perception of liability for damages to their environment and the real dimension of it.

For example, the population of India is feeling the most responsible for the damages brought to the environment (52 %) and believes that their life style is harmful (47 %), while only 14% from Germans consumers and 23% Americans are feeling responsible and only 9-10% believes that their life style is harmful.

These misconceptions can originate from the lack of awareness of risks resulted from the climate changes, in culture or religion.

In other words, technical innovations, public policy and state regulations can be effective only if people are aware of the risks and participate in their quality as polluters, producers or consumers of goods, citizens and voters in decisions regarding the society.

The role of consumers, related to the rapid evolution of climate and environment changes, was never properly taken into consideration.

Although the moral consumption is fashionable, most consumers lack the will to adjust their shopping habits and lifestyles to the climate changes.

But why is there so often a gap between the mind and behavior in everyday life?

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[1] Kofi Annan .

[2] http://blog.goethe.de/climate-worlds/categories/3-Sustainability- and - Ethics.

What are the cultural and moral premises for sustainable consumption and which are the common strategies of the companies and consumers that are confronted with the impact of climate changes?

All these questions are answered by Ecology, part of civic education.

II. Paper Content

1.1. Education / Ecological Culture

The idea of correlation between ecological education and civic education has its foundation in Frederic's Mayor Statement performed at the World Congress of Natural Sciences.

According to him, „ Humanity's future is tied to global environmental protection systems and we do not have a better way to achieve this, than through science - science for peace, development and a democratic society based on equal opportunities ".

It requires the creation of an ecological culture that would have the effect of stimulating the type of ecological consciousness and behavior that lead to ecological sustainability.[3]

This will be achieved only by acquiring knowledge related to: composition, structure, function and evolution of natural populations, biocoenosis, ecosystems, biosphere, the principles of interaction between the individual and society, on one hand and nature, on the other hand , according with the requirements for durable development (sustainable).

The keywords for environmental education [4]are: material and intellectual ecological culture, responsibility, global ecological problems, ecological balance, ecological crises, skills, knowledge, competences and, ultimately, durable development (sustainable).

We will talk only about few of them:

- *Ecological culture of the individual* is a combination of ecological knowledge acquired consciously and its views regarding interaction between all forms of life and environment, regarding the place and the role of the human as bio-social being. This determines the rules of interaction between man and nature both as individual and on community level or globally.

- *Ecological material culture* includes technological developments that lead to ecological sustainability of industrial production (for ex. equipment for controlling environmental pollution, for purifying the environment or that leads to producing less wastes)and the "friendly" products for environment as household appliances, cleaning products, clothes, etc.

- *Ecological intellectual culture* includes : knowledge of events and environmental issues, laws, opinions, beliefs, prudence, intentions, theories, assumptions and hypotheses which aim to create social development and sustainable balance between humanity and nature.

- *Ecological responsibility* is based on strong belief in the objectivity of environmental rules and awareness of environmental rules prohibiting their violation.

The culture and responsibility are in a strong connection that leads to the issuance of appropriate rules.

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[3] Ecological sustainability is defined as the capacity of ecosystems to maintain essential functions and processes and to retain biodiversity in full measure over the long term - http://www.businessdictionary.com/ definition/ecological-sustainability html

[4] Environmental education is a learning process that increases people's knowledge and awareness about the environment and associated challenges, develops the necessary skills and expertise to address the challenges, and fosters attitudes, motivations, and commitments to make informed decisions and take responsible action (UNESCO, Tbilisi Declaration, 1978) – http://en.wikipedia.org/wiki/Environmental_education

The Ecological News is given by the major problems that human civilization globalize is confronted lately especially those connected to exponentially increasing human population and the increasing environmental impact produced by an economy increasingly higher.

The problem of finite resources, raw materials and fossil energy accessible, the pollution problem of diverse types, like climate changes, global biodiversity decline, desertification and the decreasing of the surfaces covered by forests, all this are fundamental issues in the debate on the future of our civilization.

In a first conception of environmental education, there must be an overlap between the theoretical and practical activities that need to support each other and individual can quickly progress in understanding the nature and in rethinking the approach to nature and society.

The formal and non-formal ecological education must be grounded in the compulsory education system but it should continue throughout the individual existence.

The diversity of the ways to achieving this is extraordinarily high: from the compulsory education classes to transferring the information through mass-media, classes, trainings, artistically activities, ecotourism, etc.

In another opinion , [5] the ecological education should be carried out over the entire life, non-formal, through a series of practices in different cultures, transmission of knowledge about different practices in communities or educational practices.

In this conception, the ecological education shouldn't be seen as a new science but as a long practice of lifelong learning and social transmission of knowledge in all spheres of life.

This concept belongs to the experts of UNESCO who have developed several continuing education programs of Alpha 94 and Alpha 97 that relate to sustainable development.

ALPHA 94 is developed on the crisis in rural areas of several regions in Europe and USA, and explores local initiatives for cultural development. Among the solutions offered by the program are: social assistance to those remaining in these areas, resistance to not forgetting the culture (environmental component) and the mobility of regional natural resources .

ALPHA 97 is centered on the development of adult education policy according with the demands of communities.

It is found that the participation of all individual in taking decision that regards their lives is central.

2. Ecological Education in Romania

In Romania, the ecological education is done through school programs, through introducing the Ecology and Environmental Law as a compulsory subject in university education, through extracurricular actions, by mass-media, giving the public the access to environmental information and last but not least, the development by the Ministry of Environment and Forests to some strategies and eco-guides having the purpose to educate target subjects to adopt eco-responsible behavior.

The concept of durable development (sustainable development), which is the central pillar of environmental education, stipulated in art.2 p.23 and art.3 let. g from OUG.195/2005[6] regarding environmental protection, establishes the principle of sustainable use of natural resources and in regional legislation.

The principle of sustainable development implies respect and care for living organisms, life saving and biodiversity on Earth, a reduced use of non-renewable resources, participation in actions to awareness of environmental hazards and participating to action of saving it.[7]

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[5] Jean –Paul Hautecoeur – " Ecological Education in Every Day Life " - Unesco Institute of Education-http://www.unesco.org

[6] Framework Law was published in Official Gazette, *Part I nr. 1196 din 30/12/2005*

[7] Planting trees, ecological environment (ex. " Let's Do It Romania "), establishment of protected areas, respecting the regime of hunting and fishing and the regime built, ordering the owners to expand the line of hedges, controlled waste disposal , recycling of waste and water,etc.

2.1. Plans, Programs, Strategies and Daily Information Regarding the State of The Environment

Ministry of Environment and Forests adopts every 4-5 years, strategies, programs and action plans for protecting the environment and to remedy its damage.

The strategies and programs establish the objectives that central and local public institutions have to meet (for ex. reducing the pollution in agglomerations in which they exceeded the permissible values)[8] either in cooperation with civil society or by empowering / determination to respect the objectives established. The plans indicate the means that will be used to reach these objectives, for ex. adoption of rules setting emission limit values or standards.

These strategies, plans, programs and information are adopted taking into account the specific problems encountered in Romania and the local culture and are published daily on the website of the Ministry of Environment and Forests[9] in order to inform, educate and make it aware of the environment problems, for the measures that have to be taken for protecting the environment and for sustainable development.

As an example we mention:

- *National Strategy and National Plan for Environmental Protection in 2004-2013;*
- *National Strategy and National Plan for Atmosphere Protection;*
- *National Program for Reducing Emissions of Sulfur Dioxide, Nitrogen Oxides and Dust from Large Combustion Plants;*
- *National Program for Combating Climate Warming;*
- *Master - Flood Risk Reduction Plan in Prut- Barlad river basins;*

2.2. Eco- Guides and Codes of Practice

Eco- Guides and Codes of Practice addresses to a target group and contain a series of recommendations, without the power of law that aim to educate regarding the group behavior that must be adopted to protect the environment.

Through this is established the intellectual ecological education and the ecological responsibility.

If the code is adopted by a law, decision or order, it gets the power of the law and the violations of conduct set forth in this, often attracts sanctions (ex. Code of Good Agricultural Practice).

Among the eco-guides prepared by the Ministry as: Citizen Eco-Guide, Eco-tourists Guide, Public Servant Eco-Guide, Guidelines on Access to Environmental Information, Guidance on rules for Detergents. [10]

2.2.1 Citizen Eco-Guide is aimed at attracting attention, promotion and awareness of major importance to the environmental protection by presenting eco-instructions to every citizen . It is divided into four main chapters in which the main daily activities of the citizens are offered eco-instructions .

In the first chapter entitled "**Eco-Instructions for Home**" the citizens are educated on : reducing water consumption and avoid wastage, reducing energy consumption and avoid wastage, reducing and selecting removal of quantity waste, action against noise pollution,etc. They are advised to act to prevent further leakage of tap, to consume preferably tap water to avoid creating waste in the form of PET and save energy, to the use of equipment with low power consumption, to make thermal rehabilitation works, to using biodegradable detergents and cleaning products, to not discharge toxic products in the drains, to evacuate waste selectively, to preserve peace, etc.

[8] Gabriela Gyongy MIHUT- "Environmental Law "-course for students from ID, (Ed University, 2010), p.38
[9] http://www mmediu ro
[10] http://www mmediu ro

The chapter entitled **"Eco-Instructions for the Job/Place of Work"**, along with the instructions in the previous chapter includes instructions for submitting electronic documents to avoid the consumption of materials, maximum use of natural light, etc.

The third chapter entitled **" Eco-Instructions for Shopping ",** aims to educate citizens as consumer. It is recommended to purchase eco-labeled products, agricultural products and foodstuffs from ecological farming, to avoid buying disposable products which rapidly increase the quantity of waste, avoid buying plastic bags and buying those from material or paper or avoid purchasing products based on aerosol or sprays and avoid going shopping by car.

The last 2 chapters entitled "**Eco-Travel and Eco-Instructions Instructions for Leisure" ,** urges to drive at moderate speed allowing emission reduction, to ride by bike or by foot, possible use by others of the same car, parking in spaces specially designated, hunting in permitted periods, garden design, immediately inform the authorities in case of environmental accidents, etc.

2.2.2.As a result of awareness of tourism development in Romania and the increased number of tourists, Public Policy Unit of the Ministry of Environment and Forests developed "**Eco-Tourist Guide"** includes instructions on how the tourists have to behave on mountain vacations, to the sea, in urban and rural environment and instructions on transport.

The Guide includes instructions similar to those mentioned but according to custom tour. Tourists are taught to protect species of plants, animals, birds and fish, to consider the signs, get rid of garbage in special places, to use boats that do not pollute, to participate in activities with environmental impact, to use, preferably a single car, etc.

2.2.3.Public Servant Eco-Guide includes mostly the same custom instructions to the work of public servant. It is worth mentioning that these instructions have begun to be implemented by both the population and the administrative authorities. Thus some Romanians private individuals or companies had developed a project to go to work with the same car several people from different families, actions of replanting trees, setting up the parks and green spaces, ecological actions in which the most famous remains the action "Let's Do It Romania " that had its purpose to clean the environment of waste. This action done on an international level has attracted people from different backgrounds : corporate, police, education.

2.2.4.Guidelines on Access of Environmental Information

The Guide drafted in the HG.878/2005[11] by the Ministry of Environment and Forests in collaboration with the National Environmental Protection Agency and its purpose is, to educate population regarding their rights to have access to information related with the environment and to formulate opposition, requests or requires the introduction of additional condition to protect the environment in projects that asked for permit or environmental authorization.

It contains :

- list of normative acts which gives the right to citizens to have access to any environmental information without justifying the purpose and without paying any tax, in order to protect the right to a healthy and ecologically balanced environment[12] ;
- the concept of environmental information and exceptions;
- indication of institutions that hold this information and that will be required to provide the form that is needed to be taken requesting the term for its solution;

[11] HG.878/2005 regarding the public access to environmental information - Published in Official Gazette, Part I no. 760 of 22/08/2005

[12] Aarhus Convention (1998) on access to information, public participation in decision taking and access to justice in environmental matters - ratified by L.86/2000, Directive 2003/4/EC on public access - to environmental information, OUG.195/2005 environmental protection, L.554/2001 on access to public information and HG.878/2005

- teaching the applicant to take court action in case of failure, refusal or rejection of his request.

The information provided aims condition and quality of external elements of Human organism(air, atmosphere, soil, landscape, biological diversity, genetically modified organisms, etc.) factors that affect or may affect the environment (chemicals, energy, noise, radioactive waste, etc.) human health (e.g. effects of air pollutants coming from industry on human health).

Information providers are the National Agencies, Regional and Local Environmental Protection, National Environmental Guard and other institutions with competence in the field such as : Ministry of Agriculture and Rural Development, National Institute of Statistics, local governments, etc.

Through this guide, people are empowered ecologically being achieved a component of environmental education : responsibility.

2.2.6. Guidance on rules for Detergents

It was adopted under Regulation (EC) nr.648/2004 and includes information on the composition and effect of detergents, information that the manufacturer must provide to the health professionals, to the state institutions and consumer in writing, through labels and websites.

2.2.7.Codes of Best Practices

By Order nr.1270/2005, Ministry of Agriculture and Rural Development adopted "**Code of Best Agricultural Practice for Waters Protection against Pollution with Nitrates from Agricultural Sources** "[13] which aims to recommend the most useful practices, measures and methods possible to apply by each farmer or agricultural producer in order to protect water against pollution caused by fertilizers (especially nitrates), coming from agricultural activities and promote sustainable agriculture.

This is a set of scientific and technical knowledge regarding the effect of various fertilizers on water, soil, subsoil and atmosphere and on agricultural management, knowledge that properly implemented leads to obtaining higher quality productions and environmental conservation restriction on its adverse consequences .

The Order identifies the areas with problems and educates people whom it is addressed to the pollutant nature of agriculture.

In the Order it is shown that ,,In terms of agricultural intensification, crop production growth and rural development, agriculture can not be considered as sustainable for farmers and society to which they belong, it is not beneficial." .

In December 2005, were also adopted "**Guidelines for Good Hygiene Practice and Production in Bakeries and Confectionery.**" [14]

The guide contains instructions of major importance for confectionery operators which has to act by optimal hygienic practices of production and distribution and to ensure the reduction and even cancellation of biological contamination physical and / or chemical which could affect the safety of the products, health and even lives of consumers.

The Guide is useful also to the official inspectors because details problems and difficulties that require basic hygiene rules and food safety procedures in all phases of production activities specific to the bakery and confectioneries, with protective effect of life and health of consumers.

[13] Published in Official Gazette, Part I no. 224 from 13/03/2006

[14] http://www.anamob ro/ghidpat.shtml

2.2.8.EcoWeb and Green Package[15]

EcoWeb is a project conducted by the National Environmental Protection Agency (NEPA) with the U.S. Embassy and Peace Corps Romania, which consists in un interactive website for scholars's education as far as waste .

Currently Ministry of Environment and Forest together with the Ministry of Education is working on the program called Green Package will introduce concrete measures to protect the environment in schools .

According to Minister of Environment, Laslo Borbely, the most important are not the books but actions that teachers do in school to demonstrate the importance of maintaining a clean environment.

3. Conclusion

Finally, it would be good to remember Albert Einstein words „We need a dramatically different way of thinking for humanity to survive.". If humanity will not be aware of the devastating effect and the serious consequences that its behavior has on the environment, will not feel responsible and will not take measures will have to bear the disastrous consequences of the disappearance process of life and economic resources, a planet of hunger and unbearable.

Memorable remains in the memory of humankind M.K.Gandhi's words:„The planet produces enough resources to satisfy human needs but not enough to satisfy every man's greed. "

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DEFINING THE CONCEPT OF FUNDAMENTAL HUMAN RIGHTS IN THE LIGHT OF JURIDICAL VALUES THEORY

NICOLAE PAVEL[*]

Abstract
We find relevant for this study to highlight the general trend that the evolution of the concept of fundamental human rights approach and implicitly that of human rights in light of the values theory in general and juridical values in particular, established by the general principles both of the Romanian Constitution-republished, and those set out in the Preamble to the universal and European standards for human and citizen rights, on these values. By the expression citizen rights we refer to the European standard, namely Charter of Fundamental Rights of the European Union.
This is why the study begins with the justification of the scientific approach by identifying the general principles by which the documents referred to proclaim the rights of supreme values, universal values, European values and common values for countries that have ratified the universal or European document on human rights or fundamental rights. Following a key-scheme, conceptual demarcation in the field of values knowledge study, the establishment of three levels of genesis in their valuation process and, finally a systematic hierarchy of juridical values, and determining the place of supreme values in this hierarchy are analyzed successively. The final part of this study is devoted to the diachronic approach to the concept of fundamental rights and exploitation of this approach to establish the concept of fundamental rights in the light of legal values theory.

Keywords: *(f) fundamental rights, (v) values, (j) juridical values, (s) supreme values, (u) universal values*

Introduction

Taking into account K. Mbaye's assertion according to which **human rights history is similar to human history,** in our opinion, the first legal regulation of human rights can be identified in the statements of rights and in the content of the first written constitutions in the world, followed by their enshrining in the constitutions of the states, and much later their integration and protection at universal and regional level.

The subject of the scientific approach will be circumscribed to establish the concept of **fundamental rights** discussed in terms of values theory and finally, values positivitated as juridical values. In formulating this concept we hold the classic component element of the Romanian constitutional doctrine and of the theory of fundamental rights that is addressed in a general sense of **rights and freedoms of citizens proclaimed and guaranteed by the Constitution**, which can be considered similar to the concept of **public freedoms** enshrined in the French constitutional doctrine. Also, in our opinion the establishment of the concept of **fundamental rights** is suggested by the title of the Chapter II of Title II, entitled Rights and Fundamental Freedoms.

The usage of the subsumated concept **fundamental rights** provides that **the rights and freedoms of citizens** have the same juridical status, meaning that both components are subjective rights. These components of the concept will be seen as **constant elements of the concept and elements of continuity in its diachronic evolution.**

In our opinion, the subject of the study is important for the constitutional doctrine in the matter and for the fundamental rights theory because, through this study we aim **to establish a correlation between the constitutional principle established in the paragraph 3 of the article 1 of the Constitution of Romania**-republished, which proclaims that**:**...**the rights and freedoms of**

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the citizens are supreme values,… and **are guaranteed** and **subsuming a new component of the concept of fundamental rights,** that highlights their **supreme value**, established by the fundamental law.

The discussion of this correlation leads us to the field of **values**, an extra-juridical field studied by the philosophy of values, and by transforming them in positive values they become **juridical values, which means binding normative values, dealt with as formal phenomena, imposed by the state** and which, in our opinion, are subject of the science of law, being linked to all manifestations of the individual's behaviour in society by effective use and exercise of fundamental rights.

However, in establishing the concept of fundamental rights it is necessary to mention that they are **subjective rights**, **essential for citizens** and for the supreme values selected and protected by the paragraph 3 of article 1 of the fundamental law, among which we mention: **human dignity and free development of human personality.**

To achieve this goal, we intend **to analyze the general theory of knowledge of the values and knowledge of formal judicial values applying the following formal scheme**: - the study of knowing values in general and in the legal field in particular, - approaching the theory of knowing the judicial values subsumed by three levels of genesis; - based on the idea that the values of positive law form a system of values, we will determine their hierarchy system, which will include **the position of supreme values** in that hierarchy.

Moreover, on the components of the concept of fundamental rights discussed in terms of judicial values, we aim to propose the introduction of **a new component, which subsumes four relativity determinations of the concept** as, in our opinion, they result from the relativization of the provisions in the paragraph 1 and paragraph 2 of the article 20 of the Constitution which essentially establishes two constitutional rules: the first rule establishes that the constitutional provisions regarding **the rights and freedoms of the citizens** shall be interpreted and applied in accordance with the Universal Declaration of Human Rights, the covenants and other treaties to which Romania is party, and the second states that if there is any inconsistency between the covenants and treaties on fundamental human rights to which Romania is party, and domestic laws, the international regulations have priority, except where the Constitution or national laws contain provisions more favourable.

Even if the theory of fundamental rights, addressed as the rights and freedoms of citizens points to the adoption of the first written constitution, the theoretical interest for its discussion is determined by the fact that the studies in the field has not always paid sufficient attention to some theoretical aspects of the fundamental rights approached in the light of the values and legal values in particular. The studies in the field generally refer to the world of values, without extending and deepening this research, and the determinations of relativity mentioned are limited at the state level without being extended to universal or European level.

1. The justification of the scientific approach

The approach of the judicial values knowledge in the field of human rights in general and that of fundamental rights is particular will be motivated for this study by identifying the principles in the matter established by documents have symbolic value for these rights up to the current standards, and those set by the Constitution of Romania-republished in 2003 as follows:

1.1. In the preamble to the Declaration of Independence of the United States of America[1] it is expressed the belief that the following truth are considered self-evident: all men are created equal,

[1] Elena Simina Tănăsescu and Nicolae Pavel, Constituția Statelor Unite ale Americii/Constitution of the United States of America (Bucharest: All Beck, 2002), 32;

they are endowed by their Creator with certain **unalienable rights**, among these rights are life, freedom and pursuit of happiness;

1.2. In the article 1 of the French Declaration of Human and Citizen Rights[2] it is stated that **humans are born and remain free and equal in rights.** Social distinctions may be based only on common utility;

1.3. In the Preamble of the Universal Declaration of Human Rights[3] are enshrined the following principles: **a.** the recognition of the inherent dignity of all memebers of a family, **and their equal and inalienable rights which is** the foundation of freedom, justice and peace in the world; **b.** U.N. peoples have reaffirmed their faith **in *the fundamental human rights,*** in the dignity and **worth of humans**, in the equal rights of men and women and that they are determined to promote social progress and to create better conditions of life, ensuring a larger freedom;

Also, the article 1 states the philosophical postulate to which the Declaration addresses: **All human beings are born free and equal in dignity and rights.** Thus the fundamental ideas that inspired the Declaration are defined: **a. the right to liberty and equality is an acquired right from birth** and could not be alienated. **b.** as man is a moral being and endowed with reason, he is different from other creatures of the earth and therefore **can claim certain rights and freedoms that other creatures do not enjoy**.[4]

Moreover, the article 2 of the Declaration states the essential principle of equality and non-discrimination regarding **the exercise of human rights and fundamental freedoms,** thus developing the provisions of the United Nations Charter, according to which the United Nations should encourage the **exercise of these rights and freedoms for all,** irrespective of race, sex, language or religion.

The preamble to the International Convention on Civil and Political Rights and that to the International Convention on Economic, Social and Cultural Rights adopt and develop the content of the principles stated in the United Nation Charter and in the Universal declaration of Human Rights, representing **universal values universally accepted by the international community.**

1.4. In the third paragraph of the Preamble to the Convention on the Protection of Human Rights and Fundamental Freedoms it is proclaimed the principle according to which the aim of the Council of Europe is to achieve a closer collaboration between its members **and that one of the ways to achieve this goal is the protection and development *of human rights and fundamental freedoms.*** Also, the provisions of the article 1 of the Convention set the obligation of the Council of Europe member states **to respect the human rights established by the Title I of the Convention**.[5]

1.5. We consider it necessary for this study to remember the concept of **human dimension** that **subsumes the respect for all human rights and fundamental freedoms,** and those on human contacts and other humanitarian issues, as defined in the Section ***The Human Dimension of C.S.C.E.*** in the *Final Document of the 1986 meeting of the representatives of the states participating*

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[2] Charles Debbasch and Jean Marie Pontier, Les Constitutions de la France. (Paris: Dalloz, 1983), 8;

[3] Nicolae Pavel, Drept Constituțional și Instituții Politice/Constitutional Law and Political Institution,Vol. I, Teoria Generală/General Theory. (București: Fundația România de Mâine, 2004), 222. Art.1 All human beings are born free and equal in dignity and rights. They are endowed with reason ans conscience and should act towards one another in spirit of brotherhood. Art.2 : paragraph. (1) Each individual is entitled to all rights and freedoms set forth in this Declaration, without distinction of any kind, especially of race, color, language, religion, political or other opinion, national or social origin, property, birth or other status**. paragraph. (2)** In addition, there will be no distinction based on the political, juridical or international status or the territory of the country whose citizen is a person, whether that country or territory is independent or non-autonomous or subject to any limitations of sovereignty.

[4] *Activité de l´O.N.U. dans le domaine des droits de l´homme***.** (New York: Nation Unies, 1998), 10.

[5] Nicolae Pavel**,** Drept constituțional și instituții politice/Constitutional Law and Political Institutions, vol.I, Teoria Generală/General Theory. (București: Fundația România de Mâine, 2004), 264. Art. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms proclaims: ***The high contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Title I of this Convention.***

in the Vienna Conference on Security and Cooperation in Europe, held under the provisions of the Final Act relating to the consequence of the conference.[6]

We also believe that it is necessary to present other components of the **human dimension** which in our opinion results from the Seventh Principle of the Decalogue of the CSCE Final Act of Helsinki in 1975[7], and includes the following components: a. **the respect *for human rights and fundamental freedoms***, including freedom of thought, religion or belief for all without distinction as to race, sex, language or religion; b. **universal recognition for human rights and fundamental freedoms** and the commitment of participating states to respect them in their mutual relations and to strive individually and jointly, including in cooperation with the United Nations to promote universal and effective respect for them;

In this context, in our opinion, we must note the principles of human rights, democracy and the rule of law enshrined in the Charter of Paris for a New Europe[8], as follows: a. Heads of State and Government of participating States undertake to build, consolidate and strengthen democracy as the sole way of government of these states and nations, and for this purpose shall comply to: **a.1. *Human rights and fundamental freedoms* are inherent to all people, inalienable and guaranteed by law. a.2. Democracy is founded on respect for the human person** and the rule of law. a.3. Participating countries are ready to join all States and each of them in an effort **to protect the community and to determine the progress of the fundamental human values.**

1.6. In the Preamble to the Treaty on European Union[9] it is confirmed the commitment of the member states representative to the **principles** of freedom, democracy **and respect for human rights and fundamental freedoms** and the rule of law, principles which are common to the Member States (as amended by the Treaty of Amsterdam in 1997). It also expressed willingness **to deepen the solidarity between their peoples to respect their history, culture and traditions.** Moreover, in the article B of the Title I, among the Union's objectives it was introduced that of **strengthening the protection of rights and interests of nationals of Member States through the introduction of a citizenship of the Union**. Text mentioned is reiterated in the article B of the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts of 1997. In addition, the article F paragraph (2) states that "**The Union shall respect fundamental rights as guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms** signed in Rome on 4 November 1950 and **as they result from constitutional traditions common to the Member States as principles of Community law.**

1.7. The second paragraph of the Preamble to the Treaty of Lisbon, December 2007[10] - regarding amendments to the Treaty on European Union and the Treaty Establishing the European Community enshrines the following principle on universal values: Inspired by the cultural, religious

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[6] Pavel Nicolae, Iulian Şomănescu, Dumitru D. Ifrim, *Drepturile omului –Documente adoptate de organisme internaţionale/ Human Rights-Documents Adopted by International Organizations*, Adevărul Publishing House, Bucureşti, 1990, pp.164-202;

[7] Final Act of the Conference on Security and Cooperation in Europe, Helsinki, 1 August 1975, Published in the Official Gazette no. 92 of 13 August 1975.

[8] *Charter of Pars for a New Europe*, Published in the Official Gazette, Part I, no. 181 of 9 September 1991;

[9] *Traite sur L'Union Européenne, Le texte integral, Signé à Maastricht le 7 février 1992*, amended by the Treaties of Amsterdam in 1997 and Nice in 2001**,** *Journal L'Humanite*, Paris, 1992, p. 12;

[10] *Official Journal of the European Union, C30612*, of 17 December 2007; In addition, we must observe the general principle of Union's action on the international level which is based, among other principles, on the **principle of promoting the universality and indivisibility of human rights and fundamental freedoms** proclaimed in the paragraph 1and paragraph 2.a of the Chapter I of the Treaty, that sets states: **paragraph. 1** Union's action on the international scene **is based on the principles that inspired** the creation, development and its expansion and which it intends to promote to the wider world: democracy, rule of law**, the universality and indivisiblity of human rights and fundamental freedoms,** respect for human dignity, the principles of equality and solidarity and the respect for the principles of the United Nations Charter and international law. **Paragraph 2b consolidation and support** for democracy, rule of law, **human rights** and the principles of international law.

and humanist heritage of Europe from which the **universal values** were developed and that are **the inviolable and inalienable rights of the person**, and the freedom, democracy, equality and the rule of law. Also in the article 1 of the General Provisions of the Treaty is enshrined the principle that the **Union is founded *on the values of respect for human dignity, freedom, democracy, equality***, rule of law and **respect for human rights,** including rights of persons belonging to minorities. **These values** are common to the Member States in a society characterized by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men.

Furthermore, we observe the principle of **promoting the values that contribute to the protection of human rights** stated in the paragraph 5 of the article 2 of the General Provisions of the Treaty: In its relations with the wider world, the Union **upholds and promotes its values** and interests and contributes to the protection of its citizens. **It contributes** to peace, security, the sustainable development of the planet, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and **protection of human rights** and especially child rights and the strict observance and development of international law, including the respect for the principles of the United Nations Charter.

1.8. The proclamation in the Preamble to the Charter of Fundamental Rights of the European Union,[11] of the following principles: **a)** the Union is founded on **the indivisible, universal values of *human dignity, freedom, equality and solidarity***; **b)** the Union places the individual at the center of its actions, ***establishing UE citizenship and creating an area of freedom, security and justice.*** **c)** The Union shall contribute to the preservation and development of these **shared values. d)** For this purpose, it is necessary ***to strengthen the protection of fundamental rights***;

1.9. The Title I of the Constitution of Romania, amended in 2003, entitled General Principles enshrines **the rights and freedoms of the citizens**, human dignity, free development of human personality, justice and political pluralism as **supreme values and guarantees theme,** article 1 paragraph 3;[12]

1.10. Multiplying the state and conventional constitutional laws at the regional and universal level by inserting, recognizing and allowing **protection to the moral values,** an idea supported by the doctrine of natural law;

1.11. We can find in Europe today, and this finding can be extrapolated to the international society that **all the values are transformed and their quintessence is determined**.

At least these considerations have led us to approach the concept of fundamental rights in the light of **supreme values** enshrined in the paragraph 3 of the article 1 of the Constitution of Romania, republished in 2003, in the light of common **European values, universal values** and the **components of human dimension**.

2. Conceptual demarcations in the field of value learning

The word axiology in Romanian comes from the Greek word **axios = value + logos = study.** In essence, we should note that axiology is a branch of philosophy which has as object of study the study of values.

On the other hand, the Romanian word for epistemology comes from the Greek word **episteme = knowledge + logos = study.**

In its substance, epistemology is part of gnoseology which has as object for study the **process of knowing** as it works within the sciences in general and the theory of scientific knowledge.

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[11] *Official Journal of the European Union*, (2007/C 303/01);

[12] Romanian Constitution, revised in 2003, was published in the Official Gazette of Romania, Part I, no. 767 of October 31, 2003, article 1 paragraph (3) Romania is a state of law, democratic and social, in which human dignity, rights and freedoms, free development of human personality, justice and political pluralism represent supreme values, in the spirit of the Romanian people's democratic traditions and ideals of the Revolution of 1989, and are guaranteed;

By using the compound word **axiological-epistemological approach** we wanted to use in the scientific approach the study of value knowledge in the field of law.

We must point out the complexity of the study and its location in a condominium belonging to the philosophy of law, gnoseologiei and the field of law.

Referring to the time of all values transformation, Nicholas Râmbu[13] considered that now a new objective spirit, ie a new way of thinking and being, to value on and create, a new sensitivity are about to be set.

Moreover, **the reflection on values is a constant of the philosophical spirit**, but it becomes central in crucial moments of history. Besides that, people live in the world of values without being aware of them, as not aware of the air they breathe. In this respect it seems self-evident what is the truth, good, beauty, happiness, freedom, etc.

We consider that the author cited addressed an exhortation to becoming aware of the values and learning their content.

We can also say that the philosophy of value and knowledge of legal values has become more than ever a cardinal problem of the contemporary world. In addition, quantification of the values and their positivation became **a part of human society at national, regional and universal level**, thus tending to confirm Hegel's assertions according to ***which laws must, on one hand, to be an all over, closed, on the other hand, the continuing need for new legal determinations still remains.***[14]

We noted for this study the following concept of value, considering it general enough, comprehensive and sufficient to cover the research and its application in law, in particular in establishing the concept of fundamental rights in the lights of juridical values theory.

The concept value, in a philosophical, general sense, includes **the acquisition of certain things, events and actions to which a human society grants appreciation under their correspondence with its needs or necessities and the ideals generated by them.**[15]

The studies in the field support the idea that **values are related to all manifestation of social relations and human behaviour.**[16]

Regarding the criteria according to which the values were grouped, they are:[17] a. the validity of values; b. their quality; c. their subject; d. the reasons that have determined the values; e. their object; f; mental faculty from which these values arise; g. their scope.

We use the fifth criterion of classification, namely the object of values, according to which the values can be classified as economic, legal, ethical, political, etc. and the seventh criterion, their scope, according to which values can be individual, social and universal.

Starting from the idea enshrined in the philosophy that **man knows reality to use it we consider that between knowledge and value** there is a bi-univocal correspondence.

It follows that the foundation of value should be based on the science of logic and value theory. As the studies in the field have shown, **the object of value is value as a phenomenon, or as a given fact exterior to human.**

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[13] Petre Andrei**,** *Filosofia valorii/Philosophy of Value, III Edition, Preface by Nicolae Râmbu,* Polirom Publishing House, Iaşi, 1997, p.7.

[14] G.W.F. Hegel, *Principiile filosofiei dreptului/Philosophy of Law*, IRI Publishing House, Bucharest, 1996, p. 213;

[15] *Mic dicţionar enciclopedic/Glossary encyclopaedic*, Editura Enciclopedică Română, Bucharest, 1972, p. 984;

[16] Adrian Năstase, *Drepturile omului-religie a sfârşitului de secol/Human Rights-the Religion of the End of the Century*, Institutul Român pentru Drepturile Omului, Bucureşti, 1992, p. 32; The author further states: Individual's participation in political, cultural or social life reflects the influence and impact of values, categories of maximum theoretical-philosophical generality, which fiind their expression at the axiological level of social knowledge, and that objectifies in all sorts of social norms, forming the behavior in different spheres of social life.

[17] Petre Andrei**,** *Filosofia valorii/Philosophy of Value*, ed. cit. p. 47; The autor considers that the following values are part of the social values: a. economic values; b. judicial values; c. political values; d. ethical values; e. historical values; f. aesthetic values; g. religious values; h. cultural and social values;

Referring to the philosophy of value, Petre Andrei[18] considers **philosophy as the science of the ultimate values of truth and life**, highlighting the subjective nature of philosophy, since we do not know realities, but the values we ascribe to psychological and logical datum which we objectivate.

Consequently, the great problems of the philosophy of values can be summarized in three main categories of research: that of reality, that of knowledge and that of action.

Given the above, we believe that we can study the universal, regional and constitutional theory of values structuring it on two generally accepted levels of genesis:

a. knowing the reality and the configuration of the social values to which a human community gives appreciation based on their correspondence with the essential requirements or needs determined by society's objectives and goals and its general ideals;

b. the recognition of values or valuing the social values for creating a table of values or their hierarchy;

The two levels of value genesis are generally applied not only in the study of philosophy and sociology of value, but they have the same application in the study of social reality in different fields, such as: economic, political, legal, ethical, historical, aesthetic, religious, social, cultural, etc.

It follows that interdisciplinary approaches to the theory of values is a constant of the modern science, a study condominium in contemporary sciences.

We conclude that in the national, regional and universal society today there are many values in the fields mentioned above, which have an open content.

As Petre Andrei[19] said, the **judicial values could be the object of a science of law**, a legal sociology or a philosophy of law, as we study them as formal, rational phenomena, imposed by the state as social regulatory phenomena or abstract concepts of social reality of practical life.

Through the law, the individuals' behavior is subject to rules or mandatory rules in the social life. These mandatory rules or rules of conduct are general, impersonal and apply iterative when the reality or the fact circumscribed to it appears.

Also on the legal values, another author makes the following statement: **judicial value** is thus a **normative value**, from a special point of view which is that of the justice of an action. It is not a normative value of existence, as it is about obligations, we say it is true that a person is required or not to do something, and not that it is true that his action exists or not[20].

It follows that the dyad of the value genesis above is not sufficient for judicial values.

c. Therefore, it requires a third level of the genesis called the **realization of the value by its positivation, which means passing a value from the non-legal, moral or customary field in the field of law.**

Starting from the idea that **values are social phenomena, legal values are related to all manifestations of individual behavior in society.**

Human rights as value are rooted in the historical development of human society, as theorized by both natural law doctrine and the doctrine of positivism.

We must point out that the first two levels of value genesis have a social character, they are outside the law and only after positivation they become judicial values.

Positivation implies a shift in the value from non-legal field to the legal field, thus becoming a value in positive law.

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[18] Ibid, p. 13;

[19] Ibid**,** p. 128

[20] Mircea Djuvara**,** *Teoria generală a dreptului(enciclopedia juridică), Drept rațional, izvoare și drept pozitiv/General Theory of Law, Rational Law, Sources and Positive Law* Editura All, Bucharest, 1995, p. 439 – 442; on the same line of thought the author adds: **The legal rules are thus violated, by their very definition and nature,** they can not claim to ascertain facts, ie if they are broken or not, also the **laws of science say what is and can be seen, but will never lay down in the final analysis what we are rationally obliged to do based on ideas of justice,** as a rule of practice sets.

The values of positive law form a system of values. As the system of law has a hierarchy of rules and its branches, it follows that the value system of positive law also experiences such a hierarchy.

In essence, taking into account the above, in our opinion, in this field there is the following system of hierarchy of values, but we do not consider it comprehensively approached:

2.1. Absolute values, as determined by the philosophy of law as a science of the ultimate values of reality and life that can not be challenged, of which we mention: the truth, good, beauty, happiness, right, justice, life, liberty, equality, dignity , good faith, the rule of law, etc.

2.2. Universal values, universally accepted by the international community at the United Nations level or European regional community at the European Union level and proclaimed expresis verbis in the preamble or normative content of international or European documents of which we mention: **the inviolable and inalienable right of individual**, freedom, democracy, equality, human dignity, solidarity, the worth of human person, etc.

2.3. Supreme or fundamental values, superior to legal order of a state, proclaimed expressis verbis by the general principles of the State Constitution, for which the Constitution is the supreme law or the law of laws. For example, the 1991 Constitution, revised in 2003, declares expressis verbis in the article 1 paragraph 3, entitled General Principles, the following **supreme values**: human dignity, **rights and freedoms of citizens**, development of human personality, justice and political pluralism.

2.4. Relative values enshrined as judicial values and related to other values or other reference system of values against which they define. For example, protection of judicial values by the other fields of law, of which we mention: the protection of human rights by means of criminal law, civil law, labor law, financial law, etc.

2.5. Moral values are required to be discussed in the theory of value in law. If legal values are imposed by the legislature, ie outside the will of the individual, moral values or moral law is an externalization of the individual personality and is imposed by the interior, because, as Ihering says, the moral man is the product of social evolution. In essence, we must remember that both values are rules of conduct for the individual except that for non- complying with the moral values can not be applied the coercive force of the state. Finally, we must remember that absolute values should also be subject to positivity in law in order to be realized, but only as part of universal or regional documents or in the content of the fundamental laws.

Moreover, **moral values** must be discussed in the context of this study taking into account the constitutional provisions of article 11, paragraph 1 that proclaims that: The Romanian State pledges to fulfill **in good faith** the obligations deriving from the treaties it is party. We noticed the following definition of morality: **a set of concepts and rules of right or wrong, just and injust, allowed or disallowed**[21]. Good faith is a moral concept deriving from international customary law of compliance by states with their obligations in treaties concluded by the will of their agreement.

In our opinion, **the set of values of the European Union** should build a condominium with the **set of national values** so that the **European peoples to feel part of the same Union**, thus defining a set of values that can be called the **Union's ethics.**

Finally, we must observe that absolute values can be subject to their positivation in law, but only as part of universal or regional standards or normative content of the fundamental laws of the states.

[21] Ioan Ceterchi, Momcilo Luburici**,** *Teoria generală a statului şi dreptului/General Theory of state and Law,* Tipografia Universităţii din Bucureşti, Bucharest, 1983, pp. 104 – 106;

3. A diachronic approach to the concept of fundamental rights and its consequence in approaching the concept of fundamental rights in light of the theory of judicial values-selective aspects

In our opinion, through the diachronic approach to the concept of fundamental rights we can establish the first determination of relativity on the development of criteria under which some rights are considered fundamental and others, not at different times that accompany a state constitutional development and terminology evolution under which these rights are identified. It is also why we kept for this study K. Mbaye's statement that **human rights history is identical with the history of mankind.**[22]

Defining fundamental rights of citizens has been a constant concern of legal doctrine.

In a diachronic approach to defining the fundamental rights of citizens, we find that the first Romanian constitutionalists have perceived the ideas and principles of the French Declaration of Human Rights and Citizen and the theory of natural law. We believe that in general, the content of the definition refers to the normative constitutional document come in force or its evolution over time.

Thus, Constantin G. Dissescu[23] entitled the Chapter IV Rights of the course Romanians Rights, but defining the law as regulatory of the liberties and retaining that the fundamental problem of social organization lies in the harmonization of freedoms, it concludes that the fundamental law regulates these freedoms and guarantees them in the article 5-30.

They form, according to this consideration the Rights of Romanians proclaimed in the Title II of the Romanian Constitution of 1866.

Finally, it is mentioned that the **Rights of Romanians** are the common freedoms of Romanians and foreigners on the Romanian territory and he names them names **public freedoms.**

Starting from the theory of natural law the author refers to the close link between human rights and freedoms by stating that **the right derives from liberty**. On the other hand **freedom is conscious exercise of will, the will in contest with life, intelligent being is entitled to develop in his order by reason.**

Defining **freedom** legally as **human faculties and powers of human beings, it results that each faculty or power is a right or privilege. For these reasons it confuses right and freedom, so freedom is a right as a right is a freedom.**

We can thus see that the idea of freedom was not known by the ancient city.

In the Middle Ages appears the doctrine of natural law, establishing one of the fundamental principles according to **which man as a human being is endowed by nature with rights specific, previuos and opposable to the state.**

Starting from the idea of individual freedoms proclaimed by the French Declaration of Human Rights and Citizen, Paul Negulescu shows that **public rights, also called public freedoms, or the rights of man and citizen, are faculties, opportunities recognized by the constituant legislature for all members of society, apart from special restrictions, in order to help improve and preserve the individual himself.**[24]

We conclude that in terms of legal nature between law and freedom there is no difference, these opportunities, these faculties recognized by the legislature to human being are guaranteed to each and to other individuals and to the community in which the human being lives.

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[22] K. Mbaye, *Les droits de l'homme et des peuples,* Edition A. Pedone, Paris, 1991, p. 111.

[23] Constantin G. Dissescu, *Dreptul constituțional/Constitutional Law*, Editura librăriei SOCEC & Co., Societate anonimă, 1915, p. 440 et seq.

[24] Paul Negulescu, Curs de drept constituțional român/Romanian Constitutional Law Course, Edited by Alex. Th. Doicescu, Bucharest, 1927, pp. 512-513.

It is also considered that these freedoms **are subject to restrictions only because one's freedom is limited by another's** freedom and because of the need for conservation and development of the state itself. As proclaimed in the article 4 of the French Declaration of the Rights of Man and Citizens**, freedom is the power to do anything which does not harm another: therefore, the only limits to the exercise of each person's natural rights are those which ensure that the other members of the community enjoy those same rights**.

From the above, we must accept the idea that although the Constitutions of Romania of the years 1866, 1923 and 1938 constantly proclaim in the Title II the **Rights of Romanians**, they are called in the studies in the field either **public liberties** or **public rights** or **rights of man and citizen.**

Romanian Constitutions of 1948, 1952 and 1965 enshrine the **fundamental rights of Romanian citizens**, and the Romanian Constitution of 1991 proclaims the **rights, freedoms and fundamenta duties.**

Given the constitutional considerents in our legal field, many authors have defined the concept of fundamental rights.

Nistor Prisaca, from theoretical considerations, suggests the following definition: **fundamental rights of citizens are those powers of the citizens to perform certain actions, essential to ensure its existence and socio-political and cultural development that are enshrined in the constitution and guaranteed through economic base and the coercion of the state.**[25]

The definition includes the following components:

a) Fundamental rights are those powers of the citizen to exercise certain actions;

b) Performing these actions is essential to ensure his existence and socio-political and cultural development;

c) Fundamental rights are provided in the Constitution and are guaranteed through the economic base and the coercion of the state;

d) State coercion is exerted against those who try top revent citizens to exercise their fundamental rights enshrined in the Constitution and other laws.

Tudor Drăganu, referring to the **Fundamental Rights of Citizens** states: **the concept of fundamental rights of citizenship designates those rights of citizens, essential for the physical existence and psychological integrity, for their material and intellectual development, as well as to ensure their active participation to the leadership of the state and are guaranteed by the Constitution itself.**[26]

In an axiological approach, the author emphasizes that the fundamental rights of citizens are fundamental social values, being essential for the phisical existence and psychological integrity, for material and intellectual development of the citizens and to ensure their active participation in state lidership.

Because of their overriding importance, they are guaranteed by the Constitution of Romania itself.

Ioan Muraru and Elena Simina Tănăsescu, following scientific arguments, propose the following definition: **Fundamental rights are those subjective rights of citizens, essential to their life, liberty and dignity, essential to their free development of human personality established by the Constitution and guaranteed by the Constitution and laws**[27]. Regarding the establishment of criteria by which certain rights are considered essential or not the authors noted that **this criterion leads to world of values** and the most important problem is the selection of the values and their

[25] N. Prisca, Drept constituțional/Constitutional Law, Editura Didactică și Pedagogică, Bucharest, 1977, p.20.

[26] Tudor Drăganu, Drept constituțional și instituții politice/Constitutional Law and Political Institutions, *Tratat elementar/Handbook*, vol. I, Lumina Lex Publishing House, Bucharest, 2000, p. 151.

[27] Ioan Muraru, Elena Simina Tănăsecu, Drept constituțional și instituții politice/Constitutional Law and Political Institutions, Edition 13, Volume I, C.H. Beck Publishing House, Bucharest, 2005, pp. 139 -140.

special legal protection. The author also states that **certain subjective rights, because of their importance, are selected on a value criterion and are considered fundamental rights.**

In order to define the concept of **fundamental rights** the following were taken into account:

a) fundamental rights are subjective rights of the citizens;

b) these rights are essential for citizen's life, freedom, and dignity, indispensable for the free development of human personality;

c) fundamental rights are set by the Constitution and guaranteed by Constitution and laws.

Ion Deleanu, referring to the **rights of citizens** or **public freedoms'**, states: We called them **fundamental not only because they are enshrined and essentially guaranteed by the basic law, but – especially – because they are the nucleus around which revolve all the other subjective rights**. [28]

This definition highlights the fact that fundamental rights are enshrined and essentially guaranteed by the fundamental law and they are the nucleus around which revolve all other subjective rights.

The French constitutional work consulted studies the **human rights, public freedoms, the rights and freedoms of citizens and fundamental freedoms.**

We note that the terminology used is not uniform. The synonym of the Romanian concept of **fundamental rights** in French terminology is the concept of **public freedoms**.

A general definition of this concept states that **public freedoms are human rights recognized, defined and protected by law.**[29]

Starting from the fact that freedom should not be reduced to a single meaning, Jacques Robert[30] considers that it should have at least two senses:

a) the first sense, freedom is the absence of constraint, which he names actual freedom, which is the same as guaranteeing a private sphere where every human being is master of his own;

b) the second sense, the freedom is the power to act and have the right or power to achieve this or that act, which is considered normative freedom or protected freedom.

According to the first sense, the public freedom is a freedom granted to all individuals, so that its exercise by anyone should not result in any case to a harm to exercising the same freedoms of another.

According to the second sense, **the public freedom** is defined broadly and narrowly.

In a narrow sense, **the public freedoms** are freedoms enshrined in the Declaration of Rights or the Preambles, the essential rights and freedoms being specifically mentioned.

In this sense, not every public freedom should be a freedom constitutionally declared.

In a broad sense, **the public freedoms** are any right recognized by law; this obviously includes constitutional texts and that of declaration of rights.

These public freedoms will be referred to as recognized freedoms.

The fundamental freedoms are placed, in author's opinion, among the public freedoms, declared and recognized. Approaching axiologically the issue of fundamental freedoms, **fundamental freedoms** are considered to be the rights having a certain social importance, meaning that they are considered to have a fundamental character. They do not represent a immutable list, being always subject to revision.

Claude Albert Colliard[31], states that the expression **public freedoms** comes from the article 34, paragraph (2) of the French Constitution of 1958 which reserves the field of **public freedoms** to be regulated exclusively by the Parliament. Moreover, the law lays down rules on: civil rights and

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[28] Ion Deleanu, Drept constituțional și instituții politice/Constitutional Law and Political Institutions, Bucharest, vol. I, 1991, pp. 11-12.

[29] Raymond Guillien, Jean Vincent, Lexique de termes juridiques, Edition Dalloz, Paris, 1990, p. 301

[30] Jacques Robert, Droits de l'homme et libertés fundamentales, Edition Montchrestien, Paris, 1993, pp. 13-22.

[31] Claude Albert Colliard, Libertés publiques, Septieme édition, Edition Dalloz, Paris, 1989, pp 21-29.

fundamental guarantees given to the citizens to exercise public freedoms... Constitutional Advisory Committee has proposed to define by law the exact content and meaning of the concept of **public freedoms** as the definition of doctrine is never very precise, always founded on excesses of exegesis or refinements of subtlety.

The author states from the beginning that **public liberties** exist only in positive law and by positive law, which leads to the result that they vary in space and time. It follows that legal rules can only protect the natural rights of human beings, and that positive law is the only real legal framework of public freedoms.

Following these considerations it is necessary to propose a general definition of **public freedoms** which **are rights that individuals benefit from and that are analyzed by recognizing them for individuals in a certain field of autonomy**.

This general notion can be clarified if it is successively applied to the following three fields:

a) the relationship between individual and public power;

b) public freedoms and their collective character;

c) public freedoms and positive obligations from the state.

Regarding the relationship between individual and public power, public freedoms are rights belonging to individual and that constitute limitations of state power or negative obligations of the state.

Regarding the collective nature of civil liberties, this means that public freedoms are individual, but when an individual acts without constraint and the action takes place in a social context in relation to other humans it can acquire a collective character.

Also, positive obligations from the state were classified into two broad categories:

a) obligations provided and organized

b) set or virtual obligations.

Positive obligations, separated by public liberty itself may give in reality its full sense.

Set or virtual positive obligations generally refer to economic and social rights that are considered public freedoms.

They are known as set or virtual because their framework is established by the constituent but the legislature is not required to meet them.

Given the general definition applications in the three fields mentioned, we propose the following definition is strictly legal sense: **public freedoms are legal situations and those established** by acts issued by the competent executive authorities in which the individual is granted the right to act without constraint within the limits set by positive law in force and may determine, under judicial control, the police authority obliged to maintain public order.

Jean Rivero,[32] referring comparatively to **human rights and public freedoms, shows that public freedoms have at least the benefit of being a reality in the legal sense, through public liberties the State recognizes the right of individuals to exercise, away from all external pressures, a number of specific activities.**

This recognition implies, in a variable manner according to legal systems, a relatively solemn formulation and the existence of real guarantees, most often national and jurisdictional but equally nonjurisdicțional or supranational.

The definitions observed for this study reveal a diversity of terminology in addressing fundamental rights, and a variety of views on the establishment of the concept proposed by the authors over time.

The research on these views allows us to deepen the individual's development in society, both in relation with state power and in relation to other individuals and the group to which it belongs.

[32] Jean Rivero, Les libertés publiques, Tome 1, *Les droits de l'homme*, Presses Universitaires de France, Paris, 1991, p. 12. and p. 109.

From the analyze of the diachronic approach on the fundamental rights presented above and the observations formulated, in our opinion, the conclusion emerges that it can be regarded ***as a first determination of relativity which can be subsumed to the concept of fundamental rights.***

A definition of fundamental rights includes the identification of its components on the basis of scientific criteria that achieve a more complete picture of the legal dimensions and capture their essential features.

Regarding the terminology adopted, that of **fundamental rights**, it is suggested by the Title II of the Constitution entitled **Fundamental Rights, Freedoms and Duties.**

Given that between **right** and **freedom** there is no difference in terms of legal nature, we proceeded to the above generic definition. This terminology was also suggested by the **Universal Declaration of Human Rights** and the two covenants, namely the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Certainly, in terms of terminology, we can also define the **fundamental rights and freedoms** by taking strictly the constitutional text.

From the considerations above, **we observe a current trend in the general use of values criterion and legal values in particular to identify the fundamental rights and to determine their essential or primordial character for citizens**.

This current trend is determined as mentioned above by the universal and European regional documents on human and citizen rights that **proclaim those rights as universal, European or common values** in their preamble.

We must remember that, in our opinion, the fundamental law of Romania has used these principles by enshrining them in the general principle set in the paragraph 3of the article 1 as the **supreme values of human and citizen rights, human dignity and free development of human personality and guaranteeing them by the Constitution of Romania.**

These **three components proclaimed supreme values together with the component of human dimension will form the constant or primordial core of the concept of fundamental rights.**

Also, for this study it is necessary to take into account the **criterion according to which the human being, man, is always in the space of a sovereign state.** The citizen, because of its constitutional relationship to citizenship, benefits from the universality of rights and freedoms enshrined in the Constitution and other laws and has the obligations set by them.

According to this criterion, in our opinion, it can be subsumed **a second determination of relativity, which relates to the economic, social, political and cultural context of a society organized as a state** and that determines the use and exercise of fundamental rights guaranteed by the constitution and laws.

From the justification of the scientific approach observed in the first part of the study, in our opinion, it is required that in establishing the concept of fundamental rights we must take into account the international community, in terms of the normative standards both universally represented by the UN and at European regional level represented by the European Union's system, which is also concerned with protecting and promoting the human rights and fundamental freedoms. We can talk about a **universalization of basic human rights.** Gaining universal recognition, the human rights are indivisible and inalienable, inherent to human being.

In this regard we must subsume to the concept of fundamental rights **a third determination of relativity** on the criterion of **the synchronism between internal law and treaties on fundamental human rights, to which Romania is party.**

This criterion of relativity is suggested by the provisions of the paragraph 2 of the article 11 of the Romanian Constitution, republished, which establishes the following constitutional rule: **Treaties**

ratified by Parliament, by law, are part of the internal law. This process involves an analysis of simultaneity for the process of valorisation and positivation of human and citizen rights on the three levels, namely: universal, regional and state or national level. But in the case of positivation a lack of synchronism can occur on the three levels mentioned. To support this theory, we mention as argument, the provisions of the Constitution of Romania, revised, referring to the **International Treaties concerning human rights** which proclaims that: **if there are inconsistencies between the covenants and treaties on fundamental human rights to which Romania is party and internal laws, the international regulations shall prevail, unless the constitution or domestic laws contain provisions more favorable.**

In our opinion, the **diversity of approaches to the issue of human and citizen rights** on the three levels, namely: universal, regional and state or national, can be explained by the **heterogeneity of the international community**, part of which will be subordinated to the fourth determination of relativity.

Summarizing the above considerations, from the perspective of judicial values we define **fundamental rights as being those subjective rights of individual and citizen, components of the human dimension, which in an axiological approach are primordial to their dignity and freedom and for the free development of human personality, universal values, common European values and Romanian supreme values, enshrined and guaranteed by the universal and European standards and by Constitution of Romania and which subsumes four determinations of relativity: the first determination of relativity relates to addressing human rights developments over time; the second determination of relativity relates to the approach in the economic, social, political and cultural context of a society organized in a state; the third determination of relativity concerns the lack of synchronism between the regulations at universal or regional level and at state or national level; the fourth determination of relativity relates to the diversity of approaches in human rights issues explained by the heterogeneity of the international community.**

Conclusions

The objective to define the fundamental rights in terms of values in general and judicial values in particular, in our opinion was achieved. The foundation of this concept was suggested to us by the constitutional principle enshrined in the paragraph 3 of the article 1 of the Romanian Constitution, republished, which proclaims human dignity, rights and freedoms of the citizens and the free development of human personality, supreme values and their guarantee, and the general principles contained in the Preamble to the universal and European standards on human and citizen rights, that proclaims those rights as values. From these documents, we identified and noted the enshrinement of the following values for the concept of fundamental rights: **the supreme values, common European values, universal values,** and **components of the human dimension.**

Establishment the concepts in the field of values in general and judicial values in particular, we examined the learning and study of values on three levels of genesis and their systemic approach, an approach that involves their hierarchization, **setting the place of supreme values** in this hierarchy. In logical order, we identified the four determinations of relativity that have been subsumed to the concept.

The proposed concept can be considered a contribution to the expansion of research on constitutional law and human and citizen rights, in line with the current trends in the field.

Also, the proposed concept opens a complex and complete vision, but not exhaustive in this field.

The scheme-key proposed to justify the scientific approach, the scheme-key proposed to study the field of learning values and the determination of relativity can be replicated and extended to other fields such as justice, political pluralism, human dignity, etc.

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DEATH ON REQUEST

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Abstract
The topics of euthanasia and assisted suicide are of profound importance in terms of law, ethics, religion, and social values. The question whether assisted dying should be legalised is often treated, by judges and commentators alike, as a question which transcends national boundaries and diverse legal systems. In this article we seek to examine the ECtHR's approach, the different legal routes by which attempts are made to legalise assisted dying and improvements in end of life decision making. In this article, we shall try to answer the question of whether or not voluntary euthanasia and assisted suicide are morally and legally acceptable.

***Keywords**: euthanasia, assisted suicide, assisted dying, right to life, ECHR*

1. Introduction

The first substantive right proclaimed by the European Convention on Human Rights (the "*Convention*") is the right to life, set out in Article 2[1]. The right to life is listed first because it is the most basic human right of all: if one could be arbitrarily deprived of one's right to life[2], all other rights would become illusory. The fundamental nature of the right is also clear from the fact that it is "*non-derogable*": it may not be denied even in "*time of war or other public emergency threatening the life of the nation*".

The Convention does not otherwise clarify what "*life*" is, or when it *begins* or *ends*. Indeed, in the absence of a European (or worldwide) legal or scientific consensus on the matter, the Commission (when it existed) and the Court were unwilling to set precise standards in these regards. As the Court put it in the case of Vo v. France[3]:

(…) the issue of when the right to life begins ***comes within the margin of appreciation*** *which the Court generally considers that States should enjoy in this sphere, notwithstanding an evolutive interpretation of the Convention, a "living instrument which must be interpreted in the light of present-day conditions" (…)* ***there is no European consensus on the scientific and legal definition of the beginning of life***.

Rather than imposing a uniform standard, the Commission and ECtHR thus assessed and assess matters relating to the beginning of life only in a marginal way, ***on a case-by-case basis***, while leaving considerable freedom to States to regulate the matters in question themselves, as long as they approach them in an appropriate way, in particular by giving appropriate weight to the various interests at stake and by carefully balancing those interests. This can be noticed from the case-law of the Convention organs on abortion, euthanasia and assisted death. The term of "*abortion*" is well known, but the terms of "*euthanasia*" and "*assisted suicide*" are controversial.

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[1] (*1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. (2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.*

[2] "*Life*" here means *human life*: neither the right to life of animals, nor the right to existence of "*legal persons*" is covered by the concept;

[3] Vo v. France, Application no. 53924/00;

Hippocrates mentioned *euthanasia* in the Hippocratic Oath, "*To please no one will I prescribe a deadly drug nor give advice which may cause his death*". "*Active euthanasia*" refers to a deliberate act to accelerate the death of a dying patient. Euthanasia comes from the Greek word "*eu*" which means "*goodly*" or "*well*" and "*thanatos*" meaning death[4].

"*Assisted death*" is a model that includes both what has been called *physician-assisted "suicide"* and *voluntary active euthanasia*. It suggests a difference in the degree of involvement and behaviour. "*Physician-assisted suicide*" entails making lethal means available to the patient to be used at a time of the patient's own choosing (*at the patient's autonomous request*). By contrast, *voluntary active euthanasia* entails the physician taking an active role in carrying out the patient's request, and usually involves intravenous delivery of a lethal substance. Physician-assisted suicide is seen to be far easier emotionally for the physician than euthanasia as he or she does not have to directly cause a death; he or she merely supplies the means for the patient's personal use[5].

Despite the fact that *autonomy* has been used in many distinct senses, it seems that in biomedical ethics there is a common core understanding of the meaning of this notion. According to this idea, autonomy means self-government[6]. If a person's decisions, beliefs, desires are due to such external influences as unreflected socialization, manipulation, coercion, and brainwashing, they are not autonomous but heteronomous. If a person's beliefs concerning some matter are false, inconsistent with each other, or she is insufficiently informed about that matter without realizing it, then she is not autonomous with respect that matter. Similarly, if a person's behaviour results from such things as compulsion and weakness of will, then it is not autonomous but heteronomous.

Thus, is there a right to die according to the Convention? Could we interpret that the suicide, assisted suicide and euthanasia are allowed by the Convention?

2. Paper content

2.1. Does the jurisprudence of ECtHR acknowledge the existence of a *"right to die"*?[7]

Article 2 of the Convention requires that everyone's "*right to life*" be "*protected by law*". Apart from the death penalty, it envisages only limited circumstances in which a person can be deprived of this right; none of these relate to suicide or euthanasia. This raises **several difficult and overlapping sets of questions**. *First* of all: when does life – and therefore the right to protection of life by law – end? *Secondly*: is it acceptable to provide palliative care to a terminally ill or dying person, even if the treatment may, as a side-effect, contribute to the shortening of the patient's life? And should the patient be consulted on this? *Third*, may or must, the State "*protect*" the right to life even of a person who does not want to live any longer, against that person's own wishes? Or do people have, under the Convention, not just a right to life, and to live – but also *a right to die* as and when they choose: to commit suicide? And if so, can they seek assistance from others to end their lives? And *fourth*: can the State allow the ending of life in order to end suffering, even if the person concerned cannot express his or her wishes in this respect? Perhaps surprisingly, the first, second and fourth of these sets of questions have not (*yet*) been put to the Commission or the Court – but the case-law on abortion and on the third question does provide some indications of the probable approach of the Court.

The first issue could arise, in particular, in a case in which the authorities in a member State of the Council of Europe had decided to switch off life-support machines at a certain moment when

[4] Goodman James, *The Case of Dr Munro: Are There Lessons to be Learnt?*, Medical Law Review, 18, Winter 2010, p. 564;

[5] Available at http://www.worldrtd net/taxonomy/term/475;

[6] Jukka Varelius, *Voluntary Euthanasia, Physician-Assisted Suicide, and the Goals of Medicine*, Journal of Medicine and Philosophy, Vol. 31, No. 02, February 2006, p. 122 – 123;

[7] Available at http://www.coe.int/t/dghl/publications/hrhandbooks/index_handbooks_en.asp;

they deemed the person attached to the machines was no longer alive, but where this was disputed by relatives. However, as with the beginning of life, there is no European (or wider) legal or scientific consensus on when this moment is – except perhaps that death is not a moment, but *a process*, which suggests that it is scientifically, and thus arguably also legally, impossible to provide a clear-cut answer to the question. The Court would leave the answer to the question of when life ends – like the question of when life begins – primarily to the States. In practice, in the member States, the issue tends to be whether life-support machines can be switched off even before a person is "*clinically dead*" (whenever that may be), in order not to unduly extend the dying process[8]. The question that arises under the Convention in such cases is whether the law in a member State which allows the switching off of the life-support machines still adequately "*protects*" the right to life of the person concerned. However, even in these terms the issue has not yet come up in the case-law. In view of the case-law on demands for assisted suicide, discussed below, it is likely that the Court, if and when it is faced with this issue, will leave a wide margin of discretion to the States. The issue is closely linked to, indeed shades into, the second question: whether it is permissible to provide palliative treatment to a terminally ill or dying person, if this treatment has the side effect of hastening the patient's death. On this issue, the Parliamentary Assembly of the Council of Europe recommends that the member States should:

ensure that, unless the patient chooses otherwise, a terminally ill or dying person will receive adequate pain relief and palliative care, even if this treatment as a side-effect may contribute to the shortening of the individual's life[9].

It is notable that the Court, in the case of Pretty discussed below, expressly referred to Recommendation 1418 (1999). In view of the apparently wide consensus on this matter, and the express recognition of freedom of choice for the individual in this recommendation and in State practice, the Court is likely to accept that such an approach does not contravene the Convention. The fourth issue – whether euthanasia can be in accordance with the Convention even in the absence of a clear expression of the will of the person concerned – has also not been determined by the Convention organs. Here, too, there is somewhat clearer ground, in the sense that such "*mercy killings*" are clearly not regarded as acceptable in Recommendation 1418 (1999), and in that there are no Council of Europe member States that allow for active termination of life, other than at the request of the patient. Because of this apparent consensus, and given the emphasis which the Court places on "*personal autonomy*" it is possible that the Court, if confronted with this question, would feel that States that would depend on the circumstances of the case. The only cases in this field so far have concerned the third set of questions: whether a seriously physically ill but mentally fit person has a right to choose to die by committing suicide rather than to go on living, and whether, if so, that person can seek assistance from others in the taking of his or her life, or whether the State has the right, or the duty, to intervene to prevent this. The Court has assessed these questions at different times, in different contexts, and by reference not just to Article 2, but also to other articles of the Convention. It has, in particular, linked its considerations under Articles 2, 3 and 8 in a way that is illustrative of its holistic approach to the rights protected in the Convention. The 1984 case of *X v. Germany*[10] concerned a prisoner who had gone on a hunger strike and who was forcibly fed by the authorities. X complained of this treatment, arguing that it constituted inhuman and degrading

[8] An example is a case before the High Court of England in August 2005, in which most of the medical experts argued in favour of withdrawal of life support from a patient, Mr. A, but relatives, backed by one doctor, argued against this. The Judge, Mr Justice Kirkwood ruled against the relatives, on the basis that: "*It is in [Mr A's] best interests that he be allowed a peaceful and dignified death. Everything should be done to support him in that, including hydration and nutrition, but it's not in his best interests that he should continue to be subjected to painful and undignified medical processes which do nothing to improve his terminal condition.*"

[9] Recommendation 1418 (1999), paragraph 9, at (a) (vii); available at http://assembly.coe.int/main.asp?link=/Documents/AdoptedText/ta99/EREC1418 htm;

[10] *X v. Germany*, Application no. 10565/83;

treatment, contrary to Article 3 of the Convention. However, he did not argue that, under the Convention, he had a right to choose to die by starving himself. The Commission dismissed the application in the following terms:

In the opinion of the Commission forced feeding of a person does involve degrading elements which in certain circumstances may be regarded as prohibited by Article 3 of the Convention. Under the Convention the High Contracting Parties are, however, also obliged to secure to everyone the right to life as set out in Article 2. Such an obligation should in certain circumstances call for positive action on the part of the Contracting Parties, in particular an active measure to save lives when the authorities have taken the person in question into their custody. When, as in the present case, a detained person maintains a hunger strike this may inevitably lead to a conflict between an individual's right to physical integrity and the High Contracting Party's obligation under Article 2 of the Convention – a conflict which is not solved by the Convention itself. The Commission recalls that under German law this conflict has been solved in that it is possible to force-feed a detained person if this person, due to a hunger strike, would be subject to injuries of a permanent character, and the forced feeding is even obligatory if an obvious danger for the individual's life exists. (…) The Commission is satisfied that the authorities acted solely in the best interests of the applicant when choosing between either respect for the applicant's will not to accept nourishment of any kind and thereby incur the risk that he might be subject to lasting injuries or even die, or to take action with a view to securing his survival although such action might infringe the applicant's human dignity.

It is notable that the applicant in this case was a prisoner, and that he did not claim a "*right to die*". Prisoners are under stress by nature of their confinement, which may make them suicidal even if they would not normally be, while the State authorities are under a special duty of care towards them.

More pertinent to the general question about the existence of a "*right to die*" are therefore two cases, *Sanles Sanles v. Spain* and *Pretty v. the United Kingdom*. The first of these concerned a man, Mr Sampedro, who had been a tetraplegic since the age of twenty-five and who, from 1993, when he was about fifty, had tried to obtain recognition from the Spanish courts of what he claimed was his right to end his life, with the help of others (including, in particular, his doctor), without interference by the State. However, he died before the proceedings in Spain had come to an end, and the relative he appointed as successor to this claim, Mrs Sanles Sanles, was held by the Spanish courts and by the European Court of Human Rights to have no standing in the matter, i.e., in the latter forum, not to be a "*victim*" of the alleged violation of the Convention.

The issues raised in the *Sanles Sanles* case did at last come directly before the Court in the subsequent case of *Pretty v. the United Kingdom*[11]. The case was brought by a 43-year-old married woman, Mrs Dianne Pretty, who was suffering from a degenerative and incurable illness, motor neurone disease (the "*MND*"), which was at an advanced stage. Although essentially paralysed from the neck down, and incapable of decipherable speech, her intellect and capacity to make decisions were unimpaired. Frightened and distressed at the suffering and indignity she would have to endure if the disease were to run its course, but unable to commit suicide by herself, she wanted her husband to assist her in this. In the United Kingdom, committing suicide is not a criminal offence, but encouraging or assisting someone else to commit suicide is (under the Suicide Act 1961). However, prosecutions can only be brought with the consent of the Director of Public Prosecutions (the "*DPP*"), a senior law officer, who can exercise discretion in the matter. Mrs Pretty therefore sought an assurance from the DPP that he would not prosecute her husband if he were to assist her to commit suicide in accordance with her wishes, but the DPP refused. The United Kingdom courts upheld the DPP's decision not to give the undertaking, after detailed analysis of the case-law of the European Commission and Court of Human Rights. Mrs Pretty then turned to the European Court of Human Rights.

[11] *Pretty v. the United Kingdom*, Application no. 2346/02;

The Court admitted the case and, apart from receiving submissions from the applicant and the respondent Government, also allowed third-party interventions by the Voluntary Euthanasia Society[12] and by the Catholic Bishops' Conference of England and Wales. The Court also quoted parts of paragraph 9 of Recommendation 1418 (1999) of the Parliamentary Assembly of the Council of Europe, already mentioned, in which the Assembly recommends:

(…) that the Committee of Ministers encourage the member States of the Council of Europe to respect and protect the dignity of terminally ill or dying persons in all respects: (…)

c.by upholding the prohibition against intentionally taking the life of terminally ill or dying persons, while:

i. recognising that the right to life, especially with regard to a terminally ill or dying person, is guaranteed by the member States, in accordance with Article 2 of the European Convention on Human Rights which States that "no one shall be deprived of his life intentionally";

ii. recognising that a terminally ill or dying person's wish to die never constitutes any legal claim to die at the hand of another person;

iii. recognising that a terminally ill or dying person's wish to die cannot of itself constitute a legal justification to carry out actions intended to bring about death[13].

The Court was quite dismissive of the claim that Article 2 of the Convention should be read as granting individuals a right to commit suicide. It noted, with reference to earlier case-law on various issues under Article 2, that, "*in certain well-defined circumstances*", the article may impose a positive obligation on State authorities "*to take preventive operational measures to protect an individual whose life is at risk*", and that this also applied to "*the situation of a mentally ill prisoner who disclosed signs of being a suicide risk*". However, as the Court pointed out:

The Court is not persuaded that "the right to life" guaranteed in Article 2 can be interpreted as involving a negative aspect. (…) ***Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life****. The Court accordingly finds that no right to die, whether at the hands of a third person or with the assistance of a public authority, can be derived from Article 2 of the Convention. It is confirmed in this view by the recent Recommendation 1418 (1999) of the Parliamentary Assembly of the Council of Europe (…)*[14].

However, the Court was careful to stress that this ruling did not mean that if a particular State does recognise such a right (as does Switzerland, for instance), that would ipso facto be contrary to Article 2; nor did it mean that if a State that did recognise a right to take one's own life were to be held to have acted in accordance with Article 2, that would imply that the applicant, too, should be granted that right:

(…) even if circumstances prevailing in a particular country which permitted assisted suicide were found not to infringe Article 2 of the Convention, that would not assist the applicant in this case, where the very different proposition – that the United Kingdom would be in breach of its obligations under Article 2 if it did not allow assisted suicide – has not been established[15].

The Court clearly felt that the matter should be examined under different articles, and the ultimate decision based on the interplay between them. The Court therefore went on to carefully consider the claim to a right to commit suicide in the face of terrible suffering under Article 3, which prohibits torture, inhuman or degrading treatment or punishment in absolute terms, and Article 8, which guarantees, among other things, respect for "*private life*".

[12] An United Kingdom organisation favouring voluntary euthanasia;
[13] Pretty judgment, § 24;
[14] Pretty judgment, §§ 39 - 40;
[15] Pretty judgment, § 41;

The applicant had claimed that the suffering to which her illness would inevitably lead was so severe as to amount to "*degrading treatment*" in terms of Article 3; and that the State had a positive duty to take steps to protect her from this, by allowing her to obtain assistance to commit suicide[16]. However, the Court held that "*Article 3 must be construed in harmony with Article 2*", which "*does not confer any right on an individual to require a State to permit or facilitate his or her death*"[17].

Therefore, Article 3, also, did not impose on States a duty to allow actions to terminate life in cases such as hers[18]. The Court took a much more positive approach to Mrs Pretty's case under Article 8. In a way, this became the provision under which the difficult and sensitive issues involved were addressed in the greatest depth and detail.

The Court reiterated, first of all, with reference to earlier case-law on a variety of different issues, that the term "*private life*" in Article 8 "*is a broad term not susceptible to exhaustive definition*"[19]. It then took an important new step, by recognising a new principle of "*personal autonomy*" or "*self-determination*":

Although no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees[20].

The Court accepted – or rather, was "*not prepared to exclude*" – that Mrs Pretty's wish to "*exercise her choice to avoid what she considers will be an undignified and distressing end to her life*" was covered by the concept of "*personal autonomy*", and that the law preventing her from exercising this choice thus constituted an "*interference*" with Mrs Pretty's right to respect for private life as guaranteed under Article 8 § 1 of the Convention[21].

Recognition of the principle of "*personal autonomy*" enabled the Court to address the issue at the heart of the case: whether this principle protects the right of mentally fit individuals to choose death (if needs be with the assistance of others), or whether "*the principle of sanctity of life*" should – or can be allowed to – override such "*self-determination*". The Court held that it was "*common ground [between the parties] that the restriction on assisted suicide in this case was imposed by law and in pursuit of the legitimate aim of safeguarding life and thereby protecting the rights of others*". The only issue to be determined was therefore whether the interference was "*necessary in a democratic society*"[22].

On the margin of appreciation to be accorded in making this assessment, the Court recalled that this margin "*will vary in accordance with the nature of the issues and the importance of the interests at stake*"[23]. However, the Court disagreed with the applicant that the margin had to be narrow, in line with the Court's case-law in other cases involving intimate personal matters, such as sexual life[24]. Rather, the focus was on the issue of proportionality and prevention of arbitrariness:

It does not appear to be arbitrary to the Court for the law to reflect the importance of the right to life, by prohibiting assisted suicide while providing for a system of enforcement and adjudication which allows due regard to be given in each particular case to the public interest in bringing a prosecution, as well as to the fair and proper requirements of retribution and deterrence. Nor in the circumstances is there anything disproportionate in the refusal of the DPP to give an advance undertaking that no prosecution would be brought against the applicant's husband. Strong arguments based on the rule of law could be raised against any claim by the executive to exempt

[16] Pretty judgment, §§ 44 - 45;
[17] Pretty judgment, § 54;
[18] Pretty judgment, § 55;
[19] Pretty judgment, § 61;
[20] *Pretty* judgment, § 61;
[21] Pretty judgment, § 67;
[22] Pretty judgment, § 69;
[23] Pretty judgment, § 70;
[24] Pretty judgment, § 71;

individuals or classes of individuals from the operation of the law. In any event, the seriousness of the act for which immunity was claimed was such that the decision of the DPP to refuse the undertaking sought in the present case cannot be said to be arbitrary or unreasonable. The Court concludes that the interference in this case may be justified as "necessary in a democratic society" for the protection of the rights of others and, accordingly, that there has been no violation of Article 8 of the Convention[25].

The crucial issue is therefore *one of balance*. Of particular importance is the fact that the law in the United Kingdom which makes it a criminal offence, in principle, to assist another person in committing suicide, can be applied with flexibility and restraint – or even not applied – in individual cases. That flexibility, that legal responsiveness to the specific circumstances, more than anything else, led the Court to its finding of "*no violation*" of Article 8. It would appear that an inflexible law would have been disproportionate and thus contrary to Article 8. After this, the Court quickly dismissed the remaining arguments of the applicant, under Article 9, which protects the right to freedom of thought, conscience and religion, and Article 14, which prohibits discrimination in the enjoyment of the Convention rights. On the former, it held that Mrs Pretty's "*claims do not involve a form of manifestation of a religion or belief*"[26]. On Article 14, it ruled that:

(…) there is, in the Court's view, objective and reasonable justification for not distinguishing in law between those who are and those who are not physically capable of committing suicide. (…) The borderline between the two categories will often be a very fine one and to seek to build into the law an exemption for those judged to be incapable of committing suicide would seriously undermine the protection of life which the 1961 Act was intended to safeguard and greatly increase the risk of abuse. Consequently, there has been no violation of Article 14 of the Convention in the present case[27].

A few days after the judgment, Mrs Pretty started having breathing difficulties and was moved to a hospice. There, following palliative care, she slipped into a coma and died, on 11 May 2002, twelve days after the ruling.

2.2. Assisted dying in different legislations

The question whether assisted dying (i.e. euthanasia and assisted suicide) should be legalized is often treated, by judges and commentators alike, as a question which transcends national boundaries and diverse legal systems. Greater caution is needed before relying on the experience of one jurisdiction when discussing proposals for regulation of assisted dying in others, and the possible consequences of such regulation.

Assisted suicide is currently illegal in ***Australia***, but was for a time legal in the Northern Territory under the Rights of the Terminally Ill Act 1995[28]. As professor Suzanne Ost mentions[29], a well publicised example of partially *de-medicalised assisted death* occurred in Australia in 1996, during the short period in which assisted suicide and euthanasia were lawful in the Northern Territory. *Dr Philip Nitschke* devised a process of computerised assisted death. He provided patients with intravenous access and connected the infusion tubing to a laptop computer. The patients then had to answer three questions which appeared on the computer screen by pressing certain keys. The final question was as follows: "*If you press this button, you will receive a lethal injection and die in 15 seconds— Do you wish to proceed?*" If the patient answered all the questions affirmatively, the computer automatically switched on a previously prepared solution of a fatal dose of the sedative

[25] Pretty judgment, §§ 76-78;
[26] Pretty judgment, § 82;
[27] Pretty judgment, §§ 88-89, reference to other paragraph in the judgment omitted;
[28] The Rights of the Terminally Ill Act 1995 was passed by the Legislative Assembly of the Northern Territory in July 1995 and repealed by the Australian Commonwealth Parliament in March 1997;
[29] Ost Suzanne, *The de-medicalisation of assisted dying: is a less medicalised model the way forward?*, Medical Law Review, 18, Winter 2010, p. 504;

Nembutal[30]. The use of modern technology might make this example of partially de-medicalised assisted death seem somehow dehumanised.

However, Nitschke stated in an interview that the process allowed him "*to leave the immediate personal space of the patient, so that the family could enter and be closest to the patient when the button was pushed*". Thus, arguably, far from removing the human element, de-medicalising-assisted death in this way can remove the external presence of a doctor and enable the act of dying to be a more personal and private experience for the person to share with those she or he is closest to. This is at least one reason that can be given in support of calls for the de-medicalisation of assisted death.

The "*Euthanasia Act*" legalized euthanasia in ***Belgium*** in 2002, but it did not cover assisted suicide. In 2006, Belgium legalized partial euthanasia with certain regulations. Similarly to the Netherlands, in Belgium, a doctor who performs euthanasia does not commit a crime if he or she ensures that "*the patient is in a medically hopeless situation of persistent and unbearable physical or mental suffering that cannot be alleviated, resulting from a serious or incurable disorder caused by illness or accident*"[31].

In ***Canada***, the debate on euthanasia peaked in 1994 when Sue Rodriguez[32] publicly campaigned for the right to an assisted suicide[33]. However, suicide is not a crime in Canada, but physician-assisted suicide is considered illegal. The Criminal Code of Canada states in section 241(b) that:

Every one who (….) (b) aids or abets a person to commit suicide, whether suicide ensues or not, is guilty of an indictable offence and is liable to imprisonment for a term not exceeding fourteen years.

The reason behind its illegality is due to prevent people from "*assisting in suicide*" of those that are not mentally capable of making the decision and because of the "*value that society place on human life*" which "*in the eyes of the law makers, might easily be eroded if assistance in committing suicide were to be decriminalized*".

An article in *People's Daily* reported that nine people from Xi'an City in ***China*** made news when they "*jointly wrote to local media asking for euthanasia, or mercy killings*". These people had *uremia*, a disease due to the failure of the kidneys, and expressed their "*unbearable suffering and [an unwillingness] to burden their families any more*". The article stated because it is illegal for doctors to help their patients die, all that could be done for them was to ask the doctors to ease their pain.

In May 1997, ***Colombian*** courts allowed for the euthanasia of sick patients who requested to end their lives. This ruling came about due to the efforts of a group that strongly opposed euthanasia. When one of their members brought a lawsuit to the Colombian Supreme Court against it, the court issued a 6 to 3 decision that "*spelled out the rights of a terminally person to engage in voluntary euthanasia*". Though physician assisted suicide is legal, the country has no way to document or set

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[30] See Lopez Kathryn Jean, *Euthanasia Sets Sail: An interview with Philip Nitschke, the other "Dr Death"*, National Review, available at http://www nationalreview.com/interrogatory/interrogatory060501.shtml;

[31] Mullock Alexandra, *Overlooking the Criminally Compassionate: What Are the Implications of Prosecutorial Policy on Encouraging or Assisting Suicide?*, Medical Law Review, 18, Winter 2010, p. 464;

[32] She suffered from the MND (just like Mrs Pretty). For more than two years, Rodriguez captivated the attention of Canadians during her legal challenge for a constitutional right to assisted suicide. The Supreme Court of Canada ultimately denied her this right in a narrow 5-4 ruling in favour of the protection of the sanctity of life *(Rodriguez v. British Columbia,* 1993). Nevertheless, aided by an anonymous physician, she took an overdose of barbiturates and morphine and died in the company of an outspoken Member of Parliament, Svend Robinson. Subsequent to Rodriguez's death, a Special Senate Committee on Euthanasia and Assisted Suicide held public hearings and eventually produced a report recommending that euthanasia and assisted suicide remain criminal offences. In addition to the thousands of written submissions received by the Committee, hundreds of groups and individuals presented oral testimony;

[33] Ogden Russel D. and Young Michael G., *Euthanasia and Assisted Suicide: A Survey of Registered Social Workers in British Columbia*, *Br. J. Social Wk.* (1998) 28, p. 162;

rules and regulations for doctors and patients that want to end their lives. Though it is opposed on religious grounds by many Colombians, many patients have still been able to find doctors to assist them in ending their lives.

In ***France***, the controversy over legalizing euthanasia and physician assisted suicide is not as big as in the United States because of the country's "*well developed hospice care program*". However, in 2000 the controversy over the uncontroversial topic was ignited with Vincent Humbert. After a car crash that left him "*unable to "walk, see, speak, smell or taste*", he used the movement of his right thumb to write a book, "*I Ask the Right to Die" (Je Vous Demande le Droit de Mourir)* in which he voiced his desire to "*die legally*". After his appeal was denied, his mother assisted in killing him by injecting him with an overdose of barbiturates that put him into a coma, killing him 2 days later. Although his mother was arrested for aiding in her son's death and later acquitted, the case did jumpstart a new legislation which states that when medicine serves "*no other purpose than the artificial support of life*" they can be "*suspended or not undertaken*".

Killing somebody in accordance with their demands is always illegal under the German criminal code[34] (section 216, "*Killing at the request of the victim; mercy killing*"[35]). Assisting with suicide by, for example, providing poison or a weapon, is generally legal. Since suicide itself is legal, assistance or encouragement is not punishable by the usual legal mechanisms dealing with complicity and incitement (German criminal law follows the idea of "*accessories of complicity*" which states that "*the motives of a person who incites another person to commit suicide, or who assists in its commission, are irrelevant*"). There can however be legal repercussions under certain conditions for a number of reasons. Aside from laws regulating firearms, the trade and handling of controlled substances and the like (e.g. when acquiring poison for the suicidal person), this concerns three points:

- Free v. manipulated will

If the suicidal person is not acting out of their own free will, then assistance is punishable by any of a number of homicide offences that the criminal code provides for, as having "*acted through another person*" (section 25, par. 1 of the German criminal code). Action out of free will is not ruled out by the decision to end one's life in itself; it can be assumed as long as a suicidal person "*decides on his own fate up to the end (…) and is in control of the situation*". Free will cannot be assumed, however, if someone is manipulated or deceived.

Apart from manipulation, the criminal code states three conditions under which a person is not acting under his own free will:

1.if the person is under 14 years;

2.if the person has "*one of the mental diseases listed in §20 of the German Criminal Code*";

3.a person that is acting under a state of emergency.

Under these circumstances, even if colloquially speaking one might say a person is acting of their own free will, a conviction of murder is possible.

- Neglected duty to rescue

German criminal law obligates everybody to come to the rescue of others in an emergency, within certain limits (section 323c of the German criminal code, "*Omission to effect an easy rescue*"[36]). Under this rule, the party assisting in the suicide can be convicted if, in finding the suicidal person in a state of unconsciousness, they do not do everything in their power to revive them.

- Homicide by omission

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[34] Available at http://bundesrecht.juris.de/englisch_stgb/englisch_stgb html#StGB_000P216;

[35] *(1) If a person is induced to kill by the express and earnest request of the victim the penalty shall be imprisonment from six months to five years.*

(2) The attempt shall be punishable;

[36] Whosoever does not render assistance during accidents or a common danger or emergency although it is necessary and can be expected of him under the circumstances, particularly if it is possible without substantial danger to himself and without violation of other important duties shall be liable to imprisonment not exceeding one year or a fine;

German law puts certain people in the position of a warrantor for the well-being of another (e.g. parents, spouses, doctors and police officers). Such people might find themselves legally bound to do what they can to prevent a suicide; if they do not, they are guilty of homicide by omission.

Until recently, death and dying were considered taboo or inappropriate subjects for discussion in ***Japan***. Attitudes have changed primarily due to a recent case in which a doctor admitted to helping some of his cancer patients die by "*switching or turning off their respirators*". Even though the Yokohama District Court established, in a 1995 ruling, guidelines under which a "*mercy killing*" (active euthanasia) would not be considered murder, it appears that the doctor in this case met some of the guidelines but not all.

According to the ruling, a mercy killing would not be considered a crime if:

- "*the patient was suffering from unbearable pain*";
- "*the death of the individual was inevitable and imminent*";
- "*all alternative measures have been taken to relieve the pain*";
- "*the patient makes a clear statement of his or her desire to shorten his or her life or hasten death*".

The problem that arose from this, in addition to the problem faced by many other families in the country, has led to the creation of "*bioethics SWAT teams*". These teams will be made available to the families of terminally ill patients in order to help them, along with the doctors, come to a decision based on the personal facts of the case. Though in its early stages and relying on "*subsidies from the Ministry of Health, Labour and Welfare*" there are plans to create a non-profit organization to "*allow this effort to continue*".

After failing to get royal assent for legalizing euthanasia and assisted suicide, in December 2008, ***Luxembourg***'s parliament amended the country's constitution to take this power away from the monarch, the Grand Duke of Luxembourg[37]. Euthanasia and assisted suicide were legalized in the country in April 2009[38].

In the ***Netherlands***, assisted dying on request[39] is permissible only where the *"patient's suffering was unbearable, and (...) there was no prospect of improvement"* and both doctor and patient were convinced that *"there was no reasonable alternative in light of the patient's situation'*[40].

South Africa is struggling with the debate over legalizing euthanasia. Due to the under-developed health care system that pervades the majority of the country, Willem Landman, a member of the South African Law Commission, at a symposium on euthanasia at the World Congress of Family Doctors, stated that many South African doctors would be willing to perform acts of euthanasia when it became legalized in the country. He feels that because of the lack of doctors in the country, *"(legalizing) euthanasia in South Africa would be premature and difficult to put into practice (…)*".

It is believed that in the not so distant future ***more countries in Africa***, including Nigeria and Ethiopia, will find reason to follow the laudable examples of Belgium and the Netherlands in legalising active euthanasia[41].

[42]In ***Switzerland***, although euthanasia is illegal, assisted suicide is not an offence in its own right and there are several groups who assist suicide. The most publicised of these is *Dignitas*[43],

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[37] Luxembourg strips monarch of legislative role. Available at http://www.guardian.co.uk/world/2008/dec/12/luxembourg-monarchy;

[38] Luxembourg becomes third EU country to legalize euthanasia. Available at http://www.tehrantimes.com/Index_view.asp?code=191410;

[39] The Termination of Life on Request and Assisted Suicide (Review Procedures) Act 2002;

[40] Mullock Alexandra, *op. cit.*, p. 464;

[41] Nwafor Anthony O., *Comparative perspectives on euthanasia in Nigeria and Ethiopia*, African Journal of International and Comparative Law 18.2 (2010): 170-191, Edinburgh University Press, p. 191;

[42] Dyer Karen, *Raising Our Heads Above the Parapet? Societal Attitudes to Assisted Suicide and Consideration of the Need for Law Reform in England and Wales*, The Denning Law Journal 2009 Vol 21, p. 42;

whose motto is "*to live with dignity, to die with dignity*". Swiss members of *Dignitas* are able to die in their own homes, but obviously this is not possible for "*suicide tourists*"[44].

Though it is illegal to assist a patient in dying in some circumstances, there are others where there is no offence committed. The relevant provision of the Swiss Criminal Code refers to "*a person who, for selfish reasons, incites someone to commit suicide or who assists that person in doing so will, if the suicide was carried out or attempted, be sentenced to a term of imprisonment of up to 5 years or a term of imprisonment*".

A person brought to court on a charge could presumably avoid conviction by proving that they were "*motivated by the good intentions of bringing about a requested death for the purposes of relieving suffering*" rather than for "*selfish*" reasons. In order to avoid conviction, the person has to prove that the deceased knew what he or she was doing, had capacity to make the decision, and had made an "*earnest*" request, meaning he/she asked for death several times. The person helping also has to avoid actually doing the act that leads to death, lest they be convicted under Article 114: *Killing on request*[45]. For instance, it should be the suicide subject who actually presses the syringe or takes the pill, after the helper had prepared the setup. This way the country can criminalise certain controversial acts, which many of its people would oppose, while legalising a narrow range of assistive acts for some of those seeking help to end their lives.

The status of healthy individuals seeking to end their own lives remains unresolved under Swiss law. As of 2009, *Dignitas* was pursuing the case of a Canadian couple, Betty and George Coumbias, who wished to *end their lives simultaneously*. In July 2009, British conductor Sir Edward Downes and his wife Joan died together at a suicide clinic outside Zürich "*under circumstances of their own choosing*". Sir Edward was not terminally ill, but his wife was diagnosed with rapidly developing cancer.

In March 2010, a television in the United States showed a documentary called "*The Suicide Tourist*" which told the story of Professor Craig Ewert, his family, and *Dignitas*, and their decision to commit assisted suicide using Sodium Pentobarbital in Switzerland after he was diagnosed and suffering with ALS.

Several attempts to legalize assisted suicide have been rejected by the ***UK*** Parliament. In the meantime the DPP has clarified the criteria under which an individual will be prosecuted for assisting in another person's suicide.

Assisted suicide is legal in the three ***American states of Oregon*** (via the Oregon Death with Dignity Act[46]), ***Washington*** (by Washington Death with Dignity Act), and ***Montana*** (through the 2009 trial court ruling *Baxter v. Montana*). There are relatively substantial barriers to the use of some of these provisions.

For instance, in Oregon[47], assisted suicide is available only to those with an imminently terminal illness, which is defined as "*an incurable and irreversible disease that has been medically confirmed and will, within reasonable medical judgement, produce death within six months*". The person must be a "resident" of Oregon. A written request for prescription and two oral requests from the patient are also needed to escape criminal liability, plus written confirmation by doctor that the act is voluntary and informed.

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[43] Founded in 1998 by the Swiss lawyer, Ludwig Minelli, Dignitas is a nonprofit organisation set up to assist those with "*medically diagnosed hopeless or incurable illness, unbearable pain or unendurable disabilities*";

[44] For non-Swiss residents, *Dignitas* once rented a flat in an apartment block in the residential suburb of Wiedikon in Zurich. Unsurprisingly there were complaints and they were evicted from the flat. At one point, whilst looking for new accommodation, they assisted the death of a German "*suicide tourist*" in a car park. The organisation currently operates in a business park in the village of Schwerzenbach;

[45] *A person who, for decent reasons, especially compassion, kills a person on the basis of his or her serious and insistent request, will be sentenced to a term of imprisonment*;

[46] Available at http://egov.oregon.gov/DHS/ph/pas/ors.shtml;

[47] The Oregon Death with Dignity Act 1994;

Neither the Romanian legislation recognizes the right to die, the **Romanian** Criminal Code stipulating that:

• *The deed to induce or facilitate a person's suicide, whether suicide or attempted suicide took place, is strictly punished by imprisonment from 2 to 7 years*[48].

• *The abandonment, relegation or leaving without help, in any way, of a child or a person who is not possible to take care of herself by the person who has it in her custody or care, putting in immediate danger, her life, health or physical integrity, is strictly punished with imprisonment from one year to three years or with a day-fine*[49].

Listed below are some major organizations that support assisted suicide: Dignitas, Exit International, Euthanasia Research & Guidance Organizationent, Death with Dignity National Center, Compassion & Choices, World Federation of Right to Die Societies, Final Exit Network, Dying with Dignity, Dignity in Dying, Dying with Dignity Victoria, Dignity New Zealand.

It should be noted that there are many health care professionals, especially those concerned with bioethics, who are opposed to assisted dying due to the detrimental effects that the procedure can have with regard to vulnerable populations and to the fact that *it transforms a healing profession into a killing profession*. This argument is known as the "*slippery slope*" argument[50]. This argument encompasses the apprehension that once assisted dying is initiated for the terminally ill it will progress to other vulnerable communities and may begin to be used by those who feel less worthy based on their demographic or socioeconomic status. In addition, vulnerable populations are more at risk of untimely deaths because, patients might be subjected to assisted dying without their genuine consent. However, recent studies show that the available evidence suggests that the legalisation of physician-assisted suicide might actually decrease the prevalence of involuntary euthanasia.

Also, prejudices against disabled people may be enacted with regards to end of life care. For example, do not resuscitate orders are more frequently issued for those who become hospitalized and previously suffer from severe disabilities. In addition, many people who suffer from lifelong disabilities suffer from "*burn out*", which is a general feeling of depression and sadness that comes as a result of years of intolerance and prejudice. Naturally, those individuals suffering from "*burn out*" are more likely to want to refuse treatment and end their fight for life prematurely.

2.3. Improvements in end of life decision making

Currently only a small fraction of patients, about 15% have clear directions in the form of a living will or a health care proxy in place to advise family members or physicians of their end of life wishes. This leads to uncomfortable questions if the patient suddenly no longer has the ability to speak for themselves when answers are needed to important medical questions. Even if a patient has selected a proxy they may, "*be guilt ridden, wondering whether they acted to hastily or if their decision was inconsistent with the patient's desires*".

In order to preempt some of the difficulties that are associated with end of life care many medical schools and nursing programs now stress the importance of early discussions with the patient about their wishes and planning for the future. Unfortunately, since the views concerning physician assisted suicide are so polarizing, many doctors are reluctant to discuss withholding and withdrawing life sustaining treatment. In fact, in a recent study of 58 physicians, 19 admitted that they did not feel comfortable discussing end of life care with their patients.

In an effort to change the apprehension that is associated with end of life care new techniques are being explored to ensure more *doctor to patient* communication including:

• analyzing the cognitive ability of the patient to make their own decision regarding end of life care;

[48] Article 182 (1) of the Romanian Criminal Code;
[49] Article 198 (1) of the Romanian Criminal Code;
[50] Available at http://www nytimes.com/2009/09/07/opinion/07douthat html;

- encouraging doctors to initiate end of life conversations;
- making sure that the patient is made fully aware of all options regarding their personal medical treatment;
- providing counseling and support for families of patients especially in situations where a decision to remove life support and/or stop treatment is involved.

In short there are two major ways in which the physicians can more easily be made aware of the wishes of their patients. The first of which simply involves participation in the informed consent process or, "*engaging competent patients in comprehensive discussions of treatment options and likely outcomes*". The second of these methods involves advance care planning which ensures that patients tell their doctors exactly what they wish to be done in case a medical emergency arises in which they are not able to speak for themselves.

3. Conclusions

The topics of euthanasia and assisted suicide are of profound importance in terms of law, ethics, religion, and social values[51].

Should we defend the right of each individual to live by her/his own personal values, and the freedom to make decisions about her/his own life so long as this does not result in harm to others? Currently, the needs and autonomy of patients are often disregarded. Compassionate doctors, who follow the wishes of their terminally ill patients by assisting them to die, risk being charged with assisting suicide or murder. The current system sometimes also results in close relatives being faced with immensely difficult choices: *whether* to assist a loved one who is begging for help to put an end to their suffering knowing that it is unlawful, *or* to deny their loved one the death they want. Is it right that anyone should be put into the position of having to make such choices, or indeed into a position where they believe that they have no other option but personally to end the life of someone they love?

After all, who can say for sure that assisted dying is good or bad? We know what a respectable life means, but we can hardly imagine what means a respectable death. That is the reason why assisted dying provokes in us different reactions.

As regards the religious perspective, it may be of interest to observe here that the late Catholic Pontiff, Pope John Paul II, in spite of his avowed stand against euthanasia, expressed a wish at the terminal days of his life, and which was respected by the College of Cardinals, as widely reported in the news media, to be allowed to die peacefully in the Papal home at the Vatican. Could his pains, suffering and imminent death not have been prolonged by advanced medical technology if he was taken to the hospital? The only reasonable response at that point in time is that prolonging his death has no utilitarian value. By respecting his wish, the Cardinals had either advertently or inadvertently assisted the Pope to die[52].

The domestic policies may merely succeed in encouraging people to seek help abroad, because no meaningful help is available at home[53]. This approach may also encourage people to seek an assisted suicide *sooner* than they might otherwise because of the need to travel abroad to Switzerland whilst they remain able to do so. Unlike other jurisdictions where assisted dying is permitted, certain Swiss cantons allow non-Swiss residents to avail themselves of the services of Swiss assisted suicide organisations such as *Dignitas*.

Within the social and legal debate surrounding assisted death, the focus in recent times appears to have moved away from a doctor's involvement in a clinically assisted death to "*suicide tourism*" and particularly, the matter of relatives "*assisting*" by making travel arrangements and

[51] Ogden Russel D. and Young Michael G., *op. cit.*, p. 161;
[52] Nwafor Anthony O., *op. cit.*, p. 191;
[53] Mullock Alexandra, *op. cit.*, p. 450;

accompanying their loved ones to a country in which, according to local law, they can receive assistance to die. Of course, the question of whether an individual must be suffering from a medical condition in order for assisted death to be legitimate is increasingly being raised.

Ultimately, if a practice judged by many to be undesirable is, in any case, occurring, even those opposed to it may recognize that rather than merely having the opportunity for retrospective appraisal and possible punishment, control through legalisation is a more satisfactory approach[54].

Definitely, the assisted dying is a very delicate subject and a painful problem. Analysing it with freedom and responsibility does not mean to blame its supporters[55]. Whatever the outcome is, it is clear that this area needs much more open debate from all levels of society, not just those groups who hold steadfast but extremist views on either side of the argument.

Finally, we should try to find in ourselves the answer to the first question of this article: *is it possible that human rights are limited to life or can they be extended also to death*?

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[54] Mullock Alexandra, *op. cit.*, p. 470 ;
[55] Carpizo Jorge, Valades Diego, *Derechos humanos, aborto y eutanasia*, Dykinson, 2010, p. 159.

„FRAMES OF TRANSITIONAL JUSTICE: SOME APPLICATION IN INTERGENERATIONAL JUSTICE AND RETROACTIVITY"

GABRIEL RADU*

Abstract
The article attempts to evaluate the concept of transitional justice in the sphere of public and academical debates, in different social environments during the transition period in the recent history. The approach will include an overflight over some definitions and interpretation of that concept and an assessment of possible applications of this concept in the reparative (corrective) theories during the political transition. The evaluation of operational dimension of transitional justice will focus primarily the moral grounds invoked in political and juridical debates, and will pursue some applications of the transitional justice in intergenerational justice realm and at the level of the institution of retroactivity. Also, the assessment will focus the moral core of the motivation of judicial decisions in the space of positive law debates, concerning the constitutional and normative dimension.Examination of particular aspects of the transition has raised particular interest in the public agenda of romanian political change. Reparation issues in dealing with the past had always occupied a privileged role in public debate, in social and political problems. Justification for corrective measures during transition period were presented on various occasions in different points of view, but tools and proper institutions in generating legitimate formal-political obligations were absent, threatening the strength of the the political stability. Requirements for application of a corrective, reparative justice, appeared as a consequence of subjective awareness of rights and liberties that positive law of the communist system ignored or assign them like law infrigement. An approach of such rights, with their features should be evaluated in the context of both totalitarian and democratic state. A dialogue with the past becomes more necesary and will contribute to the success of any public policy designed for any possible reparation in the future. Transitional justice could also be a frame for testing the theoretical outcomes of an analytical justice which could bring normative results in intergenerational justice. One of the most important issues which requires an approach in transitional justice perspective remains the institution of retroactivity.

Keywords: *transitional justice, intergenerational justice, reparations, moral grounds, retroactivity*

I. Introduction

The paper attempts an overview of the concept of transitional justice in an intergenerational perspective, an assessment of the moral debate about transitional justice issues in situation generated by changes in political regimes. Arguments will be tested also in an intergenerational view by examination of the institution of retroactivity. We consider that the importance of this approach lies in the moral assessment of controversial issues in the area of intersection between political philosophy and science of law, clarifying possible opportunities in the evolution of positive law.

As a main objective we attempt a critical approach of the studies on this issues and a systematization of some operational dimensions of transitional justice in its relations with the past.

II. The concept of transitional justice: an intergenerational perspective

Transitional justice represents an area of interest in actual research in the field of positive law, but also in political philosophy. The importance of the transitional justice literature is given by the possible applications of this concept in intergenerational justice issues. Intergenerational justice itself has a particular importance mostly in the points of historical discontinuity, in changing the political system, both in Romania and in other places in Eastern European states. An explanatory overview of

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political reparations makes necessary an intergenerational approach during the political transition period.

The main difficulty could be taking into account a "dialogue" with the past in conditions of a different constitutional and legal orders. Every political and legal order can be regarded as a historical evolution of a previous order. Intergenerational relations will have to overcome this difficulty by providing relevant moral arguments. Analogies with similar problems in history would be acceptable only if arguments will prove their moral relevance. Extending possible generalization to contemporary situations might be assessed only regarding all particular circumstances (local and historical) requiered in any theories of justice.

For example, if we intend to appeal to different substitutions in the lines of morality in a relevant context and compatible with the situation in which we relate. We could consider therefore that there may be a permissible substitution in the domain of reparations in present day compatible to that of the reparation due to the moral descendants of slaves in America, for example[1] (method known as *empirically informed normative argument*).

Normative political philosophy and social science explanations of social inequality have contributed to the formulation of arguments of reparative justice.

Whether we refer to redress historically injustice by means of transitional justice, we have to refer to:

- Who is entitled to compensation?
- who pays for repairs?
- under which procedural principle the due amount must be calculated?

Requirements in any frames of transitional justice will be found in theories of intergenerational justice, but they have to complete conditions of demonstrable and measurable arguments.

Also, corrective justice arguments, in any historical epoch, would have to include a retrospective analysis of eventual injuries circumstances and must bring them under the „microscope" of rational public debate, concerning the nature of historical injustice, moral motivations and procedures for repair.

Essential to any initiative for repairing was a public conscience that activated the collective memory. Any legal initiative for reparations arose from moral intuition concerning the restorative justice. *Prima facie* obligation[2] for the perpetrator is to restore the situation in conditions of a *status quo ante.*

A philosopher of law as Jeremy Waldron (1992, 2002) opened a new perspective on the obligation to rectify the historical injustice based on compensation through applying principles of justice. Waldron warns of the danger of neglecting the "double edge" of justice in the process of repair, by potential conflicts of interest outlined by the resources in question. Waldron proposed to rank priorities of injustice on an axis of time, requiring first the resolution of recent issues and then an extended process in time.

Methodological difficulties in dealing with the past are often amplified by an ambivalent quality of the state in transitional situation. On the one hand, the state appears as an active and responsible political actor, but on the other hand the state itself acts as a deliberative and reflective agent. In a strong argument for restorative justice, the state is considered to be primarily responsible both directly and indirectly, for his role in facilitating and supporting a system of

[1] A similar methodology was used in the assesment for the treatment of racial .inequality in a 2010 article, *"Racial Inequality and Reparations*" byDerrick Darby, University of Kansas, published in PhilosophyCompass 5 / 1 (2010), p.55-66.

[2] A *prima facie* duty can be suggestive defined as a "specific circumstances that can be presented on the basis of its moral relevance, " according to Ross, WD "What Makes right right Acts, " in The Right and the Good, (Oxford, Clarendon Press, 1930), p.21.

subordination to the groups that had been injured, especially after passing a period of time in a constitutional system. In any theory of law, stronger that the obligations for justice enforced between individuals, are the obligations of the state, espacially in restoring injustice and unjust exploitation. A moral obligation of the state is to recover the visible signs of injustice produced by the policy of the state institutions in the past. State acknowledgment could be formulated only by public policies in demonstrable and quantificable manner. An eventually state inaction would constitute a further enhancement of the effects of injury.

Specific to intergenerational relations is the fact that time is „continous, linear, unidirectional and irreversible"[3]. The fact that time cannot intervene on what happened in the of the last generation exclude any contractual relationship possibility with the past. Including arbitrarly the last generation in a contractual relationship *sui generis*, it opens, according to Bell, the path of counterfactual reasoning, very difficult to be admitted even at an intuitive level. But a formal exclusion of the past generations cannot ignore in a moral analysis their posthumous interests[4]. Intergenerational justice as a subspecies of justice, is a culturally determined concept, with a significant contribution even in classical theories of justice. Nozick asks "How far in the past we have to wipe the injustice?" Difficult as well is answering how to change things, if both the beneficiaries and losers are not directly engaged in the historical wrong, for example, the case of their descendants[5] ?

The concept of intergenerational justice can refer, in some specific approaches for example, from general to particular, to an ethical problem of distribution of resources available in insufficient quantities between different age groups in society. Intergenerational justice can act as controversial stake in allocation of resources for educating young generation vs. resource allocation for protecting the elderly[6]. In some situations intergenerational justice argument concerns in the very existence of rights and obligations between the present and the past generation or the next generation, as well as the admission of the existence of such rights in the application of theories of justice in issues concerning relationship between different generations.

III. Transitional justice and restoring issues

Issues of transitional justice seems to be a complex task in the assessments of the legal consequences generated by regime change. Restoring democratic regime in conditions of transition from a "monolithic" past to a "plural" present, represents a fertile ground for debates in the general theories of law. Restitution issues were limited in public debate only to discussions about legislative acts with applicability in real estate claimings of the injured persons in their property rights, in romanian courts or European laws[7]. Restitution itself represent an important side of intergenerational justice, the complex of such problem could not be simplified only by reducing the concept of intergenerational justice to a simple restitution. The restitution problem is also an applied ethics matter that require an ethical perspective approach. An ehical similarity in the case of regime change brings another types of historical shortcomings of those who have fulfilled their obligations imposed by the totalitarian regime and as a „reward" for their social status became disastrous without having any restitutional problems. The issue of reparations is required to be approached under different angles of moral relevance starting a debate in legislative bodies, academic or media space. We will try to draw some explanatory models that could shape certain patterns in the matter of reparations.

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[3] Bell, 2003, p. 140, Bell, W. (2003). *Foundations of Future Studies*. New Brunswick, NJ: Transaction Publishers, source: http://www2.warwick.ac.uk/fac/soc/pais/staff/page/ecpr/

[4] Callahan, J. C. (1987). On Harming the Dead. *Ethics, 97*(2), p.341-352

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[6] Source: Medicine Encyclopedia, vol. 2, Aging Healthy, Intergenerational Justice, http://medicine.jrank.org/pages/934/Intergenerational-Justice html

[7] Socaciu, Emanuel-Mihail,"Restituția imobilelor naționalizate: preliminarii ale unei evaluări morale", Sfera Politicii, nr.128, 2007

In literature was suggested that one of the possible techniques to address the issue of restitution could be a counterfactual approach to the issue[8]. There are numerous difficulties in determining the facts, historical context or the complexity of analyzed cases. In the absence of possibilities in counterfactual approach, were propositions of direct return of natural resources, goods, etc.The solution of physical return is not accepted from the point of view of the teories of justice because arises problems like the current market value of the property, either the temporal possesion or *time preference*[9] (Rawls, 1971)

An utilitarian approach to intergenerational restitution policy cannot be achieved in a cost-benefit analysis because of the impossibility of setting a time preference agreement. Without a well defined set of preferences it cannot be a formulated a cost-benefit analysis because it would lose the strength of normative and practical applicability.

A counterfactual analysis based on what would have happened if the theft would not exist requires strong moral intuitions[10]. Another possible approach would be an imposition of an external rate of time preferences in order to compare the value of assets over several generations. To implement a positive rate of time preference across generations, an analyst should opt for an explicit moral reasoning on how the price of the object of restitution was formed, grown and diminished in the time (*restitution liabilities*). Ethical constraints that requires time preference approach gives us a satisfactory solution of justice. In these circumstances, the restitution process over generations is not only a matter of transfer of resources from past to present value, using for this purpose only a positive economic analysis. Restitution policy becomes more complex when deals with pecuniary value judgments. Based on this assumption we have to answer about how much money must afford the state to pay to the victims, why, and whether this policy could be admitted as morally considerable effort made by the state for his own past injustices.

Restitution issues in the perspective of Ackerman (1995, cited by Fishkin, the "Boundaries of justice") have an interest not only in the technical approach, but also for the status of the participants at a moral debatre, in a context of a neutral dialogue.

IV. Moral considerations on reparations

In intergenerational perspective, the restitution argument is strengthened when the effects of nationalization were very negative and it generated a persistent injustice. Arguments are built on intuitions, current practices and moral injustice by studying history, even some authors believe that the restitution argument claim lies in the context of intergenerational justice more than in historical injustices[11].

Once the frameworks of post-totalitarian political regime were established in the new democratic order, public debate on social demands were focused on moral repairs, proposing different solutions. Whether it was a case of goods or real estates, the repair has been alleged in its pure form, strictly speaking a "turning back the watches" to the *status quo ante*. Experience has shown that this is an ideal that can not be put into practice. For injuries to individuals, physical or mental demages, finding an equivalent for compensation could not be stated as a principle. No any precise criterion was managed for compensation for moral right that a person is entitled to receive in order of confiscationed property or for life years lost in prisons during the dictatorial regimes. It has been argued that a nonmonetary injury can not be perfectly equated in terms of symbolic repair.

[8] Source J-store: article: "Discounting and Restitution", p. 184 Cowen Tyler, "Philosophy and Public Affairs", vol.26, no.2

[9] TOJ, cap.V, paragr.45, p.293, „Time preferences"

[10] source J-store: article "Discounting and Restitution", p. 184 Cowen Tyler, "Philosophy and Public Affairs", vol.26, no.2

[11] Lyons, David (1981), „The New Indian Claims and Original Rights to Land", în „*Reading Nozick*" , (Oxford: Blackwell), p. 355–379.

General theories of law have revealed that the application of retributive justice by criminal justice retribution and a subsequent repairing process, have the virtue of refocusing society in a moral space. Punishment and reparing has the virtue of restoring social relationship between the offender and the injured. Mechanisms of reparative justice, aimed at offsetting are the key in rebuilding the moral core of a society. The moment for initiate a corrective justice overlap with the regime political change, on condition that free political debate can take place, the moral evaluation is operational in the sense described by Kierkegaard "history can be lived only forward and assessed backward". Where victims of political injuries (including ethnic or racial persecution on grounds of political motivations) are no longer alive, moral reparation could to be made only with moral means, honoring the memory of victims in the official acts of the state. Reparation, whether pecuniary or moral status, has a strong legitimacy given by systematic presence of the political repression. Assuming that most citizens of Eastern European states would be freely chosen socialism and expropriation, does not make the totalitarian transformation to be a legitimate policy. Moral significance of a democratic decision that most citizens choose to put their wealth to be shared and managed by the state, cannot be extended to everyone, proclaming same moral situation, when it is clear that any person represents an authority in the matter of his/her own fortune.

Communist totalitarian state, no matter how legitimate would have been its foundation cannot claim legitimacy in the historical process where his raw power confiscated the wealth of families, farms and the means of production, turning abusively the owners into state tenants. Affirming that the process of expropriation was just a simple wrong side of a good socialist transformation, it results then that all its victims are in position of main candidates prima facie to damages compensation. Legitimating the expropriation by arguing that social revolutions do not happen at the polls can not be accepted as a final outcome. Even if by democratic processes may result social class or political groups that are inadequate compensated iit requires a legitimate remedy. The legitimacy of a regime is not just about how he comes to power. The Nazi regime, for example, came to power through free elections, but its illegitimacy came from the policies that profoundly affected the human dignity.

A theory of retrospective moral evaluation would be the key to understanding intergenerational justice in conditions of regime change. A moral evaluation of history would be a very complex endeavor, so we try to offer just a preview of a narrowly defined context, whose nature and character can be morally judged.

A historical normative theory of property as lockeanis consider that any title of property is sufficient that any legislative changes that aim an expropriation would be excluded on grounds of moral justification. A moral theory applied during totalitarian period tried to defeat lockean argument by claiming that ownership is given also by the quantity of work submitted as a production factor, been able to convert the worker in a collective owner of a share. Collective property would thus become stronger through a new element merged in ownership, the amount of work. Marxist theory neglects that the amount of work was remunerated under an employment contract and can not merge in property right.

In the explanatory introduction of the romanian nationalization law from 1950, what disturbed the regime was the very existence of the property title, which have been considerred a potential "*exploatator*" („exploiter"), attribute admitted only in the benefit of the state.

If the case of communist expropriation from GDR, between the years 1945 to 1949[12], the justification for confiscation of large enterprises and agricultural areas exceeding 100 hectares has been made under the so-called "denazificaton". The meaning of "denazification" was punishment,

[12] Mark Blacksell, "The Reality of Property Restitution in Central and Eastern Europe," Material prezentat la „Conference on Political Transformation, Restitution, and Justice", la Jagiellonian University, (Cracovia, Polonia, 6–8 iunie 2002).

from a retributive point of view. Property contains, in the eyes of the totalitarian legislative, a dangerous potential behavior of the material property owner.

IV.1. On monetary compensation

If the repair by in-kind compensation is objective, repairing in financial equivalent raises several issues of justice, considered to be a subjective compensation. As a starting point, the total financial compensation is known as a "maximalist" one. A maximalist approach considers the value of the expropriated property at a market value during the expropriation, adding the possible lost income while the property belonged not to the rightful owner. In a moral evaluation of compensation, maximalist approach is unsustainable given that the owner could had acces to a form of use, like possession, or the case in which the State has offered some form of material compensation.

Moreover, even assuming that we could calculate a market price in its historical context, it is difficult to determine the income generated by exploitation of these assets in uncertain conditions. Here we are in the presence of a similar argument, with the same force as Jeremy Waldron's argument, speaking about the rights to compensation claimed by aboriginal peoples. The calculation would be made in an ideal context revenue management, fact hard to be accepted even in the counterfactual approaches[13]. Also, in case of maximalist approach to compensation, the victims of expropriation would be in a best-off situation and nonvictims of expropriation, from the same period would be in an unfair position, because they had suffered other kind of losses during totalitarianism, like their life plans that have been altered by a brutal authoritarian state[14]. A fundamental difference that characterized the discontinuity between the two regimes was property regime, although not alone. When trying to evaluate the restitution process in time, we may find connection with new political context, social and legal issues. For example in the cases of reparations applicants could be the heirs of victims. And a compensation given to the heirs of victims could exceed the maximum amount decided by the testator to be inherited. Also in any moral evaluation must be take into consideration that heirs would have been best-off in case they would have enjoyed all the assets, but any unfavorable situation were possible too and could affect the value of heritage. In other situations we can not ignore the potentiality variations of tax provisions.

The heritage problem lies in the moral intergenerational context. There are some streams of opinion against the "Death Taxes" (for ex. in the U.S.), population of many countries been affected by significant inheritance taxes, taxes that are present in almost all legislations. A state law can be set to any level of inheritance taxes, but taxing the surviving spouse or descendants are morally questionable, especially when they have suffered through expropriation and deprivation[15]. It is morally difficult to sustain a charge of family members in this context. Those who are entitled to inherit cannot claim a right to the whole legacy as long as any state can fix their fiscal policy, fact bring into question the correctness of monetary compensation. Clearly, legislative instability on legacy strongly affect the maximalist position.

A second important issue that brings into question the maximalist position is that it treats victims of expropriation in a normative isolation, separating them from other victims of the communist period, without restitution entitlements. Suffering caused by expropriation is only a simple issue on the state's limited resources, but not an exclusive priority on the political agenda. Also it cannot be overlooked those citizens who were not owners of real estate, but are entitled to compensation from numerous other reasons, having no access to economic or social capital, nor bequests. Random distribution of wealth has, according to Rawls, no moral significance[16]. Moreover,

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[13] Jeremy Waldron, "Superseding Historical Injustice,"Ethics 103

[14] An idea developped in the book „Filosofie fără haine de gală: despre filosofie şi politică", by Miroiu, Adrian, (1998, All Educational, Bucureşti.)

[15] Liam Murphy, Thomas Nagel, „The Myth of Ownership", (New York: Oxford University Press, 2002)

[16] John Rawls, A Theory of Justice, (ed. Cambridge, Mass.: Harvard University Press, 1999), p. 87

some authors consider that until the expropriation moment the owner could fully enjoy of his property. Then he was removed from the benefits of his destiny, but this removing exceeded his moral predictible expectations. In this case we are getting out from transitional justice frameworks that we have proposed. But the problem of allegedly withdrawing a lucky destiny cannot be accepted as a expropriation principle, morally permissible.

V. Arguments against restitution

1. It was argued that expropriation itself was more moral acceptable than dubious historical conditions in which property was acquired: unjust feudal traditions,: economic exploitation, gender discrimination, etc. In this intergenerational perspective, the argument in favor of reparations would be weak, if the "nationalization" may be able to produce acceptable moral arguments.

2. If the owners of real estate property planned their lives around the exploitation of their assets, the same legitimate expectations had those who had not property at all and were also deprived of their own capital - human capital - which could be exploited in other circumstances, if the communist regime would not came to power. And as the number of the latter was undoubtedly much higher than applicants for restitution. There were some opinions issued that property owners would be charged to bear the repair costs for other members of society, less favored by fate.

Non-owners of real estates were already in the worst-off position even before the expropriation of the rich ones, and so they would suffer a double injustice by worsening their position again by the paying the reparations only rich people[17]. In a moral line of thinking those without any property are entitled to compensation for spending their working capital, justifying their claim for compensation as long as they remained in the worst-off position. We cannot accede such an opinion as long as the "nationalization" was not completely dematerialized. This unjust legal act produced however profitable legal effects to different social classes and categories of population, and in many cases even the previous owners had access to his ex-propriety in conditions of mere material use, only *usus*.

3. For some authors restitution is an exercise of sentimentalism, because over time the market value of assets could decrease by the fluctuation of the market system, or of the tax policies could change and the transmission business to the next generation could be affected. Summarizing it can be seen that the requirements of restitution cannot be limited only to expropriations, but also must be extended to all those who fulfilled their duties in a manner of *bona fides* during the communist systems and they have been injured and so they have legitimate moral claims on state resources. The moral problem of reparation after a totalitarian regime was formulated by those who opinated against the restitution in a simple way: rewarding the favored ones of the fate at the expense of the disadvantaged ones. Reparation is a powerful argument, but is not decisive. According to some authors, the reparation is only a preference for a particular social policy and cannot be considered as a solution to social justice.

4. Another moral reason for rejecting the ideea of reparation was the identity the entitled holders. Regime change was treated as an end of a war and moral controversy scheme is identified as that by which citizens that were involved in war without their consent, had to bear the costs of war compensation, if their country was defeated. This obligation stands as well for those who were not even involved in the war. A social group included by force in the redress process who had no role in the formation of injustice will bear the costs of repair. Some opinions have emphasized that restitution process is not grounded only on suffering, but on the existence of conflicting interests between the victim and perpetrator[18]. In reparative moral requirements an important shift is made

[17] An argument of Jon Elster, in "On Doing What One Can: An Argument Against Restitution and Retribution as a Means of Overcoming the Communist Legacy,"East European Constitutional Review 1, 1992, p. 15–17.

[18] Kutz, Christopher „Justice in Reparations: The Cost of Memory and the Value of Talk”

when subordination of power is replaced by that of justice. A restorative acceptable model seems difficult because it requires strong correlation with the degree of public awareness. While victims of injustices seek their inclusion in a community of political and moral agents, aiming reparations, the holders of reparative obligations tend to separate morally from political institutions responsible for damages, requiring a fair assessment of each relevant case, hoping that general evil could be mitigated by justificative particularization.

5. The superseding thesis of historical injustices accepts a reduction of the force of ownership right. The reduction of entitlement for property rights is accepted in the case of changing circumstances, theory expressed by David Lyons and Jeremy Waldron. The core argument of weakening the entitlement by separating people from their land represents a form of prescription. As Waldron argues, justification of property must comply with a set of requirements regarding the rights, liberties and privileges, requirements characterized as "circumstantially sensitive". But in a same line of argumentation, if legitimate entitlement is sensitive to changes in circumstances, then the effects of illegitimate purchases or other infrigement of rights of some to become legitimate in changing circumstances. This represent the main argument in Waldron's thesis of superseding the historical injustices. The thesis regards only past injustices and it does not mean that past violations have been fair. For example: a community that used fraudulently the water source of another community forced by an ecological disaster. The act of injustice was morally superseded by the new circumstances. (Waldron 2004, op.cit).

But if compensation is possible, then it depends on „moral relevant circumstances and their evolution" (Waldron). Superseding argument is identified by the concept of *force majeure* clause, in the positive law.

V.1. Distributive justice vs. corrective justice

Even admitted in Eastern European legislation, reparatory policies often lost ground against other public policies, even in the sphere of justice. In ranking priorities in terms of distributive justice, the requirement for access to public resources for repairs was below the requirements for political actions in reducing the poverty, below the need for health care or the state pension problems or other policies relating to investment in human capital, education, etc.

Some analysis consider distributive justice itself as a priority of application to the criteria of reparative justice. Distributive justice contains the principles for establishing a public policy framework, including management issues of property litigation against the state or other individuals, the economic and social needs. Priorities of distributive justice are given by government institutions, including the tax system, health or education, institutions managed by the distributive process system.

Corrective justice concerns the principles of justice that aim to rectify any intrusion in the individual rights, to preserve physical and spiritual integrity of property, principles that contained within the institution of tort-law in the Anglo-Saxon legal system[19]. The restoring of a lost property is a matter of corrective justice, but we have to introduce a distinction between the expropriation made under totalitarian political pressure and the expropriation made for reasons of urban architectural necessities in the political transition process.

Central and east European countries have experienced both the requirements for distributive and corrective justice. It appears as problematic a conflict of priority between the two, when it appear a problem in choosing between them. By its nature, distributive justice establishes the entitlements, corrective justice protects from possible violations. Corrective justice impose the restoring of the *status quo ante* principle. If the principle of *status quo ante* is regarded as illegitimate, then state institutions are no more justified in their moral status and a transitional justice is required. Difficulties in dealing with reparations requirements will impose a stronger conception of distributive

[19] Stephen Perry, "Responsibility for Outcomes, Risk, and the Law of Torts," in Philosophy and the Law of Torts, ed. Gerald Postema (New York: Cambridge University Press, 2002).

justice. Strict theories of distributive justice, egalitarian or utilitarian, requiere a total subordination of principles of corrective justice in order to achieve their distribution purpose.

If Lockean legitimacy approach is binary (justice can be compatible or incompatible with a set of principles), a complete liberal vision have to answer to corrective statements in non-ideal circumstances. According to Rawls, the beneficiary of distributive justice is the „basic structure of society". Taking into account their different spheres of interest, distributive and corrective justice can relate in different shape[20]. First, corrective justice can appear as tool of distributive justice: the principles of corrective justice seek to maintain fair distribution of goods. On this ground, restorative justice emphasizes its normative force by the difference between the present unfair context and fair desirable distribution. Second, restorative justice can be seen as independent from normative distributive justice: corrective justice must resolve the turmoil of property, obstructing the illegally distributive approach, for example, in terms of a reasonable institutional expectations.

Even if it concludes that the East European socialism has failed because the scheme of distributive justice, imposed in opposition with individual choices, we just think that accumulation of citizens during this totalitarian political system - cars, apartments and other properties - worth in turn to be protected in case of an arbitrary illegitimate usurpation, whether direct or indirect. On this grounds, the strength of corrective justice requires the protection of legitimate expectations as an auxiliary of distributive justice.

None of these criteria is entirely satisfactory. In the absence of a fair distributive criterion it is hard to foresee a significant regulatory power of the corrective justice. If principles of distributive justice are sufficient to evaluate the distributions of post-expropriation, any corrective requirement should be determined solely by a distributive way. Conversely, if the principles of distributive justice applies only to basic social institutions, (Rawls's argument), so that the current distribution is only a matter of consensual transaction in an institutional framework, it should be difficult to foresee any moral force for arbitrary models involved in the modification of the private property. In this argumentation, the principles of distributive justice have insatisfactory relevance in corrective context.

A third possibility, more plausible in the sense of some authors (e.g. C. Kutz), would be full integration between distributive justice and restitution. Reparative justice principles represent a distinct normative basis as long as it express an ideal of interpersonal behavior and responsibility, but the force of those principles is effective only in a scheme of distributive justice.

So we could distinguish two possibilities:

- An inability of a state to ensure a minimum living standard, with a strong corrective bias, but neglecting its distributive liabilities. With limited financial resources cannot be ensured the minimum functioning of the basic structure of society. Once assured the basic needs, including the management and functioning of democratic institutions, granting compensation for injuries may proceed.

- Second, correlation between corrective justice and distributive justice is more profound. Injuries caused by expropriations are relevant facts evan for a distributive justice process, from the point of view of relative position of the victims and the degree to access to compensation.

It should not be neglected the view claiming that that imposition of reparation in kind was prefered by the state for reasons of economic efficiency of state administration, the cost of maintenance of assets was a hard financial burden for the state, fact that would have affected the distribution process.

V.1.1. The problem of cultural property restitution

The most restrictive form of compensation is considered the restitution of the community property of churches, synagogues, museums, universities, other cultural places, because of its public good indivisible structure, its importance in community life. Requirements for reparation in this case

[20] Stephen Perry *"On the Relationship Between Corrective and Distributive Justice,"* in Oxford Essays in Jurisprudence, Fourth Series, ed. Jeremy Horder, New York: Oxford University Press, 2000, p. 237–63.

be expressed in a money ammount. The value of these institutions is given by their cultural tradition in community. The seizure of these institutions give priority for allocation of resources in order to restore the previous situation. The requirement derives from the contribution they make to the cultural life of those communities[21].

Loss of common culture is considerated a greater loss than that of the property, even if the members of society have adapted their life to the imperatives of political and social commandments of the time. A stronger argument in favor of refunds is the need of traditional institutions, as future sources of culture. This is the argument of intergenerational justice of Rawls, the moral necessity of strengthening the right institutions.

If the properties may not be returned in kind, a subsidiary of compensation requirement is fully justified to reconstruct traditional infrastructure elsewhere, but fully accessible to the community. The argument for reparations lies both in the corrective and distributive justice in the case for the restoration of cultural life, and it is mandatory in the case of the massive dislocations of population.

Although common pool resources is limited, the necesity for repair has a moral justification in the same way like satisfying the need or interest for distribution.

In ordering the priorities for reparations Jon Elster[22] considers that reparative justice requirementsă for cultural groups take precedence over all other repair requirements.

V.2. Mainstreams in Romanian restitution debate

The romanian legislative debate has enumerated several visions for restoration of the totalitarian state injustice. Thus, some guiding ideas could be highlighted.

Restitution of property has never been discussed as a reverse political measure of nationalization, although therestitution was qualified in various parliamentary debate as a "political moment of truth and justice, for the resolution of economic issues"

Restitution in kind has been seen in some political positions as preferable in terms of efficiency, but not in terms of justice, the repairing process by restitution in kind was considered preferable than compensation with money from the public budget. Pecuniary compensation was admitted only as an exception to repairation. Arrangements for refund in cases of exceptions provided three modes of compensation: equivalent goods or services, government bonds and shares. The advantage of this project was considered by its promoters to avoid the encumbrance for many years of the state budget. The draft law also covers both the housing estate, which formed the subject of the controversial Law no. 112 and the destination other than residential buildings, like the economic buildings. Besides reparations any draft law was concerned for dealing with the concept of legal stability, trying to achieve continuity in the rule of law. Restoring justice issues were focused on some aspects of language that generated questionable interpretations. Parliamentary debates have varied between concepts like "return of the equivalent" or "the equivalent remedies."

Often, some parliamentary moral evaluation revealed that restitution had a negative character negativ by its utilitarian aspect. Moreover, in lacking moral landmarks, during certain debates there was not dificult for some of them to justify the uselessness of a remedial legislation. Thus, in a cost-benefit analysis, restitution would have costs an amount that exceeded the benefits, that would be received only by a small part of the population. In an opinion, the reparation policy would be destinated only to 5% of the population, the rest of 95% of the population would not have suffered any damages at all. The moral problem that intervenes here, according to parliamentary studies information, is whether 92% of the country's wealth must be transferred to 5% of the population. As it could be seen, a matter individual right is reported, even after 1989, quantitatively, configuring a new issue, the absence of this concern for the great mass of the population. Any ethical principle

[21] Jeremy Waldron, *"Minority Cultures and the Cosmopolitan Alternative*," in The Rights of Minority Cultures, (ed. Will Kymlicka Oxford: Oxford University Press, 1995, p. 93–119.)

[22] Elster, Jon, *Retribution and reparation in the transition to democracy*"....

would be sacrificed under such circumstances of absence of a great number of similar cases[23]. There have also been made moral judgements on neglecting any other disscutions outside the refunds of historical injustices, althogh "the injustice was done to all other members of past generations, who - under the old totalitarian social arrangements - have lasted for decades[24]."

Out of totalitarianism and during the political reform the debates had not exhausted the inventory of the ethical grounds for refund due to the vast particularization.

A comparative approach for integration of accepted practices of civil society in matters of intergenerational justice, would increases the interest in an "original position" of applying principles, either in the establishment of communist totalitarianism or a liberal democracy. A "time zero" for post-war German states, was considered in some papers as a moment of a „state choise", either for economic prosperity in terms of capitalism, or a social justice state (the former GDR)[25]. Administration of a real social justice was considered as the result of state intervention in the former GDR. Intervention of the socialist states in the organization of the social life had shown a poor management in dealing with a social justice in a communist state, shaping a stronger criticism of the founding principles of communist authoritarianism. Admitting that justice could not be fully identified with the legitimacy, at least its intergenerational dimension of justice must have an important part as a constituent of it.

Following retrospectively some relevant behaviors of actors engaged in moral debate over repair issues during the transition period it could be foreseen dominant aspects of this context. Thus, a controversial issue which has not received a definitive answer, was whether the repair requirements of the victims of abuses and injustices can accept a state response in delaying the fulfilling of their claims on the grounds that the repair would compete with other types of requirements that the state must face[26].

In Romania, the fact that the repair is not fully carried out, so it could not be considered as *corrective justice* policy, is announced from the title of the decree-law no. 118 of the 30th. of March 1990, as: "Decree-Law on the granting ***some rights*** to persecuted persons for political reasons by the dictatorship starting March 6, 1945, and for persons deported abroad or in prison…." In terms of intergenerational justice, reparation was realized by compensation for injured survivors (article 4 of the law), but under condition that it shall not be remarried later.

Motivation for remedy in the case of regime political regime is reflected in the normative acts issued on this purpose. In this respect, the Law 341 of 2004, shows even in the title called "law of gratitude for the heroes and martyrs, fighters who have contributed to the Romanian Revolution in December 1989", indicating also that beneficiaries of rewards are those who have helped the political change of regime "popular uprising in Timisoara, Bucharest and in other cities that were transformed into antitotalitarian revolution, backed by the army, who led to the fall of the communist regime and to the establishment of democracy".

Moral justifications for gratifications are set out in the principles which are governing the application of this law, as follows:

a. *Respect and gratitude* to the heroes and martyrs from December 1989, and care for the heroes survivors;

b. *Respect* for *historical truth* by deepening the research and documentation on the Revolution of 1989;

c. *Differentiation of stages* of the Revolution ;

d. *Defining the categories* of fighters, by distinguishing the commitment and participation in revolutionary activities;

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[23] Chamber of Deputies, Session from the 23th. of August 1999

[24] Miroiu, Adrian *„Filosofie fără haine degală"*, (Ed. All Educational, Bucureşti, 1998)

[25] Marshall, Gordon *"Was Communism Good for Social Justice?*: a Comparative Analysis of the Two Germanies", The British Journal of Sociology, vol. 47, no.3, sept. 1996, p. 397-420

[26] Kutz, Christopher *„Justice in Reparations: The Cost of Memory and the Value of Talk*"

e. *Differentiate between civilians and soldiers* on the stages and forms of participation in actions undertaken for Revolution;

f. *Equity* in the granting the rights under this law.

A distinctive and importantant aspect of the legal nature of the rights granted to participants is not considering them as *income*. In art. 5, paragraph 2 states that "the rights granted under this law are not considered income, nor taxed and do not affect the granting of other rights."

Delimitation of those who can not benefit from the provisions of this law (art. 8) might be regarded as a sign of moral accountability in terms of efficient factors of injury caused by the totalitarian political regime. In this position are mentioned "civilians and soldiers, who are proven to have been involved in the former Securitate forces as political police activities, and those who organized, acted, instigated and fought, in any form, against the Revolution of 1989 .

VI. Retroactivity challenges

VI.1 The concept of intergenerational justice in the case of non-retroactivity. Case reparation issues

A dificult argument faced by the intergenerational justice, especially in present-past relationships was the argument of *non-retroactivity*. In favor of a mandatory rule of non-retroactivity of the law, regardless of cause, have opined authors in different historical periods. In Hobbes's Leviathan[27] is stated that "any law passed after the consummation of a fact cannot turn this fact into crime. A similar principle is postulated in the U.S. Constitution (Article 1, sect 9 (3)) which prohibits any *ex post facto* action. Similarly, the European Convention on Human Rights bans in art. 7 that anyone can be found guilty retrospectively, if the facts were not violating the general principles of law recognized by civilized nations, at that time. The purpose of these provisions is formulated synthetically by Friedrich Carl von Savigny: ".... confidence in the rule of law in force is important and desirable. This does not mean we have the same confidence in the permanence of that law, but as long as the law is in force its effectiveness is indisputable"[28]. Our interest here rests only in matters of principle and their moral relevance.

If it is real that time initiates legal relationships, in intergenerational justice we can not speak of absolute opposition to non-retroactivity, because intergenerational justice itself contains the essence of retrospective approaches. The problem of non-retroactivity in some cases served only as a "political buffer"[29], the legal responsibility of non-retroactivity is often protected by legal institution of the prescription. There can not been invoked the non-retroactivity when assessing the moral nature of the facts from the past, but relevant to transitional justice. Often, the post-totalitarian regime, by invoking the principle of non-retroactivity as a technical legal argument, tried to oppose the attempted repairs satisfaction (either economic or moral). Indeed, all modern democratic constitutions recognize unanimously that the law cannot look to the past. Sure, morally could be accepted the non-retroactively when speaking about a juridical sentence as long as it was not envisaged in the legislation of another legal order. Moreover, some political facts were not criminalized, even more, these facts were widely accepted as public service obligations to be performed in accordance with the requirements of that time. In the case of the totalitarian regime, the horrors discovered by retrospective examination of the past is the moral argument itself which requires democratic measures in order to safeguard the future democratic state. It is therefore morally

[27] „No law, made after a fact done, can make it a crime ... For before the law, there is no transgression of the law.(Hobbes, Leviathan (1651), Cap. 27-28)

[28] von Savigny, Friedrich Carl, „Private International Law, and the Retrospective Operation of Statutes", 1880, p. 344.

[29] Letki, Natalia „*Lustration and Democratisation in East-Central Europe*", în Europe-Asia Studies, 2002 University of Glasgow.

accepted, for example, that a public servant of the totalitarian state has no longer a social capacity to respond to special conditions required for a democratic state, as a way of protection for future democratic institutions. In some Central and Eastern European countries, lustration was applied only when the public official has lied about his past. In a case like this institution of non-retroactivity couldn' be moral relevant in a case of consciously deliberate alteration of the official truth. An argument of political revenge in case of administrative removal from office cannot be sustained, as long as *transitional justice* expects honest answers to clarify the relationship with the past. In supporting the concept of retroactivity, was formulated an argument that could be described as one of the symmetry. Totalitarian regime itself has often acted retroactively regarding the political past of its citizens, so its entire existence of the totalitarian regime should be reviewed retroactively. Political transitions in East European areas were conducted with different intensity regarding the legislative changes. From a certain perspective any legislative change can be seen as a microtransition itself, which produced political effects even at a small scale. Legislative power, manifested in the form of a legislative will, had to justify any new passed law on grounds of efficiency or on a higher moral grounds. However, an important distinction must be stated. The institution of retroactivity required in a transitional justice political process must not be confused with a basic human right, argument that often was invoked misty, especially in the public debate.

VI.2. Arguments of the retroactivity of law

1. Adherents of doctrine of retroactivity of law recognize the validity of this principle only in exceptional circumstances, where the negative moral consequences remain strong, through legal action or inaction, where a natural right was transgressed. As such it was widely considered that the Nazi laws could not be evaluated in a perspective of an active principle of non-retroactivity. On this line of reasoning, the legal approach of retroactivity sustained the Nuremberg trial.

2. Was argued also that retroactivity should be understood as a temporal range of options and not as a binary construct strictly based on acceptance or refusal. So retroactivity is seen as a possible recourse to stability in particular cases where the new law is unclear, in a kind of rawlsian reflective equilibrium, setting a kind of dialog with the previous legislation.

3. Also, a retroactive regression was considered and the use of judicial precedent, a source of law in Anglo-Saxon legal system, and by moral extension, moral precedent is used in moral dilemmas solving.

4. Theoretically, legislation is prospective and general, but the sentence is retrospective and particular. An acceptance of the moral argument of retroactivity is compatible with the argument set out by the U.S. Supreme Court, who stated in some of its decisions that the legislative changes, often defeat expectations based on the priority of the rule of law. Legislative initiative in this case is analitically regarded as a feature limit, tolerable but hardly acceptable in a democratic state. Of course, a reference like this has a strong libertarian political connotation, where the process of formal legislation is considered as non-necessary. The character of the libertarian society that has no bias in laws changing, it is morally a pro-retroactive attitude.

5. In U.S. legal practice the institution of retroactivity had prevailed even in civil contracts. Non-retroactivity principle was often cited in courts in contractual clauses interpretation, but the practice had recognized numerous exceptions to this principle.

6. Another argument that favours the admission of retroactivity in the reparation approach is based on the concept of "private rights" of individuals, that are naturally inherent to people rights, with pre-political origin. Also, "private rights" or "absolute rights" inherent to every citizen is a natural result of the freedom that cannot be sacrificed for the public interest sake. The fundamental purpose of any just legislation is to maintain and regulate the absolute rights of individuals, action that requires a regressive retroactive approach. The appeal itself to legislation is considered, within

certain limits, as a retroactive approach, developing the explanatory power of the categories of "public rights" and "private rights"[30].

VI.3. The argument of non-retroactivity

The principle of non-retroactivity was controversed, but its moral grounds were oftenly ignored. Being invoked in judicial trials, the principle of non-retroactivity could be morally assessed derivating the evoluate form of a juridical solution on its moral bases, the core of any juridical decision containing particles of moral entitlement.

The main accusation of the principle of retroactivity is that it couldn't be morally accepted a punishment of an *ex-post fact.*

The moral efficiency and the legal impact in the constitutions of democratic states, makes the principle of non-retroactivity to be employed in the *universalist* paradigm.

VI.4. To a reconceptualization of the retroactivity

Practitioners and modern doctrines of law consider the delimitation prospectivity-retroactivity as purely illusory. Retroactivity has manifested in its material form, in fact, by changing the legal consequences of acts from the past, but the concept of retroactivity has been insufficiently morally assessed. Retroactivity in reparation process required by the collapse of totalitarian legal system was only a transitional feature for appealing to the old legislation with the purpose of configuring moral intuitions a remedy approach. At least some features of retroactivity could be morally permissible for the need to qualify and clarify the nature of past historical deeds. Subjective rights that were violated imply a moral dialog which need a reconceptualization of retroactivity. Recognition of these infringed rights determines the possibility of effective retroactive procedures in a *transitional justice* process. In essence, the moral debate is not only the conflict between legal provisions, current or past, but, ultimately, between the positive law and natural law.

Under the legal doctrine of the U.S. legal system was admitted a concept of *mild retroactivity*, in the case of taxation, arguing that in states with conflicting administrative regulations, traditional opposition to the retroactivity cannot be accepted[31]. Thus, retroactivity cannot be rejected purely axiomatic. It was considered that retroactivity may work for safeguarding social values, when are involved individual rights or public welfare. It is recognized in some doctrinal views that these categories of public rights and private rights may be part of a coherent scheme, in which retroactivity can become formally constitutional.

VII. Conclusions

Emerged recently, "*transitional justice*" was originally called "*retroactive justice*". This field of study has outlined some specific problems of the states recently emerged from totalitarianism, in which liberal justice had proved ineffective in developing solutions[32]. Retribution and redress measures generated by the functioning of totalitarian systems are difficult to achieve solely through classical legal steps. In a historical plan, the last event where was upheld retroactivity in a case of a totalitarian regime was the case of the Nuremberg Trials. The essence of the concept of non-retroactivity in a state of law is the protection against abuse. Putting the problem of intergenerational relations, in terms of relations with the past, in a transitional space, it requires moral analytical approach. The constraints of non-retroactivity principle cannot deal with a totalitarian past, being difficult to accept the presence of a structurated moral injustice, subject of interest for transitional justice.

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[30] Woolhandler, Ann „*Public Rights, Private Rights and Statutory Retroactivity",* 2005, source: http://law.bepress.com/uvalwps/uva publiclaw/art37

[31] http://law.bepress.com/cgi/viewcontent.cgi?article=1062&context=uvalwps

[32] The article: „*Curtea constituțională și lustrația*", Adrian Cioflâncă, Revista „22", 31 aug 2010

We consider that if the problems of relationship with the past cannot be solved, then at least could be simplified by moral assessments, in an interdisciplinary approach of the intersection of philosophy of law and political science. We cannot avoid some examinations of existing injustice, revelead by analytical moral evaluation inside the society, only accepting that a law has been declared constitutional. This can lead us through a rational approach of *reflective equilibrium* type to the idea that, perhaps, it would be required a constitutional revision, at least in some specific area, concerning *transitional justice*.

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THE VIRTUES OF AN ACCELERATORY REMEDY IN THE FIGHT AGAINST THE EXCESSIVE LENGTH OF JUDICIAL PROCEEDINGS

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Abstract:
According to the established case-law of the European Court of Human Rights, the Contracting Parties the Convention for the Protection of Human Rights and Fundamental Freedoms have the obligation to provide an effective remedy to the person that pretends that his right to a fair trial has been violated. Such a remedy must include a compensatory component; the European Court, in its judgments relating to Italian Pinto Law, underlined the essential character of the compensation in cases of excessive length of proceedings; still, the same Court encouraged States Parties not only to compensate, but also to offer an acceleratory remedy, in order to reduce the length of the procedures, as well as the amount of the compensation once the proceedings have been finalized. Following several major judgments pronounced by the European Court, some European States reacted by implementing such remedies: most solutions combine elements of acceleration with elements of compensation. The experience of such countries allows the institutionalization of a form of remedy that could be implemented also in Romania where, although there are some legal provisions stipulating some form of redress, we cannot talk of an authentic effective remedy. The present paper will focus on the acceleratory remedy, seen not only as a demarche at the disposal of the individual, but also as an interesting measure allowing for the reduction of length of procedures and thus limiting the effect of a violation of the right to a fair trial. [**]

Keywords*: acceleratory, remedy, excessive, length of procedures.*

Introduction

In 2001, overwhelmed by the number of cases enrolled on the docket of the European Court of Human Rights (herein the Court), alleging the violation of the right to a fair trial within a reasonable time, recognized in article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (herein the Convention), Italy adopted the famous now *Pinto Law*. The piece of legislation was intended to offer to those complaining about the length of the judicial proceedings a domestic remedy allowing for compensation, thus reducing the number of complaints before the Court and alleviating its docket. The redress was welcomed by the European jurisdiction, which underlined the importance of a national compensatory recourse. Still, five years later, in a series of Great Chamber judgments on the question of the effective character of the Pinto remedy in cases of unreasonable length of judicial proceedings, although the Court maintained the important nature of a compensatory redress, it underlined the essential need for prevention and remarked: "The best solution in absolute terms is indisputably, as in many spheres, prevention. (…) Where the judicial system is deficient in this respect, **a remedy designed to expedite the proceedings in order to prevent them from becoming excessively lengthy is the most effective solution**. Such a remedy offers an undeniable advantage over a remedy affording only compensation since it also prevents a finding of successive violations in respect of the same set of proceedings and does not merely repair the breach *a posteriori*, as does a compensatory remedy of the type provided for under Italian law, for example."[1]

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[**] This paper was elaborated as part of the scientific research in the research project PN II IDEI 1982, financed by the UEFISCSU under the Contract no 769/2009.

[1] *Cocchiarella v. Italy*, judgment of 26 March 2006, par. 74 .

This remark of the European Court on one hand encouraged the efforts already made by some States like Poland and Slovenia towards the implementation of a preventive domestic remedy but also draw other States attention (including Italy) on the fact that a compensatory redress was not going to be sufficient in the future in order to fight the excessive length of judicial procedures.

Although the subject was present in the preoccupation of the European Court from the beginning of the 2000, and Romania started in 2003 to see the judicial procedures before the domestic courts challenged before the international jurisdiction in term of unreasonable length, it was only in 2009, with the release of the *Abramiuc* judgment[2], that the need for a national remedy at the disposal of those alleging the violation of the right to a fair trial within a reasonable time was expressly affirmed by the European Court.

Still, two years later, such a remedy is not yet in place and the law on the Small Reform does not introduce such a redress at the disposal of individuals and entities discontented with the duration of the judicial proceedings they were involved in.

In the search of a pattern for such a remedy, which is necessary and will be requested in the case-law of the European Court against Romania, we will research the past experiences of other countries; their reaction to the excessive length of judicial procedures in term of prevention will be studied only as it refers to domestic remedies. Although the systemic reforms are the best solutions, from the European Court perspective, only national recourses can be evaluated in terms of exhaustion of domestic remedies.

Given the technical nature of the subject, our references will mainly consist of the case-law of the Court. It serves both to identify the problem and to evaluate the solutions found by different States.

The goal of this research is to sketch a possible acceleratory remedy that could be implemented in Romanian legal order, to combat, from the individual perspective, the unreasonable length of judicial procedures.

Past experiences: lessons learned?

Several States were confronted with the need to implement a domestic acceleratory remedy in order to avoid future complaints before the European Court challenging the length of national judicial procedures. The paper will only focus on five such experiences, as some countries like Italy still appreciate the compensatory redress as being not only effective but also sufficient to fight unreasonable duration. The presentation of States legislation will limit itself to acceleratory remedies or elements. It is to be noted that all five countries accompany the acceleratory remedy with the compensatory one.

The judgment that marked the begging of Polish quests for such a remedy is the one pronounced in *Kudla* case[3]. This case, concerning among other alleged violation the length of a criminal procedure already in place for 9 years at the moment the Court examined the complaint, offered the European jurisdiction the perfect occasion to draw States attention on their obligation to create in their respective national legal systems a remedy designed for hypothesis of excessive length of procedures.

The reaction of Poland, although delayed some four years, consisted in the adoption of legislation creating such a remedy; any party in a judicial procedure (including the enforcement ones or the preparatory criminal proceedings) unsatisfied with the speed of settlement of the affair was entitled to file a complaint, seeking ascertainment of the fact that the proceedings were pending longer than needed to establish the facts and resolve the case. The complaint was lodged before the superior court of the tribunal examining the main proceedings and was examined in the light of the Court's case-law.

[2] *Abramiuc v. Romania*, judgment of 24 February 2009.
[3] *Kudla v. Poland*, judgment of 26 October 2000.

The proceedings examining such a complaint were considered as incidental ones and the superior court hade to deliver its evaluation in two month from the date of lodging the complaint. As to the outcome of the proceeding, in the situation were the conclusion was affirmative and the reasonable time was exceeded, the superior court may give recommendations to the court conducting the main proceedings on appropriate measures to be carried out in a fixed time-limit. Accompanying such recommendations, the national tribunal could grant satisfaction to the author of the complaint. The allowance of such a partial compensation did not deprive the interested party of his or her right to seek further compensation after the closing of the main proceedings.

In its case-law after the adoption of this remedy, the European Court expressed its confidence in the potential of the redress; *Charzynski*[4] and *Figiel*[5] judgments applauded the demarche of Polish authorities, although some aspects relating to the actual implementation of the legislation did not permit the access of all interested individuals and entities to the new remedy or offers only limited satisfaction.

The Czech Republic was first confronted with a conclusion regarding the inexistence of a remedy to allow the allegation of a violation of the right to a fair trial within a reasonable time to be examined before the domestic courts in *Hartman*[6] case. The European Court in that case examined two potential acceleratory remedies against the excessive length of judicial proceeding put forward by the Czech Government: the first one indicated was a hierarchical recourse lodged before the superior court to the one conducting the main proceedings. It was rejected by the European jurisdiction as it did not recognize an individual right to seek and obtain the cooperation of state organs in the enforcement of the conclusion, but a mere right to be informed on the potential conclusions and recommendations made to the national tribunal. The second remedy invoked by the Government concerned a complaint before the Constitutional Court, which could indicate to the national judicial organ the measures to be adopted in order to stop the violation of the right to a fair trial. Still, the European Court found itself unsatisfied by the fact that the recommendations of the Constitutional jurisdiction could not be enforced if ignored by the national tribunal and by the fact that no compensation was granted to the interested party.

In reaction to the *Hartman* judgment, the Czech Republic reformed its legislation in order to introduce an acceleratory remedy, consisting in a complaint to be lodged before the president of the court examining the main proceedings. The president has one month to decide on the merits of the complaint; if the complaint is well-founded, he or she will indicate some measures to be carried out by the court. Still, the president could not decide on the re-allocation of the file, fix strict time limit for the court to complete procedural acts or put the file on the docket of priorities. Thus, the European Court refused to consider this remedy more than an extension of the hierarchical remedy already considered inadequate and in a later decision in *Vokurka*[7] case the Court suggested that the examination of the complaint be made by the superior court to the court involved in the main proceedings. Despite such a recommendation, the amendments brought in 2009 to the law on the judicial system transfers to the very instance dealing with the main proceedings the competence to examine the complaint.

Croatia developed the most rich and adaptable acceleratory remedy; after the first judgment on the infringement of the reasonable length of judicial proceedings[8], The Constitutional Court reacted and through case-law and reform in legislation, developed an acceleratory remedy offer the constitutional jurisdiction the competence to determine a time-limit within which the competent court shall decide the case on the merits. Still, the growing number of constitutional complaints attracted

[4] *Charzynski v. Poland*, judgment of 1 March 2005.
[5] *Figiel v. Poland*, judgment of 16 September 2008.
[6] *Hartman v. Czech Republic*, judgment of 10 July 2003.
[7] *Vokurka v. Czech Republic*, decision of 16 September 2007.
[8] *Rajak v. Croatia*, judgment of 28 June 2001.

delays in theirs examination, jeopardizing the reasonable time for the decision in a certain case and, more worrying, some decision of the Constitutional Court were not respected by the national tribunal, raising questions on the enforcement of constitutional decisions.

The latest reform adopted by the Croatian authorities introduced essential changes in the competence of the Constitutional Court; from that point forward, the complaints about the length of judicial proceedings would be examined by the superior court of the tribunal conducting the main proceedings. The justification of the reform underlined the need to respect the urgency of the procedure. The court thus requested can indicate a time-limit for the adoption of a decision on the merits, the procedure is very speedy. The decision on the incidental complaint can be appeal only by the party, but not by the Attorney's office.

After the *Lukenda*[9] judgment, Slovenian authorities adopted at their turn a legislation to address the question of effective acceleratory remedies. The Act on the Protection of the right to a trial without undue delay of 2006 opens for the interested party two possibilities of action: the supervisory appeal before the president of the court examining the case and the motion to set a deadline.

The supervisory appeal allows the president of the court, after requesting a report from the judge of the case, to indicate a time-limit not exceeding six month for the performance of certain procedural acts, to put the case on the priority list or to reallocate the file.

The motion to set a deadline can only be lodged after the exhaustion of the supervisory appeal, before the president of the court competent to exercise appellate jurisdiction over the court conducting the main proceedings. The president of the appellate court can also set a deadline or decide to put the case of the priority list.

The new legislation has already been examined by the European Court in its *Grzincic* judgment of 3 May 2007. The Court favorably noted the celerity of the incidental proceedings and the measures at the disposal of the judicial authority in cases of undue delay.

He last experience that it is worth mentioning is the Slovakian one; after a total vide in legislation concerning a domestic remedy against unreasonable length of judicial proceedings, noticed by the European Court in its *Havala* decision of 13 September 2001, amendments were brought to the Constitution and the Law on Constitutional Court, to introduce the possibility of lodging constitutional complaints against the alleged violation of the right to a fair trial without undue delay. The Constitutional court, in well-founded cases, would order the court conducting the main proceedings to speed up the examination of the case or to perform specific procedural acts. The Constitutional jurisdiction could also offer satisfaction for the violation of the reasonable length requirement. The new amendments were already in 2002 evaluated by the European Court that expressed satisfaction for their adoption and appreciated their effective character[10].

The possible model of an acceleratory remedy

After reviewing the experiences of countries challenged with the need to identify and implement a remedy for cases of excessive length of judicial proceedings, certain conclusions can be drawn.

The first that comes to mind, in light of Court's case-law, refers to the fact that any acceleratory remedy must be accompanied by a compensatory one. It is the legislator' choice were in the economy of the remedial complex it places the compensation element – a partial one going hand in hand with the acceleratory procedure or a final compensatory redress after the closure of judicial proceedings – but it must exist to complete and provide full effectiveness to the acceleratory elements. This conclusion is logical if we take into account the fact that the mere recognition of the

[9] *Lukenda v. Slovenia*, judgment of 6 October 2005.
[10] *Andrasik v Slovakia*, decision of 22 October 2002.

violation of the right to a fair trial, not followed by just satisfaction, does not lift the victim status to the individual or the entity affected by the unreasonable length of proceedings.

This paper only follows the characteristics and benefits of the acceleratory remedy, but does not loose sight of the whole economy of the right to an effective remedy, that the Convention proclaims in article 13 and that requests both recognition of the violation but also granting of just satisfaction.

The first limitation of the acceleratory remedy is given by its scope: it can only be used if a procedure is still pending. Once the main proceedings are closed, only a compensatory request could be lodged. However, in order for the remedy to be in line with the conclusions already stated by the European Court, it should be applicable to all stages of proceedings, including the administrative preliminary stage or the criminal investigations, as well as the enforcement stage of a civil procedure.

If the scope is large, the sphere of beneficiaries should be constructed in a manner to allow for a full protection of the right to a fair trial without invoking the acceleratory remedy against the individual or the entity whose right is affected. The Croatian provision forbidding the attorney to use the complaint for undue delay was the consequence of such a practice, where the attorney challenged all the decisions concluded on the violation of the right to a fair trial.

As far the competent court or authority are concerned, the possible solutions adopted by different States do not suggest a certain pattern; it is true that most of the practices seem to support the complaint lodged before the hierarchically superior court (or its president) the most important issue is the functional one: if the president of the main court can adopt effective measures, e.g. reassignment of files, placement on the list of priorities, mandatory time-limit, then the choice of such a incidental procedure is favorably appreciated by the European Court.

Still, within the domestic system, accurate attention must be paid to situations were the measures adopted in the framework of the acceleratory remedy are misused; for example, the reallocation of files is a measures that theoretically is beneficial to the interested party, but can also be a way for over-loaded judges to see their docket alleviating. Another problem could be the inadequate balance between the boldness of measures that could be indicated and the enforcement options or the inexistence of alternatives in case the main court is ignoring or unable to perform the procedural acts or to reach a solution on the merits in the fixed time-limit. In this light, the solution put forward by the Slovenian legislator seems to be the most balanced, although in other cases, like Slovakian one, the fact that the decision of the Constitutional Court are followed by the main court is also a positive sign.

To complete the functional criterion, the above exposed experience indicated that this procedure should imply with necessity, at least at a later stage, the access to a judicial form of control; the complaint before the president of the main court, although effective, in order to be more than an hierarchical supervision, must be doubled by the possibility to present a complaint to the appellate court (or at least its president).

Irrespective of the choice made as to the competent court or authority, the incidental procedure must be a speedy one, offering an evaluation and a decision in a maximum four month. The evaluation should always follow the Court's case-law, the criteria the Court developed regarding the behavior of the individual or entity invoking the violation of the right, the behavior of competent authorities, the complexity of the case, the moment in the procedure when the complaint is being lodged.

Where does Romanian domestic legal order stand?

As stated in the introductory section, in 2009 Romania faced the need to introduce in the domestic legal order an effective remedy in cases of alleged violation of a right to a fair trial within a reasonable time. Still, two years from the *Abramiuc* judgment, the only legislative remedy existing is to be found in the new Code of Civil Procedure, that was adopted in 2010 and is still to enter into force.

The acceleratory remedy can be lodged by any party to the main proceedings, including the prosecutor participating in the case, with the goal of requesting a decision on measures to be taken in order to eliminate such a situation of disrespect for the right to a fair trial, but only they consider to find themselves in one of the following situations: the time-limit stipulated by law for the performance of a certain procedural act, for the delivery of a judgment or of its considerations elapsed without the compliance to the legal requirement; the court has indicated a time-limit for a participant in the main proceedings to perform a procedural act, to present a document or certain information and the indication was ignored, but still the court did not adopted the measures provided by law, or when the court disregarded its obligation to solve the case in a predictable optimal time-limit.

According to the new legislation, the complaint will be examined and decided upon within 5 days, by the judges conducting the main proceedings. If they consider the complaint to be well-founded, the court will immediately take all the necessary measures to eliminate the situation that cause the undue delay and notify the measures adopted to the author of the complaint. The decision admitting the complaint can not be appealed; the decision rejecting the complaint can be appealed in 3 days from the notification. The decision on the appeal must be taken within 10 days from the receipt of the file. In case of well-founded appeal, the court will decide on the measures to be taken by the main court and, when appropriate, it will also fix a time-limit for the performance of the procedural acts or legal measures. The whole procedure is taking place without notification of the parties.

Some preliminary remarks on this acceleratory remedy, in the light of the abovementioned experiences of several States, as evaluated by the European Court, will cast more shadows than light on it.

We should begin by mentioning that the provisions are part of the Civil Code thus inapplicable to criminal proceedings. Or, an effective remedy must also be offered for those complaining about the length of this kind of proceedings.

As far as the substance of the mechanism is concerned, we deplore the fact that the same court conducting the main proceedings, in fact the same judges, will examine the acceleratory complaint. As justice must not only be done, but must be seen to be done, this element will affect the perception on the impartiality of the decision. It is a good point the fact that an appeal is provided in case the complaint is rejected. Still, an acceleratory remedy before the appellate court, without an appeal of the decision would have offered a more impartial appearance of the mechanism. But, even when the same judges reach the conclusion of an undue delay, they will indicate themselves the measures to be taken. Or, given the active role of the judge, it would seem to us that they already are aware of the measures to be adopted in order to assure a reasonable length of proceedings.

The third remark is targeting the grounds for lodging such a complaint: in great part, the disrespect of legal and judicial deadlines. The criteria enshrined in the case-law of the Court would become useless and still with the respect of all legal and judicial time-limits sometimes the proceedings are excessively long, as the provisions are permissive or the disrespect is not accompanied by sanctions.

Another remark concerns the absence of any compensatory element; furthermore, penalties are provided in case of abuse of the right to complaint. Taking into account the fact that the examination of the complaint does not have a suspensive effect and the short time –limit for the adoption of a decision, the sanctions imposed have a discouraging effect on the interested party.

Conclusions

The acceleratory remedy, as part of the effective remedy stipulated in article 13 of the Convention, is essential as it offers the possibility to reduce the already length of a judicial proceeding. It is also a fact that its preventive role is limited: in fact, it can and should be used an

instrument to evaluate on a regular basis the length of a given proceeding, in order not to extend the reasonable requirement. Still, its regulation and its functioning suggest that it intervenes at a stage where already there are some signs of undue delay. In this hypothesis, it is too late to prevent the excessive length, but still it can play a useful role in limiting its unreasonable character.

If we were to create a sketch of a theoretical acceleratory remedy, we would support an acceleratory remedy that be lodged before the appellate court (for cases of criminal investigation, the court competent to deliver the judgment on the merits in first instance or the court in which jurisdiction the enforcement procedure is taking place). The court should, in well-founded cases, fix a certain time-limit or decide to place the case on the priority list. It is true that a possible measure is thus being left aside: the reassignment of the case. Still, we expressed already certain doubts on the implications of such a measure and we consider that the gain of the involvement of the superior or appellate court is more consistent then the loss brought to the picture by the renunciation to this measure. In our view, the involvement of the appellate court would eliminate the perception, although unsubstantiated, that the main court is judge in its own case.

It is in the advantage of celerity that the procedure be a non-contentious and mainly written one; some measures preliminary to the examination of the case could be useful, such as the request of a report from the judge of the case, the request of the file or of a copy of the file, the notification to the other parties to the main proceedings on the lodging of an acceleratory complaint.

A deadline must be set for the adoption of the decision in the incidental proceedings, and this deadline should not exceed four month. In the evaluation of the well-founded character of the complaint, the criteria already enshrined in the case-law of the European Court should serve as guidance to the instance: the whole length of the proceedings, the time elapsed since the past acceleratory complaint, the complexity of the case, the nature of the case requesting special diligence from the part of the authorities, the behaviour of the interested party as well as the behaviour of the authorities and also the repercussions of the case on the personal situation of the interested party.

In case where the well-founded character of the complaint is established, the measures directed to accelerate the procedures could imply, *inter alia*: fixing a time-limit for the performance of certain procedural acts, placing the case on the priority list, eventually the reallocation of the case to a different court or taking over the case by the appellate court. Although possible in theory, the last measure is not very recommendable, as it deprived the individual or the entity of an appeal. In any event, the appellate court will not offer any indication on the factual elements of the case nor suggest any solution to be endorsed by the main court.

Once the length of the proceedings evaluated as excessive, the main court should benefit of a limited time to perform required procedural acts and to deliver a decision on the merits. For this reason, a new acceleratory complaint should only be admissible after a certain period; a six to twelve month term is in our view a reasonable and allows for the proper decision to be adopted in the main proceedings. The actual prohibition limit should be established by the appellate court, after due consideration of elements like the whole length of the proceedings, the stage of the proceedings in the moment of the evaluation and the realistic chances of a solution.

For the sake of celerity, the points of a possible appeal to a decision in acceleratory proceedings should be strictly listed by the legislation. This would avoid a ¨process about the process¨; moreover, the appeal in the acceleratory proceedings, given the other elements, would not justify on the grounds of guaranteeing impartiality.

In our view, this is the model that should be followed by the Romanian authorities. The specific provisions concerning the partial of final compensation, the source of this compensation are the legislator's choice. Still, the Romanian legislator needs to make a choice, in order to provide the effective remedy and avoid complaints before the European Court. Complaints that, in the end, will only lead to the same requirement: the creation in the domestic legal order of an effective remedy, combining elements of acceleratory and compensatory nature.

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THE NECESSITY OF ENSURING PERSONAL RELATIONSHIPS WITH THE MINOR. GUARANTEEING THE BEST INTEREST OF THE CHILD IN TERMS OF THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract
We can not ignore, concerning the regulation of relationships between parents and children, a real assessment of the child's best interest, this being left to the courts or competent authorities' decision. An issue that needs to be clarified is the divorce situation, when the court entrusts the child to one of the parents, who prevents the other one to have contact with him. Although the legal text refers only to acts committed after the pronouncement of the sentence of entrusting custody of minor, however the judicial practice stated that it is also about those situations in which these acts are committed before pronouncement of the judicial sentence. In this regard, assessing the child's best interest is also a sensitive issue and extremely important by the fact that the court must maintain a balance between the need to ensure a child's growth and harmonious development and respect for privacy and family, as it is covered in Article 8 of the European Convention on Human Rights, even if it is about the right of the child or of one of his parents.

Keywords: *personal relationships, child's best interest, entrusting custody of minor, parents rights, ECHR*

Introduction

Taking into consideration the complexity and variety of situations wherein each child finds him/herself, the legislator intentionally allows the courts a free hand in deciding what is in the child's best interest, starting with a concrete assessment of the specific circumstances of every case. The necessity of ensuring the personal relationships with the minor is included among these desiderata. This is a sensitive and extremely important problem in terms of the fact that the court has to maintain a balance between the necessity to ensure the upbringing and harmonious development of the child and the respect for the child's right to a private life and a family, as it is stipulated by article 8 from the European Convention of Human Rights, whether it concerns the rights of the child or of either of the parents.

We are of the opinion that the best interest of the child is a criterion that must govern every decision or action of every person, public institution or authorized public institution and which involves the child directly. This is the reason why we proceed to an *in extenso* interpretation of the text of the law with direct applicability to the problems that arise in the factual reality. Precisely because the field of children's rights has substantially grown and even though the regulation of these rights is considerably evasive, we have proceeded in this study to analyse the decisions of the European Court of Human Rights, the more so as the decider does not establish by law any reference points in accordance with which the best interest of the child should be arranged.

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1. The problematics of ensuring the personal relationships with the minor in case of non-compliance with the measures concerning the custody of the minor. A premise situation.

As stipulated in the text of article 307 of the Criminal Code the keeping a minor without the consent of the other parent, may constitute the offence of non-compliance with the measures concerning the custody of the minor, if through this action the upbringing and the development of the child is jeopardised. The parent to whom the child was not entrusted retains, the non-custodial parent retains, as we have mentioned, the right to watch over the upbringing and the education of the minor. Taking the child from the custodial parent must be well-grounded, meaning that it must be determined by reasons that demonstrate that entrusting the child to that parent would have negative consequences on the child's physical and emotional development[1]. Consequently, this is the situation, in which the parent granted custody can no longer ensure the conditions necessary for an appropriate development, in which case the said action no longer constitutes an offence. In the assessment of such a situation both material possibilities as well as emotional relationships formed between the minor and the non-custodial person are taken into consideration. In this instance, it has been established that the request of the parent for the return of the child from any person that keeps him/her without the right to do so shall be rejected, if the return is contrary to the interests of the child[2].

At the same time, the repeated prevention of the person entrusted with the minor, or of either parent from having a personal relationship with the child may present certain elements that constitute an offence as stipulated in article 307 of the Criminal Code. This is the case, in which for sound reasons the child is entrusted to another person to be brought up and educated. Such a decision may be made by the court when it judges that the parents are guilty of negligence, without constituting a grave offence or without abusing their parental rights and responsibilities, and thus still jeopardising the health and development of the child. In this situation, one must guarantee the parents the right to maintain a personal relationship with the minor, as they have the obligation to raise the child without making any decisions concerning the child's person. The duty to protect and watch over the child rests in such a case with the person entrusted with the child's upbringing and education.

Among the cases adjudicated by specialized legal bodies, situations may arise, in which the custodial parent is guilty of negligence and abuse. In this case the non-custodial parent may contact the police to investigate the danger such an attitude may cause the person of the minor. This is the ideal situation in which emergency protective measures may be taken by the social service. However, there are situations in which one intervenes on one's own authority, as we say, by giving the child to the non-custodial parent without receiving the permission of the custodial parent. This action seems completely justified, as long as it does not endanger the development of the child.

The existence of court decisions whereby the court entrusts the minor to another person to be raise and educated, as well as denying the parents the right to have a personal relationship with the child, within the terms set by the respective parties or by the judicial body, may be the focus of criminal investigations. Criminal investigative authorities are responsible for classifying the conditions, in which the child's upbringing and development are endangered, and for ascertaining whether such an action has been perpetrated.

In this sense, throughout the investigation, the respective authorities must keep establishing the circumstances of every case, the material and moral conditions that each parent offers, but also the best interest of the child.

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[1] Trib. Mun. Bucureşti, secţ. a III-a civilă, Dec. nr. 826/1993, in *Culegere de practică judiciară a Tribunalului Bucureşti, (*1993-1997):212-213; C.S.J., secţ. civ., Dec. nr. 2448/2003, in *Buletinul jurisprudenţei 1993*, (1993): 110-112.

[2] R. Drăghici, „În legătură cu infracţiunea de nerespectare a măsurilor privind încredinţarea minorului", in *Revista Română de Drept* nr. 6(1971):85.

2. The special situation of ensuring the personal relationship with the minor in case of divorce. The lato sensu interpretation of article 307 paragraph 2 of the Criminal Code

In legal practice, a special case has been recorded: when by a court decision in a divorce case a minor is entrusted to the mother to be raised and educated, with the obligation to allow the father the right to visit on predetermined dates. Despite all the father's attempts, the mother has repeatedly prevented him from making contact with the minor within the terms set through the decision of the court.

Concretely speaking, it concerns a court decision whereby the minor is entrusted to another person and the abusive violation of its terms, by preventing any contact between the child and his parents. Foreseeing such a situation is determined by the gravity of the action, whereby a minor is abusively estranged from one or both parents and which can weaken the family relationships and endanger the upbringing and education of the minor[3].

A problematic situation is the one in which, in case of divorce, the court may entrust the minor to one of the parents, who then prevents the other parent from making contact with the minor. Although the legal text is concerned only with the actions of prevention perpetrated after the court entrusted the child, the judicial practice states that it concerns those situations, in which the preventative actions are perpetrated before the court rules on the matter, every time the court establishes the residence of the minor with one of the parents and before the divorce is pronounced[4].

This text has been criticised for expressly specifying only the hypothesis of entrusting the minor through a court ruling to be raised and educated by one of the parents or by another person, and not the cases of establishing the residence of the child with one of the parents, until the divorce is settled. This means that the other parent is considered deprived of parental rights and the child is deprived of the protection of both his parents, which implies that the stipulations are interpreted in the aforementioned sense[5].

Speaking for ourselves, we consider, along side other authors, that the text of article 307, paragraph 2 from the Criminal Code should be interpreted lato sensu, and with respect to the situations that may arise before the court's final ruling whereby entrusting one of the parents with the upbringing and education of the child.[6] Consequently, in case the divorce proceedings have not concluded yet, if the court decides to temporarily establish the residence of the minor with one of his parents and this parent prevents the other from having contact with the child, then the court must ascertain, through an extensive applicability of the text of the law, the existence of the offence stipulated by article 37, paragraph 2 from the Criminal Code.

Therefore, the action of the parent, with whom the minor resides until the divorce proceedings end, to prevent repeatedly the other parent from maintaining a personal relationship with the minor, within the terms set by the court ruling, constitutes the offence of violating the terms of the custody agreement.

Throughout the criminal investigation, the judicial authorities need to ascertain to what degree the action of preventing contact with the non-custodial parent represents a danger to the child. Obviously, the parents' separation results in a change of the way their rights and obligations to the child are exercised or fulfilled[7]. The researched situations differ depending on whether the child was entrusted to one of the parents, a relative or any other person or protective institution.

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[3] Al. Boroi, *Infracțiuni contra unor relații de conviețuire socială*, (Bucuresti: Ed. ALL Beck, 1998), 53.

[4] T. Toader, *Drept penal român. Partea specială*, ediția a 4-a, revised and updated, (Bucuresti: Ed. Hamangiu, 2009), 429.

[5] Proc. Jud. Prahova, ord. from 28 August 1979, in case 29/II/1979, with notes by N. Puşcaciu and N. Pleşan in *Revista Română de Drept* nr. 9(1980): 46.

[6] O. Loghin, T. Toader, *Drept penal român. Partea specială*, (Bucuresti: Casa de editură şi presă "Şansa SRL", 1999), 518.

[7] G. Raymond, *Droit de l'enfance et de l'adolescence*, 5-e édition, (Paris: Litec, 2006), 161; Ş. Cocoş, *Dreptul familiei*, vol. II, (Bucuresti : Ed. Lumina Lex, 2001), 167.

Therefore, even in case of a divorce, the rights of the parents remain, the non-custodial parent retains the right to exercise his/her rights as he/she is still responsible for the child's upbringing[8]. In other words, the non-custodial parent will continue to exercise the parental rights acknowledged by law (the right to watch over the child's upbringing and education and the right to guide the child in all respects). We must also mention that the non-custodial parent has not been assimilated by the parent deprived of parental rights. The law recognizes and grants the former, in virtue of his / her quality, a series of rights with regard to the child's person, rights that practically represent a guarantee to respect the constitutional right to a family and a private life.

3. Concrete ways of exercising the right to have a personal relationship with the minor

Pursuant to article 43 of the Family Code, the non-custodial parent is guaranteed the right to have a personal relationship with the minor, as well as to watch over his/her upbringing, education, teaching, and professional training, retaining also the right and the duty to contribute to raising the child. In case this parent is prevented by the custodial parent from exercising this right, the former is granted the possibility to address the court, which will establish the practical ways of exercising this right, which the custodial parent must honour. Therefore, only the court has the power to decide whether the personal relationship with the minor poses a danger to the child. Consequently, the court has the possibility, as expressly regulated by law, to limit or prohibit the non-custodial parent from maintaining a personal relationship with the minor, if there are justifiable causes that endanger the physical, mental, emotional, moral and social development of the child.

With regards to the ways in which the parent's right to have a personal relationship with the child, these are extremely diversified and involve any form of contact with the child, and namely[9]: meetings between the child and the non-custodial parent, visiting the child at his/her home; living with the non-custodial parent, for a predetermined period of time; correspondence or any other form of communication with the child; sending the child updates about the non-custodial parent; sending the non-custodial parent updates about the child, including recent photographs, medical or school evaluations; also visiting the parent at their home or visiting the child at their school etc.

According to legal practices, the right of the parent to have personal relationships with the child may not be limited except if that right was abusively exercised. If this is not proven, the exercise of this right cannot be disturbed by the mandatory presence of the other parent, communication between the non-custodial parent and the child shall take place in a natural manner, without any restrictions[10]. Therefore, only in special cases, when it is ascertained that exercising this right by the non-custodial parent is not in the child's interest, the court may prohibit visitation. This right may be removed for serious reasons, for example, anything that could severely trouble the child (alcoholism, inappropriate conduct towards a child)[11].

We must also mention the fact that, in case the parents cannot come to an understanding concerning the way, in which the parental rights and obligations are to be exercised or fulfilled, the court has the authority to decide on the conditions whereby ensuring the parents' right to have a personal relationship with the child[12]. The child has a right to know his/her parents and to be raised by them, therefore it is necessary that personal relationships be formed and maintained between the child and the non-custodial parent, in case the child cannot benefit equally from the protection of both parents. The best interest of the child must be observed twofold in this case. Firstly, the court must establish whether the interest of the child dictates that this right be acknowledged or whether it

[8] Bucuresti Court of Appeal, Sect. I pen., Dec. no. 391/1996 (unpublished)

[9] Art. 15 alin. 4 of Law no.272/2004 on the protection and promotion of the rights of the child, published in Monitorul Oficial al României, part I, no. 557 from 23 June 2004

[10] Sect. III civ., Decision nr.560/8.04.1994 (unpublished).

[11] R. A. Garder, *Les enfants et le divorce, (*Paris : Éd. Le Hennin et Éd. Ramsaz, 1980), 244.

[12] G. Raymond, *Droit de l'enfance et de l'adolescence*, 5-e édition, (Paris: Litec, 2006), 161.

prohibits such a relationship, following the fact that there are clear and well-grounded reasons for this: the life and physical and mental health of the minor are jeopardised by the parent's condemnable behaviour. Secondly, the court must decide not only on the matter of granting custody of the child, but also on more precise aspects concerning the exercise of this right, as it is necessary to find the best practical means of maintaining the parent – child relationship.

4. The Jurisprudence of the European Court of Human Rights in matters of ensuring the personal relationships with the minor

It is obvious, that after the divorce, the child can no longer live with both parents. The law thus grants one parent the chance to exercise their parental rights. The law must find a balance between the parents' desire for freedom and the exercise of their parental responsibilities. Notwithstanding all of these, every law, every court ruling remains without effect, thus depriving the child of his/her parent's love[13]. According to the European Court of Human Rights, the court rulings concerning the custody of the child must keep in mind aspects pertaining to equality.

Not even in the case of entrusting the child during divorce proceedings, does the ascertaining of the child's best interest have any legal criteria, and thus the courts decide on this matter. We consider that in the court ruling, whereby the child is entrusted to either parent, the right of the child to maintain their relationship with the other parent as well as a visitation schedule and the practical ways of exercising this right must be well established. Therefore, in case of divorce, article 8 stipulates the right of the non-custodial parent to visit, in order to maintain contact with the minor[14], if the child's best interests do not prohibit it. Such being the case, any parent that does not live with their child has the right to maintain contact with the child. The European judges condemn any difference of treatment with regard to the right of divorced fathers or fathers of children born out of wedlock to visit their children. In this situation, the state has a positive obligation not to impede the father from forming a personal bond with the child, as long as both of them want to.

With regards to the carrying out a court ruling whereby a child is entrusted to either parent after the divorce, the court has decided that the obligation of the national authorities to take certain steps to reunite the child with the non-custodial parent, in case the child resides with the other parent[15]. The national authorities must make every effort to maintain cooperation among all the persons and institutions involved, in order to reunite the child with his/her parent, and the right of these authorities to resort to coercive measures is limited by the rights and the interests of all the persons involved and especially the best interest of the child. Therefore, in case contact with the parents would risk to threaten these interests or to encroach upon the child's rights, the national authorities have the duty to ensure an equitable balance of all interests[16].

Taking into consideration the best interest of the child, the case of Sahin v. Germany, the European Court of Human Rights has established that the refusal of national jurisdictions to grant the claimant the right to visit his/her child, born out of wedlock, was completely justified by the serious tensions between the parents, which have constituted pertinent reasons for this ruling. The Court admitted that the rulings in question were made in the child's best interest, as there is a risk that the respective parental visits may affect the child's normal development within the family, with which the child resides, especially if the agreement between the parents to have family therapy had failed. With regards to the possibility of establishing contact between the child and the claimant, the Court decided that subsequent psychological expertise in this case is at the discretion of the national

[13] H. Fulchiron, *Autorité parentale et parents désunis*, (Éd. du Centre National de la Recherche Scientifique, 1985), 31.

[14] European Court of Human Rights, Hendriks v The Netherlands, Decision form 8 March 1982

[15] C. Bârsan, *Convenția europeană a drepturilor omului. Comentariu pe articole*, (Bucuresti : Ed. All Beck, 2005), 630.

[16] European Court of Human Rights, Ignaccolo – Zenide v Romania, decision from 26 June 2003.

courts[17]. Therefore, we do not consider it crucially necessary to request the advice of a psychologist in the matter of granting the non-custodial parent the right to visit, keeping in mind in this point every circumstance of the case.

Not carrying out the rulings of the court with regard to visitation and the custody of the child may pose certain problems, in applying article 8 of the European Convention of Human Rights, as proved also by the ruling in the case of Ignaccolo-Zenide v. Romania[18]. The criterion consists in knowing whether the authorities have taken all the necessary measures that could be reasonably taken in the circumstances of the respective case in order to carry out the terms of the ruling. By underlining the fact that coercive measures are generally undesirable in cases involving children, the Court has accepted that resorting to sanctions is allowed in such a case, where the behaviour of the custodial parent is illegal.

Conclusions

An interesting issue which really affects the future of education and raising a child in case of divorce is related to child custody to one of the parents. The problem of ensuring personal relationships with the minor can not be treated otherwise than in accordance with the principle of best interests of the child, providing the exercise of conventional fundamental rights. The court must once again consider the best interests of the child, without benefit of legal criteria. It must decide not only on child custody, but also about practical matters related to the exercise of this right, in order to find the best practical means of maintaining these relationships. We believe that the judicial decision of custody should determine the child's right to maintain personal relationships with the other parent, but also the program of visiting and the concrete ways of exercising this right. It should be borne in mind in this respect, for a better functioning of the legal system in Romania, an interweaving of national jurisprudence with ECHR jurisprudence in which concerns the assessment of child's best interest in custody matters.

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[17] European Court of Human Rights, Sommerfeld v Germany, decision from 8 July 2003.
[18] European Court of Human Rights decision, 25 ianuarie 2000 in the case of Ignaccolo-Zenide v Romania.

THE RESULT OF THE TRANSPOSITION OF EU DIRECTIVES INTO NATIONAL LEGISLATION. THE FIRST CASE AGAINST ROMANIA REGARDING THE IMPLEMENTATION OF THE RACIAL EQUALITY DIRECTIVE (2000/43/EC) AND OF THE EQUAL TREATMENT DIRECTIVE (2000/78/EC)

CRISTIAN JURA*

Abstract

The purpose if this research paper is to analyze how the two directives, The Racial Equality Directive (2000/43/EC) and of The Equal Treatment Directive (2000/78/EC), were transposed into national legislation. One objective of the paper is to present and analyze some outcomes of the transposition: the national legislation on combating discrimination and the national institutions in this field. The second objective is to present and analyze the first case against Romania regarding the transposition of The Racial Equality Directive (2000/43/EC) and of The Equal Treatment Directive (2000/78/EC) into national legislation: preliminary ruling C-310/10 (Agafiței and Others, Romania) and the possible impact of this case. Council Directive 2000/43 is implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. Directive 2000/78/EC is establishing a general framework for equal treatment in employment and occupation. The case stems from a salary dispute Agafitei and others, staff of the national anti-corruption board and management research to fight organized crime and terrorism. There is a reward past circumstances arise system with two tracks: one that is followed by the 'attorneys' and by other staff. For the first track counts along the length of service for the second. Since there is no (additional) qualification requirements for the group of prosecutors, according to defendants pay equal. In a national procedure Agafitei others (defendants in the national procedure) in the right, and their employers to pay the lost wages. The respective employers, however, did not agree and make cassation.

***Keywords**: transposition, discrimination, National Council for Combating Discrimination, European Court of Justice, preliminary ruling*

Introduction

In 2010 there was introduced Reference for a preliminary ruling from the Curtea de Apel Bacău (Romania) lodged on 29 June 2010 — Ministerul Justiției şi Libertăților Cetățeneşti v Ştefan Agafiței and Others[1].

This is the first case first case against Romania regarding the transposition of The Racial Equality Directive (2000/43/EC)[2] and of The Equal Treatment Directive (2000/78/EC)[3] into national legislation: Preliminary ruling C-310/10 (Agafiței and Others, Romania).

In order to have a clear picture of this case, there must be analyzed a series of institutions, most of them used for the firs time since Romania became member of European Union.

The research will be structured based on four main themes:

- European Union and discrimination;
- The national institutions in the field of combating discrimination;
- The preliminary ruling in front of Court of Justice.

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[1] OJ C234/27 from 28.08.2010

[2] OJ L180/22 from 19.07.2000

[3] OJ L303/16 from 02.12.2000

Based on the four analyzes we could draw same conclusions related on possible impact of this case on Romania.

European Union and Discrimination

It is well known that the combating discrimination legislation lies at the level of European Union in three distinct Directives. The three Directives are:

- Council Directive 2000/43/EC – Racial Equality Directive: establishes a framework against discrimination based on racial or ethnic origin inside and outside the labour market;

- Council Directive 2000/78/EC – Employment Equality Directive: establishes a framework for equal treatment in employment and occupation, and in Article 1 lays down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation;

- Council Directive 2004/113/EC[4] – Gender Directive (and Gender Recast Directive 2006/54/EC): establishes a framework for equal treatment between men and women in access to and supply of goods and services.

In addition to the Council Directives, European Union considers combating discrimination one of the top priorities. In 2008 was issued another proposal for a new Directive, so called Horizontal Directive, on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.

There are another two documents important for this issue, both Communications From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions: 2008 Non-discrimination and equal opportunities: A renewed commitment[5] and 2008 Renewed social agenda: Opportunities, access and solidarity in 21st century Europe[6].

Recently, February 2011, was published a study called: EU – MIDIS European Union Minorities and Discrimination Survey - Data in Focus Report – Multiple Discrimination[7].

The referring court, Curtea de Apel Bacau, refers to only 2 EU directives out of the three mentioned above. The referring court refers to Directive 2000/43/EC – Racial Equality Directive and to Directive 2000/78/EC – Employment Equality Directive: establishes a framework for equal treatment in employment and occupation.

More precise Curtea de Apel Bacau refers to the art. 15 of Directive 2000/43/EC – Racial Equality Directive: establishes a framework against discrimination based on racial or ethnic origin inside and outside the labour market and to art. 17 of Directive 2000/78/EC – Employment Equality Directive

The content of the two articles mentioned are very much similar.

The art. 15 of Directive 2000/43/EC is named "*Sanctions*" as has the following content: "*Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 19 July 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them.*"

The art. 17 of Directive 2000/43/EC is named "*Sanctions*" as has the following content: "*Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that*

[4] OJ L373/37 from 21.12.2004
[5] COM (2008) 420
[6] COM (2008) 212
[7] www fra.europa.eu

they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. Member States shall notify those provisions to the Commission by 2 December 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them."

The National Institutions in the Field of Combating Discrimination

The National Council for Combating Discrimination (NCCD) was established in august 2002[8].

The National Council for Combating Discrimination was established pursuant to the adoption of Government Ordinance no. 137/2000[9] and Government Decision no. 1194/2001 on organization and function of NCCD. These legal acts represented the transposition of the community legislation in the field at national level. At European level there are institutions assigned to human rights protection and combating discrimination but NCCD is unique, its activity combining 14 discrimination criteria, no other institution having such a vast sphere of action, including sanctioning.

The National Council for Combating Discrimination (NCCD) is the autonomous state authority, under parliamentary control, which performs its activity in the field of discrimination[10].

The main Competences and responsibilities of the NCCD are[11]:

a) prevention of discrimination deeds through information and awareness campaigns regarding human rights, discrimination effects, the principle of equality, formation and informing courses, projects and programmes at local, regional and national level, studies realization, reports etc

b) the mediation of discrimination acts is the way to solve the discrimination deeds on friendly terms of the parts implicated in the discrimination case, in the presence of the National Council for Combating Discrimination representatives. The National Council for Combating Discrimination aims to reduce and eliminate the discrimination acts and by no means to penalize.

c) the investigation, ascertainment and sanction of discrimination acts. For the proper analyze of the cases and decision making about petitions received or internally generated complaints, the Steering Board has means at its disposal in order to investigate the cases, from which it establishes the existence of any discrimination act and penalizes it accordingly.

d) the monitoring of discrimination cases as a result of the ascertainment of discrimination cases by NCCD, through subsequent supervision of the involved parts.

e) granting specialized assistance to the victims of discrimination. The NCCD juridical advisers explain the legislation to those interested through assisted guidance regarding the activity of filing a petition and additional information that results from this.

Following the receiving of your petition, it will be registered and forwarded to the Steering Board, in order to be solved. The NCCD could be notified within one year from the date the discrimination took place or the date a person took cognizance of its commission[12]. The discriminated person may demand the annulment of the discrimination facts' consequences and the re-establishment of the situation that existed before the discrimination deed[13]. The term for solving your petition is of 90 days[14]. The Steering Board will ascertain the existence of the discrimination

[8] C. Jura, Combating discrimination in Romania, CH Beck Publishing House, Bucharest, 2004

[9] Published in the Official Gazette no. 99 from 8 of February 2007

[10] Section VI, art. 16 from Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination as modified and approved

[11] www.cncd.org ro

[12] Section VI, art. 20 (1) from Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination as modified and approved

[13] Section VI, art. 20 (3) from Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination as modified and approved

[14] Section VI, art. 20 (7) from Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination as modified and approved

deed by compulsory summoning of the parts, that is realized by any means that ensures the confirmation of receive. The absence of parts involved at the hearings does not affect the petition's solving. In order to take a proper decision, NCCD can perform additional investigation, or NCCD can call the parts involved (you and the person you accuse of discrimination) at our headquarters for hearings[15].

The persons considered discriminated have the obligation to prove the existence of facts from which it may be presumed that there has been discrimination and the person you accuse has to prove that these deeds do not constitute discrimination[16].

The Members of the Steering Board may apply sanctions when they ascertain discrimination has taken place. The sanctions can be warnings or fines of between 400 to 4.000 lei, if the discrimination affects a natural person, and of between 600 to 8.000 lei, if the discrimination affects a group of persons or a community[17].

The solution (The Decision of the Steering Board) is transmitted in writing to the discriminated persons and the person accused of discrimination within 15 days from its adoption in the Steering Board meeting. In another 15 days' time from the receiving of the Steering Board Decision, the parts can dispute it in instance if they are not pleased with the solution of the case. The judicial stamp value is free for both parts[18].

For all discrimination cases, the victims are entitled to claim damages, proportional to the act, as well as the restoration of the situation prior to discrimination or to the cessation of the situation created by discrimination, in accordance with common law. Upon request, the court can order that the competent authorities withdraw the licence of legal entities that significantly prejudice society by means of a discriminatory action or have repeatedly violate the provisions of the Government Ordinance no. 137/2000. Human rights non-governmental organizations can appear in court as parties in cases involving discrimination pertaining to their field of activity and which prejudice a community or a group of persons[19].

The prevention of discrimination deeds is a priority among the Council's functions and prerogatives and the correlation and observance of the guidelines with the objectives and priorities established in the National Strategy implementing the measures of preventing and combating discrimination (SNIMPCD) 2007 -2013 is essential in achieving the objectives of this field.

In order to enforce the guidelines in preventing and combating discrimination, on the basis of policies which promote equality of opportunity, mutual understanding and respect, the National Council for Combating Discrimination sought to strengthen cooperation with civil society and institutions of public administration and local government, increasing knowledge and awareness of the population with regard to the non-discrimination principles.

In the last years, NCCD conducted campaigns which had well established target groups, such as: pre-school children, pupils, students and Master students, kindergartens, schools, high schools and university teachers, clerks, policemen, gendarmes, judges, lawyers, members of non-governmental organizations, doctors and health personnel, representatives of national minorities, etc, both in Bucharest and across the country. We wish to underline the significant fact that these activities pursued the objectives of the National Strategy implementing the measures of preventing

[15] Section VI, art. 20 (4 and 5) from Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination as modified and approved

[16] Section VI, art. 20 (6) from Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination as modified and approved

[17] Chapter 3, art. 26 from Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination as modified and approved

[18] Section VI, art. 20 (9 and 10) from Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination as modified and approved

[19] Chapter 3, art. 27 from Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination as modified and approved

and combating discrimination during 2007 -2013, drawn up by the National Council for Combating Discrimination in 2007.

Also, some of the activities have pursued and fallen under the scope of the specific European issues 2008 – European Year of Intercultural Dialogue, designated as such by a joint decision of the European Parliament and the European Council, at the end of 2006.

The preliminary ruling in front of Court of Justice

The procedure of preliminary ruling is based on the Chapter 9 Preliminary Rulings and other References for Interpretation, art. 103 – 104 from Consolidated Version of the Rules of Procedure of the Court of Justice (2010/C 177/01)[20] and on Information Note on References from National Courts for a Preliminary Ruling (2009/C 297/01)[21].

Under the preliminary ruling procedure, the Court's role is to give an interpretation of European Union law or to rule on its validity, not to apply that law to the factual situation underlying the main proceedings, which is the task of the national court. It is not for the Court either to decide issues of fact raised in the main proceedings or to resolve differences of opinion on the interpretation or application of rules of national law.

8. In ruling on the interpretation or validity of European Union law, the Court makes every effort to give a reply which will be of assistance in resolving the dispute, but it is for the referring court to draw the appropriate conclusions from that reply, if necessary by disapplying the rule of national law in question.

Under Article 267 TFEU, any court or tribunal of a Member State, in so far as it is called upon to give a ruling in proceedings intended to arrive at a decision of a judicial nature, may as a rule refer a question to the Court of Justice for a preliminary ruling

All national courts must therefore refer a question to the Court when they have doubts about the validity of such an act, stating the reasons for which they consider that that act may be invalid.

A national court or tribunal may refer a question to the Court for a preliminary ruling as soon as it finds that a ruling on the point or points of interpretation or validity is necessary to enable it to give judgment; it is the national court which is in the best position to decide at what stage of the proceedings such a question should be referred.

A reference for a preliminary ruling calls for the national proceedings to be stayed until the Court of Justice has given its ruling.

Base on these rules of procedure Curtea de Apel Bacău introduced Reference for a preliminary ruling:

1. Do Article 15 of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (1) and Article 17 of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (2) — both transposed into national law by OG (Ordonanta Guvernului (Government legislative decree)) No 137/2000, as republished and amended — preclude national legislation or a judgment of the Constitutional Court (Constitutional Court) prohibiting the national judicial authorities from awarding to claimants who have been discriminated against the compensation for material and/or non-material damage which is considered appropriate in cases in which the compensation for the damage caused by discrimination relates to salary rights provided for by law and granted to a socio-professional category other than that to which the claimants belong (see, to that effect, judgments of the Constitutional Court No 1325 of 4 December 2008 and No 146 of 25 February 2010)?

2. If the answer to Question 1 is in the affirmative, are the national courts required to await the repeal or amendment of the provisions of national law — and/or a change in the case-law of the

[20] OJ C177/1 from 02.07.2010
[21] OJ C297/1 from 05.12.2009

Constitutional Court — which are, ex hypothesi, contrary to the provisions of Community law, or are the courts required to apply Community law, as interpreted by the Court of Justice of the European Union, directly and immediately to the proceedings pending before them, declining to apply any provision of national law or any judgment of the Constitutional Court which is contrary to the provisions of Community law?

Basically the question asked is Do Article 15 of Council Directive 2000/43/EC and Article 17 of Council Directive 2000/78/EC preclude national legislation or a judgment of the Constitutional Court prohibiting the national judicial authorities from awarding to claimants of the Constitutional Court prohibiting the national judicial authorities from awarding to claimants?

The provisions of the Government Ordinance no. 137/2000 were interpreted by Constitutional Court of Romania[22] by several decisions: Decision No.818 of July 3rd 2008 on the objection of unconstitutionality of the provisions under Article 1, Article 2 paragraph (3) and Article 27 of the Government Ordinance no.137/2000 on the prevention and punishment of all forms of discrimination[23], Decision No.819 of July 3rd 2008 on the objection of unconstitutionality of the provisions of Article 1, of Article 2 paragraphs (1) to (3), of Article 6 and of Article 27 paragraph (1) of Government Ordinance no.137/2000 on the prevention and punishment of all forms of discrimination[24], Decision No.820 of July 3rd 2008 on the objection of unconstitutionality of the provisions of Article 1, of Article 2 paragraph (3) and of Article 27 paragraph (1) of Government Ordinance no.137/2000 on the prevention and punishment of all forms of discrimination[25], Decision No.821 of July 3rd 2008 on the objection of unconstitutionality of the provisions under Article 1, Article 2 paragraphs (1), (3) and(11) and Article 27 of the Government Ordinance no.137/2000 on the prevention and punishment of all forms of discrimination[26] and Decision No.997 of October 7th 2008 on the objection of unconstitutionality of the provisions under Article 20 of the Government Ordinance no.137/2000 on the prevention and punishment of all forms of discrimination[27].

The important Decision of Constitutional Court in the analyzed case is Decision No.997 of October 7th 2008.

As grounds for the objection of unconstitutionality the Constitutional Court shows that, as from the interpretation of the criticized legal text, results that the decisions of the Steering Board of the National Council for Combating Discrimination are given only with a view to investigate and prosecute wrongdoing facts or acts of discrimination, acts construed as illegal actions or omission that violate the individual right rules, causing damage to a person. Nothing contained in Government Ordinance no.137/2000 empowers the College to issue resolutions in the exercise of the power of harmonization of legislation. This conclusion is required by several aspects, such as the need for referral to the Council within one year after the act was committed or within one year after the date on which the same could get to his knowledge, the burden of proving the act by the one who considers to be discriminated, the opportunity the use as evidence also audio and video recordings, application of fines, the enforceability of the Council decision as regards pecuniary penalty and the possibility of restoring the previous situation. A contrary interpretation, which would legitimize the National Council for Combating Discrimination to apply fines for the adoption of certain normative acts, would be a nonsense. Likewise, it is impossible to restore the situation preceding the discrimination „created" by a statutory provision by a resolution of the National Council for Combating Discrimination, the provisions of laws and ordinances enjoying, until proven otherwise, the presumption of constitutionality and those contained in an administrative act of the presumption

[22] www.ccr ro

23 Published in the Official Gazette (Monitorul Oficial) of Romania, Part I, no.537 of July 16th 2008

24 Published in the Official Gazette (Monitorul Oficial) of Romania, Part I, no.537 of July 16th 2008

25 Published in the Official Gazette (Monitorul Oficial) of Romania, Part I, no.537 of July 16th 2008

26 Published in the Official Gazette (Monitorul Oficial) of Romania, Part I, no.537 of July 16th 2008

27 Published in the Official Gazette (Monitorul Oficial) of Romania, Part I, no.774 of November 18th 2008

of legality. Therefore, it considers that Article 20 of Government Ordinance no.137/2000 is unconstitutional insofar as it is interpreted in the sense that it gives the Council the power to ascertain the breach of the principle of equality before the law by examining and censoring the solutions contained in regulations and administrative acts of normative type.

Examining the objection of unconstitutionality, the Court finds that, in essence, the author challenges the constitutionality of the judicial powers of the National Council for Combating Discrimination, which, according to Article 20 paragraph (3) of Government Ordinance no.137/2000, may order „the removal of the consequences of discriminatory acts and restoration of the situation preceding such discrimination", to the extent that discriminatory situations arise from the content of certain normative acts.

The decision issued by Constitutional Court decided to Allow the objection of unconstitutionality raised by the Ministry of Justice in the File no.7,604/99/2007 of Iaşi Court of Appeal – Contentious Administrative and Tax Division and holds that the provisions of Article 20 paragraph (3) of Government Ordinance no.137/2000 on the prevention and punishment of all forms of discrimination **are unconstitutional**, insofar as they can be interpreted as granting to the National Council for Combating Discrimination, as part of its jurisdictional activity, the power to cancel or refuse the application of certain normative acts with force of law, considering that they are discriminatory, and to replace them with rules established by means of the judiciary or with provisions contained in normative acts.

Conclusions

It is difficult to reach a conclusion because any conclusion could interfere with the judgment of Court of Justice in the case of a preliminary ruling, because I am a member of a Steering Board of the National Council for Combating Discrimination and because National Council for Combating Discrimination is one of the Intervening parties in this case.

But still there are some aspects that must be underline. In order to invoke a possible discrimination, there must be a case brought to National Council for Combating Discrimination and solved by Decision of Steering Board of NCCD. Only in the case that Steering Board decided there was an act of discrimination the victims are entitled to claim damages, proportional to the act, as well as the restoration of the situation prior to discrimination or to the cessation of the situation created by discrimination, in accordance with common law.

On the other hand National Council for Combating Discrimination, as part of its jurisdictional activity, has no the power to cancel or refuse the application of certain normative acts with force of law, considering that they are discriminatory, and to replace them with rules established by means of the judiciary or with provisions contained in normative acts. In this particularly case NCCD received no complain from a person or from an authority, not to forget that NCCD is the only the autonomous state authority, under parliamentary control, which performs its activity in the field of discrimination and which could ascertain a fact of discrimination.

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THE REQUIREMENTS FOR PROTECTION OF THE COMMUNITY DESIGN

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ABSTRACT

This paper aims at showing the key issues underlying the requirements for protection of the community design. According to the Council Regulation (EC) No 6/2002, a design must satisfy two main conditions to be protected by a Community design: novelty and individual character. A further consideration is the requirement of visibility, but only when it comes to register component parts of a complex product. Three main types of subject matters are excluded from protection: first, a Community design cannot relate to characteristics of the appearance of a product that are exclusively dictated by its technical function; second, the situation referred to as "must fit" and "must match" cases and, third, a design applied to or incorporated in a component part of a complex product if the component part does not remain visible during the normal use of the complex product. Also, Community designs contrary to public policy or to accepted principles of morality are excluded from protection.

One special interest of the paper is the recent jurisprudence of the community design courts in this field. A core element of the protection system is the role of the community court's jurisdiction in matters of community design. These are courts of Member States that have been designated by them as community courts, which have exclusive jurisdiction to decide on cases of breaches of rights of community designs. The evolving and contradictory decisions of the national instances implies that with respect to the evolution of a homogeneous case law on unified Community industrial property, the European Court of Justice has had and still has to fulfil its exclusive mission of informing national courts as to the direction, in which European Union law is to develop.

KEY WORDS: *community design, individual character, informed user, solely dictated by technical function, European Court of Justice*

I. INTRODUCTION

The Community Design Regulation (CDR)[2] states, in articles 4 to 9, that a design shall be protected by a Community design to the extent that it is *new* and has *individual character*. A further consideration is the requirement of *visibility*, but only when it comes to register component parts of a complex product. In addition, Community designs contrary to *public policy* or to accepted principles of *morality* are excluded from protection. The requirements for protection of community design mentioned above are circumstantiated using notions that entail further consideration and analysis. The present paper highlights, in the context of community design, these concepts and attempts to clarify them

The significance of the studied matter is relevant in outlining the protection conferred for the community design. The requirements for protection regarding novelty and individual character, actually, constitute absolute grounds for invalidity[3].

The paper illustrate that there are conflicting views over the clarification of this legal norms in the jurisprudence of the national instances, designated as European design courts and in the decisions of the Board of Appeal of the Office. Therefore, depending on the understanding of the notions mention above the validity of design will be established.

To clarify the concepts of novelty and individual character, it will be carry out an examination of the legal norms governing the issue, art 4-9 of the Regulation 6/2002. The attempt is to compare

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[2] Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, *OJ L 3, 5.1.2002, p. 1–24*

[3] Massa, Charles-Henry, and Alain Strowel. "Community Design: Cinderella revamped." *EIPR* (2003): 68-78.

and study these terms in light of the programmatic documents of the European Commission, the opinions of scholars, the recent decision of the Office for Harmonization in the Internal Market and the few existing judgements of the European General Court. One special attention is grant to the jurisprudence of the European design courts.

The issue of harmonization and unification of the legislation on design law, at the European Union, is a constant concern of the doctrine. Since the planning stage, proposals for a directive on the harmonization of national legislation on the design and the creation of the Community Design Regulation enjoyed an in depth comparative analysis, in an attempt to anticipate the possible interpretations of legal text (Mario Franzosi, 1996), (David Musker, 2002). It is recognized that design protection crosses all aspects of intellectual property rights (Uma Suthersanen, 2000; 2010)[4] and advantages and drawbacks of community design is consider (Massa and Strowel, 2003). The coverage of the legal norms governing the community design is present in the Romanian doctrine (Viorel Roş, 2003)[5], (Constantin Duvac and Ciprian Paul Romiţan, 2009)[6], (Alice Mihaela Postăvaru and Gheorghe Bucşă)[7]. Access to the decisions of competent national law courts is not simple. Some court decisions are published in annual collections, receiving annotations. (Henning Hartwig, 2007, 2008, 2009).

II. Novelty

Under article 5(1) of the Regulation"a design shall be considered to be new if *no identical design* has been made available to the public". Novelty is identified with the absence of identical designs publicly disclosed prior a reference date. Designs are considered identical if their features differ only in *immaterial details*[8]. In other words, according to Massa and Strowel, novelty consists in an objective non-identity exceeding immaterial details.

In the case of the protection of community design, the Commission did not intend to adopt the system of "novelty" within the meaning of patent law protection, although the drafting norm displays similarities, but to create a specific concept[9].

In this context, the Green Paper[10] indicates a two-step test presented below. In the first stage of the test, the design must not to have been anticipated by a design which appears as identical or substantially similar *to the circle of specialists* in the field and in the second stage, must be distinguished from other designs commonly known *in the eyes of an ordinary consumer*. The result of this first stage of the test would, therefore, be that designs which are not known by experts operating within the Community would be eligible for protection either because they are completely different from anything known by them at the specific point in time, or because they present, according to the assessment by an expert eye, sufficient differences from known designs to constitute creative independent development.

The second stage involves the evaluation of the test indicated by the "relevant public". While the Commission acknowledges that the differences can be less perceptible to an ordinary consumer, it

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[4] Suthersanen, Uma. Design law in Europe: an analysis of the protection of artistic, industrial, and functional designs under copyright, design, unfair competition, and utility model laws in Europe, including a review of the E.C. Design Regulation, the E.C. Design Directive, and international design protection. London: Sweet & Maxwell, 2000 (2nd ed., September 2010)

[5] Roş, Viorel. Dreptul proprietăţii intelectuale. Dreptul de autor şi drepturile conexe, Editura ALL Beck, 2005

[6] Duvac, Constantin, and Ciprian Paul Romiţan. *Protecţia juridico-penală a desenelor şi modelelor*. Bucureşti: Universul Juridic, 2009

[7] Postăvaru, Alice Mihaela, and Gheorghe Bucşă. *Designul comunitar. Ghid*. Bucureşti: Ed. OSIM, 2007

[8] Art. 5(2) of the Regulation

[9] Commission of the European Communities. Green Paper on the Legal Protection of Industrial Design: Working Document of the Services of the Commission, Brussels, 1991. parag. 5.5.1.3.

[10] Commission of the European Communities. Green Paper on the Legal Protection of Industrial Design: Working Document of the Services of the Commission, Brussels, 1991. parag. 5.5.5.4

points out the design rationale protection, which must be perceived as something different at the market level, where it plays its role in competition between products, and not at the more sophisticated level of the world of the experts.

As regards the interpretation of the expression *immaterial details*, the Board of Appeal of the Office considered, that as the only difference is ”a slight variation in the shade of the colour pattern in the contested design, this amounts to no more than a hardly noticeable difference in a detail”[11]

A recent decision of the OHIM Board of Appeal of 2 November 2010, in Case R 1086/2009-3, *Erich Kastenholz*, concern a contested RCD registered for ‘watch-dials’(represented below in grey scale). The invalidity applicant claimed that the RCD was not new since an identical design of a clock-face with the technique of overlapping coloured foils had been shown and published by an artist in exhibitions and catalogues between 2000-2005.

The board held that in the case of the RCD ”the intensity of the colours does not change gradually with the change of time” and that, ”by contrast, the clock-face of the earlier design is able to produce a wide spectrum of colours”

The differentiating features mentioned have a significant impact on the overall impression produced by the two designs and lead to a different perception by the informed user. The contested RCD, therefore, possesses individual character.

The two designs are not identical. It is clear that novelty and individual character, although presented as separate requirements in Articles 4 to 6 CDR, overlap to some extent. Obviously, if two designs produce a different overall impression on the informed user, they cannot be identical for the purposes of Article 5 CDR.[12]

It is considered that for establish novelty, the specific elements that confers the design its particular character should be taken into account, and not the general ones. A design should be considered new if its specific matter are different from the status quo of *"the existing design corpus”* (prior art).

The reference date for novelty is stated in article 7(a) of the Regulation no. 6/2002. A design shall be deemed to have been made available to the public if it has been published before the date on which the design for which protection is claimed *has first been made available to the public*[13] (in the

[11] OHIM, Decision of the Third Board of Appeal of 28 July 2009 In case R 921/2008-3 Věra Šindelářováv. Blažek Glass s r.o (Nail files)**,** parag. 25

[12] OHIM, DECISION of the Third Board of Appeal of 2 November 2010, In Case R 1086/2009-3, Erich Kastenholz v. qwatchme a/s (Watch-dials), parag. 25-27

[13] Articles 5(1)(a) and 6(1)(a) of the Regulation

case of an unregistered Community design) or before *the date of filing of the application for registration* of the design for which protection is claimed, or, if priority is claimed, *the date of priority*[14]. Publication can be achieved as a result of registration, or exhibited, used in trade or otherwise disclosed[15].

However, a design is not considered publicly disclosed where these events could not have become known in the normal course of business to the *circles specialized*[16] in *the sector concerned*, operating within the Community[17]. Sherman and Bently point out that this is a "safeguard clause" aimed at preventing a design form being unregistrable on the basis of prior obscure disclosures. The precise impact of this clause is difficult to predict, not at least because its wording presents a number of ambiguities[18].

As regards the interpretation of this provision of the regulation, can be reported the decision of the British courts in the case *Green Lane Products v PMS International*[19]. The case concerned infringement of a Community Design, registered for products indicated as "flatirons and washing, cleaning and drying equipment" by Green Lane Products and the trial was on a preliminary point: namely, which disclosures constituted prior art. The question here was, which was the "sector concerned": the sector of the prior art (i.e. massage balls) or the sector of the design (i.e. laundry balls). The judge held that the design would be infringed whatever the product, so that the registration did not merely cover "flat irons and washing, cleaning and drying equipment", but any product whatsoever. The judge concluded that the "sector concerned" was the sector of the prior art.

The Hamburg District Court held, in the case *Gebäckpresse I*[20] that

"an unregistered Community design acquires protection by being made available to the public for the first time within the territorial borders of the Community. A design registration of the same object published by the holder in a foreign country (China) prior to the disclosure of the unregistered Community design is not detrimental to novelty"[21].

Also is not considered to have been made available to the public a design that was disclosed only to a third party in explicit or implicit conditions of confidentiality. A disclosure shall not be taken into consideration for the purpose of applying Articles 5 and 6 and if a design for which protection is claimed under a registered Community design has been made available to the public by the designer, his successor in title, or a third person as a result of information provided or action taken by the designer or his successor in title; and *during the 12-month period preceding the date of filing of the application or, if a priority is claimed, the date of priority.*

In the case *Gebäckpresse I*[22], Hamburg District Court decided that:

"The presentation of the design in the context of contractual negotiations is subject to confidentiality even without explicit agreement on this point, and therefore does not constitute a fact detrimental to novelty".

In the Case R 608/2009-3, *Reinhold Gerstenmeyer* AB, the Board of Appeal of the Office[23] stated that"since it has been established that the prior design, which is identical to the RCD, was

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[14] Articles 5(1)(b) and 6(1)(b) of the Regulation

[15] OAPI, Decizia Camerei a treia de recurs din 26 martie 2010 in Cauza R 9/2008-3 *Crocs V. Holey Soles Holdings Ltd Inc*

[16] Commission of the European Communities. *Green Paper on the Legal Protection of Industrial Design: Working Document of the Services of the Commission.* Brussels:, 1991. parag. 5.5.5.2 " the specialists, designers. merchants, and manufacturers operating in the sector concerned"

[17] *Green Paper,* parag. 5.5.5.2 "The circle of relevant persons Is limited to those operating within the Community, but their knowledge is not subject to any territorial limitation"

[18] Bently, Lionel, and Brad Sherman. *Intellectual property law*. Oxford ; New York: Oxford University Press, 2004, pag. 629

[19] Green Lane Products Ltd. v PMS International Group Plc, Court of Appeal (UK), [2008] ECDR 15

[20] Landgericht Hamburg – Gebäckpresse I, Urteil vom 20. Mai 2005 – 308 O 182/04

[21] Hartwig, Henning. *Designschutz in Europa*. Ko ln ; Mu nchen [u.a.]: Heymann, 2007, pag.243

[22] Landgericht Hamburg – Gebäckpresse I, Urteil vom 20. Mai 2005 – 308 O 182/04

disclosed in 2004 well before the 12-month period preceding the date of priority claimed of 7 December 2006","it is of no relevance who the designer of the prior design was".

The rationale for the existence of this warranty clause is contained in the Preamble, which specified that the author should have the opportunity "to test the products embodying the design in the market place before deciding whether the protection resulting from a registered Community design is desirable"[24].

The same applies if the design has been made public following *abusive conduct*[25] against the author or his successor in title. The characteristic of an *abusive* conduct is underlined by the OHIM Board of Appeal in the decision of 8th March 2010, in Case R 1775/2008-3, *European Citizen's Band Federation* where it concludes that

The objection about the ineffectiveness of disclosure of the RCD under Article 7, paragraph 3, is unfounded. Disclosure is not the consequence of any abuse and does not, therefore, in this case described in paragraph 3 of Article 7 CDR[26].

III. Individual character

Article 6(1) provides that "a design shall be considered to have *individual character* if the *overall impression* it produces *on the informed user* differs from the overall impression produced on such a user *by any de*sign which has been made available to the public". It is specified that in assessing individual character, *the degree of freedom of the designer* in developing the design shall be taken into consideration[27].

As explained in the preamble "the assessment as to whether a design has individual character should be based on whether the overall impression produced on an informed user viewing the design *clearly* differs from that produced on him by the existing design corpus, taking into consideration the nature of the product to which the design is applied or in which it is incorporated, and in particular the industrial sector to which it belongs and the degree of freedom of the designer in developing the design".

Individual character is thus a difference in the overall impression on the informed user. Individual character seems to be more demanding than novelty as it refuses protection to overall *déjà vu*. In practice, individual character is likely to absorb novelty[28].

The approach used to implement the trademark test of distinctiveness appears more appropriate than the patent approach, in view of the stated intention to protect the marketing functions of designs. In each case, the test is based on the reaction of the consumers to the design relative to the prior art, whereas the patent test of inventive step is based on a peer review approach by designers rather than consumers[29].

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[23] OHIM, DECISION of the Third Board of Appeal of 11 December 2009, In Case R 608/2009-3, Reinhold Gerstenmeyer AB v. B-NU Limited

[24] Point (20), preamble of the Regulation :"It is also necessary to allow the designer or his successor in title to test the products embodying the design in the market place before deciding whether the protection resulting from a registered Community design is desirable. To this end it is necessary to provide that disclosures of the design by the designer or his successor in title, or abusive disclosures during a period of 12 months prior to the date of the filing of the application for a registered Community design should not be prejudicial in assessing the novelty or the individual character of the design in question.

[25] Franzosi, Mario. *European design protection : commentary to directive and regulation proposals*. The Hague ; Boston: Kluwer Law International, 1996, pag.81

[26] OHIM, DECISIONE della Terza Commissione di ricorso del 8 marzo 2010 Nel procedimento R 1775/2008-3, EUROPEAN CITIZEN'S BAND FEDERATION (ECBF) contro European Citizen's Band Federation, parag. 58

[27] Article 6(2) of the Regulation

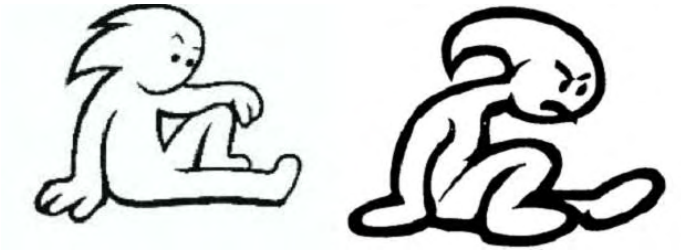
[28] Massa, Charles-Henry, and Alain Strowel. "Community Design: Cinderella revamped." *EIPR* (2003): 68-78.

[29] Musker, David. *Community Design Law: Principles and Practice*. London: Sweet & Maxwell, 2002, pag. 29

The Office admitted[30] the existence of some criticism, expressed when the Community Design Regulation came into force, because it does not require a Community design to "clearly differ"[31] from the prior art in order to have individual character as a pre-requisite for protection. In fact, all it specifies is that the Community design produces a different overall impression on an informed user than any prior design.

In the case R 860/2007-3, *Wuxi Kipor vs. Honda Motor*, the Boards had to compare the subject matter of the contested Community design RCD 171178-0004 concerning inverter generators with a prior design Despite the many differences between the two opposing designs, the Boards found that "the differences are not sufficient to affect the overall impression that the two designs produce on the informed user", because "*the informed user* is more likely to be impressed by *the overall aspect* of the generator rather than *the various details* that characterise mechanical devices in general." The Board held that, "according to the case-law of this Board, *the informed user is identified on the basis of the class of products* within which, according to the application for registration, the design itself is intended to be incorporated. (...) The informed user against whom individual character of the contested RCD should be measured is therefore whoever *habitually purchases* such an item and puts it to *its intended use* and has become *informed on the subject by browsing* through catalogues of such generators, visiting the relevant stores, downloading information from the internet". The Board underlines that the two designs concern products having a high technical content and, consequently,"are products for which technical characteristics and safety considerations – ease of use, protection against hazards – are of such importance that the informed user's overall impression of the aspect of the product is more likely to be *influenced by the general appearance* (arrangement of component parts, size, overall shape of components) *than by relatively immaterial details*"[32]

In its recent decision, from 16 December 2010, in Case T-513/09 *José Manuel Baena Grupo, SA v. OHIM*[33], the European General Court considered a dispute against the validity of a registered Community design (RCD 426895-0002, on the left) brought on the basis of an earlier Community trade mark (CTM 1312651).



Whilst the Board of Appeal (and before it the cancellation division of OHIM) considered the registered design to be sufficiently close to the Community trade mark so as to decline individual character to the design, the General Court held that it did produce a different overall impression on the informed users and, therefore, that it did have the necessary individual character. As regards *the*

[30] Decision of the Third Board of Appeal of 17 April 2008, Case R 860/2007-3, *Wuxi Kipor Power Co., Ltd. vs. Honda Motor Co., Ltd.*

[31] The Office mentions that "during the drafting process of the CDR the term "clearly" has been deleted in the definition of individual character. The fact that it was forgotten to delete the term in the preamble of the Regulation has led to some confusion"

[32] Decision of the Third Board of Appeal of 17 April 2008, Case R 860/2007-3, *Wuxi Kipor Power Co., Ltd. vs. Honda Motor Co., Ltd*, emphasis added

[33] Case T-513/09, Judgment of the General Court of 16 December 2010 - Baena Grupo v OHIM - Neuman and Galdeano del Sel (Seated figure)

identity of the informed user, the General Court considered it to be teenagers who were presumed to be the consumers of the T-shirts, stickers and other items for which the design was registered. The Court also emphasis the *different facial expressions* depicted in the two competing character designs and consider that

In this case, it should be noted that the overall impression created by the two conflicting figures on the informed user is determined largely by the facial expression of each thereof.[34]

It is, however, controversial the fact that the different facial impression is sufficient for considering the contested design as having individual character.

Bently and Sherman believe, however, that the elaborated definition of ”individual character” does not demand a ”personality” of its own of the design, and merely focuses on the difference of impression[35].

This view was confirmed in case the national design courts. The Court of Appeal of Berlin, in the case *Sal de Ibiza*[36], said that

”contrary to section 1(2) German design act- former version-, there is no minimum ”particular individuality” required for the Community design. In particular, it does not necessarily have to demonstrate any aesthetic content. Therefore, a high degree of originality is not required. Primarily, distinctiveness is determining, not creativeness”.

As regards interpretation of the concept of "informed user", the Court held recently in *Shenzhen Taiden* [37]decision, issued on 22 June 2010 that

”With regard to the interpretation of the concept of informed user, the status of ‘user’ implies that the person concerned uses the product in which the design is incorporated, in accordance with the purpose for which that product is intended. The qualifier ‘informed’ suggests in addition that, without being a designer or a technical expert, the user knows the various designs which exist in the sector concerned, possesses a certain degree of knowledge with regard to the features which those designs normally include, and, as a result of his interest in the products concerned, shows a relatively high degree of attention when he uses them.”[38]

Competent national courts have had occasion to rule, before the above decision of the Court, on the interpretation of the term *"informed user"*.

In the first case concerning the registered Community design that has come before the Court of Appeal in England and Wales, *Procter & Gamble Company v Reckitt Benckiser (UK) Ltd*[39], Lord Justice Jacob, by decision of 10 October 2007, stated that ”the informed user is not the same as the "average consumer"[40] of trade mark law”[41], so ”is alert to design issues and is better informed than

[34] Case T-513/09, 16 December 2010, Baena Grupo, parag. 21

[35] Bently, Lionel, and Brad Sherman. *Intellectual property law*. Oxford; New York: Oxford University Press, 2004, pag. 635

[36] Kammergericht *Berlin – Sal de Ibiza, Beschluss vom 19. November 2004 – 5 W 170/04*

[37] Case T-153/08, Judgment of the General Court of 22 June 2010 — *Shenzhen Taiden v OHIM — Bosch Security Systems* (Communications Equipment), *OJ C 209, 31.7.2010, p. 34–34*

[38] Case T-153/08, Judgment of the General Court of 22 June 2010 — *Shenzhen Taiden v OHIM — Bosch Security Systems* (Communications Equipment), *OJ C 209, 31.7.2010, p. 34–34, parag. 46-47*

[39] Procter & Gamble Company v Reckitt Benckiser (UK) Ltd [2007] EWCA Civ 936, comentat de Carboni, Anna. “Design validity and infringement: feel the difference.” *European Intellectual Property Review* 30.3 (2008): 111-117

[40] For the purposes of that global appreciation, the average consumer of the category of products concerned is deemed to be reasonably well-informed and reasonably observant and circumspect (see, to that effect, Case C-210/96 *Gut Springenheide and Tusky* [1998] ECR I-4657, paragraph 31). However, account should be taken of the fact that the average consumer only rarely has the chance to make a direct comparison between the different marks but must place his trust in the imperfect picture of them that he has kept in his mind. It should also be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question.

[41] Procter & Gamble Company v Reckitt Benckiser (UK) Ltd [2007] EWCA Civ 936, parag. 24

the average consumer in trade mark law"[42]. "The "informed user" will have more extensive knowledge than an "average consumer in possession of average information, awareness and understanding" in particular he will be open to design issues and will be fairly familiar with them".

In *Bailey & Anor v Haynes & Ors* the enquiry on the informed user focuses on "those having a practical interest in the use to which the *product* incorporating the design is to be put"[43].

In its decision of 21 December 2007, the High Court of Ireland, in the case *Karen Millen Ltd.* v *Dunnes Stores & Anor*[44],follows the decision *Procter & Gamble Company v.Reckitt Benckiser (UK) Ltd* (2007) and considers that the informed user is "an "end user" of the products to which the design relates", "is aware of similar designs which form part of the relevant design corpus", "he will be alert to design issues and better informed that the average consumer in trade mark law", "he must be considered to be familiar with the functional or technical requirements of the design or, perhaps more precisely, the product for which the design is intended", and "he is not considered to have extensive technical knowledge appropriate to a manufacturer of the product".

An additional factor in assessing the individual character is, under Article 6 (2) of Regulation no. 6/2002, *the degree of freedom of the designer* in developing the design. This provision must be considered in the context of the Preamble, which along with the degree of freedom of the designer in developing the design., evaluation takes into " consideration the nature of the product to which the design is applied or in which it is incorporated, and in particular the industrial sector to which it belongs"[45]

The test of the "degree of freedom of the designer 'indicates that where the possibility of differences is small, the smallest difference from the previous drawing will be sufficient to give an individual character[46].

Court stated in its Judgement of 18 March 2010 in Case *Grupo Promer Mon Graphic* that in this respect,

"it must be noted that the designer's degree of freedom in developing his design is established, inter alia, by the constraints of the features imposed by the technical function of the product or an element thereof, or by statutory requirements applicable to the product. Those constraints result in a standardisation of certain features, which will thus be common to the designs applied to the product concerned"[47].

Massa and Strowell notes that the requirement of individual character could be interpreted as "unconfessed original novelty" and that, in theory, there is no oxymoron in associating novelty and originality as both standards may perfectly well supplement each other. In law the conjunction"or" separating novelty and originality in article 25.1 of the TRIPs constitutes an insuperable obstacle to associate them[48].

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[42] Ibidem, parag. 28

[43] Bailey & Anor v Haynes & Ors [2006] EWPCC 5 (02 October 2006), Patents County Court (England and Wales), parag. 55

[44] Karen Millen Ltd. v Dunnes Stores & Anor. [2007] IEHC 449 (21 December 2007)

[45] Punctul (14), Preambul, Regulamentul (CE) nr. 6/2002

[46] Musker, David, op.cit, pag. 33

[47] Judgment of the General Court (Fifth Chamber) of 18 March 2010, Grupo Promer Mon Graphic, SA v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Case T-9/07, European Court reports 2010 Page 00000

[48] Pentru o discuție asupra art. 25 TRIPs, a se vedea: Reichman, Jerome H. (1995) *Universal Minimum Standards of Intellectual Property Protection under the TRIPS Component of the WTO Agreement.* International Lawyer, 29 . pp. 345-388, http://eprints.law.duke.edu/687/

IV. Visibility of the constitutive elements

Article 4(2) of the regulation provides that ”a design applied to or incorporated in a product which constitutes a *component part of a complex product* shall only be considered to be new and to have individual character: if the component part, once it has been incorporated into the complex product, remains *visible* during *normal use* of the latter; and to the extent that those visible features of the component part fulfil in themselves the requirements as to novelty and individual character”[49].

As regards the visible character, OHIM Board of Appeal has ruled that

”The Board concludes none the less that the requirements of Article 4(2)(a) CDR are satisfied. That provision does not require a component part to be clearly visible in its entirety at every moment of use. It is sufficient if the whole of the component can be seen some of the time in such a way that all its essential features can be apprehended.”[50]

"Normal use" shall mean use by the end user, excluding maintenance, servicing or repair.

Musker underlies that the notion of *normal use* could imply that even an attractive component, perhaps visible at point of purchase, can be denied protection if invisible in ”normal use”. The issue is apparently not whether the article is bought for its appearance, but whether it is used for its appearances[51].

Issues covered in this article are particularly used parts”for the purpose of the repair of that complex product so as to restore its original appearance”[52], the spare parts.

The debates that took (and still) occur in connection with the opportunity to protect spare parts forced the adoption of a temporary solution for the Community design protection. As stated in the preamble” (...) under these circumstances, it is appropriate *not to confer any protection* as a Community design for a design which is applied to or incorporated in a product which constitutes a component part of a complex product upon whose appearance the design is dependent and which is used for the purpose of the repair of a complex product so as to restore its original appearance, until the Council has decided its policy on this issue on the basis of a Commission proposal”[53].

Regulation no. 6/2002 has, therefore, a transitional provision that "are not granted protection as a Community design to a design that is one part of a complex product, until a later date when is foreseen an amendment to the Regulation, on a Commission proposal. According to Regulation no. 6/2002[54], the proposal from the Commission shall be submitted together with, and take into consideration, any changes which the Commission shall propose on the same subject pursuant to Article 18 of Directive 98/71/EC. In 2004, the Commission submitted a controversial[55] proposal[56] to amend Art. 14 of the Directive that excluded spare parts from design protection afforded by national legislation. To the extent that this proposal will be adopted, it will have a direct impact on the Regulation on Community design.

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[49] Point (12) Preamble of the regulation” Protection should not be extended to those component parts which are not visible during normal use of a product, nor to those features of such part which are not visible when the part is mounted, or which would not, in themselves, fulfil the requirements as to novelty and individual character. Therefore, those features of design which are excluded from protection for these reasons should not be taken into consideration for the purpose of assessing whether other features of the design fulfil the requirements for protection”.

[50] OHIM, DECISION of the Third Board of Appeal of 22 October 2009 in Case R 690/2007-3 Lindner Recyclingtech GmbH v. Franssons Verkstäder AB, parag. 21

[51] Musker, David. *Community Design Law: Principles and Practice*. London: Sweet & Maxwell, 2002, pag.24

[52] Article 110 (1) of the Regulation

[53] Point (13) Preamble of the Regulation

[54] Article 110(2) of the Regulation

[55] Straus, Joseph: Design Protection for Spare Parts Gone in Europe? Proposed Changes of the EC Directive: Commission’s Mandate and its Doubtful Execution. in: EIPR, 2005, p. 391 - 404.

[56] Proposal for a Directive of the European Parliament and of the Council amending Directive 98/71/EC on the legal protection of designs, COM/2004/0582 final

V. Products that cannot be protected

1. Public policy or morality

Article 9 of the regulation provides that" a Community design shall not subsist in a design which is contrary to public policy or to accepted principles of morality." This is similar to the corresponding provision of the Directive[57]. However, it raises different issues because the Directive does not impose a European level of morality, leaving this to the discretion of each state. Phillips believes that a design may be completely unacceptable in a Member State, although it could be considered a masterpiece in another state[58].

As stressed by Musker, the importance of identifying this problem appears in the context in which, apart from the definition of design, it is the only basis for evaluating formal application for a registered Community design[59]. It is equally a ground for invalidity. It is possible that the protection should be refused if the design is contrary to public order and morality, in no more than in one Member State[60]. Examples brought are a swastika decorating a product or drawing of anti-personnel mines[61].

Duvac and Romițan expressed the opinion that in case the community design should have a unitary character at European level, it is necessary that the notions of public order or morality to be cleared at EU level[62].

2. Technical features

Article 8(1) of the Regulation provides that"a Community design shall not subsist in features of appearance of a product which are *solely dictated by its technical function*". To assess the area of exclusion, clarification is needed on the terms "*technical*" and " *solely dictated"*". The following questions arise: how broad is"technical function" intended to be and how strict is the"solely dictated" link intended to be[63].

This provision excludes from protection certain technical aspects. According to the declared legislative intent[64], the purpose of regulation is to protect both functional and aesthetic designs. Apparently, this provision is contrary to this purpose. Paragraph (10) of the Preamble explains that the exclusion from protection is intended *not to hampered technological innovation* and that *this does not entail that a design must have an aesthetic quality*[65].

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[57] Art. 8, Directiva 98/71/CE

[58] Phillips în Franzosi, Mario. European design protection: commentary to directive and regulation proposals. The Hague ; Boston: Kluwer Law International, 1996, pag.52

[59] Musk**er**, David, op.cit, pag. 104

[60] Massa, Charles-Henry şi Strowel, Alain, *Community Design: Cinderella revamped*, 2003, EIPR, pag. 68-78, pag.72

[61] Commission of the European Communities. *Green Paper on the Legal Protection of Industrial Design: Working Document of the Services of the Commission.* Brussels:, 1991. parag. 8.9.2.

[62] Romițan, Ciprian Paul, and Constantin Duvac. *Protectia juridico-penala a desenelor si modelelor*. Bucureşti: Universul Juridic, 2009; for an in depth view of morality and public order in the protection of community design, pag 90-101.

[63] Massa, Charles-Henry şi Strowel, Alain, *Community Design: Cinderella revamped*, 2003, EIPR, pag. 68-78, pag. 72

[64] Commission of the European Communities. Green Paper on the Legal Protection of Industrial Design: Working Document of the Services of the Commission. Brussels:, 1991. Parag 5.4.4.2

[65] Paragraph (10) Preamble of the regulation" Technological innovation should not be hampered by granting design protection to features dictated solely by a technical function. It is understood that this does not entail that a design must have an aesthetic quality. Likewise, the interoperability of products of different makes should not be hindered by extending protection to the design of mechanical fittings. Consequently, those features of a design which are excluded from protection for those reasons should not be taken into consideration for the purpose of assessing whether other features of the design fulfil the requirements for protection."

As observes Bently and Sherman, the term "technical" is not clarified in the context of the Regulation on Community design, although it believes it has become a key concept of European patents law[66]. Although the functionality is a concept known in national law, each state has (had) different standards[67]

The interpretation of Article 8(1) CDR (and of the corresponding provision in Article 7(1) of Council Directive 98/71/EC on the legal protection of designs) is highly controversial. One view holds that a technical necessity exception, such as that contained in Article 8(1) CDR applies only if the technical function cannot be achieved by any other configuration; if the designer has a choice between two or more configurations, the appearance of the product is not solely dictated by its technical function. That theory – known as the multiplicity-of-forms theory – is defended by some German authors[68] and was formerly followed by the French courts.

According to another view ("causal approach"), a design will be imposed by the function depending on whether it was created purely with functional intentions (even if the function could be satisfied through other forms).

Regarding the decisions of national courts, in *Landor & Hawa against Azure Designs*[69], English Court of Appeal confirmed in the decision of 2006, that the design that serve a functional purpose may be protected under European Union legislation on industrial designs. Exclusions from protection on the grounds "dictated solely by technical function" and "method or principle of construction" must be interpreted restrictively so as not to unduly restrict the availability of protection to non-aesthetic designs. Under ancient law of Great Britain, established by interpretation of the decision *Amp against Utilux*[70] [1972], the exclusion was understood in an extensive way: "dictated solely by function" meaning "attributed to or caused by function ".

The Court held, in *Landor & Hawa against Azure Designs* that decisions on the Directive on the Community trade mark cannot be safely relied on in a case involving the community design, invoking Advocate General Colmer, in *Philips v Remington*[71]:

the level of functionality must be greater in order to be able to assess the ground for refusal in the context of designs; the feature concerned must not only be necessary but essential in order to achieve a particular technical result: form follows function.

Recently, the Supreme Court of England and Wales decision, from 29 July 2010, *Dyson Ltd v Vax Ltd*[72], returns to the interpretation given by the decision *Amp against Utilux*, in terms of understanding the concept of "solely dictated by technical function", distancing over the multiplicity

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[66] Bently, Lionel, şi Brad Sherman. *Intellectual property law* . Oxford ; New York: Oxford University Press, 2004, pag. 618

[67] Phillips în Franzosi, Mario. *European design protection : commentary to directive and regulation proposals* . The Hague ; Boston: Kluwer Law International, 1996, pag. 86

[68] Ruhl, Oliver, and Martin Schötelburg. "Gemeinschaftsgeschmacksmuster: Kommentar." Carl Heymanns Verlag, Köln-Berlin-München 2007, pag. 169, cited in OHIM, DECISION of the Third Board of Appeal of 22 October 2009 in Case R 690/2007-3 Lindner Recyclingtech GmbH v. Franssons Verkstäder AB, parag. 28

[69] Landor & Hawa International Ltd v Azure Designs Ltd [2006] EWCA Civ 1285; [2006]

[70] Amp Inc v.Utilux Pty Ltd [1972] R.P.C. 103 (HL)

[71] Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 23 January 2001, Koninklijke Philips Electronics NV v Remington Consumer Products Ltd. Case C-299/99 , *European Court reports 2002 Page I-05475 "The wording used in the Designs Directive for expressing that ground for refusal does not entirely coincide with that used in the Trade Marks Directive. That discrepancy is not capricious. Whereas the former refuses to recognise external features which are solely dictated by its technical function, the latter excludes from its protection signs which consist exclusively of the shape of goods which is necessary to obtain a technical result. In other words, the level of functionality must be greater in order to be able to assess the ground for refusal in the context of designs; the feature concerned must not only be necessary but essential in order to achieve a particular technical result: form follows function. This means that a functional design may, none the less, be eligible for protection if it can be shown that the same technical function could be achieved by another different form".*

[72] Dyson Ltd v Vax Ltd [2010] EWHC 1923 (Pat) (29 July 2010)

of forms theory. The court judgment was based on the decision of the Office of Harmonization in the Internal Market on 22 October 2009, in the case *Lindner Recyclingtech*[73].

In this case, the Board of Appeal of the Office chose not to follow the Advocate General of the Court of Justice in *Philips v Remington* case or the decision of the UK Court of Appeal in the *Landor & Hawa against Azure* and the adoption of the multiplicity of forms theory supported by a large part of the doctrine, adopting instead *the designer's intention theory*. Thus, in the case *Lindner Recyclingtech against Franssons Verkstäder*, Office Board of Appeal stated that the drafting of Art. 8 (a) of Regulation 6/2002,

"do not, on their natural meaning, imply that the feature in question must be the only means by which the product's technical function can be achieved. On the contrary, they imply that the need to achieve the product's technical function was the only relevant factor when the feature in question was selected."[74]

According to article 8 of Regulation no. 6/2002, are the excluded from protection designs of interconnections. The argument presented is that interoperability should not be disturbed by products of different makes [75].

Consequently,"a Community design shall not subsist in features of appearance of a product which must necessarily be reproduced in their exact form and dimensions in order to permit the product in which the design is incorporated or to which it is applied to be mechanically connected to or placed in, around or against another product so that either product may perform its function"[76]. Article 8 of Regulation no. 6/2002 requires exclusion seemingly[77] committed to free market competition by encouraging interoperability of products of different makes[78]. It is considered that the main problem, however, is the automotive industry and automotive spare parts issue.

In article 8(3) of Regulation no. 6/2002 is foreseen an exception to exclusion of protection of interconnections products for modular products. Thus,"a Community design (...) shall subsist in a design serving the purpose of allowing the multiple assembly or connection of mutually interchangeable products within a modular system". The argument presented in the preamble is that"the mechanical fittings of modular products may nevertheless constitute an important element of the innovative characteristics of modular products and present a major marketing asset, and therefore should be eligible for protection".

This provision is similar to the "must-fit" exclusion of British law.[79] It is considered that the term refers to modular product type of LEGO[80] or Duplo. This provision is considered from a part of the doctrine as an exception to principles of free competition[81].

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[73] OHIM, DECISION of the Third Board of Appeal of 22 October 2009 in Case R 690/2007-3 Lindner Recyclingtech GmbH v. Franssons Verkstäder AB

[74] OHIM, DECISION of the Third Board of Appeal of 22 October 2009 in Case R 690/2007-3 Lindner Recyclingtech GmbH v. Franssons Verkstäder AB, parag 32

[75] Paragraph (10) Preamble of the Regulation , (...) Likewise, the interoperability of products of different makes should not be hindered by extending protection to the design of mechanical fittings. Consequently, those features of a design which are excluded from protection for those reasons should not be taken into consideration for the purpose of assessing whether other features of the design fulfil the requirements for protection.

[76] Article 8(2) of the Regulation

[77] Phillips în Franzosi, Mario. *European design protection: commentary to directive and regulation proposals* . The Hague; Boston: Kluwer Law International, 1996, pag. 88

[78] Case 53/87, Consorzio italiano della componentistica di ricambio per autoveicoli and Maxicar v Régie nationale des usines Renault, Judgment of the Court of 5 October 1988, European Court reports 1988 Page 06039

[79] *British Leyland Motor Corporation Ltd. v Armstrong Patents Ltd. [1984] FSR 591.*

[80] Case T-270/06 , Lego Juris A/S v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM,)Judgment of the Court of First Instance (Eighth Chamber) of 12 November 2008, European Court reports 2008 Page II-03117

[81] Phillips în Franzosi, Mario, op. cit., pag. 88

VI. CONCLUSIONS

The key concepts identified as structuring requirements for protection of the community design are: novelty, immaterial details, the existing design corpus (prior art), the sector concerned, the circles specialized, individual character, overall impression, the informed user, the degree of freedom of the designer, a component part of a complex product, to remain visible during normal use, technical features, solely dictated by technical function.

The paper illustrates for each of the terms above that there still are ambiguities and tensions in their understanding from the point of view of the Board of Appeal of OHIM and, more relevant, in the judgement of the competent national courts. As such, the unitary character of the community design is uncertain. This issue is even more significant as the reference is to the absolute grounds for invalidity. Moreover, the rules established by the Regulation 6/2002 seem to establish an exception to the general rule that national courts do not have jurisdiction to ascertain the invalidity of acts of an EU institution. A national court is competent to annul a design conferred by the Office for Harmonization in the Internal Market. Given that these decisions have a European wide effect, the demand for unitary interpretation is compulsory.

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Landgericht Hamburg – Gebäckpresse I, Urteil vom 20. Mai 2005 – 308 O 182/04
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OHIM, Decision of the Third Board of Appeal of 26 March 2010 in Cauza R 9/2008-3 *Crocs V. Holey Soles Holdings Ltd Inc*
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A VIEWPOINT ON THE CURRENT STATE OF KNOWLEDGE MANAGEMENT INSTRUMENTS

ANDREEA PAULA DUMITRU*

Abstract

Knowledge management is seeking solutions to harmonize the objectives of organizations of the human group, which need to rationalize, to provide policy makers and to implement. This article aims to provide readers with an introduction to knowledge management basic definitions, theories and concepts such as types of knowledge, the differences between data, information and knowledge, etc, are given. But, why we need a knowledge management ? This article justified the need for companies to focus management efforts on their intangible elements and provides the five enabling conditions for knowledge creation.

Keywords: *knowledge, tacit knowledge, explicit knowledge, data, information, wisdom* .

Introduction

In today's new economy, learning and knowledge have become key success factors for international competitiveness with the result that intangible and immaterial resources have overtaken physical and tangible assets in order of importance. In particular, knowledge has become the primary resource for power, prestige and creating wealth in the modern economy and society. The generation, acquisition and use of knowledge have turned out to be vital in sustaining economic, social and cultural development. This applies equally to individuals, organizations, public sector bodies, companies, whole regions and even states. This is reflected by a dramatic rise to the top of the policy agenda of knowledge-related goals. Hence, the Lisbon Council set the ambitious strategic goal of making the EU the most dynamic, competitive, sustainable knowledge-based economy.

In research related to management a new discipline has appeared – knowledge management, which reflects issues coming from human resources management, organizational learning, information management, change management, brand and reputation management, performance measurement and valuation, innovation management, business process management, etc.

Historically, KM has been aimed at a single group of company managers, and has emerged as an executive information system containing a portfolio of tools such as access to databases, news source alerts, and other information – all aimed at supporting the decision making process of the company managers. More recently, however, KM systems are increasingly designed for entire organizations, thus providing all employees access to information and knowledge, necessary for their work.

1. Basic definitions: Data, information and knowledge

The academic community has spent years discussing and clarifying what constitutes data, information and knowledge. Depending on the background of the author and the specific aims he pursues there emerges variations in the definitions and the basic terminology used.

Data are described as a "set of discrete, objective facts about events… and is most usefully described as structured records of transactions"[1]. The authors further consider that "information has meaning… Not only does it potentially shape the receiver; it has a shape: it is organized to some

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[1] Davenport T., Prusak L., - "Working knowledge: How Organizations Manage What They Know", Harvard Business School Press, 1998, p. 7.

purpose." Subsequently, knowledge is defined as follows: "Knowledge is a fluid mix of framed experience, values, contextual information, and expert insight that provides a framework for evaluating and incorporating new experience and information. In organizations, it often becomes embedded not only in documents or repositories but in organizational routines, processes, practices, and norms."

From a business practice perspective, the KM terminology is defined in (Bergeron, 2003):

✓ Data are numbers. They are numerical quantities or other attributes derived from observation, experiment, or calculation;

✓ Information is data in context. Information is a collection of data and associated explanations, interpretations, and other textual material concerning a particular object, event, or process;

✓ Metadata is data about information. Metadata includes descriptive summaries and high-level categorization of data and information. That is, metadata is information about the context in which information is used;

✓ Knowledge is information that is organized, synthesized, or summarized to enhance comprehension, awareness, or understanding. That is, knowledge is a combination of metadata and an awareness of the context in which the metadata can be applied successfully[2].

Becerra-Fernandez et al.(2004) provide the following definitions:

✓ Data comprises facts, observations, or perceptions. They represent raw numbers or assertions;

✓ Information is processed data. It could be described as a subset of data, only including those data that possess context, relevance and purpose. Information involves manipulation of raw data;

✓ Knowledge is a justified true belief (Nonaka and Takeuchi). It is different from data and information. Knowledge is at the highest level in a hierarchy with information at the middle level, and data to be at the lowest level. It is the richest, deepest and most valuable of the three. It could be described also as information with direction[3].

Moreover, the authors outline a subjective view on knowledge – as State of

Mind or Practice, and an objective view – as objects, access to information or capability.

Mertins et al. (2003) consider the hierarchy from data to information, knowledge and wisdom[4]. They stress that typical questions for data and information are: who, what, where, when, while for knowledge are: how? and why? From practical point of view they associate knowledge with the scientific knowledge, from one side, and with the experiences knowledge, from the other. Further, while discussing the nature of knowledge, Mertins et al. (2003) point the method for acquiring scientific knowledge, that is developed using scientific methodologies and standards, tested and validated from the research community, and explicitly described in research papers, reports and books.

Coakes (2003) relates data encoded in some medium and transmitted in any form, e.g. waves, electrical current, etc., which we receive trough our senses – vision, hearing, smell, touch, taste.[5]

The difference between data, information and knowledge is considered also in (Herbert, 2000). Data are facts; information is processed data; knowledge represents the collection of events,

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[2] Bergeron B. – "Essentials of Knowledge Management", John Wiley & Sons, Inc Hobsken, New Jersey, 2003, p.18.

[3] Becerra I., Fernandez J. – "Locating Expertise at NASA", in Knowledge Management Review, Vol.4, No.4, 2001, p.65.

[4] Mertins, K., P.Heisig, J.Vorbeck, -"Knowledge Management – Concepts and Best Practices", Springer Verlag, Berlin-Heidelberg, 2003, p.63.

[5] Coakes, E., - "Knowledge Management: Current Issues and Challenges", Idea Group Publishing, 2003, p.51.

experiences and feelings about an organization's business that helps it to rationalize its current situation and develop plans/products for the future[6]. Further, Blumentitt et al. (1999) makes a clear distinction between information and knowledge on the basis that information can be captured, stored and transmitted in digital form, while knowledge can only exist in an intelligent system[7].

As Coakes (2004) summarizes, in Western philosophy knowledge is seen as abstract, universal, impartial and rational. It is considered as a stand-alone artifact that could be captured in technology and which will be truthful in its essence[8]. As Lehaney et al. (2004) stress, this view is evident in the works of the ancient Greek philosophers where the concept of knowledge originates with people[9]. Plato and Aristotle, for instance, were quite concerned about the nature of knowledge and what distinguishes knowledge from belief. Plato put forward the idea that correct belief can be turned into knowledge by fixing it through the means of reason or a cause. Aristotle thought that knowledge of a thing involved understanding it in terms of the reasons for it. In modern terms 'to understand' is to be fully aware of not only the meaning of something, but also its implications.

Gavigan et al. (1999) relates knowledge with learning. Knowledge is defined as "a state or potential for action and decision in a person, organization or a group"[10]. Subsequently, learning is the process which causes changes in this state - change in understanding, decision or action.

People's minds follow a certain pattern of thought – develop knowledge

according to their own pre-set formulae or methods. The experiences give people memories and values which guide them and therefore set up the conditions within which their minds operate. Knowledge is socially constructed as by accumulating new knowledge there is a conscious choice, or discard, of the knowledge of others. It is not a stand-alone artifact or universal truth.

Knowledge is used interchangeably with intellectual capital by Bukowitz et al. (1999), and is defined as "anything valued by the organization that is embedded in people or derived from processes, systems or the organizational culture – individual knowledge and skills, norms and values, databases, methodologies, software, know-how, licenses, brands, and trade secrets"[11].

Knowledge resources vary for particular industries and applications, but they generally include manuals, letters, summaries of responses to clients, news, customer information, competitor intelligence, and knowledge derived from work processes.

Liebowitz (1999) highlights that knowledge can be defined as undeniable facts and objective truths as well as an institutionalized, socially constructed enactment of reality. He further refers to Davenport and Prusak who provide a working definition of knowledge that is extended to include wisdom, the intellectual capital of organizations. Intellectual capital, or organizational wisdom, is the application of collective knowledge within the organization[12]. This projection is depicted in **Figure 1** above.

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[6] Herbert, I., - "Knowledge is a Noun, Learning is a Verb", in Management Accounting 2(78),2000, pp 68-72.

[7] Blumentitt, R., Johnston, R., - "Towards a Strategy For Knowledge Management" , in Technology Analysis & Strategic Management 3(11),1999, pp.287-300.

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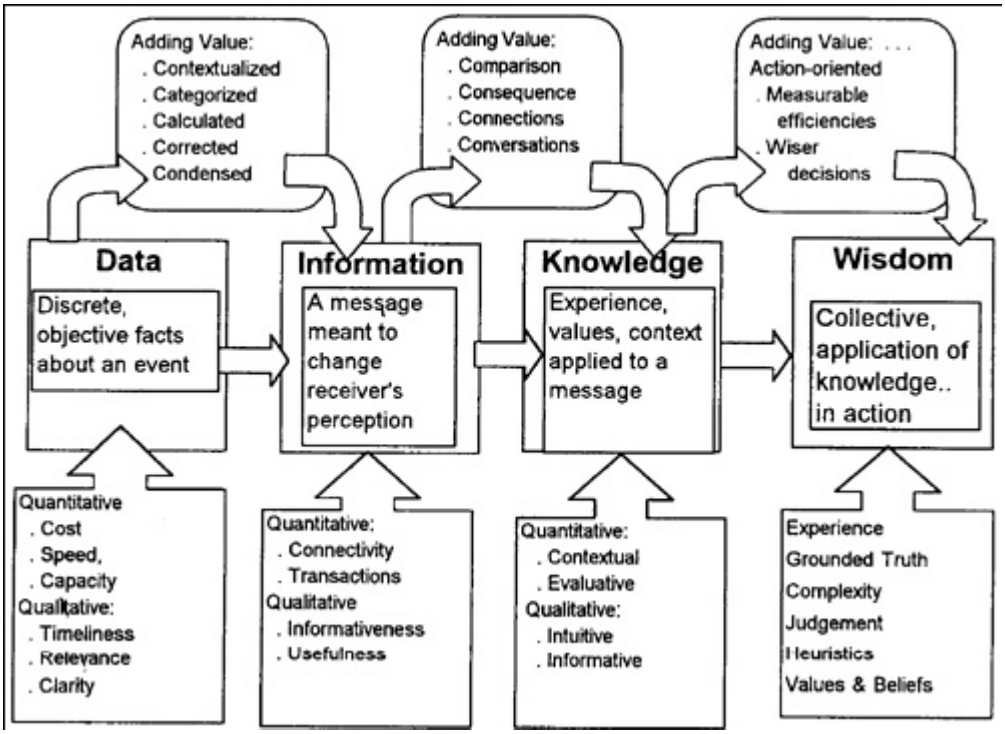
[10] Gavigan, J., M. Ottisch, S.Mahroum, - "Knowledge and Learning: Towards a learning Europe", Futures report series 14, EC JRC, 1999, p.34.

[11] Bukowitz, W., R.Williams, -"The knowledge management", Prentice Hall, 1999, p.23.

[12] Liebowitz, J. (1999), - "Knowledge management Handbook", CRC Press LLC, 1999, p.18.

Figure 1: *The knowledge progression*



Bennet et al. (2004) provides an interesting visual understanding of "knowledge" – with a bite of a red apple. He points out that "while all that we are doing in information technology and information management is critically important, it is not until the bite (of information) is taken, chewed, digested, and acted upon that it becomes knowledge"[13].

2. Classifications of Knowledge

While considering knowledge, researchers have distinguished two main categories: explicit and tacit knowledge. For example, in (Polanyi, 1966) they are considered as explicit knowledge, which can be articulated in formal language and transmitted among individuals, and tacit knowledge, personal knowledge embedded in individual experience and involving such intangible factors as personal belief, perspective, and values[14]. Later, Tiwana (1999) specifies that tacit knowledge is personal, context-specific knowledge that is difficult to formalize, record, or articulate; it is stored in the heads of people. The tacit component is mainly developed through a process of trial and error encountered in practice. On the other hand, the explicit knowledge can be codified and transmitted in a systematic and formal language: documents, databases, webs, emails, charts, etc[15].

The idea of different forms of knowledge was considered by two of the most influential thinkers in KM, Nonaka and Takeuchi. They state in (Nonaka et al., 1995) that "tacit knowledge is highly personal and hard to formalize, making it difficult to communicate or share with others. Subjective insights, intuitions, and hunches fall into this category of knowledge. Tacit knowledge is

[13] Bennet, A., D.Bennet – "Organizational survival in the new world. The intelligent Complex Adaptive System", in Butterworth-Heinemann, US, 2004, p.14.

[14] Polanyi, M. – "The Tacit Dimension", London: Routledge & Kegan Paul, 1966.

[15] Tiwana, A. – "The Knowledge Management", Toolkit, Prentice Hall, 1999, p.171.

deeply rooted in an individual's action and experience, as well as in the ideas, values, or emotions he or she embrace"[16]. In a comparison, explicit knowledge can be easily processed by a computer, transmitted electronically or stored in databases. The specific of both type of knowledge is given in the **Table 1**:

Table 1*: Tacit and Explicit types of knowledge*

Tacit Knowledge	**Explicit Knowledge**
Knowledge of experience (body skills)	Knowledge of rationality (mind)
Simultaneous knowledge (here and now)	Sequential knowledge (there and then)
Analog knowledge (practice)	Digital knowledge (theory)

Nonaka et al. (1995) have also considered four models for knowledge conversion (see **Table 2**). Socialization is connected with theories of group processes and organizational culture and is a process of sharing experiences, whereas combination has its roots in information processing and is a process of systemizing concepts into a knowledge system. Internalization is closely related to organizational learning and is a process of embodying explicit knowledge into tacit knowledge, while externalization is the opposite – a process of articulating tacit knowledge into explicit concepts.

Table 2: *Knowledge conversion models*

Knowledge Conversion	**To:**	
From:	**Tacit Knowledge**	**Explicit Knowledge**
Tacit knowledge	Socialization (Sympathized K)	Externalization (Conceptual K)
Explicit knowledge	Internalization (Operational K)	Combination (Systemic K)

As given in (Bukowitz et al., 1999) "Explicit knowledge" is knowledge that individuals are able to express fairly easily using language or other forms of communication – visual, sound, movement. "Tacit knowledge" is knowledge that an individual is not able to articulate and thereby convert to information[17]. Tacit knowledge is more useful to an organizational system if it can be transferred to others so they too can use it. However, tacit knowledge cannot be communicated or passed onto others easily since it is acquired primarily through experience and is not easily expressed in words. Transfer of explicit knowledge is relatively straightforward. Transfer of tacit knowledge can be achieved either by first converting it into explicit knowledge and then sharing it, or by using approaches in which it is never made explicit.

In Lehaney et al. (2004) explicit and tacit knowledge are considered as the boundaries of the continuum of communication. It is stated that the communication process may incorporate a variety of techniques ranging from reports, visual identity, correspondence, and electronic communications, but there is no guarantee that the intended message has been received and understood. Social conditioning, cultural differences, and other external influences will always impact to convert the

[16] Nonaka, I., H.Takeuchi – "The knowledge creating company: How Japanese Companies create the Dynamics of Innovation", Oxford, Oxford University Press, 1995, p.62.

[17] Bukowitz, W., R.Williams – "The knowledge management", Prentice Hall, 1999, p.21.

message into a meaningful translation and context for the individual receiving, or not at all as the case may be[18].

In (Bergeron, 2003) human capital is considered for KM purposes as being composed of three kinds of knowledge: tacit, implicit, and explicit knowledge. Subsequently, the three categories are distinguished as follows:

✓ Tacit knowledge is knowledge that is ingrained at a subconscious level and therefore difficult to explain to others;

✓ Implicit knowledge, like tacit knowledge, typically is controlled by experts. However, unlike tacit knowledge, implicit knowledge can be extracted from the expert—through a process termed knowledge engineering;

✓ Explicit knowledge can easily be conveyed from someone proficient at a task to someone else through written or verbal communications. Unlike tacit and implicit knowledge, explicit knowledge often can be found in a book or operating manual.

Lei (1997) sees tacit knowledge as embedded in the organization's processes, dynamic routines and internal communication paths and provides a firm-specific resource to sustain competitive advantage. Explicit knowledge is often product rather than organizationally embodied. But tacit embedded knowledge is difficult to learn without close interaction and collaboration with the strategic partner[19].

Herbert (2000) considers that explicit knowledge is transparent and can be codified, categorized and stored, while tacit knowledge resides in individuals[20].

Further, Tsoukas (2003) defines the structure of the tacit knowing in three aspects: the functional, the phenomenal and the semantic. The functional aspect consists of "from-to" relations of particulars to the focal target, based on the awareness for attending something. The phenomenal aspect involves the transformation of subsidiary experience into a new sensory experience. Finally, the semantic aspect is the meaning of subsidiaries, which is the focal target on which they bear[21].

According to Coakes (2004), explicit knowledge tends to be considered as anything that can be documented, archived or codified. It can be contained within artifacts such as paper or technology. As a result it is able to be shared. Many authors even argue that explicit knowledge is not knowledge at all, but information or data. Tacit knowledge is retained by people in their head, it is the product of their minds' experiences and learning. It can be shared but in a less tangible form. In some cases it can be shared through the use of e-mail and chat-rooms or instant messaging as people tend to use these technologies informally, like a conversation, but mostly it is shared through story-telling and in conversations. It is very difficult to articulate and very difficult to know what you know in a tacit way - as often you only discover your knowledge when you have a need to apply it. Or it may rely on multiple senses to be expressed and thus is learnt by experience. Organizations need to know what they know and also to identify where their knowledge gaps lay so that they can be addressed. Explicit knowledge is relatively easy to track and develop, tacit is obviously more difficult to track and develop. Tacit knowledge may also involve more than the logical intelligence aspect of our brains and it may be that tacit knowledge is developed through the application of our multiple intelligences, (everyone uses some of, or a combination of) - logical, linguistic, interpersonal, intrapersonal, musical, spatial, or kinesthetic means to absorb knowledge.

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[18] Lehaney B., Clarke S., Coakes E., & Jack G. –"Beyond Knowledge Management", Idea Group Publishing, 2004, p. 81.

[19] Lei D.T. – "Competence-Building, Technology Fusion and Competitive Advantage: The Key Roles of Organizational Learning and Strategic Alliances", in International Journal of Technology Management 2/3/4 (14), 1997, pp 208-237.

[20] Herbert, I. – "Knowledge is a Noun, Learning is a Verb", in Management Accounting 2(78), 2000, pp 68-72.

[21] Tsoukas, H., Vladimirou E. – "What is Organizational knowledge", in Journal of Management Studies, Nov. 2003, Blackwell publishers, Oxford.

Pfeffer et al. (1999) state that tacit knowledge is transferred via social process, e.g. stories, gossip, observation - social interaction. Besides, up to 70% of workplace learning is informal. When knowledge is transferred by stories and gossip instead of solely through formal data systems, it comes along with information about the process that was used to develop that knowledge. When just reading reports or seeing presentations, people do not learn about the subtle nuances of work methods – they learn about failures, tasks that were fun, tasks that were boring, people who were helpful, and people who undermined the work[22].

Quinn et al. (1996)[23] and Nonaka et al. (1995) suggest the following typology of knowledge based on purpose and use:

✓ Know-what - This is the fundamental stage where the organization makes use of IT of some kinds to collect, gather and store the cognitive type of knowledge. In simple words, they just know what they know, but don't mean that they know when and how to apply such knowledge solve their problem;

✓ Know-how - It represents the ability to translate bookish knowledge into real world results. In this stage, they know when to use which knowledge to solve real-world, complex problems;

✓ Know-why - It goes beyond the know-how stage where they can use known rules and apply them well. In addition, they have in-depth knowledge of the complex slush of cause-and-effect relationships that underlie. This knowledge enables individuals to move a step above know-how and create extraordinary leverage by using knowledge, bringing in the ability to deal with unknown interactions and unseen situations;

✓ Care-why - It represents self-motivated creativity that exists in a company. This happens to be the only level that cannot be supported by knowledge management system.

Becerra-Fernandez et al.(2004) differentiate the following types of knowledge - individual, social, causal, conditional, relational and pragmatic; embodied, encoded and procedural.

Hildreth et al., (2000) differentiate two forms of knowledge: domain knowledge, which is relatively easily replaced; knowledge of how work is done in practice, which is not easily replaced. Further, they differentiate between hard and soft knowledge. Hard knowledge is equivalent to domain knowledge. Soft knowledge encompasses experience, work knowledge, tacit knowledge[24].

There is a wide body of literature that suggests that there are "softer" types of knowledge (Hildreth et al., 1999). This knowledge is less quantifiable and cannot be captured, codified and stored so easily. Examples of such knowledge might include tacit knowledge that cannot be articulated, internalized experience and automated skills, internalized domain knowledge and cultural knowledge, embedded in practice. Soft knowledge is acquired through the work practice and consequently when an organization loses staff, the soft knowledge that is lost cannot easily be replaced. As companies have cut out layers of middle management they find that they have lost the people who knew who to approach for specific problems; how to deal with different people and who best to use for different tasks. In short, people who knew how to make things happen. The loss of such personnel creates a problem for organizations as they move to cheaper, less knowledge-rich, workers. Soft knowledge is embedded in the practices of, and relationships within, the group. Secondly, the source of the legitimacy of the knowledge differs from hard knowledge. "Hard knowledge" is accepted as legitimate by virtue of the formal authority of the designer of the system or the author of the procedure. Soft knowledge becomes accepted by virtue of informal authority and

[22] Pfeffer, J., Sutton, R.I. – "Knowing "What" To Do Is Not Enough", in California Management Review 1(42), 1999, pp 83-107.

[23] Quinn, J.B., Anderson, P. and Finkelstein, S. - "Managing Professional Intellect: Making the Most of the Best" in Harvard Business Review. March-April 1996.

[24] Hildreth P., Kimble C., Wright P. – "Communities of Practice in the Distributed", in International Environment Journal of Knowledge Management 1(4), 2000, pp 27-38.

consensus within the group. Although newcomers might have a degree of hard domain knowledge, their soft knowledge only develops as they move from being newcomers to fully-fledged members of the community.

Lei (1997) argues that the knowledge base that lays the foundation of an organization's core competence is comprised of easily replaced domain knowledge and the less easily replaced knowledge of how work is carried out. This first form of knowledge can be called fluid knowledge because it is capable of flowing around an organization. Flow can be achieved even more effectively when the organization's social and technical systems are linked by means of information and communication technologies (ICT). The second form of knowledge can be characterized as sticky knowledge because it is inseparable from knowing how work is carried out and it is related to the processes undertaken. The signifiers fluid and sticky are more appropriate for this application than the descriptors explicit and tacit. Sticky knowledge is glued onto the experiences of individuals and may remain unarticulated formally, but it is characterized by being difficult to replace. The replacement of such knowledge is problematic because it is not easily surfaced in order for it to be codified, stored, or transmitted. It is cumulative to personal experience and thus unique to the individual's understanding. It resides in the social domain of the organization's socio-technical system. Its best form of transfer from individual to individual, tends to be through story-telling and in the practice of communities.

Blumentitt et al. (1999) examines classifications of knowledge and provides 4 categories of knowledge:

- ✓ Codified knowledge = information;
- ✓ Common knowledge = routines and practices - explicit knowledge;
- ✓ Social knowledge = relationships and cultural matters;
- ✓ Embodied knowledge = tacit knowledge - that knowledge deriving from experience, skills, competences, training, practice accumulated during a lifetime.

Another way to look at forms of knowledge, which may be more helpful to organizations than tacit versus explicit distinction, is as follows (Bukowitz et al., 1999):

- ✓ known knowledge: knowledge that the individual knows that she/he knows;
- ✓ unknown knowledge: knowledge that the individual does not know she/he knows because it has become embedded in the way she/he works.

Liebowitz (1999) stresses that organizational knowledge is knowledge that is shared among organizational members. Although organizational knowledge is created via individual knowledge, it is more than the sum of individual knowledge. Complete organizational knowledge is achieved only when individuals keep modifying their knowledge through interactions with other organizational members. Second, organizational knowledge is distributed. Organizational knowledge is created and managed by individuals who act autonomously within a decision domain.

Tsoukas (2001) defines further organizational knowledge to be the capability of members of an organization to draw distinctions in the process of carrying out their work, in particular concrete contexts, by enacting sets of generalizations, whose application depends on historically evolved collective understanding and experiences.

Von Krogh et al. (1995) quoted in (Mertins et al., 2003) propose 7 categories of knowledge that has to be used in management and organizational theory - tacit, embodied, encoded, embedded, event and procedural[25].

Five levels of people knowledge can be distinguished in organizations: individual, teams, geographical units, affinity networks, and enterprise (Boudreau et al., 1999). Above the individual level, the knowledge consists in the collective, meaning structures that exist among the group. These structures include norms, strategies and assumptions that guide how work is organized and

[25] Mertins, K., P.Heisig, J.Vorbeck. – "Knowledge Management – Concepts and Best Practices", in Springer Berlin-Heidelberg, 2003, p. 82.

conducted. The five levels intermingle, and knowledge typically flows back and forth as it is shared, reused, confronted, challenged, rejected and ignored. In addition, everyone has a personal knowledge network that extends outside the organization boundaries. The organizational knowledge network is vast and complex a real "web" by itself.

3. Views about Knowledge Management

There are various definitions of KM in the literature. Some authors [Davenport et al. (1998), Bukowitz et al. (1999), Scarbrough et al. (1999), Mathi (2004)] identify it with a process or set of processes, others [Bergeron (2003), Lehaney et al. (2003), Ackerman et al. (2003)] – with a management strategy, while third [Herbert (2000), Coakes (2004)] associate it with IT and a set of processes related to knowledge, information and data. Generally, all authors consider knowledge management as a way to administer the knowledge assets of an organization, to make them widely accessible and enlarge them continuously [Choo (1998), Bellaver et al. (2001), Sussman et al. (2002), Ackerman et al. (2003); Mathi (2004), Land et al. (2004)]. However, many theorists would argue that knowledge cannot be managed as it is held in the head or minds of people and thus one can manage the human being but not the knowledge that they contain

Additionally, some studies have called for a more holistic, systemic approach to KM. One such example is the division by Lehaney et al. (2004) into the "know-why, know-what, know-who, know-how" questions of KM. Know-how might be seen as technologically focused, know-who as socially constructed and depending on processes of debate, whilst know-why and know-what relate to issues of power and coercion in societal structures.

Various definitions of Knowledge Management are quoted in (Liebowitz, 2003):

✓ KM is the systematic, explicit, and deliberate building, renewal, and application of knowledge to maximize an enterprise's knowledge-related effectiveness and returns from its knowledge assets – Wiig;

✓ KM is the process of capturing a company's collective expertise wherever it resides – in databases, on paper, or in people's heads – and distributing it to wherever it can help produce the biggest payoff – Hibbard;

✓ KM is getting the right knowledge to the right people at the right time so they can make the best decision – Petrash;

✓ KM involves the identification and analysis of available and required knowledge, and the subsequent planning and control of actions to develop knowledge assets so as to fulfill organization objectives –Macintosh;

✓ KM applies systematic approaches to find, understand, and use knowledge to create value - O'Dell;

✓ KM is the explicit control and management of knowledge within an organization aimed at achieving the company's objectives;

✓ KM is the formalization of and access to experience, knowledge, and expertise that create new capabilities, enable superior performance, encourage innovation, and enhance customer value – Beckman.

Bukowitz et al. (1999) gives quite a broad definition for KM, whereas it is considered as "the process by which the organization generates wealth from its intellectual or knowledge-based assets." Wealth results when an organization uses knowledge to create more efficient and effective processes or to create customer value. Subsequently, a top-line impact occurs when intellectual assets are used to boost innovation and promote the development of unique market offerings which command a price premium.

Wiig (1998) considers KM from three perspectives with different horizons and purposes:

✓ business perspective – focusing on why, where, and to what extent the organization must invest in or exploit knowledge. Strategies, products and services, alliances, acquisitions, or divestments should be considered from knowledge-related points of view;

✓ management perspective – focusing on determining, organizing, directing, facilitating, and monitoring knowledge-related practices and activities required to achieve the desired business strategies and objectives;

✓ hands-on operational perspective – focusing on applying the expertise to conduct explicit knowledge-related work and tasks[26].

In (Davenport et al., 1998) knowledge management is the set of processes associated with understanding and using this asset. It is a structured approach that establishes procedures for identifying, assessing and organizing, storing, and utilizing knowledge to meet the needs of an organization. Davenport (1996) has further developed ten general principles of KM:

1. Knowledge management is expensive (but so is stupidity!).
2. Effective management of knowledge requires hybrid solutions involving both people and technology.
3. Knowledge management is highly political.
4. Knowledge management requires knowledge managers.
5. Knowledge management benefits more from maps than models, more from markets than hierarchies.
6. Sharing and using knowledge are often unnatural acts.
7. Knowledge management means improving knowledge work processes.
8. Access to knowledge is only the beginning.
9. Knowledge management never ends.
10. Knowledge management requires a knowledge contract (i.e., intellectual property issues).

According to (Lehaney et al., 2004) knowledge management refers to the systematic organization, planning, scheduling, monitoring and deployment of people, processes, technology and environment … to facilitate …. the creation, retention, sharing, identification, acquisition, utilization, and measurement of information and new ideas, in order to achieve strategic aims.

Similarly, Bergeron (2003) defines that "Knowledge Management (KM) is a deliberate, systematic business optimization strategy that selects, distills, stores, organizes, packages, and communicates information essential to the business of a company in a manner that improves employee performance and corporate competitiveness."

Herbert (2000) argues that KM is driven by IT and is concerned with collecting, rationalizing, codifying, storing and disseminating all knowledge within an organization. A key theme of KM is to transform tacit into explicit knowledge, which requires a change in organizational culture. Thus, organizational learning is the process by which individuals, and the organization as a whole, develop and use their stock of knowledge while a learning organization is one that both teaches and learns from itself.

When talking about KM, Coakes (2004) raises the question whether a system could be created that will capture companywide knowledge and make it widely available to all its members. This is a goal of numerous large and small organizations which are attempting to face the KM challenges putting in place knowledge management systems. A wide range of technologies are being used to implement KM systems: e-mail; databases and data warehouses; group support systems; browsers and search engines; intranets and internets; expert and knowledge-based systems; and intelligent agents.

4. Why we need a knowledge management ?

Knowledge management used to solve specific problems arising in an organization, even when we are dealing with a product or service is an in. Organizations implementing a knowledge management acting decisively on line using the parameters maximum intangible assets at the expense allocation of new funds for investment in intangible assets. With changes in the market, the

[26] Wiig, K. – "Knowledge Management Foundation", in Schema Press, 1998, p. 32.

uncertainty becomes greater, develops technologies, competitors are proliferating, and the products and services is rapidly devalues.

We often face a situation where we do not fully cover what we know, is left uncovered differences that sometimes can be a disaster, and sometimes may be lower. In these circumstances, an organization must be successful to increase the ability to create new knowledge on which to spread quickly and to incorporate them into new products and services.

In my opinion, we need a knowledge management, because:

- ✓ Modern organizations focus on knowledge, not capital (knowledge intensive, not capital intensive);
- ✓ Markets increasingly unstable require "organized abandonment";
- ✓ Knowledge management contain helps you change and not change to dominate you;
- ✓ Only the well informed survive;
- ✓ Knowledge helps in decision-making;
- ✓ Become effective if knowledge is shared with others;

Since "european money" requires value-added, knowledge management helps to increase innovation by valuing human potential in an organization.

Conclusions

Efforts made under the current trends and analysis of literature reveals that became required a radical change in terms of method An organization is not just a warehouse of stored knowledge, but a viable and dynamic environment, within which there are key relationships and interactions that vary with different intensities to ensure transformation of knowledge for the sole purpose of adding value.

We mentioned implanted in a socio-economic context who require complex, asking us to tackle new problems, new behavioral styles. To face the demands, will use its creative potential, in every situation inventing alternative solutions originals.

In these conditions, organizations are put in front redefining own culture through processes of organizational redesign and change of strategy.

" In the symphony orchestra, several hundreds of talented musicians, playing together. This will be the organization to new organization model, based on knowledge.

We see such a radical change from the tradition of performance that was spread primarily by advancing to positions of command in the managerial ranks.

Organizations will have very few such command's positions. We will see increasingly more organizations like jazz quintet, in which management changes within the team after the specific mission to fulfill and is independent of the <<degree>> of each member".

The future belongs to those who will ask hard questions and will dare to dream of a better world. We must dare to do more to reach knowledge. We should seek to find true wisdom and organizational ways to make really the wisest choice.

That's way, the purpose of my approach was to combine theory with practice, thus creating a framework for understanding the concept of knowledge management oriented diversity of activities in which the instrument of change can be applied.

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ELABORATING A GLOBAL DIAGNOSIS MODEL OF A COMPANY IN THE CURRENT CONTEXT OF SUSTAINABLE DEVELOPMENT

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Abstract
The new economic and social framework in which the business of XXI'th century run , globalization and internationalization of business, changing consumer optics wich become more interested in quality and organic matters incorporated, have developed new priorities for managing a company. Achieving "excellence" in business is the way of survival and development for the entities, in a competitive economy. One of the ways to achieve the excellence is the performance, currently are increasingly talking about overall performance resulting in performances obtained on three pillars: economic, social and environmental. In order to maximize overall performance of the company, investigating various aspects of economic, social and environmental approach is a very necessary step to any manager. In this paper we propose drawing up a comprehensive diagnostic system of a company, developed on the three pillars of sustainable development economy (economic, social and environmental). The model we developed is designed to provide synthetically, efficiently and quickly, the standing of a company in a given competitive environment.

Keywords: *global diagnosis, indicators, economic, social, environment.*

JEL classification: M10 , M14, M21

1. Introduction

In a world of competency that has become more and more pronounced as a consequence of the financial environment mutations and of risk increase once with the emphasizing of the econimic-financial turbulences and with the internatiolization of goods and capital exchange, reaching **„excellence" in business** represents the way of survival and development for the entities, in a competitive economy. One of the ways to achieve the excellence is represented by performance, currently they are increasingly talking about **overall performance**. This new approach to performance is currently known as **sustainable development** that has three objectives: increasing the economic-financial performance of the entity, developing the efficiency of the environment and favoring social development. Therefore, we might say that global performance represents the sum of economic-financial, ecologic (environment) and social performances.

In the current conditions of the international economy's globalization, a performing entity is an entity which creates added value both for actionaries as well as for all the participants to social life (customers, employees, entity etc.). Ellaborating certain models of business global diagnosis that would focus on the performances accomplished by the entity for all the participants to economic life, in the current context of sustainable development, is a challenge and a continuous preoccupation for all users of economic-financial information, that have a certain interest in a society.

2. Literature review

Integrating social performances as an assessment criteria of the entity;s global performances led to the occurence of the concept entitled „Triple Bottom Line" (TBL). This concept consists of

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appreciating the entity's global performances through its contribution to accomplishing economic, social and environment prosperity and it was developed by John Elkington in 1997. Subsequently, this idea started being largely sustained by lots of specialists, and we shall remind only some of the remarcable authors: Philip Kotler and Nancy Lee (2005), David Vogel (2005), William B. Werther, Jr and David Chandler (2006), William C. Frederick (2006).

Investigating international and internal specialized literature we could find various preoccupations of specialists to ellaborate models of global diagnosing of a company that would reveal approaches that are more or less tangent to social and environment performances, apart from the economic ones.

Consequently, we can classify the multitude of models that exist in specialized literature that are established, at the same time, by the economic practise in the following categories:

a) According to the issuer of these models there can be distinguished:

► Models elaborated by international organizations:

✓ Global Reporting Initiatives Sustainability Reporting Guidelines (GRI Guidelines), issued by World Commission on Environment and Development which represents the most developed initiative in the field of sustainable references. During time, there have been issued three versions of the guide (2000, 2002, 2006,2007). GRI, apart from. a generally applicable frame of sustainable references, also provides sustainable performance indicators.

✓ UK Reporting Guidelines, United Nation Approach are other approaches of sustainable performance assessment however, less developed than GRI.

► Modes elaborated by banks in the methodology of founding the lending decision. Among the very funamendal bank models in use are those elaborated by Romanian Comercial Bank, Transylvania Bank, Raiffeisen Bank (M. Achim, 2010).

► Models elaborated by rating companies and financial consultation companies:

✓ Models elaborated by international extra-financial rating agencies (Vigeo – France, ELRiS – England, SiRi Company – Switzerland, Ethibel –Belgium, Innovest – USA), that assess and rate the policies of social, environmental and governmental responsibility of the large, marketable companies. Large international extra-financial rating agencies have developed partnerships with the companies that underlie the stock market indexes to create indexes reuniting the companies which obtain the highest scores in the social, environmental and governmental field (Dow Jones Sustainability Indices – DJSI; FTSE4GOOD;ASPI Eurozone).(Mironiuc, 2009).

✓ The CEMMAT model – The Center of Management and Technologic Transfer in Bucharest that makes reference to the following categories of diagnosis: financial, marketing, technology, quality.

✓ The Roland Berger model used by R.B company of foreign consultancy refers to the following components of the general diagnosis: products, competency, distribution, financial, management, using 28 representative criteria for the reminded diagnosis fields.

► Models elaborated by different specialists of the economic field:

✓ The A.G. model (Alexandru Gheorghiu) established eight essential components of the society: financial, market and competency, research – development, products, management, production, commercial and personnel. (Al. Gheorghiu et al, 2002)

✓ The MEFAT model (model of financial assessment by And one -Țugui) is a model of global assessment of the financial diagnosis based on the points rating method and which consists in selecting a number of ten indicators out of the ensemble of economic – financial indicators, to which an importance coefficient is being attributed according to each one's significance (A. Ioan, Al. Țugui, 1999);

✓ The Bărbulescu model groups the appreciation criteria of a company's viability potential into six representative categories: economic – financial, managerial, quality and competitiveness, technical and technologic, social, ecologic, to which it grants various degrees of importance (Bărbulescu, 1999

✓ Models of assesing the financial situation, generically entitled Model "A" and Model "B" (M. Bătrâncea, L-M. Bătrâncea, 2006) are used by authors under the title of analysis models of the financial standing. Both models take into account the perspective of the diagnosis effectuated by banks on their clients being models of the "credit scoring" type and they are based on two qualitative criteria and five quantitative criteria. The difference between the two models consists in the selection method of these criteria taking into account the granted guarantees, lending service, types of clients (producers or traders).

b) According to the used methodology we can distinguish:

➢ Statistic methods based on the technique of multiple discriminant analysis. The most known models of diagnosis of statistic type used internationally are: The Modelul Altman, The Canon Holder model, The model of the Audit Central of France, the Taffle model, the Robertson model). At national level there were elaborated several models of financial diagnosis adjusted to the Romanian economy of emergent type: the Anghel model, the Cămăşoiu-Negoiescu model, the „C" model elaborated by financial analysts of the educational system from Craiova, the Băileşteanu model etc. The hereabove mentioned models reveal only the financial diagnosis angle without making reference to aspects regarding the management of resources or of sustainable performances.

➢ Non – statistic or necessitarian methods:

They use other techniques than the statistic ones, such as: comparison, induction – deduction, analysis – synthesis, rating scores, and assessment grates etc. In selecting the indicators that are representative for a diagnosed field and in granting importance degrees an extremely important role is played by the experience and the professionalism of the financial analyst that would allow the analyst to value the quality and the quantity as realistic as possible, according to the economic reality.

3. The research methodology

In view to reaching our procedures of establishing a global diagnosis of the society, moden approaches regarding the assessing of the entity's global performances will be considered (Triple Bottom Line), through investigating the three domains (components):

- Economic – financial performances;
- Social performances diagnosis
- Environment performance diagnosis.

For each diagnosed field there will be selected representative indicators abiding on a synthesis of specialized literature and economic practice but also on using professional reasoning. There will be given scores to each indicator according to its status and evolution, afterwards there will be given importance degrees to each selected indicator. The results are combined and the final score that is obtained (qualitative and quantitative) will provide information about the global position of a company on the market.

Substantively, the methodology of elaborating a global diagnosis of an entity included an ensemble of methods, teqchniques and procedures that help *establish and assess qualitatively and quantitatively the strong and the weak spots* of the economic – financial and also social management (including social and environment aspects) in view to settle a new strategy of maintenance and development in a competitive, sustainable environment.

Among the methods that techniques that have been used we remind:

✓ ***The comparison method***

✓ ***The points rating method***

✓ ***The S.W.O.T. method:***

✓ ***The method of assessment scales,*** marked with grades from 1 – 5, as in the following tables:

Table no. 1.: Simple form of financial criteria assessment scale

Grade	**1**	**2**	**3**	**4**	**5**
Status	Critical	Poor	Average	Good	Strong
Tendency	Sudden deterioration	Slow deterioration	Preservation	Slow improvement	Sudden improvement

In case both the level (status) and the tendency simultaneously improve, the framing of the indicators will be established according to the following matrix:

Tabel no. 2:Complex assessment scale of financial criteria

Tendincy/status	**Critical**	**Poor**	**Average**	**Good**	**Strong**
Sudden improvement	3	3,5	4	4,5	5
Slow improvement	2,5	3	3,5	4	4,5
Preservation	2	2,5	3	3,5	4
Slow deterioration	1,5	2	2,5	3	3,5
Sudden deterioration	1	1,5	2	2,5	3

Finally, framing in the adequate performance category can be made abinding on the global performance appreciation scale on the three levels (economic, social and environment), according to the following table:

Table no. 3: The scale for founding global diagnosis

General status of global performances	**GLOBAL DIAGNOSIS**	
	Quantitative diagnosis AVERAGE SCORE	**Qualitative diagnosis SWOT SCORE**
Strong	**5**	**Diagnosis SOLID – Category A STRONG POINT**
Very good	**4.5**	
Good	**4**	**Diagnosis GOOD – Category B GOOD POINT**
Satisfactory	**3.5**	
Average - acceptable	**3**	**Diagnosis AVERAGE/ACCEPTABLE – Category C INCERTITUDE**
Insufficient	**2.5**	**Diagnosis PRECARIOUS –Category D WEAK POINT**
Poor	**2**	
Very poor	**1.5**	**Diagnosis CRITICAL – Category E CRITICAL POINT**
Critical	**1**	

✓ **Other methods and techniques**

Other methods include:

- Quantitative methods: reports, structure rates, indices, regression method, extrapolation method;

- Qualitative methods: analysis, synthesis, interpreting the results, generalizing and assessing the results, descriptive methods.

4. Elaborating the entity's economical & financial diagnosis

The starting point in elaborating the economic diagnosis of an entity consists in assigning the components of the economic activity such as it follows:

a) The external component which focuses on the strategic and competitional environment;

b) The internal component which focuses on:

✓ On one hand on the economic environment (human resources management including company management, technical and material resources)

✓ On the other hand on the financial environment (revealed in the financial situations)

For each component we selected ten representative indicators, we granted importance degrees to them and the following synthesis models resulted:

Table no. 4: The model of strategic and competitional diagnosis

Crt. No.	Representative criteria for the strategic and competitional environment	Observations	SWOT Diagnosis	Points rating (1-5)	Ponderosity of importance (pi)	Aggre-gated points rating
1.	**Market position (measured through the market rate)**	The company has a good market position for most products and services provided especially for products of public consumption.	Status and tendency	N1	P1=18 %	N1xP1
2.	**Increase tendencies**	-Company's earnings slowly increasing -Sector is increasing	Status and tendency	N2	P2=16 %	N2xP2
3.	**Competition structure**	- high competitional level - it does not raise problems on the internal market - there have shown up many flexible private companies	Status and tendency	N3	P3=14 %	N3xP3
4.	**Outlet**	- there are traditional relations with beneficiaries - are traditional customers significant? - export earnings increase	Status and tendency	N4	P4=15 %	N4xP4
5.	**Customers' characteristics**	- Constant relations with the customers – increasing the number of customers - preoccupations to modify the customers' structure in view to discover a larger mass of customers	Status and tendency	N5	P5=7 %	N5xP5
6.	**Encouraging customers to become constant**	- After-sale services - Discounts are granted - Promotional advertising activities	Status and tendency	N6	P6=9 %	N6xP6
7.	**Degree of differentiating products/ - diversified range**	- complementarity	Status and tendency	N7	P7=5 %	N7xP7
8.	**Price /quality**	- Price accessiblity - integration in the quality standards required for the company's products	Status and tendency	N8	P8=12 %	N8xP8
9.	**Emplacement/**	- directly from warehouses + own distribution network	Status and tendency	N9	P9=3 %	N9xP9

	distribution organization					
10.	**Brand image**	Is it significant?	Status and tendency	N10	p10=1 %	N10xP10
General diagnosis of the competition environment – total score		**OPORTUNITIES – THREATS**			**100 %**	$\overline{N} = \sum NiPi$

Table no. 5: The management and human resourses diagnosis

Nr. crt.	**Criteria**	**Observations**	**SWOT diagnosis**	**Score**	**Ponderosity of importance**	**Aggregated score**
1.	**Managerial structure**	- training and competency - experience in managerial activity	Status and tendency	N1	P1=20 %	N1xP1
2.	**Quality of managerial team**	- cohesion - collaboration - perspective view - correct combination of responsibilities according to certain fields	Status and tendency	N2	P2=16 %	N2xP2
3.	**Organizational structure**	- specifically adopted - flexible - assignation of attributions and of competences on organizational levels	Status and tendency	N3	P3=6 %	N3xP3
4.	**Informational system**	- equipping with calculation equipment - ensuring personnel that is specialized in informatics - extended to all hierachical levels	Status and tendency	N4	P4=4 %	N4xP4
5.	**Ensuring the proper number of personnel**	- fully ensured - correlated with productivity	Status and tendency	N5	P5=4 %	N5xP5
6.	**Structure of personnel**	- age of the personnel and especially of the working personnel	Status and tendency	N6	P6=4 %	N6xP6
7.	**Work qualification of personnel**	- school education - average qualification - specialized personnel	Status and tendency	N7	P7=18 %	N7xP7
8.	**Permanence of the personnel**	- reduced mobility - low fluctuation - constant increase	Status and tendency	N8	P8=8 %	N8xP8
9.	**Use of work time**	- level of using work time - evolution tendency	Status and tendency	N9	P9=4 %	N9xP9
10.	**Work productivity**	- great and increasing - productivity – remuneration correlation	Status and tendency	N10	P10=16 %	N10xP10
General diagnosis of management and human resources – total score		**WEAK POINTS – STRONG POINTS**			100 %	$\overline{N} = \sum NiPi$

Table no 6: Diagnosis model of technical resources

Crt. No.	Criteria	Observations	SWOT Diagnosis	Score	Ponderosity of impor-tance	Aggregated score
1.	**Emplacement of productive capacities and access pathways**	Access pathway requires transportation means	Status and tendency	N1	P1= 7 %	N1xP1
2.	**Value and structure of body immobilization**	• immobile means are purchased from borrows • structure corresponds with the specific of the respective activity	Status and tendency	N2	1 P2= 16 %	N2xP2
3.	**Ensuring machineries and equipments**	• at the level of requirements • capacitaty surplus	Status and tendency	N3	13 % P3= 13 %	N3xP3
4.	**Condition of machineries and equipments / quality of technologies**	• low depreciation • improved technical level • increased renewal	Status and tendency	N4	P4= 15 %	N4xP4
5.	**Extensive use of machinaries and equipments**	• average degree of production capacities' utilization	Status and tendency	N5	P5= 1 %	N5xP5
6.	**Intensive utilization of machineries and equipments**	• Total income / gross profit and netto profit for 1000 lei	Status and tendency	N6	P6= 18 %	N6xP6
7.	**Maintenance and reparations**	-Own reparations workshop -Reparations time table	Status and tendency	N7	P7= 2 %	N7xP7
8.	**Maintenance costs**	-Relative maintenance costs	Status and tendency	N8	P8= 4 %	N8xP8
9.	**Investments**	- there is an investment plan - investments financed from credits - objectives execution plan	Status and tendency	N9	9 P9= 9 %	N9xP9
10	**Production flow**	- old technologies - lack of capacity at requirement level	Status and tendency	N10	P= 15 %	N10xP10
General diagnosis of technical resources – total score		**WEAK POINTS – STRONG POINTS**			**100 %**	$\overline{N} = \sum NiPi$

Table no 7: Diagnosis model of material resources

Crt. No.	Criteria	Observations	SWOT* diagnosis	Score	Ponderosity of importance	Aggregated score
1.	**Structure of purveyors**	-are there several customers for the same material?	Status and tendency	N1	P1=7 %	N1xP1
2.	**Degree if dependence on certain purveyors**	-there is a high dependence on certain purveyors which increases the activity's risk	Status and tendency	N2	P2 =15 %	N2xP2
3.	**Quality of purchased stock**	-an improved quality is desired	Status and tendency	N3	P3 = 10%	N3xP3
4.	**Transportation conditions and payment**	-is transportation or assembling included in the price?	Status and tendency	N4	P4=4 %	N4xP4
5.	**Bounties, discounts**	-are there any bounties under the form of discounts?	Status and tendency	N5	P5=8 %	N5xP5
6.	**Closing contracts for the necessary stock to be purchased, both as quantity/quality/availability/cost**	-are there any purchase restrictions from the point of view of delivering the materials at the required qualitative level, within the specified date and with the foreseen costs?	Status and tendency	N6	P6=16 %	N6xP6
7.	**Carrying out the purchase program on the overall and on the main material resources**	- is the purchase program made on the overall and on assortments?	Status and tendency	N7	P7=2 %	N7xP7
8.	**Reserve stockpiles**	-does the company have reserve stockpiles?	Status and tendency	N8	P8= 7%	N8xP8
9.	**Low mobility stockpiles**	-are there any low mobility stockpiles?	Status and tendency	N9	P9=13%	N9xP9
10.	**The efficiency of using stockpiles of materials**	- degree of valuing stocks and increasing materials?	Status and tendency	N10	P10=18%	N10xP10
General diagnosis of material resources – total score		**WEAK POINT – STRONG POINT**			**100 %**	$\overline{N} = \sum NiPi$

Tabelul no. 8 ***Synthetic model of economic environment***

Indicators	Observations Findings at the analyzed company – status and tendencies	SWOT diagnosis	Score	Ponderosity of importance	Aggregated score
Diagnosis of management and human resources	**…**	**Strong points / Weak points**	N1	P1 = 40 %	N1xP1
Diagnosis of technical resources	**…**	**Strong points/**	N2	P2 = 30 %	N2xP2
Diagnosis of material resources	**…**	**Weak points**	N3	P3 = 30 %	N3x P3
THE DIAGNOSIS' SYNTHESIS OF THE ECONOMIC CONDITION	**WEAK POINTS – STRONG POINTS**				$\tilde{N} = \sum_{i=1}^{n} NixPi$

Table no. 9: Synthetic model of financial diagnosis

The representatives criterias for financial standing of entity	Remarks	SWOT Diagnosis	Score (1-5)	Importance (pi)*	Agregate score
Financial position				**10 %**	
Evolution and structure of assets	**...**	Weak…Strong	**n 1**	4 %	**n1xp1**
Evolution and structure of debts and equity	**...**	Weak…Strong	**n 2**	16 %	**n2xp2**
Liquidity	**...**	Weak…Strong	**n 3**	18 %	**n3xp3**
General solvability	**...**	Weak…Strong	**n 4**	2%	**n4xp4**
Financial indebt	**...**	Weak…Strong	**n 5**	14 %	**n5xp5**
Times interest earning (TIE)	**...**	Weak…Strong	**n 6**	4 %	**n6xp6**
Working capital	**...**	Weak…Strong	**n 7**	10 %	**n7xp7**
Management of total assets	**...**	Weak…Strong	**n 8**	16 %	**n8xp8**
Management of inventory	**...**	Weak…Strong	**n 9**	10 %	**n8xp9**
Management of receivebles/debts	**...**	Weak…Strong	**n 10**	6 %	**n10xp10**
1. Financial position standing		**Weak…Strong**	**-**	**100 %** **10 %**	$\tilde{N}1 = \sum_{i=1}^{n} nixpi$
Financial performances				**50 %**	
Evolution of financial performances	**...**	Weak…Strong	**n 1**	4 %	**n1xp1**
Structure of financial performances	**...**	Weak…Strong	**n 2**	2%	**n2xp2**
Commercial profitability ratio	**...**	Weak…Strong	**n 3**	6 %	**n3xp3**
Return on equity (ROE)	**...**	Weak…Strong	**n 4**	9 %	**n4xp4**

Return on assets (ROA)	...	Weak…Strong	n 5	8 %	n5xp5
Dividend stock market ratios	...	Weak…Strong	n 6	9 %	n6xp6
Stock market ratios (PER, PSR, PBR)	...	Weak…Strong	n 7	14 %	n7xp7
Economic value added (EVA)	...	Weak…Strong	n 8	15 %	n8xp8
Merket value added (MVA)	...	Weak…Strong	n 9	16 %	n8xp9
Total shareholders return (TSR)	...	Weak…Strong	n 10	17 %	n10xp10
2. Financial performance standing		**Weak…Strong**	-	**100 %** **30 %**	$\bar{N}2 = \sum_{i=1}^{n} nixpi$
Cash-flow				**30 %**	
Operating cash-flow	...	**Weak…Strong**	n1	**30 %**	n1xp1
Investing cash-flow	...	**Weak…Strong**	n2	**20 %**	n2xp2
Financing cash-flow	...	**Weak…Strong**	n3	**10 %**	n3xp3
Total cash-flow	...	**Weak…Strong**	n4	**40 %**	n4xp4
3. Cash-flow standing		**Weak…Strong**	-	**100 %** **40 %**	$\bar{N}3 = \sum_{i=1}^{n} nixpi$
Risks				**10 %**	
Break-even point	...	**Weak…Strong**	n1	**30 %**	n1xp1
Global break-even point	...	**Weak…Strong**	n2	**35 %**	n2xp2
Financial leverage	...	**Weak…Strong**	n3	**35 %**	n3xp3
4. Risks standing		**Weak…Strong**	-	**100 %** **20 %**	$\bar{N}4 = \sum_{i=1}^{n} nixpi$
The global financial standing	**Category A – SOLID,** **Category B- GOOD** **Category C - AVERAGE** **Category D - PRECARIOUS** **Category E - CRITICAL**			**100 %**	$\bar{N}G = \sum_{i=1}^{n} \bar{N}ixPi$

Table no. 10.Elaborating the economical &financial diagnosis

Diagnosed fields	SWOT diagnosis	Score	Ponderosity of importance	Aggregated score
COMPETENCE ENVIRONMENT	…	N1	P1=20 %	N1X P1
ECONOMIC CONDITION	…	N2	P2= 30 %	N2X P2
FINANCIAL CONDITION	…	N3	P3= 50 %	N3X P3
SINTHESIS OF THE GENERAL ECONOMIC-FINANCIAL DIAGNOSIS	**WEAK POINTS-STRONG POINTS**		100 %	$\bar{N} = \sum_{i=1}^{n} NixPi$

5. Elaborating the diagnosis of social and envirnoment performances

Nowadays society is interested both inthe company's financial results and in the way they address the needs of various participants to economic life. One of the corporate social responsibility that ensures a social strategic development is addressing of interests of all participants to economic life (stakeholders) that is (from employees to community, from purveyors to government creditors, from managers to corporate administration and maintaining the focus on the stakeholders).

Given the large number of studies on this subject we consider appropriate, to present proposed indicators for reporting on global performance by the Global Reporting Initiative (GRI) in the context of sustainable development of an organization.

5.1. In what follows we will focus on the **social performance indicators.** According to GRI, these social performances indicators could be:

− performance indicators on ***practices and working conditions:*** the appearance of employment, occupational health and safety issue, issue education and training;

− ***human rights performance*** indicators: nondiscrimination appearance, freedom of association issue, the issue of child labor, rights of indigenous peoples;

− indicators of ***performance*** **on society**: corporate issue, political contributions issue, conformity aspect;

− performance indicators on ***product responsibility:*** consumer health and safety issue, the issue relating to labeling, marketing communication aspect, conformity aspect (Mironiuc, 2009).

5.2. Regarding the **environmental performance indicators,** GRI select the following indicators:

− ***raw material*** aspect: the raw materials used per unit of product, amount of weight in the total amount of recyclable materials;

− ***energy*** aspect: direct and indirect energy consumption, on primary energy sources, energy savings achieved by preserving and increasing its efficiency, products and initiatives to achieve low energy services, initiatives to reduce indirect energy consumption;

− **water** issue: total consumption of water by sources, significant water sources, the percentage of reused and recycled water;

− aspect of ***biodiversity:*** area of owned, leased or managed land in protected areas, describing the major impacts of activities, products, services on protected areas, protected habitats, strategies for managing protected areas, the number of protected species that have habitat in protected areas of the organization;

− aspect regarding ***emissions,*** waste: direct and indirect total emissions of greenhouse gas per unit of product, initiatives to reduce emissions of greenhouse gas and the results achieved, emissions of harmful substances per unit of product, nitrogen dioxide, sulfur and other air emissions per unit of product, wastewater and reuse methods (recycling), ratio of hazardous waste to be imported, exported, transported, treated, fauna, flora and aquatic habitats significant destroyed by sewage and emissions from the organization;

− ***appearance of products and services:*** initiatives to mitigate environmental impacts exerted by products / services of the company, the ratio of products sold and the amount of packaging / materials recycled and reused, by category;

− ***compliance*** aspect: value of significant fines and the number of non-monetary sanctions for failure regarding environmental regulations;

− ***transport*** issue: a significant environmental impact caused by transportation of goods / materials used in each activity of the company and every movement of personnel;

−***general appearance***: Environmental expenditure and investments, by type.

Many important non-financial aspects of performance can't be measured. So, they remain outside the formal performance measurement Contrary to financial performance measures, non-financial performance measures are less appropriate for decomposition, which results in the fact that they are unique to specific business units, whereas financial ones are common to many units.

The economical & financial model of diagnosis, presented at the point 4 of our article (model which is based on financial criteria) have to be adjusted with non-financial aspects consist in exercise of a high corporate social responsibility in relation between the company and stakeholders. In this way, performance of the company will be reflected completely and in a global manner.

6. Conclusions

The model presented above intends to investigate the economic, social and environment settings in which any entity activates and, thus, to outline the performances accomplished at any level and sublevel.

Among **the advantages** of the above presented model we can mention the following:

✓ The model investigates exhaustive aspects on the three pillars of sustainable development, contriving to accomplish a global assessment of an entity's performances

✓ The model is a synthetic and complex one at the same time, as it has both a determining angle of the investigated domains as well as a coercive one (under the form of measures to be taken), meant to ameliorate the future performance of a company;

✓ The model adopts a double vision, both a qualitative one (under the form of a SWOT appreciation) and a quantitative one (under the form of an assessment scale from 1-5) which, as such, offers double informational valences.

Among the model's **borderlines** we could remind:

► In regards to *the ponderosities* of importance given to various indicators, we can appeciate that these are granted abinding on the investigation of a vast specialized literature, they have empirical, subjective value and they are not necessarily based on an own statistic research. Also, these ponderosities of importance depend on the users of economic-financial information and on differential interests that they have in the analyzed entity, for instance:

- Financial creditors will give significant importance to the indicators of will give major importance to the bursary rates (PER,PSR, PBR) as well as to those of value increase (EVA, MBV, TSR);

- Managers will permanently monitor the patrimony management indicators but also the performance ones including those that reflect value increase.

- In the presented model we tried to reveal the informational valences of one indicator or another, through giving higher or smaller ponderosity of importance, taking into account the extent to which this indicators is in the focus of a large number of users.

►In regards to *the non-financial indicators* selected to reveal the entity's sustainable performances, the following borderlines can be mentioned:

✓ They are very little normalized, there is not any homogenous practice/methodology in the field of extra-financial analysis;

✓ The system of sustainable reportation (of social and environment aspects) remaines a volunteer intercession; certain indicators are not clearly defined, therefore, there are differences regarding various entities' approach to them;

✓ The calculation methodology of certain sustainable indicators is very complex and expensive;

✓ Often, there is not any strong motivation of companies for sustainable references if the cost-benefit ratio is taken into consideration;

✓ Communicating the sustainable performances through volunteer references can be a disatvantage to companies, as they can unreveal essential elements of competitive advantage on this occasion;

We can appreciate that as soon as the companies become aware of the need for sustainable reference, the models of the companies' global diagnosis of performances could be further developed and optimized.

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THE PAYG VARIANT VERSUS THE FULLY FUNDED VARIANT IN CONFIGURING AN EFFECTIVE PENSION SYSTEM

CIPRIAN PÂNZARU[*]

Abstract
The actual situation is characterized by a major transformation of economical structures, such as: the decrease of population, the increase of participation rate of younger people in higher education and most important, massive retirements and migration. These aspects have generated a drastic decrease in labor force and have brought imbalance in Romanian pension system. Now, the Romanian system of pensions based the principle of social solidarity (support by those who have an income now for the people who worked in the past) known as a „pay as you go" system – PAYG has demonstrated its limits, especially due to the current demographic context. This system is an un-funded one not based on economizing. On the other side, private pension systems, either obligatory or optional, are fully funded and based on process of economizing. PAYG pension systems are more vulnerable to demographic changes than pension systems base on accumulation and capitalization. This paper presents, in comparative approach, these two pension systems and corroborating them with present socio-demographic situation try to disclose whichever is more viable in ensuring sustainability of pension system from Romania.

Keywords: *social security, sustainability, pension systems, demographic risk, transition*

Introduction

Worldwide discussion on the sustainability of pension systems is of utmost interest, especially since, in the current socio-economic conditions, it is undergoing a severe crisis. Thus, factors such as aging, reducing the active population, labor migration, etc., represent major challenges for configuring policies on pension systems. The importance of this aspect is reflected in the allocation of GDP in most countries in Europe and which lies between 8 and 10% for providing minimum pension system's stability.

Given these assumptions, most countries were already engaged in developing policies to reform their pension systems. The main issue raised in most discussions concerning the reform of pension systems has as leitmotiv the dichotomy between PAYG and fully funded type systems.

Typically, the public pension system is founded on the pay-as-you-go (PAYG) idea, meaning current payment of pensions from contributions collected from present incomes of working population.

On the other hand, there are private pension systems based on the accumulation and investment of individual savings, also called fully funded.

Existing pension systems differ considerably between countries mainly due to the specific historical path of each. For example, in countries with an ideological and economic foundation of social obvious type, such as France and Germany, the PAYG type pension schemes are more present. In other countries, like Britain and the United States, with a liberal or neoliberal orientation economically speaking, the emphasis is on fully funded systems. These pension schemes can work mixed, as well. In fact, in most states, the main pillar for the foundation of pension provision consists of a public pension plan, mandatory, completed with a private pension system, either mandatory or optional. This is also Romania's case, which since 2007 has introduced a multi-pillar pension system.

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PAYG Pension Systems. Advantages and Weaknesses

The "pay-as-you-go" pension schemes, or PAYG, are based on a "pay as you get paid" principle. It is a state social security system that functions on the social solidarity principle, which means that those who currently receive income support financially those who have worked in the past, with the promise that, in turn, they will be supported by the incomes of future generations. The "pay as you go" pension system is a system that works on the principle of intra-and intergenerational solidarity.

This system was designed by Bismarck about 120 years ago. In fact, in the history of social security systems, this marks the crucial point of development, representing the first formal pension system in the world. Under the original scheme, devised by Bismarck, the system was financed from contributions, hence the name of social insurance. They were mandatory for employees for which they were created, whether qualified or not, young or old, male or female, regardless of their health. The principle of solidarity was manifested by contributions paid by employees on a regular basis to make bear the socio-economic difficulties, in our case this being determined by the depletion of our working life. Three social partners – workers, employers and the state – had the role, rights and obligations in the management of the system as a whole. The resources mobilized by this method are dependent on the number of working people and taxpayers, the results being related to the balance between the number of those who subscribe and the number of beneficiaries of such services. This makes such systems to encounter difficulties in times of high unemployment rates when the number of those taxpayers is reduced, requiring intervention from the state budget to not get too high the insurance premium.

The PAYG type system is an "un-funded" one, not being based on accumulation funds, in other words not being based on saving. This system was especially successful in the past because it provides a high level of confidence and a reasonable retirement income, at also reasonable contribution rates. At the time of its appearance, the system was profitable because life expectancy was low and almost coincided with the retirement age. The system has expanded in Europe and works today, but socio-economic changes produced in the last 120 years have made it not viable for our times.

The basic principles under which public pension systems operate of PAYG type are[1]:

- *the principle of uniqueness*, according to which the state organizes and ensures the public pension system based on the same rules of law for all participants in the system;
- *the principle of obligation*, under which individuals and legal entities by law are required to participate in the public pension system, social insurance rights correlating with exercising obligations;
- *the contributiveness principle*, under which social security funds are based on contributions from individuals and legal entities participating in the public pension system, social security benefits being due under the social security contributions paid;
- *the principle of equality*, which ensures all participants in the public pension system, taxpayers and beneficiaries, a non-discriminatory treatment between persons in the same legal position in respect of the rights and obligations provided by law;
- *the distribution principle*, under which social security funds are redistributed for payment of obligations of the public pension system, according to law;
- *the principle of social solidarity*, according to which the public pension system participants assume mutual obligations and enjoy rights to prevent, limit or remove the insured risks, under the law;
- *the principle of autonomy*, based on independent management of the public pension system, according to law;
- *the imprescriptibility principle*, according to which the right to pension is not prescribed;

[1] Adjustment by Romanian State Pension System (Law no. 263 from 16 december 2010).

- *the non-transferability principle*, under which the pension right may not be transferred, in whole or in part.

The pay-as-you-go system has primarily the advantage of increased prevention of poverty in the elderly and requires a fairer distribution between generations of inflation and especially of risks caused by potential disasters such as wars, recessions. On the other hand, this system is vulnerable to unemployment and population aging.

The generational solidarity principle, subsumed to the PAYG pension system, works as long as the ratio between the active and inactive population is in favor of the first category.

As life expectancy has increased, an imbalance occurred between these categories, the balance leaning in favor of retirees. Of course, the issue can be corrected by rising the retirement age, but this cannot be done indefinitely. On the other hand, such a measure generates resistance to change in society, because people do not accept the idea of working ever more years before they enjoy the right of retirement. The imbalance induced by this phenomenon in the PAYG type system is doubled also by the reduction of the working population and the decrease in birth rates. Aging modifies the conditions for redistributing income, in general, and the balance of the PAYG type pension system. A decline in the working population influences the income of these systems which, in essence, are based on wage bills (total wages received by employees). An acceleration of retirement increases pension payments so that aging degrades the financial situation of the systems based on the PAYG principle.

Global progressive aging of population stresses the financial difficulties of the PAYG type pension systems, therefore the pension schemes will have to become less sensitive to demographic and social changes.

Advantages and Disadvantages of FULLY FUNDED Type Pension Schemes

In countries with a liberal economic tradition, private pension schemes have developed, either mandatory or optional, based on the accumulation of individual savings and investment. These are the so-called fully funded systems based on a process of saving. As stated above, these pension systems find their origins in the liberal and neoliberal economic doctrine. This philosophical-social and politico-economic concept supports the minimization of the influence of state on economic events. According to this philosophy, the neoliberalism option, in terms of social security, is quite clear: privately held solutions instead of state systems considered to be inoperable because of excessive bureaucracy. State intervention on the social security component should manifest only in case of those who really need social assistance, meaning those who are unable to secure their daily living. From the perspective of neoliberalism, the pay-as-you-go strategy is criticized on the grounds that it would not have a solid foundation.

Fully funded type pension schemes may be mandatory or optional, operating in parallel with systems based on redistribution (PAYG) or they can fully replace them. For example, in countries such as Chile, Mexico, Bolivia, El Salvador, Kazakhstan, this type of pension scheme is used instead of the PAYG type, in countries such as Peru or Colombia the fully funded type private system is a variant of the PAYG type system, and in countries such as Argentina, Uruguay, Eastern European countries, including Romania, this system works in mixed regime together with that based on redistribution. The most advanced private pension systems are in the U.S.A., Australia, Switzerland, and the Netherlands. For that matter, these countries have introduced, with a binding character, a component based on accumulation, managed by private institutions and that is the result of optional pension plans organized by employers. In countries where the mixed regime operates, as is Romania's case, private pension is formed by monthly transfer of a share of the social security contribution paid in the public pension system to a private pension fund.

The most known presence in the area of social security of private pension systems is in the form of the 2nd and 3rd pillars. The 2nd pillar covers occupational pension provisions that are generally

set in advance. Pensions are managed by private, independent, pension funds. The 2nd pillar's features are:

- *requirement*, all those who receive income under an employment contract are required to contribute to a private pension fund;
- *capitalization*, private pension funds are invested in accordance with a series of legal provisions;
- *individualization*, contributions and their results are individually oriented to those who have contributed to the private pension fund.

The extension of the 2nd Pillar is the 3rd Pillar, consisting of voluntary individual savings managed by private insurers, which may be mutual funds, investment companies or even the individuals themselves. Therefore, the specificity of the 3rd Pillar compared with the 2nd Pillar is the optional nature of contributions. The second and third pillar are, usually, of the fully funded type and have as major advantage the fact that they encourage private savings for the retirement period. Pensions financed from an accumulated stock of assets are less vulnerable to demographic changes than those based on the PAYG system. However, they are subject to inherent risks in economic life, such as bankruptcy or devaluation. Yet, some specialists consider that the highest risks to which private pension funds are subjected in the near future are generated, just as with PAYG systems, again by aging. The difference is that with fully funded systems the risk generated by aging is correlated with a possible devaluation of assets[2]. Demographic factors along with economic ones pull with them asset prices and hence affect private pension systems. The idea is that over the past 30 years asset prices have skyrocketed, mainly due to the baby boomers generations who have contributed. When this generation will retire and begin to sell the assets they have, these, according to the above theory and called asset meltdown, will be devalued due to the large number removed from the market at once. The logic on which this theory develops is simple: young people gather easily assets for old age, while the elderly waive assets to finance their old age. When the younger generation is more numerous, prices raise; when the elderly are more numerous, prices are lowered.

Of course, the asset meltdown theory is subject to much criticism that required its treatment with caution. It is true that on the capital markets demographic aging induces a decline in the stock of capital, yet it is also characterized by a decline in the working population. Therefore, the dynamics of capital per capita is thus influenced by two phenomena with opposite effects, which ultimately offset each other.

The PAYG and the Fully Funded System in Romania – Present and Future Prospects

The crisis marking pension systems all over the world is also present in Romania and it affects our country's pension system. In addition, Romania is facing a different situation, generated by policies developed on the pension component after 1990.

Currently, in Romania operates, as basic formula, a public pension system, of a redistributive type based on solidarity between generations, i.e. a PAYG type system. It is also called 1st Pillar. In the public pension system all employees contribute plus any other taxpayers required by law to pay the SSC (social security contributions). For 2010, the social security contribution rates were 31.3% (for the special conditions of employment), 36.3% (for the particular conditions of employment) and 41.3% (for special conditions of employment). From this, the individual social security contribution rate is 10.5%, regardless of the working conditions.

All contributors receive a pension right, but the link between the amount of contributions paid during the lifetime and the pension amount is not proportionate. All contributors accumulate a score according to the amounts paid, and the pension which is calculated is the result of the product of the number of points and the point value. This is a very relative formula because the point value is

[2] Mankiw, N.G. and Weil, D.N, The baby boom, the baby bust, and the housing market, Regional Science and Urban Economics 19 1989, pp. 235-258.

determined politically and therefore subjected to the country's political development and the economic and doctrinal orientation of those in power. This is one of the major flaws of the PAYG type public pension system currently operating in Romania. Currently, there are approximately 4.1 million employees contributing to the public pension system supporting about 4.7 million pensioners. In addition to this type of pensions there is a the pension system for farmers, different from the public system, not contributing, which is supported by resources from the state budget and which provides payment of pensions for about 760,000 former farm workers. Then there are the special pensions of former employees of the defense system, which had a special contribution regime, and we also mention other types of pensions such as those of diplomats, judges, parliamentarians, etc. Also in the latter's case, the contributions' scheme had a special character.

Pension formulas applied in the post-socialist period hoping to solve growing unemployment (including early retirement) have increased the number of retirees. Thus, between 1990 and 2010 the number of retirees increased by approximately 80%. The situation of grave imbalance in which the pension system is found, based on the principle of social solidarity, PAYG specific, is reflected by the dependency ratio between the number of retirees and the number of employees and how it evolved between 1990 and 2010. In other words, we are speaking about the number decrease of those who pay social contributions. If in 1990 there were 8.1 million employees and only 2.5 million retirees, in 2010, statistics show only 4.1 million employees and approximately 4.7 million retirees (not including the farmer retirees). The evolution of this report is shown in the table below:

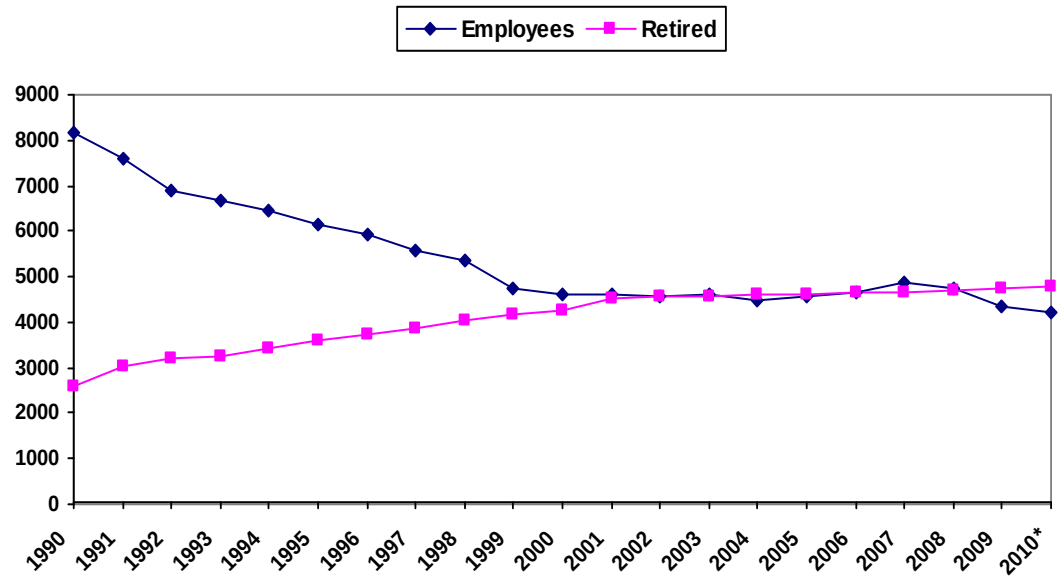


Fig. 1 – Evolution of employees - retirees ratio in Romania during 1990 to 2010 (thousands of people)

Source: National Institute of Statistics and National House of Pensions and Other Social Insurance Rights

This imbalance was produced over time, as I noted above, by pension policies developed and implemented after 1990, by the sinuous economic developments that led to an increase in unemployment and by a series of natural factors such as the population demographic evolution.

Unemployment had generally an upward trend, thus diminishing the mass of contributors to the pension system. Given the fact that the pensions of current retirees are paid from the proceeds of the contributions of current employees, the unemployment factor is obviously one having an impact on the sustainability component of the pension system. The evolution of unemployment in the period 1991 to 2010 is reflected in the chart below and indicates perhaps most accurately, by the sinuous nature, the evolution of Romanian economy after 1990. It must be made clear that 1990 is not included due to lack of data.

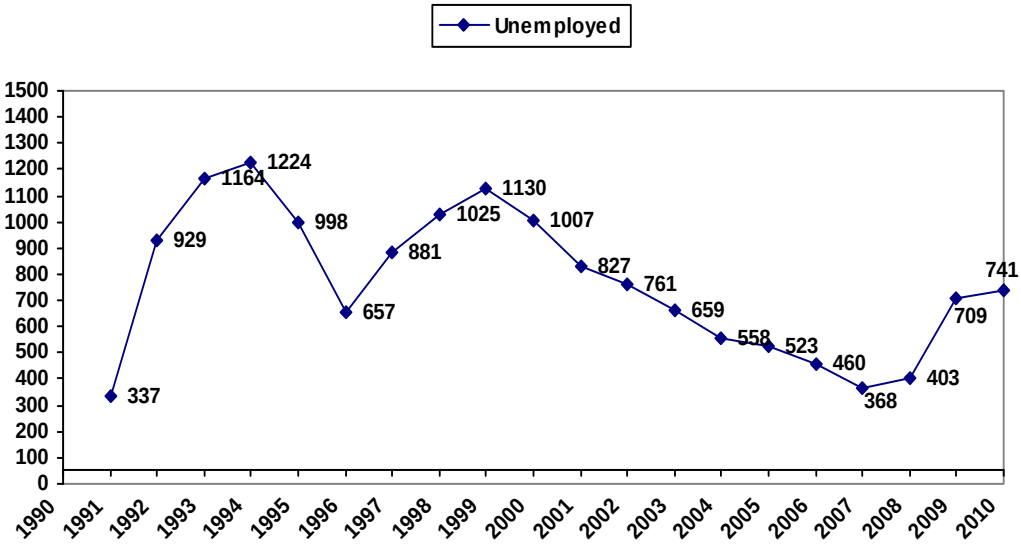
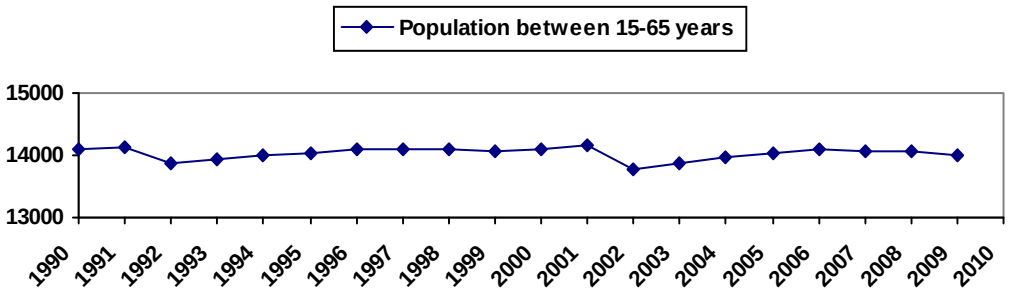


Fig. 2 – Unemployment in Romania during 1991 to 2010 (thousands of people)
Source: National Agency for Employment

Demographic issues affecting the sustainability of the current pension system in most countries have not spared Romania. The population in Romania is an old one, which affects the sustainability of the pension system. In the past 20 years, the evolution of the active population, i.e. the one aged 15 to 65, has been decreasing compared to the evolution of the population aged 65 and older. Graphically, these developments are highlighted in Figure 4 and 5:



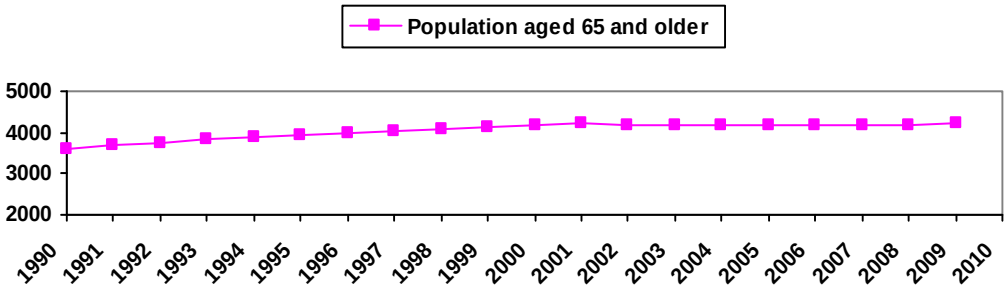


Fig. 3 – Evolution of the population aged 15 to 65 in Romania between 1990 to 2010 and evolution of population aged 65 and older in Romania between 1990 to 2010 (thousands of people)
Source: National Institute of Statistics and own approximations for 2010

Adjustment of these imbalances can be achieved only through a proper reform of the pension system in Romania. A major challenge in terms of sustainability of the pension system is the introduction of mandatory 2nd Pillar of a fully funded type. In 2007 two pillars were introduced that match the private pension system: the 2nd Pillar (regulated by Law 411/2004) and the 3rd Pillar (regulated by Law 204/2006). The 2nd Pillar is binding on all persons up to the age of 35. The contribution is voluntary for those aged between 35 and 45. The 2nd Pillar represents the pre-financed component of the first pillar, a part of social security contributions being directed towards the compulsory pension funds under private management. The contribution rate in the first year was 2% of the gross income and will reach a maximum of 6% by the end of 2016. For 2011, the contribution rate related to private pension funds is 3%[3].

Forwarding a percentage of mandatory contributions to private pension funds is a direct consequence of reducing the funds available for current pensions combined with an increase in deficit on the PAYG system. However, on long term, private pension component insertion will reduce dependence on the state of retirement and could balance the Romanian pension system.

Conclusions

The problem of efficient management of the pension systems and their adaptation to the current socio-economic dynamics is one of the biggest challenges of the 21st century. It is obvious that the risks and vulnerabilities arising from socio-economic dynamics are becoming more entrenched by the application of traditional measures. Viability of pension systems becomes an important issue and which probably will increase as the baby boom generation will reach retirement age. For this reason, policy makers are faced with different options. Of these, controlling public expenditure on pensions by thinking of pension schemes less sensitive to demographic changes through reforms in the PAYG systems or switching to a private system represent the main option.

For example, it is clear that PAYG type pension systems are increasingly inadequate in the current socio-economic context marked by demographic deficit. This situation could not be anticipated when Bismarck devised this formula. On the other hand, it is true that the Fully Funded type system is protected from the aging population risk, but only partially, if we consider the asset meltdown expected by some experts. However the fact that this type system eliminates the conditioning of retirees to the "generosity" of younger generations makes it more adapted to today. Certainly, in terms of philosophy of social security, the fully funded type systems eliminate the idea

[3] art. 17 paragraph (2) of Law no. 287/2010 on the state social insurance budget in 2011.

of solidarity between generations, but establish a deeper connection between personal contributions and the amount of pension received.

The two components, the public namely the private one, are exposed differently to demographic, macroeconomic, namely political risks. The main purpose in devising a pension system should consider opportunities to diversify the protection measures against risks induced by each variant. The risk of bankruptcy of private pension funds and the possible asset meltdown caused by the depletion of active life of the baby boom generations may be mitigated by the parallel existence of a public pension system. At the same time, the risk related to the aging phenomenon and its obvious effects on the PAYG type pension systems can be partially diminished by the existence of fully funded type pension systems. However, it is sure that both systems bear risks, generally determined by the population dynamics. As a matter of fact, the Club of Rome, through the voice of their experts, warn that population aging will affect, at a different pace and with a variable force, both the financing schemes of pensions based on redistribution (PAYG) and voluntary savings schemes based also on investment (fully funded).

In other words, having seen both the advantages and disadvantages of the PAYG type pension systems as well as the fully funded type ones, the best solution seems to be a mixed one that combines the advantages of both types of systems.

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This work was cofinanced from the European Social Fund through Sectoral Operational Programme Human Resources Development 2007-2013, project number POSDRU/1.5/S/59184 „Performance and excellence in postdoctoral research in Romanian economics science domain"

THE ROLE OF INFORMATION ASYMETRY IN THE OUTBURST AND THE DEEPENING OF THE CONTEMPORARY ECONOMIC CRISIS

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Abstract
An analysis of the outburst and deepening of the contemporary economic crisis that takes into account the information asymmetry is highly opportune. This point of view is strongly supported by the latter years' developments regarding this theory, which may be able to explain the current evolutions of the economic and financial markets. Thus, the paper argues that adverse selection and moral hazard played a key role in the evolution of the contemporary economic crisis and that its routs can be detected away in history. In this regard, we analyze the situation prior to the outburst of the subprime crisis in the U.S. and how it developed in a context of asymmetry information, fueled by the government's actions. Given the importance of certitude, quantity and quality of data and information and the way they are interpreted, it becomes crucial to isolate the role of information asymmetry. The paper shows that issues related to all these aspects are instruments of in-depth analysis that can explain the mechanisms of outburst, spread and, mostly, persistence for more than three years of the crisis.

Keywords*: information asymmetry, moral hazard, adverse selection, economic crisis, subprime lending*

Introduction

The difficult situation faced by the world economy since 2008 has been labeled, depending on the economic doctrine of those who have analyzed it, either as a product of markets' deregulation, perceived as an example of "market failure", either as the undoubtedly result of state intervention, through various mechanisms (such as monetary policies) or even through specially created institutions (named Government Sponsored Enterprises – GSE - like Fannie Mae and Freddie Mac). From the same perspective, the subsequent actions of the governments were considered either late, slow and not very harsh, either unnecessary or, worse, resulting in prolonging the agony of such markets. In all those circumstances, both views seem to ignore something that representatives of both major economic doctrines - the socialist and liberal one – agree upon: nowadays information represents a central element for any market (and is even more potentiated in the financial one), but participants performing economic transactions have access to it in varying degrees. This paper addresses the issue of asymmetric information and its contribution in the contemporary economic crisis. Thus, in this paper we argue that the current crisis has "enjoyed" the full effects of this economic reality, by analyzing its roots and the way it evolved. Also, we argue that the measures taken by the authorities in order to counteract it can be placed under the same uncertainty spectrum the asymmetric information theory has developed many concepts about. The paper aims at providing a different approach of the economic crisis, which can explain its violent and unexpected outburst, its domino development and its prolonged existence. Also, by focusing on the long-term effects of the measures taken, we argue that they can actually contain the seeds of a future economic crisis.

I. Contemporary theories regarding the information asymmetry

The theory of information asymmetry refers to the uncertainty caused by the fact that economic agents have private information about their products, information not available evenly and under the same format to third parties. The starting point of these theories is the negation of the first

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conditions of perfect competition, namely the transparency or the perfect information deferred to economic agents. Thus, according to traditional microeconomics, price is the one that transmits the information and it fulfills this role when it is flexible and freely created. However, the supporters of the theory of asymmetric information markets argue that there is no perfect information to all individuals. This aspect is reflected with different intensity in the various fields. As a result, there have been identified markets more affected by information asymmetry and others enjoying a higher degree of transparency.

The important influence of these ideas in the contemporary economic thinking is revealed by the internationally received attention, especially in recent history, reflected in the fact that the highest distinction in the field, namely the Nobel Prize, was given to representatives of the theory of asymmetric information markets. Thus, in 1996, the award went to the economists James A. Mirrlees and William Vickrey, who founded their theories on information asymmetry hypothesis. Further on, in 2001, the Nobel Prize winners were George Akerlof, Michael Spence and Joseph Stiglitz, representatives of the same school of thought. The 1996 winners took as a starting point of analysis the fact that the asymmetric distribution of information has important effects on economic behavior of individuals, meaning that those better informed can exploit this strategic advantage in their favor. The two economists, however, focused on how the consequences of information asymmetry can be countered by creating certain types of contracts and institutions.

From this point on, the analysis regarding the theory of asymmetric information targeted more and diverse fields. The presence of this perverse phenomenon has been identified in markets more and more different in terms of structure, actors, manner of organization, ranging from the goods markets to the financial–banking markets. It also has a significant impact on areas like tax systems or economic policies. It is the merit of the 2001 winners of Nobel Prize the identification of the presence of asymmetric information phenomenon in various forms, in almost all economic activity.

Among the most important concepts currently used in the analysis of asymmetric information markets and also necessary in identifying the role that this element played in the gear of the present economic crisis, are the adverse selection and the moral hazard.

I.1. Adverse selection

The effects of information asymmetry are also reflected in the way the products and services are traded in different markets, a situation known in economic theory as adverse selection. The concept was put forward by the 2001 Nobel Prize Winner for Economics, George Akerlof, in an article[1] which argues that the existence of incomplete information regarding the quality of the products traded on the market generates, through the phenomenon of adverse selection, leads to an inefficient allocation of resources on that market. The adverse selection (sometimes referred to as the lemon problem), arises from the inability of traders/buyers to differentiate between the quality of certain products. The example used by Akerlof in order to demonstrate the effects of adverse selection is that of the second hand car market, in which a trader holds product information that the other buyers/sellers in that market lack. He thus operates at a comparative advantage as the other market players cannot tell if their product is a 'lemon' (poor quality car). Consequently, there is a risk involved in purchasing the good based on quality expectations. While the lower price buyers are willingly assuming this risk, traders selling quality cars do not desire to sell at such a low price. There are three components to this theory:

(1) there is a random variation in product quality in the market

(2) an asymmetry of information exists regarding product quality

(3) there is a greater willingness for poor quality car sellers to trade at low prices than higher-quality owners.

[1] George Akerlof, "The Market for Lemons: Quality Uncertainty and the Market Mechanism", *The Quarterly Journal of Economics*, No. 3, Vol. 84 (1970): 488-500.

Insurance, credit markets and financial markets are areas in which adverse selection is also important. These aspects were addressed by D. Jafee and T. Russell, who developed a model[2] that presents the rationalization situation in which all applicants receive loans with a value lower than the one desired, at a given level of interest rate. Two other economists, J. Stiglitz and A. Weiss, have developed another model[3] which shows that rationalization is reflected in the fact that some applicants are rejected even if they do not differ by other applicants who are credited by the lender.

Another paper that constitutes an important basis to explaining how asymmetric information - and, respectively, adverse selection - has contributed to the financial crisis and, more specifically, to the subprime crisis is *"The Allocation of Credit and Financial Collapse"*[4], in which the author, Gregory Mankiw, discusses the chances of government intervention to improve the equilibrium conditions in the credit market.

I.2. Moral hazard

Also known as moral risk, the concept of moral hazard has been identified, initially, in insurance contracts, where it was empirically found that an individual or group, who are insured against risk tend to face more often that risk situation than individuals who are not insured against it[5]. The concept was then expanded, referring more generally to behavioral changes caused by imperfect information regarding subsequent actions induced by a contract[6].

Initially seen as an ethical or moral issue, the concept of moral hazard has evolved precisely from the inability of these views to explain from an economic point of view the consequences of the existence of this phenomenon. Empirical research led to practical conclusions, that allowed defining the concept in a form much closer to tangible reality. Analyzing individual behavior, some economists, such as Mark V. Pauly[7] or Gary Becker[8], concluded that moral hazard represents a situation where the intensity of the actions of the insured to protect themselves against the risk is being reduced. This is due to the difficulty of the insurer to observe this type of behavior and to act accordingly when the value of the contract and the insurance premium are fixed. A definition that describes more accurately the situation created by moral hazard is that regarding the increase in consumption of an [insured] service as a result of reducing the price paid by the insured for that type of service. The insured is basically subsidized by the insurance policy and continues to spend for that service even after the marginal benefit would have fallen below marginal cost. The revenue deficit resulted from such a conduct is covered by the insurance policy[9].

Other researchers have taken this concept further, broadening the application field also outside the insurance market. This way, a complex definition of the phenomenon of moral hazard emerged, namely "that behavior, economically rational, which occurs when there is a risk (hedged by

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[2] Dwight Jaffe and Thomas Russell, "Imperfect Information and Credit Rationing", *The Quarterly Journal of Economics*, Vol. 90 (1976): 651-666.

[3] Joseph E. Stiglitz and Andrew Weiss, "Credit Rationing in Markets with Imperfect Information", *American Economic Review*, no. 71 (1981): 393-410.

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[6] George L. Serban-Oprescu, "Contribuții teoretice la dezvoltarea conceptului de informație în știința economică", (PhD diss., Academia de Studii Economice Bucuresti), pg. 126.

[7] Mark V. Pauly, "The Economics of Moral Hazard: Comment", *The American Economic Review*, Vol. 58, No.3, 1st part (Jun 1968): 531-537.

[8] Isaach Ehrlich and Gary S. Becker, "Market Insurance, Self-Insurance and Self-Protection", *Journal Of Political Economy*, Vol. 80 (Jul 1972): 623-648.

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a third person) that an unforeseen event could occur, resulting in ulterior behavioral changes, not detectable by the third party".

II. The premises and the context prior to the contemporary economic crisis

II.1. Government conduct - element generating moral hazard

The supporters of the classical liberalism, but also many journalists[10] supporters of this thinking current brought into discussion the issue of moral hazard created through states' interventions aimed at saving various financial institutions from collapse or reviving the economy faced to a bearish trend.

The leading economists of information asymmetry theory consider that the coverage by a third person of a particular risk determines subsequent behavioral changes of those who are affected by this risk. More specifically, the existence of negative effects in case of a certain event determines the individual to act in such a way as to minimize the risk of occurrence of that event. When these effects are borne by another person, it is perfectly rational, to economically assume that the person threatened by the risk is no longer interested in avoiding the occurrence of that event. This behavior results in increasing the probability that the event would occur. Under this circumstance the person who took the risk will be affected.

By extrapolating this concept, the governments' intervention in the contemporary crisis, through the numerous aids granted to credit institutions and to large companies working in various industries, such as automotive or banking, altogether with packages for supporting their national economy, create a dangerous precedent. Therefore, the idea that the state will intervene if such a situation occurs in the future is induced in the markets.

Moreover, the phrase "too big to fail" is becoming more and more used, which means, contrary to most expectations, not that the regulations in this area will prevent such situations to occur in the future, but that large corporations, providing constant cash flows towards a country will consider the government as a "safety net" for their actions. This results in alleviating them from a prudential behavior.

Another problem that arises in this case is that not only the one who takes the risk will be affected. It is debatable in this case the complex system that allowed amounts of hundreds of millions of individuals to be channeled to rescue a few thousand and assume their misjudgments. Taxpayers have already had a violent verbal reaction to this fact. The idea that their own money serves the interests of a mass unrepresentative for the segment they are part of is an additional reason for the phenomenon of moral hazard to be brought into question.

Theories regarding moral hazard point out that the behavioral changes are not noticeable by the third person, which is, in fact, the key condition of the occurrence of the moral hazard phenomenon. Indeed, it is difficult to determine the extent to which the credit institutions "guilty" of producing the financial crisis will change their behavior in order to avoid future similar situations. Furthermore, it is impossible at this time and unlikely in the future to determine whether measures taken by various governments of the world are not exactly the germs of a future economic crisis.

II.2. The historical precedent

The concept of moral hazard can be easily illustrated by presenting the situation of the two giants of the U.S. mortgage market, Fannie Mae and Freddie Mac. If we consider the very context in which they came into being, evolved and later reached "the brink", we realize that the government intervention in creating situations of moral hazard is a plausible hypothesis.

In order to support this assumption, we will present the history of the two companies. Federal National Mortgage Association (FNMA) or Fannie Mae, as often called by the public, was

[10] "Basme austriece de succes", Capital (Magazine), January 28, 2009.

established in 1938 as a government agency, as part of the New Deal[11]. The authorities at that time were trying to find a formula for reviving the national housing market, given that the mortgage market was basically frozen after the Great Depression. Fannie Mae would provide liquidity to the mortgage market, lending federal money to local banks, which, in return, would finance housing loans. Fannie Mae allowed, thus, local banks to charge low interest rates for mortgages, favoring the buyers of houses, in an attempt to make housing affordable. Among the positive effects of this interventionist measure of the U.S., we can count the development of the secondary mortgage market, where companies such as Fannie Mae can borrow money from foreign investors at low interest rates, because of the financial support of the government. By doing so, they can provide mortgages with fixed interest and small down payments. The profit was made from the difference between the rates paid by those who own houses and what foreign creditors ask as price for their capital lend.

For 30 years, Fannie Mae had a relative monopoly on the U.S. secondary mortgage market. In 1968, due to fiscal pressures arising from the war in Vietnam, the company is privatized, and thus removed from the national budget. At that time, Fannie Mae began operating as a GSE (Government Sponsored Enterprise), namely a company that is privately owned, generating profits for shareholders, while enjoying benefits such as tax exemption and government support (access to credit lines of U.S. Treasury). In order to prevent monopolization of the market, the second GSE was created in 1970, namely the Federal Home Loan Mortgage Corporation (FHLMC), later called Freddie Mac.

The combination private company - state support was beneficial, the GSEs marking a period of unprecedented financial growth. Thus, in 2008, the two entities owned or guaranteed almost half of all the $ 12 trillion of U.S. mortgage market and they controlled over 90% of the American secondary mortgage market. Their pooled assets are 45% higher than those of the largest U.S. bank. On the other hand, their debt represents 46% of 2008's U.S. national debt. It is this combination of rapid growth and indebtedness that caused concerns in the Congress, in the Department of Justice and in SEC (Security and Exchange Commission), which finally led to their (re)nationalization during the contemporary economic crisis.

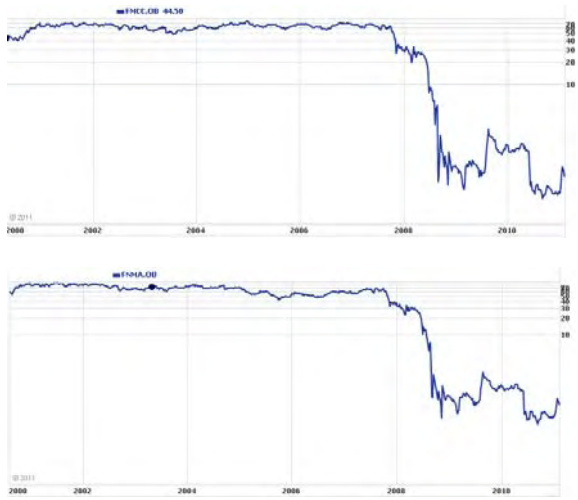
The situation was perceived somehow difficult. It should be noted that Fannie Mae and Freddie Mac are the only two Fortune Top 500 companies which are not required to inform the public about their financial difficulties. But if there had been a financial collapse of one of these companies, the U.S. taxpayers could have been held responsible for the debts of hundreds of billions of dollars. In this context, an investigation of the Justice Department and SEC about the accounting practices of Freddie Mac revealed accounting errors of 4.5 – 4.7 billion dollars and determined the dismissal of three top managers. In addition, Barclays Capital analysts have estimated that Freddie Mac's financial situation would have a negative value of at least 20 billion dollars if assets were valued at current market value. Fannie Mae's irregularities, on the other hand, are amounted to only three billion dollars. Both companies faced their stock dropping with almost 44% in just three days, due to the fact that government intervention became more and more an option, which meant the exclusion of other shareholders.

Hank Paulson, one of the recent secretaries of U.S. Treasury, sought a reversal of the situation, saying that there are significant amounts that can support Fannie Mae and Freddie Mac if necessary and that only by making funds available to them he can be sure they will not be used. The stratagem did not succeed, so Paulson had to prove the veracity of his statements by taking into charge the two agencies. The evolution of the two entities depended and will depend on the management of the U.S. government, but more important are the long-term effects of the decision to place the two institutions under the coordination of the Treasury.

[11] „Interventie comunista sau salvare din criza?", Piata Financiara, nr. 9 (2008).

By applying Bastiat's theory[12], one should take into account not only the visible effects, but especially those that hide behind the obvious. The immediate result of the notice regarding the entrance of the two under the state's tutelage was the revival of the stock exchanges, the investors considering this measure a support given to the mortgage market and, therefore, a guarantee that financial losses will not be deep. What is not seen is the fact that certain expectations were created, that the state will intervene to support the institutions in skidding, when needed, which automatically increases the risk for the situation to repeat itself in the future.

It is hard to predict the future impact of this point of view on investors. Capital might continue to inflow in the U.S. just because of these expectations that the state will intervene in case of a crisis. On the other hand, how many people would invest in a country that has just won a reputation of having dethroned an "increasingly concerned about the massive exposure to dollars"[13] China in terms of interventionism? Moreover, as stated by James Rogers, CEO of Rogers Holding, the one who has compared not so far ago U.S. to China, "this is welfare for the rich. This is socialism for the rich. It's bailing out the financiers, the banks, the Wall Streeters"[14]. Rogers believes that the move will have no effect on homeowners who are facing problems with reimbursements.



Charts 1,2: Stock evolutions of Fannie Mae(left) and Freddie Mac(right) between 2000-2010
Source: http://www nyse.com/

However, it is difficult to imagine how the situation would have developed if the government had not intervened. Some argue that Fannie Mae and Freddie Mac play such an important role in the American economy that the collapse of one of them would have serious effects not only on domestic but also on international financial markets. Even libertarians agree that the takeover is the best alternative, actually condemning government interference in the first place in the mortgage market. Overall, the total costs of supporting Freddie Mac and Fannie Mae transferred to the taxpayers are still unknown, given that the crisis prolonged from 2008 to today. Initially, the government could buy

[12] "What is seen and what is not seen".
[13] Andrada Busuioc and Cristian Birau, „The Role of Reserve Currencies in the World Economy", *Challenges of the Knowledge Society eBook*, (2010):1379-1392 .
[14] "CEO: Fannie/Freddie Bailout Makes America 'More Communist than China", Business and Media Institute, 2008 .

up to 100 billion dollars in preferential shares in both companies, but further on the evolution depends entirely on the ability of the companies and hence the market to recover.

The adverse selection is the phenomenon that determined the discrimination in granting financial aid to some companies and not to others. For example, it is the information asymmetry – especially regarding the long term effects of such a decision – that determined the U.S. government not to intervene for saving Lehman Brothers, which resulted in panic on the market. The same phenomenon determined the discriminatory choice of the receiver and the amounts given by the American and the European financial authorities in the past years. To what extent the funds reached their best receivers is an unknown variable, one of the weaknesses of the theory of adverse selection and information asymmetry, in general, being the difficulty to quantify the effects of the results.

III. Information asymmetry and its role in the 2008 economic crisis

If we consider US subprime crisis the starting point of the global economic crisis, than we can name one of its triggering factors, namely the existence of asymmetric information on credit market, which, subsequently, can be found on capital markets.

III.1. Governement's intervention on the real estate market

The credit market is subject to the risk of adverse selection, meaning that credit institutions face serious difficulties in effectively selecting eligible customers for certain types of loans. Economists talk about the phenomenon of credit rationalization, which means that credit institutions set up a certain level of interest rate at which the amount of loans offered cover only a small part of the total demand for credit at that interest rate. Normally, an excess of demand would lead to a price increase, but on the credit market, this thing does not happen. Banks choose to keep interest rates steady and not to meet all debtors' demands. Traditional microeconomics explains this phenomenon by the special creditor-debtor relationship, by the standard risk situations or by different constraints that affect the variation of the interest rate, but it can also be explained through the concept of informational asymmetry.[15]

Specifically, one can assume that on the market there are two types of borrowers - those honest, accepting only those loan contracts that they can repay and they do repay them, and the bad payers, who at the time they take the loan are aware of their inability to repay, but hope to eventually get the resources needed to pay the debts. The bad payer debtors are even willing to pay a higher interest rate only to get the credit, and normally should have priority – and on some markets they do - in obtaining the good. However, on the banking market the situation is different in the sense that banks cannot distinguish between the bad and the good payer debtors before the reimbursement moment, so they choose to rationalize the credit, by setting an interest rate at a level that ensures a maximum return in terms of minimal risk, even as they face an excess demand.

Taking this situation as a state of fact in the early 2000s, we can say that the credit market was facing an excess of demand, unsatisfied both because some applicants were not eligible and because banks had only a certain amount of money available for lending.

Often, the fact that information asymmetry may cause distortion of the mechanisms of allocating on credit and capital markets determines state intervention, in order to improve the balance in these markets. The instruments used can be government guarantees and loans to certain sectors of the economy. Similar methods have been used by U.S., in order to correct the credit market imperfections in the early 2000s, already mentioned above. The main target of such interventions was the a boost of the housing market and economic growth, affected by the "dot-com" speculative bubble. Thus, it is not surprising that free market advocates consider U.S. federal authorities'

[15] George L. Serban-Oprescu, "Contribuții teoretice la dezvoltarea conceptului de informație în știința economică", (PhD diss., Academia de Studii Economice Bucuresti), pg. 156.

monetary policy as the main responsible for the subprime crisis. The reputable publication Wall Street Journal was writing in the mid 2000 on the effect of FED's "easy" money on house prices. Overall, it was admitted, in a tacit way, that the housing boom was unsustainable on the long term, but few were those who foresaw the consequences on credit market. Thus, an initiative meant to help the housing market, along with a strong social component, became at least a spring of the current crisis.

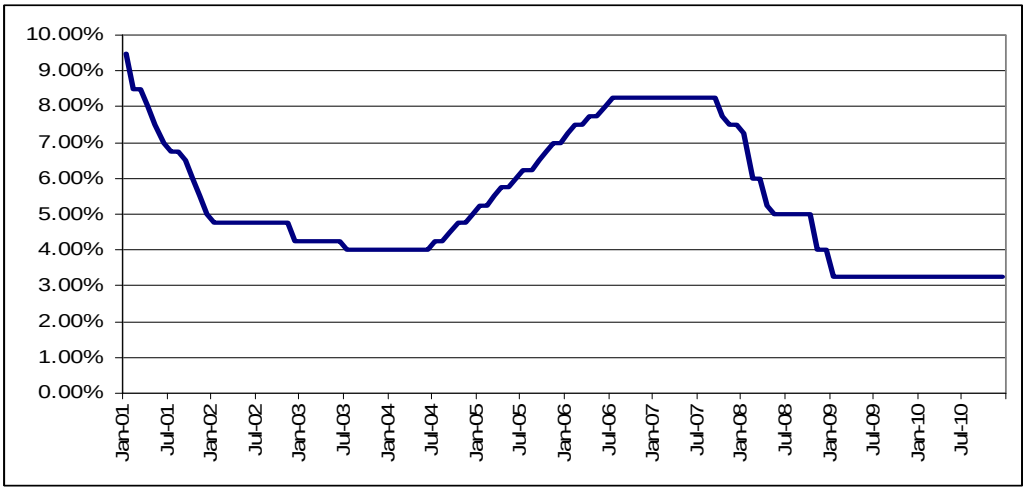


Chart 3: Evolution of FED's Prime Interest Rate between 2001-2010
Source: http://www federalreserve.gov/

The economists are blaming either the Bush administration, which implemented starting with 2004 a program designed to provide access to mortgage also to households with no equity[16], either to Alan Greenspan, the Fed governor during 1987-2006, who kept interest rates extremely low for a long time. Both theories can coexist, given that the fulfillment of Bush administration's "American dream" could not have been achieved without a relaxed monetary policy. Indeed, the conditions created by FED's low interest rates between 2000 and 2005 (a decrease in mortgage interest rate from 8% to 5.5%) enabled granting loans with a lower cost of capital. Commercial banks benefited of extra liquidity - as the U.S. economist Mark Skousen stated "banks needed to lend money to someone so they ended up lending also to those who did not afford a house"[17] – which allowed the phenomenon of selection effects to occur.

The banks also contributed to this situation, through their financial innovations for financing the mortgage market. If 20 years ago it would have been difficult to buy a house with less than 20% down payment, before the current crisis the banks and the brokers lowered the level or even removed it. Another factor that contributed to the crisis was the way the interest rates were set up. Alan Greenspan stated, in the early 2000s, that, given the fact that people keep the houses they buy for about seven years, it is illogical to pay a (higher) fixed rate for 30 years. This way, variable interest rates appeared on the U.S. market (they were called Adjustable Rate Mortgage - ARM). Flexible rates, however, are useful when the monetary policy rate has a downward trend, which was not the case in the U.S., as the level was already at around 1%.

[16] Bal Ana, "Opinii privind cauzele crizei financiare actuale", *The Romanian Economic Journal*, Nr .1(31)(2009):3-18.
[17] „Once upon a time in America", Piata Financiara, no. 3. (2008): 27 – 30.

The monetary authorities did also another mistake - although FED's responsibility is to ensure a stable monetary system, on one hand it allowed too lax lending policies, while on the other hand, it destabilized the interests' cycle, by determining a massive drop too fast, followed by a similarly fast increase. In just two years, the rates have increased by about two percentage points, determining reimbursement problems to the debtors who have not foreseen this change of trend and converting them into what we previously defined as "bad payer debtors". The major problem was that the loans could not be covered by mortgages, in many cases their value having fallen under the debtors' balance.

There are a few representative figures that truly place the beginning of the crisis in the first quarter of 2008. Wall Street Journal presented in March 2008 two key barometers of the U.S. housing market - the part of homeowners hold in their own buildings (calculated as the difference between the market value of homes and the mortgage size) and the number of mortgages in foreclosure. The first of them fell at that time to the minimum recorded after the Second World War, respectively 47%. As for the second indicator, according to data from Mortgage Bankers Association, more than 2% of the 46 million mortgage loans were in foreclosure process in the fourth quarter 2007, the highest figure since 1972, when this statistic started. In addition, the rate of nonperforming loans for the real estate sector had risen to nearly 6%, the highest value since 1985. One of five loans from the high risk category was overdue in the last quarter of 2007. So, the problems related to the contemporary economic crises are caused by past actions.

Another argument that supports the idea of informational asymmetry phenomenon being a contributor factor to the crisis is that of "predatory borrowing", Thus, even if the term predatory lending is more frequently used and part of the American public is talking about banks in these terms, experts say that the "prey" were actually the creditors, given that many mortgage brokers and lending institutions have either went bankrupt or lost money due to inefficient customers portfolio selection. This opinion is justified, given that statistics reveal some 70% of those who have borrowed in recent years have lied on loan applications. Moreover, even if the banks were to help the debtors to pay their installments on time, foreclosure being the last resort solution, most of the 90 days overdue debtors wanted foreclosure[18]. In most U.S. states, in case of mortgages, the house is also collateral, so if rates are not paid, the bank takes the property, but cannot pursue the debtor further on. When the debtors realized they were unable to repay their loans, they preferred to give up the mortgaged property, which, amid the events that took place, lost value reaching a level lower than the loan taken for its acquisition.

The adverse selection phenomenon manifested more strongly as the banks had an optimistic view on the situation - they assumed that the debtors who do not have a down payment are as stimulated as those who have invested their own money. However, the down payment is a safety net for banks, customers becoming a kind of partners. In its absence, the bank takes over most or even all the risk. This fact should be correlated with the diversification of banking products, which have a dual purpose: to banks, it meant an increase in turnover and access to potential customers less or not at all banked; while for prospective borrowers it was a way to buy a property they normally could not have afforded. Although apparently these two directions reconcile and are beneficial for both actors, in reality the diversification process, which aimed at finding alternatives for the customers not eligible for loans failed precisely because of the improper information between market realities and those expressed in economic theories.

Another aspect to consider is that, in order to determine an improvement in social welfare, government intervention should be based on information different from that of other market participants. If the government does not have additional information, which are unavailable to others, an intervention that only changes the structure of the market risks can cause negative effects that may equal or even exceed the negative effects that should initially be addressed through the economic

[18] „Once upon a time in America", Revista Piața Financiară, no. 3 (2008): 27 – 30.

policy measures. The situation described above is precisely the one that occurred in the U.S. – given the lack of valuable information on the structure of the demand for housing loans, the government intervention has only made eligible a market segment that in a perfect market would not have had access to crediting. In terms of a definition, a perfect market is a market where no intervention and no information asymmetry exists. Moreover, we can say that the conditions created, facilitated the emergence of adverse selection, meaning that for the bank it become increasingly difficult to effectively discriminate between the eligible and the not eligible loan demanders. Thus, loans that would have been optimal for borrowers with a relatively low risk were given to risky customers, which ultimately were not able to cover their debt obligations.

III.2. The capital market – an informational asymmetrical market

The evolution of the global economy in the past decades is inextricably linked to the development of financial markets, among which the capital market has a special role. The investments play an important part in economic growth and development, but the relations between funders and investors can be often characterized by information asymmetry. This is due to the fact that investors are generally willing to present their current situation and future projects more favorably than they are in reality. Even when the representatives of the capital demand have all the information about the investors, it would be too expensive for them to process and evaluate them accordingly[19].

The reflection in reality of the above statements represent another process that allowed the outburst of the financial crisis, namely the securitization, which stands for "wrapping" of nonperforming housing loans and rating them maximum grade. The information asymmetry manifested this time through the rating agencies, which did not have complete information about the instruments they rated. Further more their scoring activity was shielded by the conflict of interests resulted from the fact that they are paid by those who perform the securitization of the financial instruments, but only if those instruments are sold. The fact that the global market is an oligopoly, 90% controlled of three companies (Fitch, Moody's and Standard & Poor's) and that both in the U.S. but also globally Securities and Exchange Commission (SEC) has exceptional attributes, such as to decide who is assumed to perform the rating, adds further suspicions. For ten years SEC has constantly blocked the U.S. rating market from new competitors and through its influence minimized the importance of other such entities in the world. This has only aggravated the situation. Arguments later given to support their erroneous ratings, such as the one of Lehman Brothers ("the rating agencies act on the rating if the market sentiment becomes reality, trying to avoid the establishment of panic"[20]), only bring forward to "the public's attention the issue of rating agencies' independence in respect to the entities they assess"[21].

Thus, the rating agencies had a strong incentive to provide a high rating, so many banks and investment funds bought these bonds. International contagion was completed when the small investors realized that, instead of the reliable bonds that have been advertised to them, they have an important illiquid part of portfolio, consolidated in junk bonds. The lack of information to enable an informed investment - in this case the existing erroneous information derived from unrealistic ratings - has determined a damaging situation for many investors all over the world. Although the capital market can be characterized by the formula "you invest, therefore you accept the risk of losing", information asymmetry makes the quantification process of risk extremely difficult, or even

[19] Basarab Gogoneață, *Informația asimetrică în economie*, (Bucuresti: ASE 2003), p. 120.

[20] Andrada Busuioc and Cristian Radu Birău, „Influențele geopoliticului asupra evaluării riscului de țară", *Studia Universitas Ştiinţe Economice*, no. 20 (May 2010): 611.

[21] Andrada Busuioc and Cristian Radu Birău, „Influențele geopoliticului asupra evaluării riscului de țară", *Studia Universitas Ştiinţe Economice*,no. 20 (May 2010): 612.

impossible to be determined. Such was the case of the subprime economic crises, which converted to a financial crisis and afterwards to a global economic crisis.

Another problem is the mismatch between the goals of shareholders and those of the managers, which indicates the existence of the adverse selection phenomenon in the management of joint stock companies. The lack of information determines the shareholders, as owners, to delegate the control to managers, and the same lack of information makes it possible for managers to pursue their own interests further down the hierarchy. Thus, the managers were stimulated to pursue short-term profit, which brought them huge bonuses, approved by the shareholders who rewarded only the visible results, without access to information on the entire mechanisms of these results.

Conclusions

This paper addresses the problem of information asymmetry and its influence on the contemporary economic crisis. Through it, it is revealed that this phenomenon had its part to play in fuelling one of the hardest economic periods after the Great Depression of the '30s. The article puts in light the fact that information asymmetry is one of the most used concepts for explaining the existence of the current crisis, by analyzing facts and figures related to U.S. economy.

The information asymmetry has strong links to the contemporary economic crises, based upon the fact that the subprime crisis, which has actually triggered the World's recession, was constructed on components deferred to this area. Thus, it is clear the fact that decisions making factors have neglected the basic principles of asymmetric information conducting to the existent situation.

It was revealed that a wide range of actors involved in economics are to be blamed for creating the premises under which asymmetric information was formed. On one hand, the US government, as entity responsible for organizing a certain economic environment, has involuntary supported the perverted effects on the real estate market, through its long term decisions. On the other hand, creditor, intermediaries and debtors have each their guilt part in consolidating this phenomenon, regardless if they relate to lending money too easy, having a conflict over scoring or following just their inducted consumerist behavior.

The main issue that comes out of the study is that governments have had a major part to play in this entire situation. Further more, their actions influenced also third parties which acted under their authority. Adverse selection manifested itself through the fact that countries, investors and intermediaries acted previously and through the contemporary crises with information of different quality and quantity. Moral hazard became synonymous to short term focusing, while neglecting risks. Nowadays, this aspect has proven to be sustained and even fueled by the government bail outs of the contemporary economic crisis.

This article is a result of the project „Doctoral Program and PhD Students in the education, research and innovation triangle". This project is co funded by European Social Fund through The Sectoral Operational Program for Human Resources Development 2007-2013, coordinated by The Bucharest Academy of Economic Studies.

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INVESTIGATION OF FISCAL AND BUDGETARY POLICIES BASED ON ECONOMIC THEORIES

EMILIA CÂMPEANU[*]

Abstract
Empirical analysis of fiscal and budgetary policies cannot be achieved without first knowing how they are viewed in the economic theories. This approach is important to indicate the position and implications of fiscal and budgetary policy tools in the economic theory considering their major differences. Therefore, the paper aims is to investigate the fiscal and budgetary policies based on economic theories such as neoclassical, Keynesian and neo-Keynesian theory in order to indicate their divergent points. Once known these approaches at the economic theory level is easier to establish the appropriate measures taking into consideration the framing of a country economy in a certain pattern. This work was supported from the European Social Fund through Sectoral Operational Programme Human Resources Development 2007-2013, project number POSDRU/89/1.5/S/59184 „Performance and excellence in postdoctoral research in Romanian economics science domain" (contract no. 0501/01.11.2010).

Keywords: *fiscal and budgetary policy; economic theory; neoclassical theory; Keynesian theory; neo-Keynesian theory.*

1. Introduction

Knowledge of economic theories is the first step in deepening the effects of fiscal and budgetary policies on the economy based on empirical analysis. This approach is especially important as they are major differences between the economic theories. These differences should be known so that it can be established a national economy diagnosis through a proper framing in a specific pattern corresponding to the economic economic theories.

In general, there are three main theories in the economic doctrine, namely: classical and neoclassical theory, Keynesian theory and neo-Keynesian theory. Classical theories, neoclassical and Keynesian is also known as conventional theories because they are well known and accepted by theorists. Before proceeding to an analysis is useful to highlight the basic structure and implications of each theoretical paradigm.

If classical economic theory is argued that the state must have a limited role imposing some rationality on government fiscal operations, the neoclassical theory emphasizes the effects of enlargement the government's activities and the state's intervention for assessing economic growth which led to the shaping of a neoclassical growth model that is currently used in recent studies.

This extension is intended to support public financial decisions by both the income tax levy and by state loans. It also continues the idea that classics finance budget deficits by borrowing may adversely affect the economy by using them for purposes in order to stimulate consumption and less productive capital. More specifically, the emphasis is on stimulating the supply of state interventions that do not lead to persistent budget deficits wich have negative effects on private capital accumulation.

It was subsequently developed the Keynesian theory based on increasing aggregate demand. This led to the development of neo-Keynesian theory.

The Keynesian approach considered that a large proportion of the population has a high propensity for consumption over current available income. A temporary reduction of taxes has a

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quantitatively significant and immediate impact on aggregate demand. If the economy's resources are initially underutilized than national income increases lead to negative effects. Since the public financial imbalance stimulate both consumption and national income than saving and capital accumulation are not adversely affected. So, on short-term deficits have beneficial consequences.

In the Ricardian approach, successive generations are linked by voluntary transfers, and altruistic resources. Under certain conditions, they imply that consumption is determined as a function of state's resources (total resources of both taxpayers and their progeny). Since the deficit involves a postponement of taxes that will be supported by future generations, then it does not affect the resources. As a result the deficit is a matter of indifference.

Given the neoclassical and Keynesian paradigms we can say that the Keynesian approach refers to short term variations, while neoclassical is concerned by the long term challegnes. So the public should be split and the gap into two components, namely: a permanent component (long-term average) and a temporary component (deviation from long-term average). Thus, the neoclassical theory studies the effects of permanent deficit, and the Keynesian is concerned about the impact of temporary deficits.

The paper aims to investigate the fiscal and budgetary policies based on neoclassical, Keynesian and neo-Keynesian economic theories in order to indicate their divergent points. Once known this approaches is easier to establish the appropriate policy measures taking into account the countries' classification according to a certain pattern. To achieve this scientific approach, the paper is divided into six sections. Section two indicates general aspects of the classical economic theory, meanwhile section three is devoted to neoclassical economic theory. The basic characteristics of Keynesian and neo-Keynesian economic theories are presented in sections four and five, while section six points the conclusions.

2. Fiscal and budgetary policies in classical economic theory

Classical representatives argue that the state economic role must be limited by requiring some rationality on government fiscal operations. They, including Adam Smith, were first interested by the economic order and then developed the theories regarding the state's role in the economy.

The general peculiarities of classical economic theory of fiscal and budgetary policies are:

– The state economic role must be limited by requiring some rationality on government fiscal operations;

– Government borrowing reduces the disposable income in the economy that could be used productively in the private sector;

– Government deficits contributing to extend the work of public sector growth irresponsible government action;

– Government borrowing creates difficulties in securing future funding through the allocation of part of the increasingly large tax revenues to honor the obligations as debt amortization and interest on debt;

– Increases in taxes;

– Unbalanced budgets lead to monetary depreciation (inflation);

– Balanced budgets are a guide to transfer resources from the private to the public sector.

In view of Adam Smith (1930), the state was wasteful in the sense that he was removing a part of the revenue funds of economic entities, which then redistributed. The budget balance is achieved based on public debt as a result of state loans. These loans were intended to finance the current consumption expenditure and not the production activities that are able to generate added value to ensure the payment of public debt service. Therefore, the public debt extends the political power of the state because there will not be a dependence on the tax revenues collected from taxpayers.

According to Adam Smith (1930), important is the moment when creating public debt and not, specifically, its growth. Also, the existing debt burden is not important. The most important „loss" is recorded when economic agents accepted to borrow the state. In fact, it could not be considered a "loss of interest due to the annual transfer from taxpayers to state creditors. Jean-Baptiste Say (1853) warns that the waste of public money was spent. In this context, the author expresses his disagreement with the promotion of fiscal and budgetary policies that led to budget deficits and hence public debt. In order to balance the budget, Say recommend limiting consumption to ensure industry and trade capital. Public loans were not only unproductive because they were consumed and wasted, but also because the nation was burdened by annual interest payments. He also argued that a moderate level of public debt, which was used wisely in the interest of public investment, could generate positive effects on investment and, therefore, on the gross domestic product.

David Ricardo (1951) argued that fiscal and budgetary policies applied by the state led to increased borrowing that can be perceived as a burden because it is not reflected in the annual transfers from taxpayers to creditors as interest on the state of public credit, but by reducing the country's productive capital. On the other hand, government debt does not affect the country's ability to pay taxes because taxable material was the same with or without public credit. However, the absence of public credit could create problems in the sense that they were satisfied with the general needs of society based solely on tax revenue. The increase in public debt lead to a series of long-term effects include: i) increase tax revenues, the price of labor, ii) no changes to the nation's real capital. As a result, Ricardo has proposed the government to adopt a financial plan as "pay-as-you-go" in order to encourage a high level of current savings. This new level of saving will be able to cope with a temporary higher tax pressure.

Thomas Robert Malthus (1836) believes that additional taxation to finance the interest on state debt would cause some negative effects as the population believes that the loan would be repaid in full for no longer incur additional costs later. Debt also influences the value of money. This disadvantage should be considered in conjunction with the advantages of maintaining unproductive consumer welfare by encouraging the maintenance of balance between production and consumption.

John Stuart Mill (1929) argued that iresponsable fiscal and budgetary comportament had serious economic consequences, and proposed an index to determine such effects. If debt generates an interest rate increase it can be concluded that it would be available in the economy to attract capital to meet the general needs of society and not for productive use. But, if interest rates remain unchanged then these consequences are not obvious.

C.F. Bastable (1922) has made the distinction between debt and debt contracted for non productive loans. If there is not an equivalent income derived from loan contracted than it comes inevitably to a reduction in public spending.

3. Fiscal and budgetary policies in neoclassical economic theory

Neoclassical paradigm aimed at individual consumption plans during its life. In this timeframe the imbalance in fiscal and budgetary policies increased total consumption by shifting the burden of taxes in future generations. If resources are fully utilized than the consumption growth necessarily implies reducing savings which will increase the interest rates in order to restore equilibrium in the capital market. Thus, persistent deficits restrict private capital accumulation.

The standard neoclassical model has three main features, namely:

1.Consumption of each individual is determined as a solution of intertemporal optimization problems where both resources raised through loans and those granted in the form of loans involving interest rates set by the market;

2. Individuals have a limited lifetime, each consumer belongs to a certain generation, and related life overlaps successive generations;

3. Market freedom is assumed in all periods.

Diamond (1965) was the first economist who had studied the effects of budget deficits in the formal context of these models. He argued that a permanent increase in the rate of domestic debt to national income would result from reduced capital-labor ratio. The initial interest rate, consumers are not interested to hold capital and government securities, including new titles. Stimulate additional saving growth rate and reduce investment capital until market equilibrium is restored. Thus, persistent deficits reduce private capital accumulation.

Diamond's analysis focuses on permanent changes to the deficits and not on their temporary effects.

Auerbach and Kotlikoff (1986) were conducted policy simulations in a more complex neoclassical model. Their analysis showed that the impact of a temporary deficit may be very small, but significant negative effect (a temporary deficit may boost short-term savings). This result reflects some consideration. Economic life is relatively high so that the impact of increased wealth on current consumption (wealth effect) is reduced. In addition, if public spending is kept constant then the temporary budget deficits reflect a reduction in tax rates which implies lower marginal tax. Reducing income tax rates for capital directly stimulate saving by increasing profitability after tax. Also, lower rates of income tax wage induce a temporary replacement by increasing current revenue. As a result, neoclassical theories argue that temporary deficits have little or negative effect on short-term economic variables.

4. Fiscal and budgetary policies Keynesian economics

Fiscal and budgetary policy is the result of the election of the state for economic and social porposes. This involves, on the one hand, revenue mobilization, and on the other hand, public expense. By the mid-30s, economic theory has treated more the resource allocation problems than the the juncture regulation through public finances. Keynes view is different from those of the neoclassical analysis because it emphasis on unemployment, its causes and remedies that may apply to public authorities. Keynesian approach rejects the hypothesis of price flexibility in a market economy, the neutrality of money, and the market economy and optimality theorems of welfare redistribution before the exchange economy. Also, they do not disqualify the public financial imbalances.

The redistributive and stability policies result from market imperfections. Two cases allow the demonstration on the fact that in the event of unemployment, government intervention is needed to cover insufficient aggregate demand. For this purpose, first use a simple model and then a complete one.

Keynesian analysis has been improved over time through new models of which stands the model of Bernanke and Blinder (1988) that explains how to coordinate monetary and fiscal policies to alleviate unemployment and budget in a market economy.

From studies conducted by economists it cand be found that economic cycles could increase budget deficits or seizures crises if the state would meet the budget constraint. In addition, public spending will grow faster than sustainable economic activity due to exogenous shocks (war) as revealed Wagner (1911) and Peacock and Weiseman (1967). As a result, the authors recommended, with Myrdall (1933), achieving cyclical budgets based on automatic stabilizers; so the theory of fiscal relaxation. Insufficient findings of these approaches led to the formulation of its argument Keynes deficit through spending resulted in a sustained optimism, between 1950 and 1975, by fine-tuning of economic activity in order to alleviate or eliminate the business cycles.

To summarize, the Keynesian theory can identify the following concerns vis-à-vis the fiscal and budgetary policies:

– it is considered that a large proportion of the population has a high propensity for consumption over current revenue available;

– national income increases if the economy is initially under-utilized resources leading to side effects;

– deficit is caused by maintaining a constant level of expenditure and reducing tax revenues; in this case the household income increases lead to the improvement of the living standards. Thus, the growth of consumers' income increases demand for goods and services;

– temporary reduction of taxes is quantitatively significant and has immediate impact on aggregate demand;

– since the financial imbalance stimulates both consumption and national income then saving and capital accumulation are not adversely affected;

– so short-term deficits have beneficial consequences.

5. Fiscal and budgetary policies in neo-Keynesian economic theory

Unlike the Keynesian theory, David Ricardo suggested that fiscal and budgetary policies do not exert any effect on the national economy. According to Ricardian equivalence government spending on goods and services, and marginal rates of taxation are what counts, while the mix of debt and tax revenues is irrelevant. The reason given was related to the fact that the debt leads to higher taxes in the future while the rational agents known it

Impact on consumer mix - investment alternative methods of financing a given amount of government spending was the subject of debate since Smith (1962) and Ricardo (1962). Currently, debt neutrality conducted to an important debats such as Barro (1974), David and Scadding (1974), Lewis (1974), Carlson and Spencer (1975), Buchanan (1976), Feldstein (1976), Buiter (1977).

Macroeconomic approach provides dramatic new answers to these questions. The effect of government policies is fully measured the size and content of real government spending by way of funding.

Thus, the Modigliani-Miller (1958) theorem from the corporate finance is extended in the households sector (corporate sector) in the public sector. This establishes the conditions, in a firm's case, when the choice between borrowing and financing by issuing new shares is irrelevant. Similarly, Ricardian equivalence argues that the choice between loans and financing the public spending by increasing taxes is irrelevant. An important form of this theorem was issued by Robert Barro (1974).

James Buchanan (1976) referred to the neutrality of public sector funding as a Ricardian equivalence theorem.

David Ricardo first formulated this conclusion considering that the neutrality of public debt, given the volume and content of what today we call exhaustive public spending, reduce taxes, primarily current consumption while domestic loans to lower savings and private capital formation. So, the method of financing public expenditure is irrelevant because there are similar effects. In fact, after he made this proposition, he proceeded to outright denial of its validity. Expresses its reason on the one hand, what we call today "debt illusion" and, on the other hand, fear that expectations of future taxes induce evasive behavior, including even emigration.

Ricardian equivalence theorem is one the neutrality which requires that the state cut taxes without, however, reducing the public spending, which involve, according to conventional analysis, reducing national saving and capital accumulation and long term, restricting the economic activity. However, Ricardian equivalence argues that this policy does not affect consumption or capital accumulation.

Ricardian argument is based on the fact that lower taxes now, and record budget deficits, public expenditure remains unchanged as the level of lead in future to an increase in taxation. Consumers with a forward looking will not reacte to the reduction of taxes and increasing consumption, they will save the surplus. It is recorded an increase in private savings, an amount

equal to the reduction of taxes, that will not change national saving and other macroeconomic variables.

Barro (1974) reformulated the Ricardo's theorem in the sense that intergenerational redistribution of income associated with a shift from financing through taxes and loans can be neutralized by offsetting changes of gifts and legacies between generations.

Barro (1974) found that altruism between generations may extend the time horizon of individuals proposed as a new form for the Ricardian equivalence theorem. Thus, the modern paradigm aimed at families that drive decisions.

The strict irrelevance of fiscal and budgetary policies (Ricardian equivalence) depend on a number of assumptions, namely:

• successive generations are linked by altruistically motivated transfers;

• Capital markets are either perfect or imperfect in certain specific circumstances;

• consumers are rational and seers;

• postponed taxes do not redistribute resources between families with different marginal rates of consumption;

• taxes are not distortionary;

• deficit can not create value;

• deficit financing does not influence political processes.

So, Barro has proposed a different interpretation of the Ricardian argument, namely: for the holders, the government securities are an asset and an obligation to taxpayers that will covereit by taxes. Thus, because the population has not experienced an increase in income, it should not alter the structure of consumption in response to a temporary reduction of duties.

It is important to note that the Ricardian argument does not show all aspects of fiscal and budgetary policy irrelevant. Thus, if the government reduces taxes today, and people expect that this measure is accompanied, in the future, with spending cuts, then increases the permanent income of the population which stimulates consumption and reduces national saving. But it should be noted that expectations for reducing public spending rather than reducing tax revenues are those that stimulate consumption. Reducing public expenditure in the future affect permanent income and consumption because it implies lower tax revenue in a given period, even if current taxes are not changed.

Since Ricardian equivalence considers irrelevant aspects of fiscal and budgetary policy and others as important, testing this approach is doable. Also, most economists, though, believes that Ricardian equivalence does not describe the consumer behavior, however, this approach was particularly important in the debate about the imbalance in public for two reasons:

- Ricardian equivalence actually describes the world or at least it gives a first approximation;

- Ricardian equivalence provides a theoretical basis for many other tests.

In essence, the Ricardian equivalence combines two basic ideas, namely:

– budget constraint that lower taxes today imply its future growth, given that public spending does not change;

– permanent income hypothesis, which concerns the fact that people base their consumption decisions on permanent income, which depends on the present value of income left after paying taxes.

6. Conclusions

Classical theories of fiscal and budgetary policy are based on a series of interrelated economic statements or policy that reflects attitudes toward the role and responsibilities of the sovereign state. These can be summarized as follows:

- government loans used to ensure balance in the fiscal and budgetary policies reduces the disposable income that could be used productively in the private sector;

- deficits extend the government's activities, thus contributing to increased public sector, and lead to irresponsible government action;

- government borrowing creates difficulties in ensuring future funding through the allocation of part of the increasingly large tax revenues to honor the obligations as debt amortization and interest on public debt. Thus, it appears finally to increases in taxes;

- unbalanced budgets lead to monetary depreciation (inflation);

- balanced budgets are a guide to transfer resources from the private to the public sector.

Each of the main characteristics of neoclassical theory has an important role in determining the impact of fiscal and budgetary policies. Thus, if consumers are rational, clairvoyants, and have access to perfect capital markets where capital accumulation, there will be a reduction of the permanent deficit while the temporary deficits will have a negligible effect on economic variables (consumption, savings, interest rates, etc..) If consumers are subject to the liquidity constraints then the impact of permanent deficits remain the same. However, temporary deficits should reduce savings and increase short-term interest rates.

Unlike the Keynesian theory, David Ricardo suggested that tax and fiscal policies do not exert any effect on the national economy. According to Ricardian equivalence government spending on goods and services, and marginal rates of taxation are what counts, while the mix of debt and tax revenues is irrelevant. This reason is related to the fact that the debt lead to higher taxes in the future. We can therefore speak of a theorem of fiscal and budgetary policy of neutrality.

These differences between the economic theories should be known so that it can be established a national economy diagnosis through a proper framing in a specific pattern corresponding to the economic economic theories.

Acknowledgement

This work was supported from the European Social Fund through Sectoral Operational Programme Human Resources Development 2007-2013, project number POSDRU/89/1.5/S/59184 „Performance and excellence in postdoctoral research in Romanian economics science domain" (contract no. 0501/01.11.2010).

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BUSINESS INTELLIGENCE TOOLS FOR DATA ANALYSIS AND DECISION MAKING

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Abstract
Every business is dynamic in nature and is affected by various external and internal factors. These factors include external market conditions, competitors, internal restructuring and re-alignment, operational optimization and paradigm shifts in the business itself. New regulations and restrictions, in combination with the above factors, contribute to the constant evolutionary nature of compelling, business-critical information; the kind of information that an organization needs to sustain and thrive.
Business intelligence ("BI") is broad term that encapsulates the process of gathering information pertaining to a business and the market it functions in. This information when collated and analyzed in the right manner, can provide vital insights into the business and can be a tool to improve efficiency, reduce costs, reduce time lags and bring many positive changes. A business intelligence application helps to achieve precisely that.
Successful organizations maximize the use of their data assets through business intelligence technology. The first data warehousing and decision support tools introduced companies to the power and benefits of accessing and analyzing their corporate data. Business users at every level found new, more sophisticated ways to analyze and report on the information mined from their vast data warehouses.
Choosing a Business Intelligence offering is an important decision for an enterprise, one that will have a significant impact throughout the enterprise. The choice of a BI offering will affect people up and down the chain of command (senior management, analysts, and line managers) and across functional areas (sales, finance, and operations). It will affect business users, application developers, and IT professionals.
BI applications include the activities of decision support systems (DSS), query and reporting, online analytical processing (OLAP), statistical analysis, forecasting, and data mining. Another way of phrasing this is that BI applications take data that is generated by the operations of an enterprise and translate that data into relevant and useful information for consumption by people throughout the enterprise.

Keywords: *Business intelligence, application, decision making, knowledge, data mining, data warehouse*

Introduction

The final decades of the 20th century and the beginning of the 21st have been marked by a staggering proliferation of information and communication technologies throughout the industrialized world. Not only do globalization trends bring a turbulent and most often unequal competitive environment, they also propagate waves of "managerial imperatives" – such as total quality; reengineering and integrated systems – that exert tremendous pressure on organizations wanting not only to survive but to succeed. In addition to performance and effectiveness, global organizations are asked to display ethical, social and environmental responsibility. This entire context makes the task of managing information a formidable challenge.

At present, information management is seen as one of the biggest challenges characterizing today's corporate context. A combination of constant technological innovation and increasing competitiveness makes the management of information a difficult task, one which requires decision-making processes that are built on reliable and timely information, gathered from internal and external sources. Although the volume of information available is increasing, this does not automatically mean that people are able to derive value from it. In the IT field, after years of significant investments to create technological platforms that support all business processes

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(processes that are "reengineered" and "integrated") and that strengthen the efficiency of the operational structure (after undergoing "quality" programs), organizations are supposed to have reached a point where the implementation of IT solutions for strategic decision-making processes becomes possible and necessary. This context explains the emergence of the area generally known as "business intelligence" (BI), seen as an answer to current needs in terms of information for strategic decision-making through intensive use of information technology (IT).

Definition of Business intelligence

The literature review of BI reveals few studies. Most of the articles are conceptual. What's more, throughout the literature, meets the traditional "separation" between technical and managerial aspects, outlining two broad patterns[1]. The technological approach, which prevails in most studies, presents BI as a *set of tools* that support the storage and analysis of information. This encompasses a broad category of applications and technologies for gathering, storing, analyzing, and providing access to data to help enterprise users make better business decisions. Those BI tools include decision support systems, query and reporting, online analytical processing (OLAP), statistical analysis, forecasting and data mining. The focus is not on the process itself, but on the technologies that allow the recording, recovery, manipulation and analysis of information. Sophisticated use of warehoused data occurs when advanced *data mining* techniques are applied to change data into information. Data mining is the utilization of mathematical and statistical applications that process and analyze data. Mathematics refers to equations or algorithms that process data to discover patterns and relationships among variables. Statistics generally shed light on the robustness and validity of the relationships that exist in the data mining model. Leading methods of data mining include regression, segmentation classification, neural networks, clustering and affinity analysis. The synergy created between data warehousing and data mining allows knowledge seekers to leverage their massive data assets, thus improving the quality and effectiveness of their decisions. The growing requirements for data mining and real time analysis of information will be a driving force in the development of new data warehouse architectures and methods and, conversely, the development of new data mining methods and applications.

In short, BI is a wide set of tools and applications for gathering, consolidation, analysis and dissemination aiming at to improve the power to decision process. The components of business intelligence that focus in collect and consolidation can involve data management software's to access data variables, extract, transform and load tools that also enhance data access and storage in a data warehouse or data mart. In the steps of analysis and distribution, each time more different products are launched and integrated with objective to take care of the different use of the information. These products can include the creation of reports, the fine-tuned dashboards containing customized performance indicators visually rich presentations using gauges, maps, charts, and other graphical elements to show multiple results together, the generation of OLAP cubes and the data mining software's to discover information hidden within valuable data assets, using advanced mathematical and statistical techniques, can uncover veins of surprising, golden insights in a mountain of factual data. Figure 1 presents a proposal of BI architecture, distributing the different technologies and applications argued in function of its main contribution in each one of the steps in the BI process.

The managerial approach sees BI as a *process* in which data from inside and outside the company are integrated in order to generate information relevant to the decision-making process. The role of BI here is related to the whole informational environment and by which operational data gathered from transactional systems and external sources can be analyzed to reveal the "strategic" business dimensions. From this perspective emerge concepts such as the "intelligent company": one that uses BI to make faster and smarter decisions than its competitors. Put simply, "intelligence" entails the reduction of a huge volume of data into knowledge through a process of filtering,

[1] Altosoft corporation, Bringing business intelligence to business operations, March 2009.

analyzing and reporting information. The explanation of how companies acquire "intelligence" would lie in the data-information-intelligence transformation. Traditional wisdom emerges here: data is raw and mirrors the operations and daily transactions of a company; information is the data that has passed through filtering and aggregation processes and acquired a certain level of contextual meaning; intelligence elevates the information to the highest level, as the result of a complete understanding of actions, contexts and choices.

Both approaches – technical and managerial – rely on an objective and positive view that "strategic decisions based on accurate and usable information lead to an intelligent company". All the subjectivism inherent in social interactions is evacuated and cultural and political issues are not evoked. Whether the reviewed studies are managerial or technological, they share a common idea:

- the core of BI (process or tool) is information *gathering, analysis and use*, and
- the goal is to support the strategic *decision-making process*.

The Characteristics of a Business Intelligence Solution

Single point of access to information

With BI systems, organizations can unlock information held within their databases by giving authorized users a single point of access to data—a BI portal—in both intranet or extranet environments. Wherever the data resides, whether it is stored in operational systems, data warehouses, data marts and/or packaged applications, users can prepare reports and drill deep down into the information to understand what drives their business, without technical knowledge of the underlying data structures. The most successful BI applications allow users to do this with an easy-to-understand, non-technical, graphical user interface.

Using BI in all departments of an organization

There are many different uses for BI systems. BI systems can be used at every step in the value chain.

Timely answers to business questions

The key to unlocking information is to give users the tools to quickly and easily find answers to their questions. Some users will be satisfied with standard reports that are updated on a regular basis, like current inventory reports, sales per channel, or customer status reports. However, the answers these reports yield, can lead to new questions. Some users will want dynamic access to information. The information that a user finds in a report will trigger more questions, and these questions will not be answered in a prepackaged report.

Making the most of the internet by creating an extranet

You can open up BI system access to users outside the organization through extranet applications with clearly defined security limits. For example, customers may want to consult their ordering history to analyze their buying patterns and identify cost-saving opportunities. Or suppliers may be interested in gathering sales data.

Selection of BI Tools

Selection of a BI tool may turn out to be a difficult task. At present companies offer a wide range of products beginning from simple reporting technologies up to sophisticated BI platforms. While choosing a BI tool, it is necessary – like in the case of purchasing other IS – to take the following criteria into consideration: functionality, complexity of solutions, and compatibility. It is also necessary to remember that organization's informational needs will evolve. Therefore, BI tools should be up-to-date enough to meet enterprise's expectations in a few years to come.

At this stage, good market knowledge of BI is required. Today BI products may be found in different segments of the IT market. Providers of MRP II and ERP systems more and more frequently equip their products with BI modules (e.g. SAP, Oracle or Microsoft), thus wishing to make their products more dynamic and analytical. OLAP techniques and data mining have also been

implemented in database systems (Oracle, Microsoft or IBM)[2]. Planning and budgeting belong to another segment of the IT market that uses BI techniques. Additionally, it has to be mentioned that there is a group of providers that offer BI solutions in a highly specialized area and usually on a very high level of customer need satisfaction. Such products often include best practices for a particular sector along with some future solutions. One cannot forget about open source solutions that are more and more frequently available on the market.

In the BI sector – similarly as in case of other IT sectors – it is possible to observe some processes of consolidating providers - purchasing products or expanding products by means of functionalities that are offered by the best providers in a given category. Hence, it is necessary to consider whether a given enterprise ought to purchase products and technologies from one provider or if such an enterprise should follow a principle of selecting the best products in a given category (e.g. the best tools for OLAP, ETL, etc.) sold by different providers. In the former case, enterprises are guaranteed integration of particular products and a similar interface. However, it has to be taken into account that not all solutions are going to be of the highest possible quality. Package purchase of products frequently involves discounts, which is quite important for enterprises. On the other hand, purchasing products from several providers may lead to delegating responsibility for particular module performance to other providers. It is also more difficult to obtain larger discounts while purchasing technologies that come from different providers. There is also some other possibility – purchase of a ready to use solution instead of a particular technology. In this situation, it is necessary to learn more about capacities of a given application and then consider whether such an application meets enterprise's needs and whether there are some elements that the application in question should be subsequently provided with. Providing an enterprise with BI products of an open source type is another possibility. Examples of complimentary or open source products may be provided by Sygate Analyst (a tool used for data visualization), Agata Reports (a reporting tool), Oracle Application Express (environment for building web applications), and cockpit for the management in open source ERP Compiere, Business Intelligence Reporting Tool for Eclipse or Mondrian OLAP Server. Some providers of BI products use free databases. For instance, Business Objects uses a complimentary database called MySQL. Figure 1[3] represents the largest BI vendors of the world IT market.

[2] www.intelligententerprise.com.
[3] www.informationweek.com.

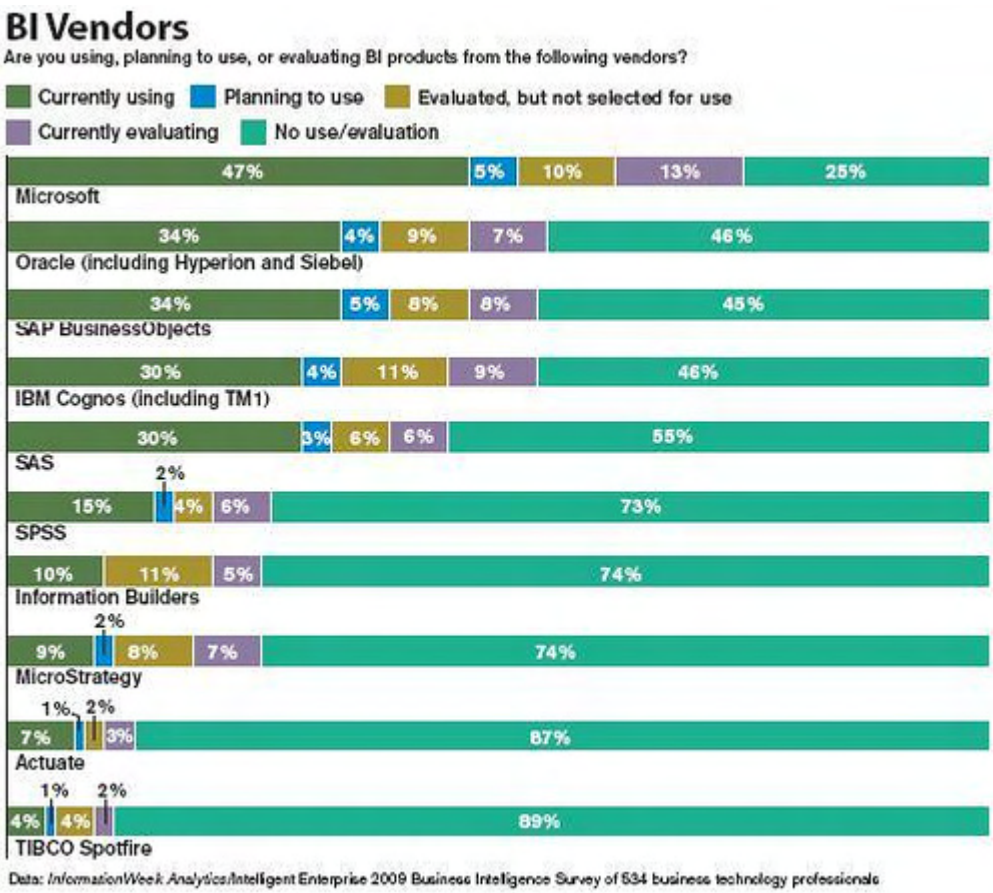

Figure 1. BI vendors
Source, www.intelligententerprise.com

The typical BI 'stack' or architecture can be represented as having a series of layers. The base is usually shown as source data systems from where data is extracted, translated and loaded by extract, transform and load (ETL) software into a data warehouse. Above this is an application layer (or BI layer) and on top of this the presentation or delivery layer which can include executive dashboards, scorecards and other tools that make it easier for managers to find and understand the information and proactively use it in decision making.

As BI has evolved, the greatest challenge has been how to integrate data on different systems accumulated from different vendors over many years. Traditionally, data flows from source systems to data warehouses then to data marts and cubes to be used in BI applications. Source data can now also come from customer facing applications, suppliers and sources of external information. The data warehouse has the potential to become the information hub that distributes data to and from many data sources and applications. Software houses used to specialize in different layers of this BI stack and businesses applied a 'best of breed' approach to assembling their own stacks. For example, a SAP ERP system might feed data to an Oracle data warehouse and the finance function might use an application from Hyperion for consolidation and reports and another from SAS for more advanced analytics. These solutions were developed by independent software houses to meet different businesses' needs.

This integration challenge is being addressed[4].

❖ Service-oriented architecture is promoted as a flexible solution which eliminates the need to develop point-to-point connections between resources. It provides access to data in legacy systems through 'services' which link together and are combined to provide a business intelligence solution.

❖ The major ERP, ETL, data warehouse and customer relationship management (CRM) vendors now offer what are claimed to be integrated BI applications, for example SAP BW, Informatica PowerCenter, Oracle Applications and Siebel Analytics. And BI vendors began to add ETL tools, such as Business Objects Data Integrator and Cognos DecisionStream.

❖ The major vendors, SAP, Oracle, IBM and Microsoft, who already had some BI solutions, have expanded into performance management by acquisition. There has been a feeding frenzy and the big players are still digesting their prey. If they succeed in doing so, they are expected to offer better integrated BI solutions.

❖ Meanwhile, data integration tools, such as those offered by Informatica, already allow data from diverse sources to be integrated into the database layer. This enhances the performance and scalability of BI applications accessing this data.

The Benefits of Business Intelligence

Because of the wide applicability of BI in enterprise and extranet deployments, the business benefits are numerous. These benefits can be grouped into three main categories: lowering costs, increasing revenue, and improving customer satisfaction[5].

Lowering Costs

Improve operational efficiency

❖ By giving internal or external customers access to real-time data over the web, customers can track their own accounts and answer their own questions. As a result, customer satisfaction is improved while reducing support costs. A significant, added benefit to real time data access is that data becomes much cleaner. By reviewing the data themselves, customers can spot errors, and help improve the quality of the information in the data warehouse.

Eliminate report backlog and delays

❖ Business intelligence allows business users to design their own queries and reports, allowing organizations to redeploy the programmers who formerly performed this task. This can generate significant cost savings in human resources, since sought-after staff can be reallocated to projects that add more value to the organization.

Negotiate better contracts with suppliers and customers

❖ A solid grasp of facts and figures is invaluable when it comes to negotiating contracts with suppliers and customers. For instance, by analyzing supplier performance on-time delivery trends, percentage of rejects, and price changes will be in an excellent position to discuss all aspects of the contract as well as possibly negotiate volume discounts. And identifying a customer's spending patterns could qualify him or her for a particular packaged deal.

Find root causes and take action

❖ If one division is doing better or worse than others, identify the root cause and either implement a best practice or fix the problem. With BI, can be found root causes both to problems and to best practices by simply asking "Why?" The process is initiated by analyzing a global report, say of sales per quarter. Every answer is followed by a new question, and users can drill deep down into a report to get to fundamental causes. Once they have a clear understanding of root causes, they can take highly effective action.

[4] CIMA, Improving decision making in organizations, September 2008.

[5] Mark Ritacco and Astrid Carver, The business value of business intelligence, Business object, 2008.

Identify wasted resources and reduce inventory costs

❖ BI can be apply activity-based costing methods to identify hidden costs or missed opportunities. From these findings, resources can be allocated to highly profitable products, customers, and projects, thereby increasing the bottom line. Also, having a clearer understanding of success of promotions can help to effectively monitor inventory levels.

Increasing Revenue

Sell information to customers, partners and suppliers

❖ Leading organizations are using BI to differentiate their product and service offerings from competitors through value added, web-based services. In the past, many departments generated zero revenue, but now with BI extranets, they create a recurring revenue stream by selling information to customers, partners, and suppliers.

Improve strategies with better marketing analysis

❖ With easy access to ordering, accounting, production, shipping, customer service, and even external databases, marketers can find answers to the most detailed of questions such as, "What was the success rate of my direct mail campaign?" or "What was the incremental revenue generated from the new TV ads we just ran?" . With this information, the marketer can precisely tailor product launches and promotion campaigns to the targeted audience. Using BI, companies can micro segment their markets and gain an edge over the competition.

Empower sales force

❖ Better results from sales force can be achieved by analyzing its selling patterns: compare results to targets, to figures from previous years, to other sales staff results, and suggest improvements. Encourage the sales force to focus on high profitability customers and products. The sales force can also use BI to analyze data on brands, clients, and distributors.

Improving Customer Satisfaction

Give users the means to make better decision

❖ With access to information, users can make better decisions faster, without having to escalate standard problems up the management hierarchy. This guarantees pragmatic and effective solutions since the people directly involved in the operations make decisions. In addition, users have the increased satisfaction of controlling their own process.

Provide quick answers to user questions

❖ One of the primary benefits of BI is that you can dramatically reduce the time it takes for internal and external users to get answers to their questions. With fewer delays and faster response time, users are empowered to act quickly, based on the information they receive.

Challenge assumptions with factual information

❖ Almost all businesses rely on assumptions and rule of thumb. However, it is worthwhile to challenge these hunches through detailed analysis of operational data, because assumptions and rule of thumb are frequently incorrect.

Conclusions

The term Business Intelligence may turn out to be a fad. However, the underlying concepts, using information technology to deliver actionable information for decision makers, are essential for managing today's global businesses. BI uses both structured and semi-structured data. The former is much easier to search but the latter contains the information needed for analysis and decision making.

For structured data, many BI tools exist for acquisition, integration, cleanup, search, analysis, and delivery. Further work is needed, however, to integrate these tools and to provide actionable information. BI tools for semi-structured data, on the other hand, are not yet mature.

The development of analytical tools to integrate structured and semi-structured data can benefit from attention by researchers. The BI market is growing, and the proportion of semi-structured data used in daily decisions is growing. Exploring the underlying issues and the development of information technology that provide intelligence to business therefore is a fertile area for research.

Business intelligence could inform better decision making in business. Everyone in management needs to be alert to this opportunity and the threat that early adapters may achieve a competitive advantage. But BI is only a technology enabler. Management accountants have important roles to play if BI is to be of value. The necessary changes will have to be implemented properly. People will have to use it to produce information and that information still has to be applied in decision making and, for those decisions to be effective, they will have to be managed through to impact.

The nature of the management information and analysis required by business has expanded. The range of data to be considered now includes non-financial and external information. The emphasis has shifted from reporting through monitoring to providing information and analysis as appropriate to users' roles. These users may be strategic managers, knowledge workers, people in operational and customer facing roles or external stakeholders and regulators Business intelligence is evolving to meet these information needs. It now encompasses the reporting and analysis tools used for performance management by accountants. Advances in data management and better integration of systems will enable BI to provide better management information to inform decision making.

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MEASUREMENT OF HEALTH INEQUALITY

NICOLETA CARAGEA*

Abstract
Health inequality is met everywhere in the world, including in countries with a high level of economic development, or those with strong social protection systems. In this paper I analyzed certain methods to measure health inequalities between population groups and also I presented some empirical results regarding health disparities between European Union countries. My research is focussed on three health areas: health status of population, access to health care services and resource allocation and population spending on health care.

Keywords: *disparities, health, inequalities, life expectance, mortality rate*

Introduction

Health inequality should not be accepted anywhere in the world. One of the main reasons why additional social policies in every country should be drafted would be the reduction of disparities between population groups disadvantaged and the rest of the population; the major objective being improving the health of the population throughout the country.

Because health inequalities are not fortuitous, but are heavily influenced by government, communities, and the individual himself, they are not inevitable. Therefore, the improvement of population health and reduction of inequality should be the main core long-term objectives, in terms of social policies at national and international. European Council (June 2008) stressed the importance of eliminating disparities - in terms of population health status - between and among State Members. EU Health Strategy includes measures and actions to reduce the inequalities between people living in different parts of the EU, but also between people of advantaged classes of society and those from disadvantaged groups, by solidarity, social and economic cohesion, the human rights and equal opportunities.

Starting with January 2011, it was initiated the *European Portal for Action on Health Equity* as a tool to promote health equity amongst different socio-economic groups in the European Union. The Portal provides information on policies and interventions to promote health equity within and between the countries of Europe, by targeting the socio-economic determinants of health.

The information presented is the result of collaboration between a wide range of health and social actors in the EU, who came together in the context of a pan-European initiative that aimed to stimulate action for greater health equity. The initiative was established an EU Consortium for Action on the Socio-economic Determinants of Health (SDH).

The 2008 WHO Annual Report highlights the deepening inequality and inefficiency of the health care systems worldwide. Even in developed countries, inequality in health is increasing, a phenomenon generated by the provision of specialized medical services, high tech, but less accessible, to the detriment of concern for providing basic health services and disease prevention among all populations.

Literature review

Increased global inequality has resulted in a different direction of research in the field: one that compares the health of the population between the various political entities, such as between

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countries or regions. Most studies are presented in numerous reports prepared by UN, ILO, OECD and the WHO.

Since 2005, in the European community, a group of experts reviewed the information on policies and practices in public health and supported initiatives to introduce community action programs to reduce existing inequalities. Research Framework Programmes (currently FP7) also provides a major boost to research in this area and share a variety of programs including health program and the Community Programme PROGRESS Social Solidarity labour and employment, financial studies and examples of good practice.

In Romania, there are few research studies on health inequality. The National Institute of Economic Research has included in the annual research programs projects relating to health, living conditions, which were addressed in the context of some aspects of these components of wealth distribution in different population categories, defined by employment status, education, age and sex, household size and type, environment and region of residence, as well as deciles or quintiles. Research on population health status has been conducted in the Institute for Research on Quality of Life and National Institute of Statistics. The economic dimensions of inequality and social polarization in Romania were the main research issues in the social field in the program research of the Institute of National Economy in the frame of Romanian Academy (Molnar, Caragea, 2010).

Measurement of health inequalities

Measuring health inequality is however a very difficult action because the complexity of the health various determinants. Therefore, any result obtained from the evaluation of differences between different individuals, between social groups, communities or societies, in terms of health, should be viewed with some reservations.

In the following section of the paper there are underlined some of the most representative methods measuring inequality in health:

(1) One of the methods measuring inequality of health in the vision of a research team from the World Health Organization (Mäkinen, 2000), examines the inequality of states in developing or in transition, in terms of resource allocation in health sector. Differences between countries were judged on the following indicators: public spending on health care per capita, number of ancillary medical personnel (nurses) and the number of doctors per 100,000 inhabitants.

(2) A recent health inequality measurement method (Doorslaer and O'Donnell, 2008) is based on the computation of the composite index accounting the cumulative action of determinants of health. The value of this approach is that the index is based on analysis of level and trends of health inequalities and the method can also explain the causes of inequality in health. Concentration index is calculated as the aggregate amount of the contribution of health determinants (demographic, social and economic factors). Wagstaff et al. (2003) demonstrate that the concentration index of health can be written as the sum of the contribution of factors, such as demographics, education, region, etc., to income-related health inequality, where each contribution is the product of the elasticity of health with respect to the factor and the concentration index of the factor. That is, the concentration index can be written as:

$$C = \sum_k (\beta_k \bar{x}_k / \mu) C_k + GC_\varepsilon / \mu \qquad (1)$$

where: μ - is the mean of the health measure y, $\bar{x}_k$ - is the mean of k[th] factor, β_k – is its coefficient from least squares regression of health on all factors, C_k - s the concentration index for the k[th] factor and GC_ε - is the generalized concentration index for the error term of the regression:

$$y = \alpha + \sum_k \beta_k x_k + \varepsilon \quad (2)$$

(3) Measuring health status inequality is based on the life expectancy distribution, by age. This approach seeks to answer several questions, for example, "it may be perfect equality between individuals when the same number of years they live," or when they enjoy the same level of health status? ".

In the next section, it is described the method for measuring health inequalities for a population with individuals born in T. We want to see if, at time T + t there are differences in terms of their health status. In other words, individuals who compose the population have the same level of health when they reached the age of t? In circumstances where there is perfect equality, we make the two conditions are necessary and sufficient:

- All individuals have the same healthy life expectancy;
- All individuals are subject to the same risks in terms of health status (incidence of illness and likelihood of improvement is considered equal for all individuals).

Healthy life expectancy is a function that can be written as:

$$S(x) = p(x) \cdot \sum_{j} p_{jx} \cdot w_{jx} \qquad (3)$$

where:

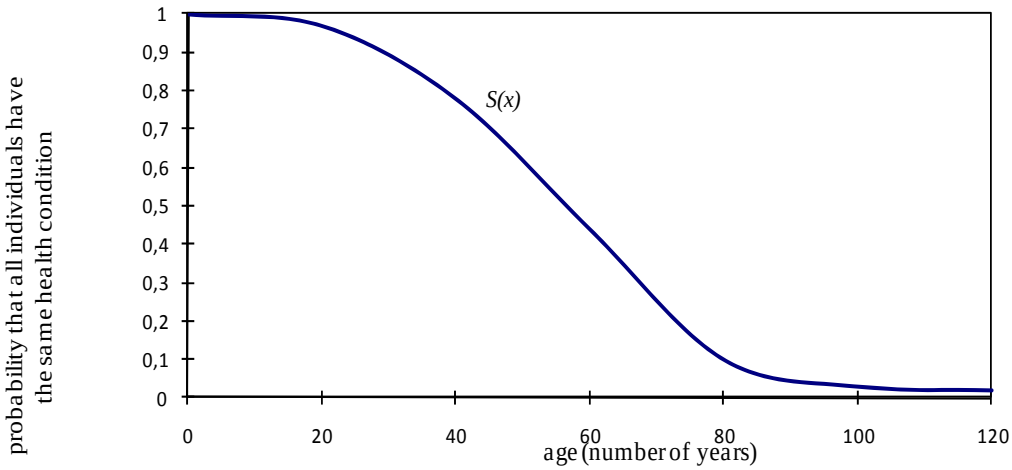
$S(x)$ - is the healthy life expectancy at age *x*,

$p(x)$ - is the probability of being alive at age *x*, $p_{jx}(x)$ - probability to have health status level *j* at age *x* and

$w_{jx}(x)$ - is the severity of disease at age *x*, attributed to the health status level *j* (severity is measured on a scale where 0 corresponds to death and 1 is equivalent to full health).

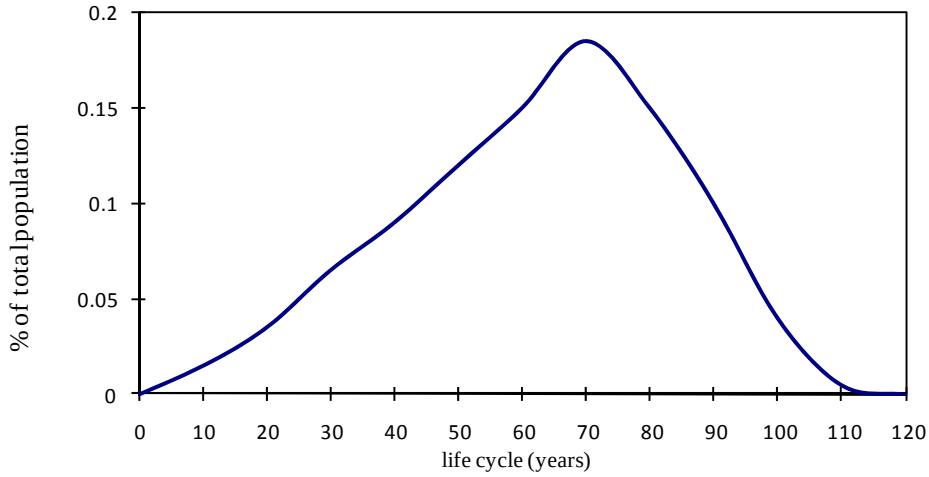
Figure 1a illustrates the healthy life expectancy by age and Figure 1b represents the distribution of healthy life expectancy for a population subject to the same risks in terms of health.

Figure 1a



In Figure 1a, healthy life expectancy - equal for all individuals - is given by the area under the curve *S(x)*.

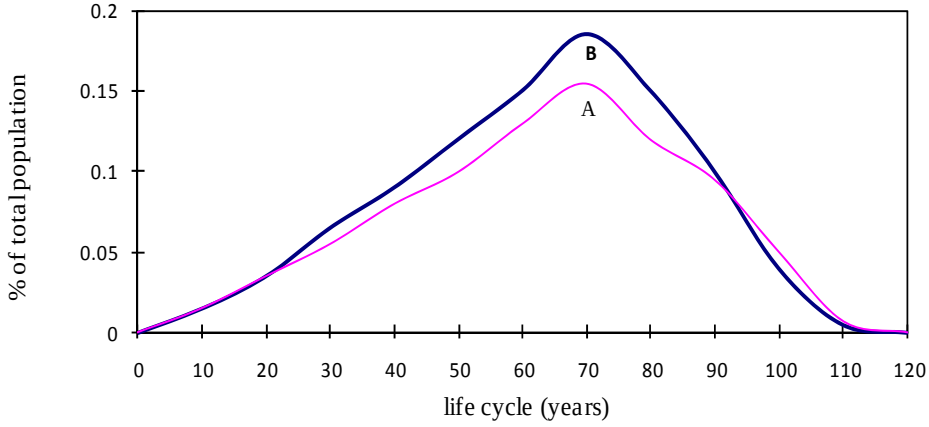
Figure 1b



Each of the individual has the same healthy life expectancy, but do not have equal chances to maintain its good health throughout life. For example, at age 20 years old, the probability of having a good health is 93%. In other words, at this age, because of natural causes (the misfortune), 7 of 100 individuals have a state of full health. Inequality in health should be analyzed, but in terms of risk factors that can damage the health of individuals. For example, if some individuals of the population are subject to risks related to socio-economic conditions in which they live, what is the likelihood that they will have good health for 20 years? Or, on an equal risk, varies as the probability of having a good health according to age?

Consider two populations A and B, characterized by different risk profiles in terms of maintaining good health of individuals who compose them, throughout life. In Figure 3 we can see that there are differences in the likelihood that individuals who constitute the population has to have the same healthy life expectancy compared to the population component B, due to risk factors that can not be avoided.

Figure 2



(4) Other method used to measure inequality in health has to calculate an index of inequality, according to the relation:

$$I(\alpha,\beta)=\frac{\sum_{i=1}^{n}\sum_{j=1}^{n}\left|y_i-y_j\right|^{\alpha}}{2n^2\mu^{\beta}} \qquad (4)$$

where:

y_i, y_j - is the health status of individual *i*, respectively *j*, μ - is the mean of population and *n* – is the number of population. α and β are parameters, which may have the following values: α =1 and β =0 or β =1, respectively α =2 and β =0 or β =1.

By replacing the parameter values α and β, following formulas are obtained:

$$I(\alpha=1,\beta=0)=\frac{\sum_{i=1}^{n}\sum_{j=1}^{n}\left|y_i-y_j\right|}{2n^2} \qquad (5a)$$

$$I(\alpha=1,\beta=1)=\frac{\sum_{i=1}^{n}\sum_{j=1}^{n}\left|y_i-y_j\right|}{2n^2\mu} \qquad (5b)$$

$$I(\alpha=2,\beta=0)=\frac{\sum_{i=1}^{n}\sum_{j=1}^{n}\left|y_i-y_j\right|^2}{2n^2} \qquad (5c)$$

$$I(\alpha=2,\beta=1)=\frac{\sum_{i=1}^{n}\sum_{j=1}^{n}\left|y_i-y_j\right|^2}{2n^2\mu} \qquad (5d)$$

If α =1, β =1, than $I(\alpha,\beta)$ is Gini coefficient often used to measure income distribution inequality.

Results

Analysis data was provided by national health interview surveys (according to European Health Interview Survey methodology), conducted in all Member States. The overall objective of this statistical research has been developing, implementing and achieving population health interview survey on a statistical sample of households to provide information and to describe the health status of the population that are not available from other data sources. In Romania, the investigation was prepared in accordance with the European methodology (European Health Interview Survey), the results being representative at national and regional level.

Perceived health status - is the subjective assessment of the individual's declared health status.

According to EU survey methodology concepts and definitions for the health status of the population, the indicator was calculated based on the choices of answer to the question: "In general,

how would you assess your health?" Very good, good, satisfactory, bad or very bad. For children, health status has been assessed by a parent.

On average, there are relatively small differences between the EU and Romania, in terms of population structure, in terms of the perceived health condition: very good, good, satisfactory, poor, very poor. Most people believe that their health is good (45.5% in the EU, respectively 43.7% in Romania). People who think that they have a very good health are more prevalent in Romania (25.7%) compared with the EU average (22.4%). The people who said they had a very poor health in Romania are 1.8%, very close to the value calculated for the EU-27, 1.9%.

Among European countries there are large variations in the structure of the population by health condition perceived of population. The highest weights of the population with good health status are observed in the Mediterranean countries (Greece and Cyprus 52.2%, 49.5%). On the opposite side are Portugal and Hungary, countries where the percentage of population with a very poor state of health is very high (5.3% and 4.9%). Also, the Baltic Countries are characterized by low values of the rate of people with good health (Latvia, 4.7%, Lithuania and Estonia 6.7%, 7.4%).

Disparities between Member States of the EU-27 - in terms of life expectancy at birth - are very high (7.8 years for the female population, i.e. 12.9 years for male population in 2008). Causes of these differences involve a wide range of factors, from the biological and behavioural socio-economic ones. The lowest life expectancy – for males - is 66.3 years in Lithuania, and the highest is recorded in Sweden (79.2 years). For women, the lowest life expectancy at birth has Bulgaria (77.1 years) and the upper, France (84.9 years). Life expectancy is greatly influenced by infant mortality, very high in countries with low economic development. Also, these countries are characterized by the highest life expectancy spreads to the EU average (e.g., the Baltic Countries: Lithuania and Latvia, but also the latest EU State Members: Bulgaria and Romania). On the opposite side are the rich countries, where values are above the European average.

Economic disparities between EU countries are also reflected in health, through the financing of health systems. Also, funding mechanisms are different from one country to another, especially by specific social protection systems. An indicator that includes all sources of financing health care, developed the methodology of the System of Health Accounts - EUROSTAT / OECD / WHO, is the total health care spending established by aggregating the national expenditure from all public or private funding sources (governmental budgets, the budgets of health insurance funds, health expenditure of private non-profit organizations, and household expenditure for health care). Among EU State Members there are great differences in the level of health care costs, coupled with economic development. For example, in 2008, total health care expenditure, per capita, have a value of more than 16 times higher in Luxembourg than in Bulgaria. Also, significant variations in spending on health care per capita, there are between three blocks of countries, based grouping by the time their integration into European structures. Most of financial resources are allocated to health care by the older EU State Members. Also, we can see between them significant amounts of health care expenditure in the Nordic Countries (Denmark, Sweden, Netherlands), characterized by strong social protection systems, including health protection.

In Romania, the financing of the health system continues to be used in an inappropriate and inefficient. Despite an increase in total health expenditure during the last decade, the financing of the health system in Romania remains low in a European context, especially taking into account the long period of chronic underfunding and lack of investment in health.

Conclusions

Over the last 50 years, there have been impressive social economic and health improvements in this country. People from every class and region are healthier and living longer than ever before. Unfortunately, not everyone is able to share the benefits of these improvements. It is essential that everyone is empowered and encouraged to do so.

Health inequalities are unacceptable. They start early in life and persist not only into old age but subsequent generations. Tackling health inequalities is a top priority for this Government, and it is focused on narrowing the health gap between disadvantaged groups, communities and the rest of the country, and on improving health overall.

Since the twenty-first century, inequality in health has become a constant concern of the social policies of the European community. Empirical studies show that the incidence and prevalence of most diseases is higher in poorer countries, but also in developed countries among people with low education and / or low income, their life expectancy is significantly less. Concerns about reducing inequalities between different socio-economic groups have led to the development of various methods of measurement. In terms of measuring inequality in health, the major problem is to choose the most relevant indicators to reflect the differences between two or more population groups.

The empirical analysis conducted in this study reflects the fact that there are differences between EU State Members in all three directions. In Romania, life expectancy, although is growing, is one of the lowest values in the European Union. Indicator value is the most influenced by infant mortality that is still very high, due to weak and under funded national health system.

Concluding remarks: inequalities are pervasive throughout the world. They are apparent in all developed countries, including ones with highly developed welfare systems such as Norway and Netherlands. Health inequalities can be found in many aspects of health; for example, poor people not only live less long than rich, but also have more years of poor health. Access to health is also uneven.

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THE APPLICATION OF OPTIMUM CURRENCY AREA CRITERIA TO EUROPEAN MONETARY UNION

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AURA-GABRIELA SOCOL[***]

Abstract
Debt crisis in several Member States of the euro area has reopened discussions regarding the sustainability of European Monetary Union. Adoption of the single currency has proven to be more costly for the economies which are structurally divergent from the core euro area economies (Germany, France, Italy). In this study I analyze the opportunity of a country to be part of the European Monetary Union on the basis of optimum currency area criteria. According to them, the euro area is characterized by an increase in trade and financial integration between member States, by emphasizing differences in competitiveness and lack of automatic fiscal transfers. If monetary union will not be completed by a fiscal union, the European monetary construction will be one vulnerable and benefits of joining to this will decrease.

Keywords*: euro area; monetary integration; fixed exchange rate; trade integration; fiscal transfers*

Introduction

The objective of this study is to analyze the sustainability of European Monetary Union with specific criteria of the optimum currency area theory. At first glance, this theory has played a secondary role when it took the decision of the European monetary integration. The experience of first exchange rate mechanism showed that maintaining fixed exchange rates between trading partners is not the best option in terms of high capital mobility. Therefore, creating a monetary union was a solution to reduce currency volatility risks. However, the theory of optimum currency areas is extremely important now, because it describes accurately the risks of being part of a monetary union and the conditions for its sustainability. According to this theory, the existence of a monetary union in the context of the absence of a fiscal union and political union, as in the case euro area, will lead to the persistence of asymmetric shocks between Member States and some of them might decide to return to its own currency. Probably it would have been the scenario for Greece and Ireland, if these countries would have not been supported through the financial mechanism established within the euro area. Its role was to complete European monetary construction in the context described by the theory of optimum currency area.

The analysis is structured in two parts in which we will provide answers to two specific questions to the topic analyzed. The first question relates to the specific criteria of an optimum currency area, which explain the risks caused by adoption of a single currency. As an element of originality, we present these criteria according to the stages of the theory of optimum currency areas in the economic literature. Thus, in the seventh decade, Mundell, McKinnon and Kenen believed that labor mobility, trade openness and export diversification were the main criteria for the analysis the costs and benefits of common currency. Over the past fifteen years, has been developed the theory of endogenous optimum currency area and were made analysis related to correlations between economic shocks and business cycles of euro area member states. Once identified these criteria, we made their application for European monetary union, to answer the question whether the euro area is

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an optimal currency area. This research allowed us to identify sufficient arguments for the euro area is not an optimal monetary union, in agreement with the theory analyzed in this project. Most studies consider that EMU is too heterogeneous to be characterized an optimal area from monetary point of view – labour flexibility is low, there is not a fiscal discipline at European level, not working the automatic fiscal transfers between countries and the common monetary policy has emphasized the divergence of the peripheral economies. This conclusion must be tempered by launching of the common currency, because increasing trade and financial linkages between countries have contributed to more symmetry of shocks. Thus, according to the approach of endogenous optimal currency area, the economic divergences between countries of euro area will diminish over time. The monetary integration process will boost trade, especially intra-industry trade, which will generate an increase in the degree of synchronization of business cycles. Thus, the sustainability of a monetary union can grow despite the existence of significant divergences between the levels of development and between economic and social systems.

What are the criteria of an optimum currency area (OCA)?

The first approaches of the OCA focused on the choice of exchange rate type, highlighting the economic adjustment mechanisms in the context of shocks induced by economic integration. According to Mundell (1961), increasing the mobility of production factors in a group of countries requires the use of a single currency by them. All other criteria of an OCA arose from the need to explain the costs and benefits associated with the decision to adopt a common currency. If the first researchers believed that a common monetary area should not include extremely heterogeneous economies, recently, other researchers claimed that there are not very important initial conditions – adoption of the same currency will induce an increase of trade and financial exchanges, enhancing benefits and for the most divergent countries.

The main researchers of the optimum currency area criteria are Mundell (1961), (McKinnon, 1963), (Kenen, 1969), Corden (1972), Mundell (1973), Krugman (1993), Frenkel şi Rose (1997), de Grauwe (2005). The optimum currency criteria include: *the mobility of production factors, price and wage flexibility, economic openness, diversification of production and consumption, similarities between inflation rates, fiscal integration, political integration, the correlation of business cycles.*

- *Mobility of production factors*. The choice of this criterion of analysis has been influenced by neo-classical perspective on the effects of economic integration. If there is a perfect mobility of capital and labour, then certain shocks may be reversed immediately. According to Robert Mundell's theory, the problem of asymmetric shocks can be solved if there is a high mobility of production factors between member countries of the monetary union. In general, countries are quite susceptible to such shocks, and their existence compromises the stability of the exchange rate between them. But, a higher mobility of labour and capital factors facilitates such adjustment process, reducing the need for an own exchange rate.
- *Wage and price flexibility*. According to this criterion, prices in the economy (including wages) are flexible, so that the economy will adjust automatically, no need for government intervention. Thus, when the economy is in recession, reducing incomes and rising unemployment will lead to lower prices of production factors and reducing production costs, inducing increase aggregate supply and return the economy to its potential. Therefore, if nominal wages and prices are flexible within an optimal currency area, the manifestation of a shock will not generate a persistent unemployment rate. Their flexibility will reduce the need of flexible exchange rates.
- *The degree of economic openness and country-size*. In 1963 year, Robert McKinnon proposed another important criterion in choosing the exchange rate. He was referring to the economic openness and country size, as factors that facilitate integration in a monetary union. He argues that in open economies, the gain of competitiveness achieved by currency devaluation is reduced, because the price of imported inputs and the final goods will increase immediately. A higher degree of

openness of the economy undermines the real exchange rate changes and increases the benefits of a single currency. Thus, the higher the degree of openness of the economy, then more economic agents will benefits from exchange stability.

• *Diversification of production and consumption.* Peter Kenen (1969) showed that the diversification of production and consumption can also be an important feature of optimal currency areas. Countries whose exports are diversified and have the same structure of production form an optimum currency area. In this situation, there are few risks of asymmetric shocks occur, if indeed occur, would be reduced in size. Although the economy has a diversified structure of production and of exports, however there is the risk of symmetric shocks within the monetary union if its economic structure is divergent from that of advanced economies in that area.

• *Divergence between inflation rates.* Differences in economic policies promoted and different inflation preferences of the countries forming a monetary union affect the terms of the exchange and require the nominal exchange rate adjustments. Substantial differences between the rates of inflation may cause external imbalances. Fleming (1971) has shown that similar rates of inflation ensure stabilization of trade, which sustain the current account balance and reduces the role of the exchange rate. A potential cost of introducing a single currency is determined by the fact that countries may have different preferences for inflation - some countries have a stronger aversion to inflation than others.

• *Fiscal integration.* A monetary union requires the existence of a supranational authority that can make transfers to areas affected by asymmetric shocks. This would eliminate the need for flexible exchange rates. Countries that have a supranational fiscal transfer authority may redistribute funds to a partner affected by asymmetric shocks. This property requires however a high degree of political integration and willingness to accept risk sharing between the states involved. A component of this property can be considered fiscal stability introduced by the Maastricht criteria and strengthened by the Stability and Growth Pact.

• *Financial market integration.* This criterion can be considered a variant of "capital mobility". If financial markets have a high level of integration, then, removing restrictions on the movement of capital, resolve the differences between interest rates and exchange rate fluctuations. Therefore, countries may adopt a common currency. Financial integration allows temporary disruption depreciation of the financial flows, for example by raising loans from surplus areas.

• *Political integration.* This criterion is seen by some economists as being the most important condition for the adoption of a single currency, the history of monetary unions showing that they were preceded by political Union. The success of Monetary Union is dependent on the compatibility preferences for growth, employment and price stability, as well as the ability to achieve compromise between those objectives. In these circumstances where there is political consensus for common goals of economic policy, Monetary Union would suffer. In circumstances where there is not political consensus for common goals of economic policy, Monetary Union will not be a sustainable construction.

• *Correlation between shocks and convergence cycles.* Under a common monetary policy, member countries can only use fiscal policy instruments. Thus, the asymmetry of shocks and business cycles divergences constitute the greatest threats of optimality of currency area. With asymmetric shocks, there must be other mechanisms of adjustment, like labour mobility, fiscal centralization or fiscal transfers to the countries affected by recession. Countries that are exposed to symmetric shocks tend to have more synchronized business cycles and therefore will promote similar economic policies. Not only asymmetric shocks generate costs of the monetary integration. If monetary union member countries must respond to symmetric shocks, the costs may result from the different ways they respond to these shocks.

Why euro area is not an optimal currency area?

Even if the OCA properties have not been taken into account when EMU was achieved, yet they are used when considering the potential manifestation of asymmetric shocks and their capacity of adjustment. However, if there is less progress on the OCA, then the costs of adopting a common currency will be higher. Economic researchers have found sufficient reasons for the euro area is not an optimal monetary union, in agreement with the theory analyzed in this project. Among member countries of the Economic and Monetary Union (EMU) there are sufficient divergences generated by different structural characteristics, by the different national policies promoted or ineffective internal economic mechanisms of shocks adjustment. Also, each rise in the euro area members increases the macroeconomic divergences in monetary union, which negatively influences the development of new entrants. In these circumstances, the most viable monetary area would be composed by economies with similar level of development, which have the same preferences and which are sufficiently interconnected financial and commercial. Although adoption a common currency is a risky option for some economies (eg Romania), however they hope to be validate the endogenous properties of the optimum currency area. A part of the criteria of an optimum currency areas support the sustainability of the euro area, while others deny. Within this study we made a summary of the five reasons why the euro area is not an optimal currency area.

Reason 1.Trading links between the Member States have increased (positive aspect), but persist divergences between commercial structures

The degree of economic integration between the euro area countries has increased from 52% during 1988-1996 years to 63% during 1997-2004 years. Joining to EMU has increased the degree of economic integration, while the share of inter-industry trade has declined. In the context of increasing share of the intra-industry trade, convergence of business cycles in the euro area has increased. Under these conditions, a shock that will affect one economy is transmitted symmetrically toward each other. However, the shares of the intra-industry trade in total trade are very dispersed across countries. Thus, the core of euro area has recorded more than 75% share of intra-industry trade and in addition a high degree of diversification of production (will be affected, therefore, less asymmetric shocks). Comparing the differences between the structures of bilateral trade in the euro area, it was noted that Germany and France had the lowest value of the divergence between trade structures (21%), while Germany and Greece are characterized by the highest divergence (95%). This is because Greece has the largest share of exports of food and beverages, while the proportion of machinery and transport equipment is the lowest. Moreover, the economy recorded six of the highest values of bilateral trade specialization, so that is the most divergent country with the euro area.

Reason 2. The adoption of the euro currency has generated increasing correlation between business cycles (positive aspect), but persist divergences between core and periphery

Joining to the euro area has led to increasing of trade relations, which positively influenced the convergence of business cycles. The adoption of a common currency has a positive effect on intra-industry trade, even if economic structures are not converging. Frankel and Rose (1998) estimated a positive influence of trade intensity on convergence of business cycles, so that the euro will lead to an increase in trade relations, which in turn will induce a greater synchronization of business cycles. Fidrmuc (2004) showed that the relationship described by the two economists is conditioned by the development of the intra-industry trade. It also predicted the existence of close links between Germany and new EU member states on intra-industry trade, which can reduce costs of common currency adoption. Artis and Zang (2001) have studied the properties of the optimum currency area for the euro area, according to criteria that influence the degree of synchronization of business cycles: volatility of real exchange rate, convergence of interest rates, degree of openness, the convergence of inflation rates and the flexibility of the labour market. According to estimates, France, Austria, Belgium and Netherlands are the economies that have the highest convergence

business cycles with Germany, while the northern and southern economies have registered the lower correlations. The difference between these groups of countries is given by the degree of flexibility of the labour market. Thus, the Nordic countries have a more flexible labour market, and it can mitigate the effect of asymmetric shocks, while southern economies cannot achieve an adjustment based on the functioning of the labour market.

Reason 3. The labor market is not flexible, what lead to a limited adjustment of asymmetric shocks

In the first studies on optimum currency area, the labour market flexibility was analyzed in particular in the light of the degree of labour mobility. According to this criterion, the EU is characterized by a reduced integration of national labor markets, given that less than 1.5% of the population had changed residence. In addition, migration process was not the answer to economic shocks (such as Mundell's theory), but was motivated by other factors. Therefore, an increase in unemployment in a particular region/country tends to become persistent, in the absence of interregional migration. Within the EU there is not only a low mobility of workers between countries but within them, at regional level. Thus, interregional mobility is lower in southern Europe compared with central and northern countries. This situation contradicts the new economic geography approaches, according to which the existence of high regional disparities involve migration of a large part of the workforce to the developed regions. On the contrary, according to European reality, economies with lower domestic regional inequality (such as northern countries) are characterized by high mobility of the population.

Differences in the labor market institutions within the euro area are a source of asymmetric shocks. Studies confirm the existence of a very low speed of adjustment in real wages to certain economic shocks. A lower wage flexibility is reflected in a higher price rigidity in the economy. Even in times of recession there is a higher unemployment pressure, which affects the employment rather than wage levels. Therefore the costs of the firms will not lower costs than a smaller extent, and the recovery of those economies will be more difficult. Some causes refer to certain specific labor market institutions such as the degree of strictness of the labour legislation, the power of union or the existence of the minimum wage. If the differences between labour markets are more significant, then both wages and prices will move divergence within the euro area, even in the presence of symmetric shocks. Therefore, countries whose labor market institutions are different (either because they are too flexible compared to average or too rigid compared to it), will consider the decision to adopt a single currency is costly.

Reason 4. There is not fiscal transfers between countries

Even if the theory of optimum currency area has described in detail the main features that generate sustainability of a monetary union, though not all were given equal importance in the literature. For example, the criterion of the existence of a fiscal union has been neglected so long as certain internal vulnerabilities have been underestimated in the context of high rates of economic growth. While there is the EU Community budget, it has no role in stabilizing the European economies, because it has a different role than the federal budget, both in terms of collection of resources and their spending. The main resource of the community budget is equivalent to about 1% of GDP in each economy, followed by a national VAT rate applied to national revenues. Most funds are targeted for cohesion policy and Common Agricultural Policy, resulting that they not have a damping effect of asymmetric shocks in Europe.

Also, funds are allocated for seven year financial program, the allocation being influenced only by the development degree of the region/economy at a time and not by the business cycle phase in which there is. However, there may be situations where funds could support the recovery of regions faced with high unemployment or characterized by a low potential for growth, but in this case, the effects are conditioned by the absorption capacity. Studies show that financial resources are

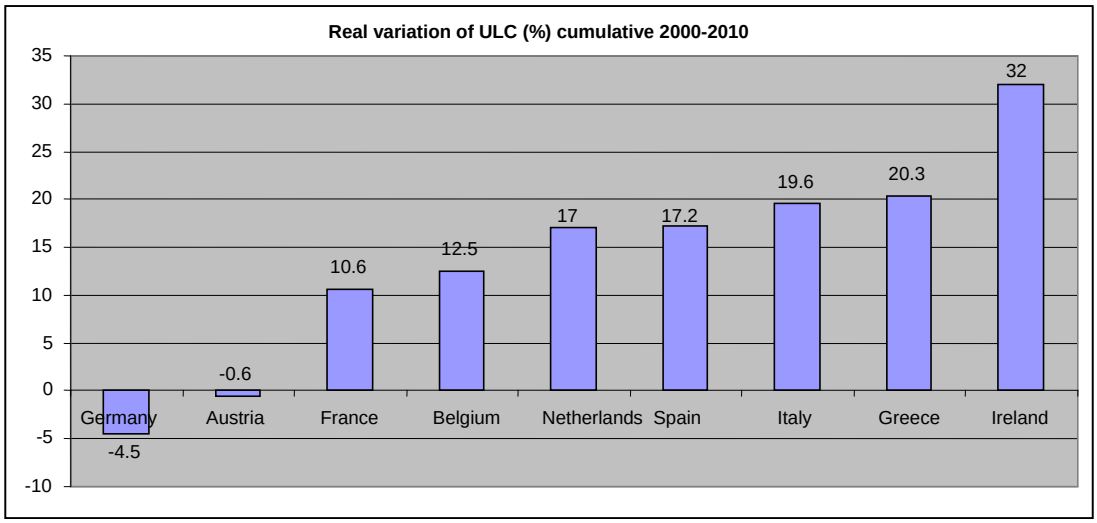
attracted to a greater extent by economic agents belonging to the more developed regions, because these regions have the ability to attract both investment and labour. All these arguments confirm the ineffectiveness of the current EU budget to mitigate the risks of participation in the euro area. Therefore, European monetary union has not one of the essential properties that ensure its sustainability, in Mundell's view. As long as economic growth (even unsustainable) allowed easy payment of state debts, the need for a fiscal union, including transfers between countries, has been neglected. Even if the monetary union was not an optimum currency area, however, it was thought that divergences between countries tend to be less important in context of increasing trade and financial integration (endogenous hypothesis).

Since the entry into the crisis of European economies the previous optimistic vision was denied, because enhancing the economic integration has generated a faster transmission of shocks within the euro area. Thus, the budgetary difficulties of some countries (Greece, Ireland) influencing through the financial system countries less vulnerable which generates a drop in confidence in the sustainability of the euro area. To avoid such a scenario, the European authorities consider that will be necessary of a fiscal Union in the euro area, which oversees more strictly economic policies of the member states. In conclusion, the membership decision is costly without a convergence and a strict regulation of national preferences in the field of taxation or of the labour market.

Reason 5. There are significant divergences of the competitiveness between countries

The member states unable to find internal tools to adjust the economic shocks will record a lower dynamic structural changes and loss of competitiveness in the monetary union. Therefore, the economic recession will extend and will be accompanied by increasing structural unemployment. Studies for the euro area economies have shown that it is composed of a heterogeneous group of economies, both in terms of development level, economic structure or the level of labor market flexibility. Empirical data suggest that the core EMU (Germany, France, Italy, Belgium, Netherlands) evolves symmetrically with the euro area economy and the periphery (Ireland, Spain, Greece) has a custom development in this area compared with the core countries.

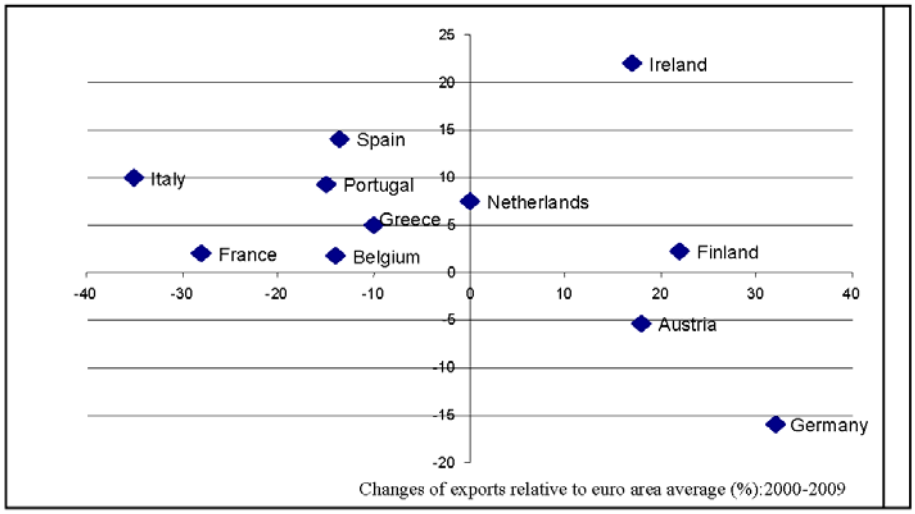
The inflation differential between the euro area countries generate divergences of external competitiveness and of real interest rate. Thus, the economies characterized by a higher inflation rate compared to euro area average recorded both a demand reduction caused by relative loss of competitiveness and an increase in demand due to lower real interest rate (Walter's critique). In the first decade of the euro area existence, countries which currently have problems with debt financing (Spain, Ireland, Greece and Portugal) showed a loss of competitiveness for some 20% compared with Germany. In other words, unit labor costs have increased by approximately 20% less in Germany than in the peripheral countries of the EU. In these circumstances necessary adjustment of this countries require a decrease of labor costs, in direction of regaining competitiveness. Spain and Ireland have recorded the largest reductions in competitiveness after 2003, in the context of the housing boom, while Germany had the largest improvement in competitiveness since 2000, as evidenced by decreasing aggregate real unit cost of labor (Figure 1).



Source of data: AMECO database, 2010

Figure 1. Competitiveness changes in nine of the euro area countries (2000-2010)

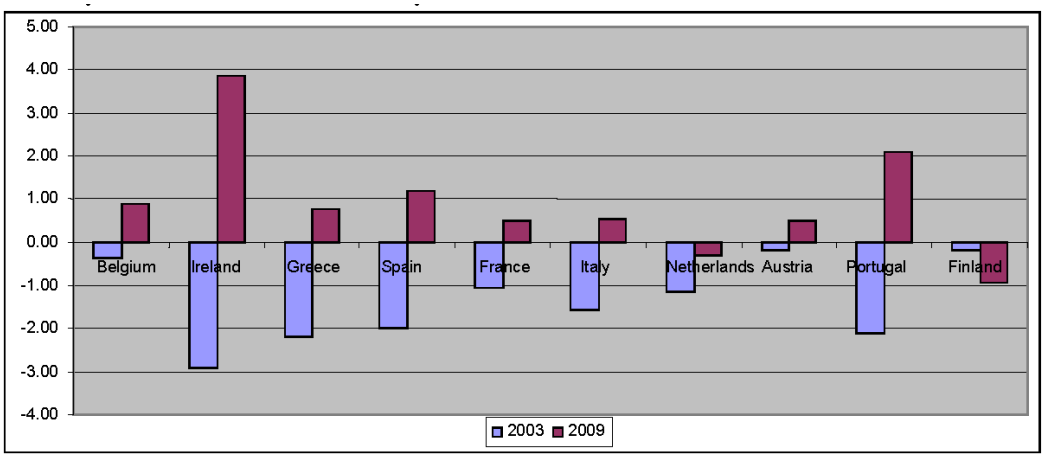
Differences in competitiveness are reflected in the divergent evolution of foreign trade. Thus, economies that have experienced a significant increase in unit labor costs relative to the euro area have generally a slower growth of exports compared with the euro area, the only exception being Ireland. The most significant increases of exports were recorded by Germany, Austria and Finland in the context in which the first two economies were characterized by relative gains in competitiveness. The consequence of this development was the increasing trade deficits of the southern countries in relation to Germany, given that before the creation of the euro area, there were close to equilibrium trade balances (figure 2). On the ordinate of the figure 2 is represented the unit labour costs changes relative to euro area between 2000 and 2009 years.



Source of data: AMECO database, 2010

Figure 2. Impactul modificării costului real al forței de muncă asupra exporturilor

The inflation differential in the euro area generates an asymmetric impact of the common monetary policy adopted by European Central Bank, because the real interest rates will be different. Thus, for economies whose real interest rates are lower than the reference value (such as Germany, the figure below), common monetary policy will be expansionary, while for others there is a restrictive effect of monetary policy. If in 2003 year the monetary policy was for all countries more expansionary relative to Germany, the situation was reversed in 2009. Thus, the southern countries were more expansionary relative to Germany until the outbreak of economic crisis, after which there was a tendency of restrictiveness induced by economic downturn.



Source of data: EUROSTAT database, 2010

Figure 3. The real interest rate chenges relative to Germany

Conclusions

In this study we demonstrated that European monetary union does not have a specific institutional arrangement of an optimum currency area. This is not a fiscal or political union, so it did not have an automatic mechanism to support the economies with debt financing problems. In accordance with the features of OCA, we believe that now would be considered costs and benefits of remaining within the monetary union. With the emergence of the financial problems in the euro area, participation at monetary union will be more expensive both for economies with financial difficulties (which must take further austerity budget) and for creditors, which must cover the losses of others. But, the decision to renounce the euro currency is costly both for current borrowers and for more stable economies in financial terms. In economies with high outstanding debt, leaving the euro area would lead to financial problems – the cost of borrowing will increase, and some capital will leave the economy – which can cause re-imposing restrictions on capital movements. Their financial difficulties will spread quickly on the financial system in the relatively stable economies, causing losses for them.

Acknowledgment

This paper represents a partial dissemination of the exploratory research projects IDEAS, *Substantiating and Implementing an Econometric Model of Growth in the Efficiency of the Fiscal Policy with reference to Romania's Adhesion to the Eurozone*, research contract no. 1766/2008,

PNCD II, Program Ideas/ Exploring Research Projects program, 3 years, 3 stages, Project Manager Socol Cristian.

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ANALYSIS OF ECONOMIC SHOCKS AFFECTING EURO AREA

MARIUS-CORNELIU MARINAŞ*

Abstract
The objective of this study is to explain the causes of economic shocks that are manifested in the euro area countries and to examine the possibilities of their adjustment in the context of a common monetary policy. The member countries of the European Monetary Union can not use its own exchange rate or monetary policy to neutralize the economic shocks. Therefore, they must find new ways to adjust the shocks such increase labor market flexibility and promoting reforms in the areas with significant structural rigidities. Common monetary policy also generates asymmetric shocks, as long as Member States are in different phases of the business cycle. In this study I have demonstrated that the ECB's monetary policy has favored Germany and has disadvantaged the countries confronted in present with problems of debt financing.

***Keywords**: asymmetric shocks; euro area; monetary policy; economic flexibility; optimum currency area.*

Introduction

Within this study I have analyzed the stance of economic shocks which affect the member countries of the euro area, as well as opportunities to neutralize them. This analysis offers a different perspective on the costs of adopting a common currency, avoiding technical analysis of its. For economies that form a monetary Union, the most important cost is giving up monetary policy and exchange rate for its own internal objectives. This cost can be illustrated from the situation of a country that is affected by a restrictive economic shock (for example, increasing internal production costs). If he had not adopted a common currency, the economy would be able to depreciate the currency in order to enhance competitiveness, and neutralization of shock would be achieved more quickly. Therefore, the economy will be affected by economic shocks which it will neutralize more difficult and the cost of adopting a single currency will be higher.

The study is structured in three parts in which I will provide answers to three specific to the topic addressed. The first one concerns the nature of economic shocks in a monetary Union. In light of this, I have identified the optimum solution to their neutralization. Thus, structural shocks (eg. the increases of food prices) can not be solved by policies to increase aggregate demand, but by policies to boost potential GDP and by structural reforms. The second question concerns the rather asymmetric economic shocks affecting the countries of a monetary union. Because these economies have divergent economic, financial and commercial structures, then even shocks symmetrical generates rather asymmetric effects. In this part I have adjusted the analysis of Robert Mundell (1961) to highlight solutions to neutralize the asymmetric shocks in a monetary union. In the economic literature it is considered that labor market flexibility is the most effective mechanism to neutralize the asymmetric shocks. For economies with rigid labor markets, the shocks will be persistent, while flexible economies will offset shocks faster. Therefore, differences regarding the flexibility of labor markets will deepen the asymmetric stance of economic shocks.

A third question concerns the effectiveness of the common monetary policy to counteract the economic shocks in the euro area. The monetary policy of the European Central Bank leads to an increase rather than a neutralization of the asymmetric shocks in the euro area. For example, if the ECB decides to decrease the interest rate in order to stimulate the economic activity in the euro area

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and the country A is in recession, while the country B is in economic expansion, then the common monetary policy will have divergent effects in countries A and B.

In conclusion, this study will explain why the asymmetry is the rule in the case of a monetary Union, while the symmetry of the shock is just random. This statement is consistent with research conducted by two of the economists who have received the Nobel Prize for Economics in recent years – Robert Mundell (1999) and Paul Krugman (2008). The starting point for the analyses pointing to the micro- and macroeconomic costs induced by the abandonment of the national currency is constituted by Mundell's work *A Theory of Optimum Currency Areas* (1961), the one who laid the basis of the theory defining the criteria which are specific to an optimum currency area. Mundell proposed a few factors which allow the adjustment of a few asymmetric shocks if there is no proper monetary policy, such as labour mobility and wage flexibility. Among Paul Krugman's works, I have studied those related to the issues of economic and monetary integration, namely *International Economics. Theory and Policy* (2005), *Integration, Specialization, and Adjustment* and *Lessons of Massachusetts for EMU* (1993). According to the author, the more the commercial and financial relationships between the economic agents which belong to two economies are stronger, the more their impulse to adopt a mutual currency is higher. Moreover, the existence of the same currency will still intensify the degree of economic integration between those economies. However, Krugman endorsed that the increase of the commercial relationships between two economies did not also generate symmetric shocks between them, as each economy will specialize in producing the goods which it can make more efficiently. This correlation is named *the specializing hypothesis* within the theory of the optimum currency area.

What is the nature of shocks in a monetary Union?

The most well-known shocks are those who exercise influence on the demand and aggregate supply. According to economic theory, there are some temporary demand shocks, because they influence only the inflation on the long-run. The supply shocks are permanent because influence both the inflation rate and the production the long-run, due to the potential impact on GDP. Demand and aggregate supply shocks may be the result of both internal policies promoted (for example, increasing or reducing the VAT rate) and of exogenous factors, such as external shocks, those caused by natural factors, etc. Briefly, economic shocks can be classified into four categories:

a) supply and demand shocks;
b) symmetric and asymmetric shocks;
c) *temporary and permanent* shocks;
d) *exogenous and policy-induced* shocks.

Aggregate demand shock causes a change in output and inflation in the same direction, which implies a compromise in the adoption of macroeconomic policies. The European Central Bank's mission is to ensure both price stability and to avoid the volatility of real variables. **Aggregate supply shocks** lead to conflicts between the policies pursued, especially when the ECB and national fiscal authorities have conflicting objectives. Poor flexibility in the adjustment of the European economy induces the persistence of these shocks, which extends the period of macroeconomic recession.

Using a common currency implies a higher difficulty to adjust the **asymmetric shocks**, rather than the **symmetrical shocks**, because the adjustment is more costly in terms of wage and costs. The asymmetric shocks cause different effects between countries or between sectors of activity. A *symmetric shock* can be defined as an economic disturbance that affects all member countries of monetary union simultaneously. An *asymmetric shock* consequently is defined as an economic disturbance that affects the member countries of monetary union to a different extent, e.g. only one country of a monetary union (country-specific shock), only one region of a country (regional shock) or only one industry within a union or country.

The distinction between **temporary and permanent shocks** refers to intensity of an economic shock. A *temporary shock* is an economic disturbance which will be reversed within a relatively short time. A *permanent shock*, by contrast, is a lasting disturbance. Thus, some shocks have only transitory effect - for example an unanticipated fall in aggregate demand - and other shocks which entail a permanent decline of competitiveness. Shocks of the first kind can be corrected by expansive fiscal and/or monetary policy. Shocks of the second kind can be corrected by major long-term restructuring of exporting sectors. The distinction is important because confusion between them can lead to action which aggravates rather than neutralizes the economic shocks. Treating shocks with a permanent effect as if they were temporary may only serve to entrench the underlying loss of competitiveness and make necessary reform more difficult.

The shocks which are caused by outside events over which the authorities in a member state of monetary union have no direct control are *exogenous*, and other shocks arising from *internal policies.* The exogenous shocks can be more difficult offset by macroeconomic policies in a monetary union. For example, the global food price increase will generate an increase in domestic inflation and the national authorities can not short term to alleviate the pressure of rising prices.

Why become asymmetric economic shocks?

Even if macroeconomic policies of countries participating in a monetary union coincides and shocks are exclusively symmetric, problems of asymmetry may arise as a result of country-specific differences in terms of economic, commercial, financial structures. This means that some country specific adjustment is needed on top of the common policy response. For instance, a rise in short-term interest rates may, for example, have differing effects in different areas because they are at different stages in an economic cycle. But they may also be due to long-term differences in financial structure: the relative importance of banking finance and the differences in monetary transmission mechanisms.

The main causes of asymmetric shocks transmission refers to:

- *the heterogeneousness of the national structures and financial systems* – the financial system interferes within the mechanism of spreading the monetary policy over the global demand (the channel of the interest rate, of the credit, of the financial assets);
- *the heterogeneousness of the prices and salaries' reactions to an exogenous shock, which affects the national economy's competitiveness, if there is a centralization of the decisions regarding the salary negotiation*;
- *the evolution of the Euro/Dollar parity,* because the foreign trade of the European economies is not the same in the relationship with the Dollar area.

The asymmetry of the national economic variables within the Euro area, which can be explained, at the same time, by:

- ✓ the action of the national asymmetrical shocks;
- ✓ the national asymmetrical spreading of the symmetrical shocks;
- ✓ the symmetrical spreading of the monetary policy impulses within the Euro area (the asymmetrical shock).

In these circumstances, the euro area must create the mechanisms to effectively neutralize the consequences of asymmetric shocks. Many asymmetries can be suppressed if the EMU promote coordination of economic activities (by aligning the legislation). An example of shocks asymmetry manifestation offers Mundell (1961). In this study, I have adapted this example to situation in which Romania and the euro area forming a monetary union. I have assumed that an asymmetric shock lowers aggregate demand in Romania and increase aggregate demand in the euro area. A demand shift caused by a change in preferences from the goods produced by Romania to the goods produced by Euro area, will lower demand in Romania, raising unemployment and causing a trade imbalance; while inflation will increase in Euro area (see Figure 1).

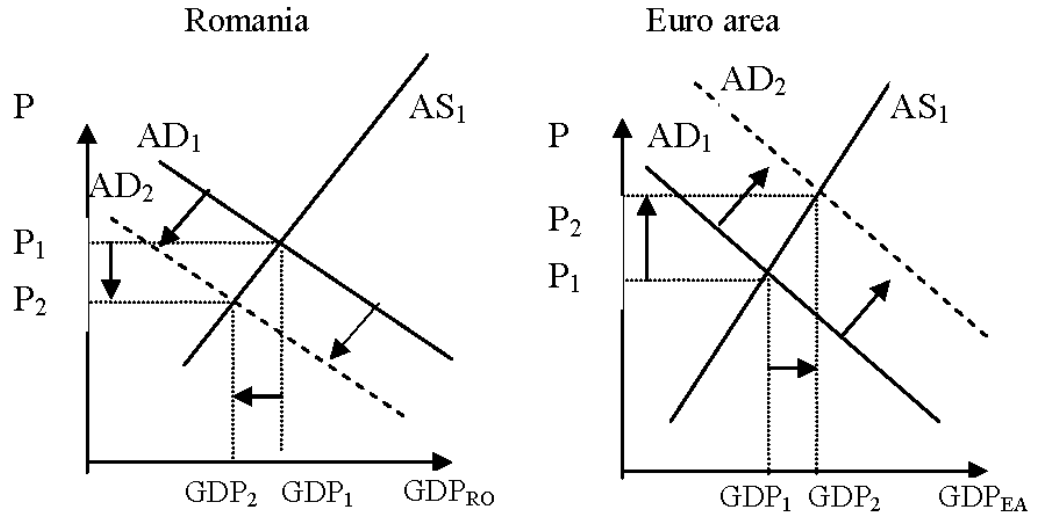


Figure 1.The asymmetric shocks in Romania and euro area

In such a situation, a common monetary policy cannot solve the problems of both economies at the same time. A restrictive common monetary policy might reduce inflation in Euro area, but worsen the unemployment problem in Romania. An expansionary common monetary policy would reduce unemployment in Romania, but worsen inflation in Euro area, because it was already in an inflationary gap. The disequilibrium caused by an asymmetric shock will therefore require a change in relative prices to restore the previous equilibrium. If the two regions have separate currencies, this can be achieved by altering the exchange rates: i.e. by a devaluation of currency in Romania vis à vis euro currency. Romania would then recover its competitive position through lower real wages and prices (though nominal wages and prices would remain constant). Aggregate demand would rise and unemployment fall in Romania.

If, however, the two economies have a common currency, production and employment in Romania must be restored through other means:

- a fall in *nominal* wages and prices;
- an upward shift in the aggregate supply curve of the home-produced good through, for example, labour migration out of the country.
- an expansionary fiscal policy.

Mundell´s analysis therefore suggested that:

- if the impact of shocks on the two countries was symmetric, fixed exchange rates, or a monetary union, was appropriate;
- if the impact of shocks was asymmetric, however, *high labour mobility* and/or *wage flexibility* (more particularly in a downward direction) were the main prerequisites.

Why common monetary policy has an asymmetric impact?

The main cost associated with the decision to join the euro area was a limited potential to neutralize the temporary shocks of the aggregate demand. The supply side shocks become permanent ones, requiring a higher flexibility of the economy for their neutralization. Applying policies to stimulate aggregate demand as cyclical policies may have perverse effects in a monetary union, leading to increased inflation. This causes an increase in relative prices, which leads to loss of

external competitiveness, the final impact on real output being a lower intensity. Thus, the manifestation of a positive demand shock may involve promoting a restrictive monetary policy to counteract inflationary pressures caused by increasing aggregate demand.

In order to outline the consequences of the symmetrical/asymmetrical shocks upon the ECB's monetary policy behavior, a simplified model will be used – aggregate demand and aggregate offer for *n* member countries of the monetary union. It is known that the inflation within the Euro area is controlled by ECB, and the offer shocks affect the national Phillips curves.

The equation of the Phillips curve is the following:

$U_i = U_i^* - a_i \bullet (\Pi_i - \Pi_i^e) + \varepsilon_i + u_i$ (1)

ε_i – symmetrical shock; u_i – asymmetrical shock

U_i represents the rate of unemployment in the country *i*

U_i^* represents the natural rate of unemployment in the country *i*

Π_i represents the effective inflation rate in the country *i*

Π_i^e represents the expected inflation rate in the country *i*

The model's hypotheses refer to:

- $\Pi_i = \Pi$ (the unique inflation rate within the Euro area); actually, there is an inflation heterogeneousness within the Euro area
- $\varepsilon_i = \varepsilon$ (the symmetrical shock has the same impact in all the countries member to the Euro area)
- $u_i \neq u_j$ if $i \neq j$ (the shock is specific to each country). The shocks u_i are purely asymmetrical if their related impact is null. They are asymmetrical if their impact differs from one country to another.
- a_i is the impact coefficient of the inflation upon the rate of unemployment. This coefficient sows, in the case of this model, the spreading of the monetary policy over the real economy.
- $a_i = a$ (there is no asymmetry in the spreading of the monetary policy)

The impact upon the related variables of the Euro area (E) is:

$$U_E = \sum_{i=1}^{n} \mu_i \bullet U_i \; ; \; U_E^* = \sum_{i=1}^{n} \mu_i \bullet U_i^* \; ; \; \Pi_E = \sum_{i=1}^{n} \mu_i \bullet \Pi_i = \Pi \quad (2)$$

μ_i represents the share of the *i* country's GDP in the Euro area's GDP.

The linearity supposed by the Phillips curve allows the outlining of an aggregate relationship in the Euro area, which has the following form:

$$U_E = U_E^* - a \bullet (\Pi - \Pi^e) + \varepsilon + \sum_{i=1}^{n} \mu_i \bullet u_i \quad (3)$$

The conclusions of the previously presented model are as it follows:

- the impact of the symmetrical shocks is outlined at the level of the aggregate relationships within the Euro area;
- the impact of the purely asymmetrical shocks is not caught;
- the bigger the asymmetrical (specific) shocks, the stronger their impact, if that economy's share in the Euro area is high (the case of Germany);
- Euro area's monetary policy does not react upon the purely asymmetrical shocks, but only upon the symmetrical shocks.

The structural harmonization policies, as well as the convergence determined by the introduction of the Euro, should result in lowering the heterogeneousness within the Euro area.

This analysis allows the offering of a possible solution concerning the development of a common monetary policy under the terms of the asymmetrical evolutions for the Euro area economies:

- if ECB is only concerned for the related macro-economic variables within the whole Euro area, then there should not be reactions depending on the disparities between the member countries, these disparities generating asymmetrical shocks;
- if the impact of the promoted monetary policy varies from one country to another and if ECB is concerned for the inflation rate in a certain country, then there must be reactions to the economic evolutions in the country where the monetary policy has the greatest impact;
- for ECB there is a dilemma between taking into account the particularities of each economy within the Euro area and the macro-economic efficiency of the monetary policy within the entire area;
- the dilemma can be solved if dealing with shocks' asymmetry will be in the charge of budgetary policy;
- *the efficiency of the monetary policy in this field* will be the more reduced so as the spreading of the monetary policy interferes with the asymmetrical shocks; the solution consists in integrating the asymmetry of spreading the monetary policy in its development;
- within the Euro area, there must be created the mechanisms which allow the efficient management of some asymmetrical shocks' consequences; several asymmetries can be eliminated if, at the EMU's level, there will be promoted a coordination of the economic activities(by adapting the laws).

At present, the problem of asymmetry does not seem to be directly approached within the decisional process of the European monetary policy, the ECB representatives mentioning that *the monetary policy is conducted by taking into account the situation within the whole Euro area.* Under these terms, it is necessary to promote some budgetary policies which could provide the neutralization of the asymmetrical shocks. Until 2005, The Stability and Growth Pact (SGP) has characterized by rigidity, because the situation of the public finances was not interpreted according to the macro-economic evolution on its whole. Thus, certain negative shocks on the side of the aggregate demand could not have been lowered through an expansionary budgetary policy because it could have generated the exceeding of the 3% target for the budget deficit (according to SGP).

To highlight the asymmetric impact of monetary policy promoted by the European Central Bank, I have analyzed the existing macroeconomic divergences within the monetary union. As these are more significant, the common monetary policy asymmetry is more pronounced. I have measured the asymmetry of macroeconomic variables with dispersion weighted by contribution of each country to obtain the euro area GDP.

$$\sigma_x = \sqrt{\sum_{i=1}^{n} (X_i - X_m)^2 \cdot GDP_i} \qquad (4)$$

Where,

X_i – value of the macroeconomic variable X for countries *i*, member of the euro area

X_m – the average value of the variable X;

GDP_i – share of the country *i* in the euro area GDP.

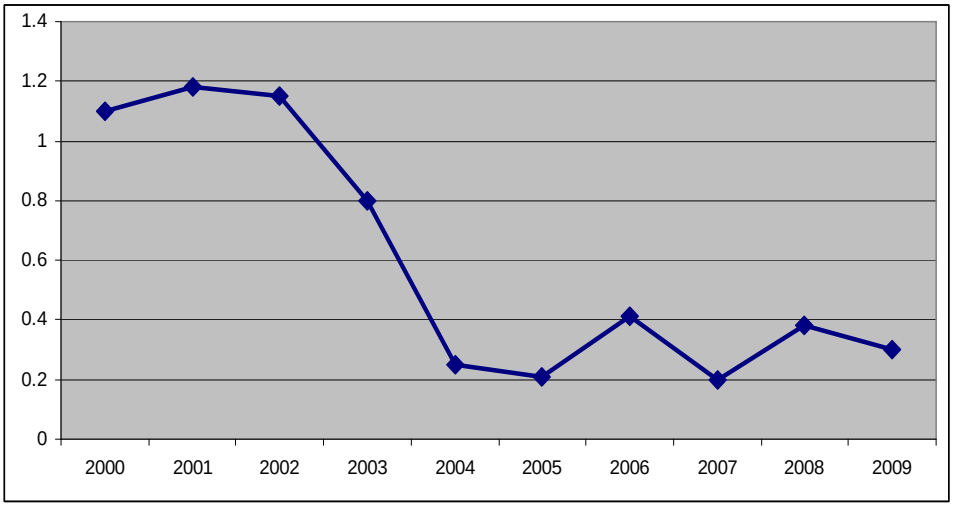
The dispersion of the inflation rates

The existence of the same currency will not cancel the differences between national inflation rates. Mainly, the evolution of the internal costs represents the most important factor of the differences in inflation in the euro area. Another important factor is the productivity differential between regions and sectors of a Monetary Union. One can distinguish two types of factors that may contribute to increased dispersion of inflation in the euro zone - factors related to convergence and European integration and the factors related to the implementation of fiscal policies, structural reforms and national wage. From the viewpoint of the first category of factors, implementing the single European market in the mid 90s and the introduction of the euro in 1999 have reduced the dispersion of price levels increased, especially for tradable goods.

Inflation differential was also generated by the convergence of price levels for tradable goods and services. This effect is often associated with recovery of growth differentials between tradable goods sector and the productivity of non-marketable goods or, more generally, with the convergence of living standards (GDP per capita) between economies. According to the Balassa-Samuelson effect, in countries with pronounced differences between sectors, wage growth and inflation would tend to further increase in tradable goods sector. In a monetary union, where the nominal exchange rate can not appreciate this kind of country would be characterized by a higher overall inflation in relative terms. However, empirical evidences of this effect are mixed.

At the same time, the inflation differential can be caused by differences of the economic structures at national level and by diversity of consumer preferences and exposure of the countries to the euro exchange rate fluctuations and commodity prices. In addition, fiscal policy may lead to inflation differential by inadequate using of the fiscal instruments. Structural policies and the earnings policies are applied at national and regional levels leading to an inflation factor asymmetrical, in the absence of implementation of the single market.

In the figure below I have presented the evolution of the dispersion of inflation rates in the euro area, expressed in percentage points. Between 2000 and 2009 years, the inflation rate has reduced in all euro area countries, except for Ireland and the Netherlands. Therefore, there as been a reduction in the inflation rates of the dispersion of 1.2 percentage points in 2001 0.2 in 2007. Therefore, there has been a reduction in the dispersion of inflation rates from 1.2 percentage points in 2001 to 0.2 percentage points in 2007.

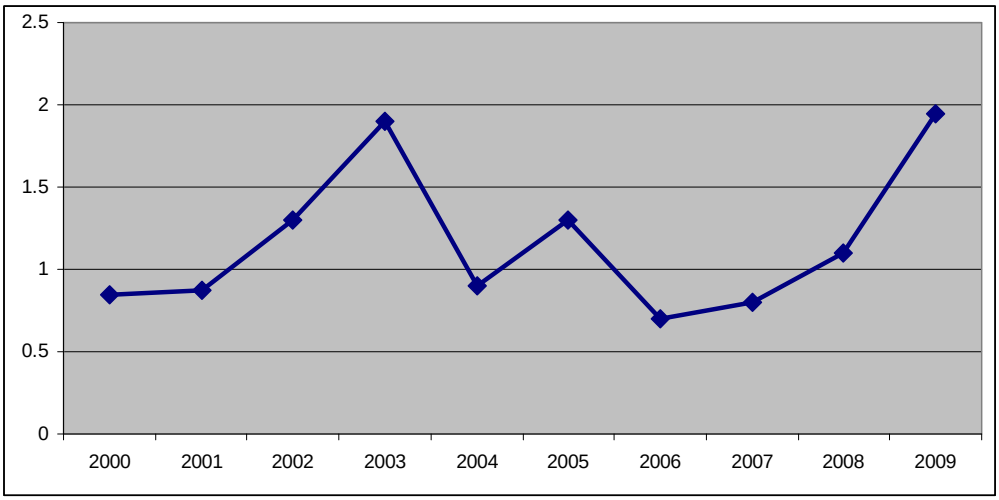


B Source: Eurostat 2010

Figure 2.Dispersion of inflation rate in the euro area

Dispersion of the economic growth rates

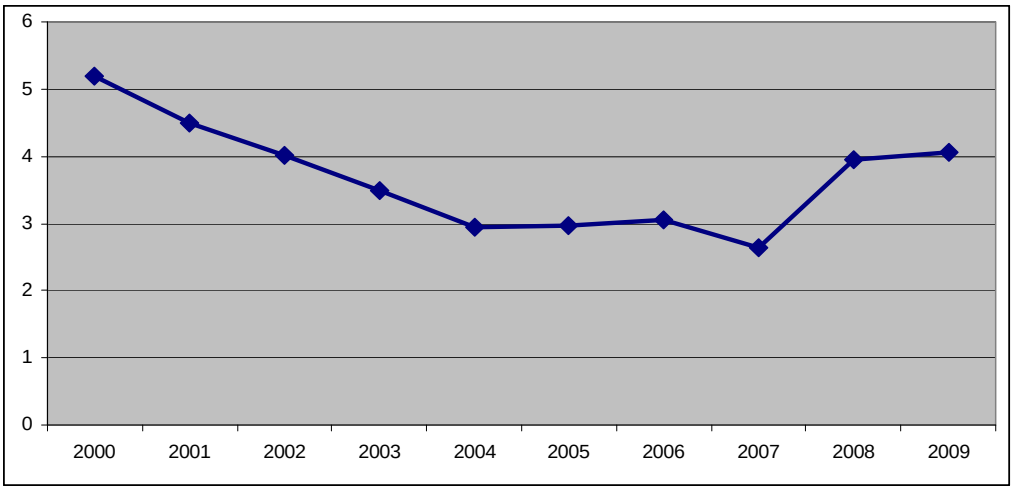
Since the business cycles of euro area countries are different, then there will be significant differences between growth rates and their dispersion will grow. The main causes of differing rates of growth are structural differences between the policies promoted in the euro area, the various stages of development in which they are and macroeconomic shocks that affect them. The dispersion of growth rates increased immediately after the adoption of the euro to around 2 percentage points, then fell to 0.8 percentage points in 2007 (figure 3). It appears that the common monetary policy has generated more asymmetric shocks once there has been an increase in economic growth dispersion.



Source: Eurostat 2010
Figure 3.Dispersion of economic growth rate in the euro area

Dispersion of the unemployment rates

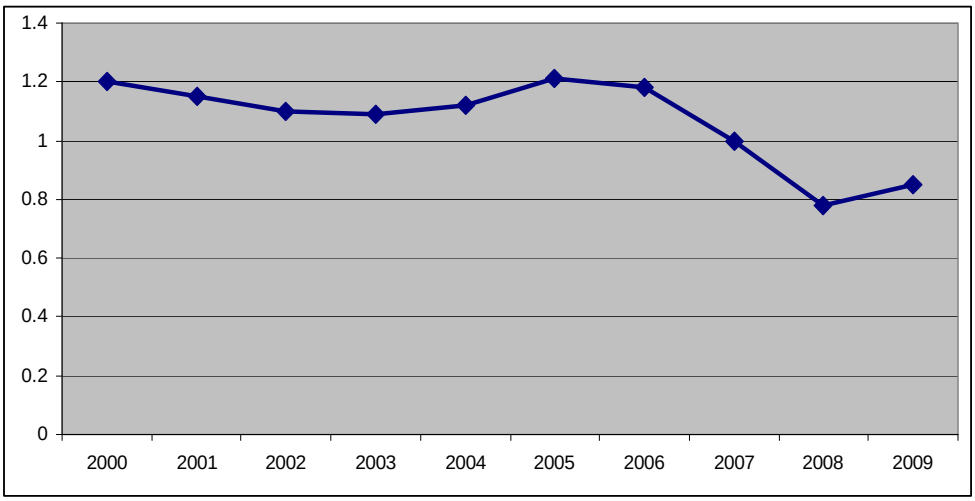
Unemployment rate constitutes one of the macroeconomic variables characterized by a high differential between member countries of the euro area. Unemployment rate dispersion decreased strongly, reaching over 5 percentage points in 2000, at least over 2.5 percentage points at the end of the year 2007 (Figure 4). Subsequently, in 2008 year, as a result of the global economic crisis occurred at the end of 2007, the unemployment rate dispersion has increased sharply, to about 4 percentage points. Differences in unemployment rates are caused by competitiveness gap between the developed countries of the euro area and the peripheral ones. For example, I have considered the case of two states in the euro area, which have been affected by the financial crisis – Germany and Spain. In 2009, Germany had a higher unemployment rate of 7.5% and a trade surplus of 175 billion dollar, while Spain had an unemployment rate of 18% and a trade deficit of 84 billion dollar. Spain could easily lower this deficit if would be able to depreciate national currency, which would have led to an increase in exports (Spanish products would be cheaper for foreign buyers). This increase in exports would bring more benefits to Spain, among which the most important were the decrease of unemployment. In the absence of own currency, member states of the euro area have not one of the most important tool of economic adjustment. Therefore the only possibility of Spain is to increase labour productivity through policies to boost supply aggregates. Because they generate effects in a longer period of time, then the adjustment of differences in competitiveness will be harder, and the dispersion of unemployment rates will increase.



Source: Eurostat 2010
Figure 4.Dispersion of unemployment rate in the euro area

Dispersion of the busgetary deficits

The creation of Monetary Union has generated an ascendant trend of dispersion budget deficit from 1.2% of GDP to approximately 0.8% of GDP in 2009 (figure 5). The higher is dispersion of budgetary deficits, national fiscal policies pursued by the monetary union countries are more different and the common monetary policy will have an asymmetric impact. The main reasons for the differences between budget deficits refers to fiscal policies stance promoted in the framework of the Stability and Growth Pact and to the shares of the spending and of the budgetary revenue. Most euro area member states have promoted restrictive fiscal policies until 2005 year in terms of restrictive rules of the Stability and Growth Pact. Along with its relaxation, fiscal policies became more expansionary and budgetary consolidation efforts in the years of economic expansion were lower.



Source: Eurostat 2010
Figure 5.Dispersion of budgetary deficit in the euro area

Conclusions

The economic shocks which affect the Euro area seem to be rather asymmetrical, because a certain structural divergence persists in the case of the member countries. It determines a lower synchronization of the business cycles, and this can negatively affect the shocks absorption through the ECB's monetary policy. Not even the fiscal policy has constituted an anti-cyclic policy, as a consequence of the strict rules required by the Stability and Growth Pact. Therefore, the macroeconomic policies that an economy uses to neutralize asymmetric shocks are no longer effective in a monetary union, so additional mechanisms must be found to adjust the shocks, like labor market flexibility. Without it, the costs of adopting the euro will increase and become asymmetric macroeconomic shocks and will acquire a permanent character. This conclusion can be developed in other research, whose objective is to determine the degree of labor market flexibility in the Romanian economy, based on indicators such as wage flexibility, the unit labor costs, changes in private investment and labour mobility.

Acknowledgment

This paper represents a partial dissemination of the postdoctoral research project CNCSIS, HUMAN RESOURCES type, *Macroeconomic modeling of the relationships between the asymmetric shocks, convergence of business cycles and mechanisms of adjustment in the context of Romania's adhesion to the euro area*, No 78/03.08.2010, Project Manager Marinaş Marius-Corneliu.

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AN ANALYSIS OF THE CHARACTERISTICS OF PUBLIC HEALTH SYSTEM AT REGIONAL LEVEL USING PANEL DATA

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BOGDAN OANCEA[**]
TUDOREL ANDREI[***]

Abstract
Reforming the public health system is a complex and long process, involving different categories of people. To accelerate the process of integration into the European Union, Romania is currently implementing strategies and programs aimed to increase the quality of public services. In the medical field a series of measures have been undertaken aimed at accelerating the decentralization process and optimize the activities of medical institutions. During the transition period a series of measures have been taken to decentralization and privatization of health services. However, currently we are witnessing a fragmentation of the system, which stressed the inequality in the distribution of medical personnel and reduced people's access to certain types of medical services. Please note that the number of doctors per capita in rural areas is only 20% of the urban area. Another major shortcoming of the system is linked to the financing system and its correlation with the strategies of decentralization. Frequently, decentralization has emerged as a way of placing the central tasks in the task of local government. Using panel data from developing regions we highlight a number of implications of the decentralization process.

Keywords: *panel data, regression models, public health care system, decentralization, regional analysis*

1. Introduction

Decentralization of public services is a process that takes place in all European countries, representing a means of increasing the efficiency of public services. In all cases, this process is based on the principle of subsidiarity. In Romania, along with political changes at the end of 1989, concrete actions have been taken to decentralize the public services. The process was difficult and long, considering the fact that during the communist period there was a hyper-centralized management of public services.

In the literature, there is a series of works that measure the impact of decentralization on the quality of health services offered to the population. Among the most recent studies we can mentioned in this respect the studies for Spain (Cantarero and Pascual, 2008, Cantarero, 2005) and Italy (Giannoni and Hitiris, 2002).

This paper will try to measure the effects of decentralization on the quality of medical services in Romania and compare results with those of the Spain, presented in (Cantarero and Pascual, 2008). The model presented here attempt to determine whether decentralization changed substantially in quality of life. The results should be viewed with reservation because the process of decentralization is still being implemented.

2. Characteristics of the public health system

In the following we present a number of features of public health system related to the evolution of the number of employees and the average wage. The indices that we've computed are aimed to analyze the evolution of the system in the last two election cycles, and a comparison of this system with other sectors. Table 1 presents some characteristics of the dynamics of health care

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personnel and social welfare and other sectors. Tables 2 and 3 show the ratio of nominal wage in the health sector compared with other sectors.

Table 1. The changes in the number of personnel on electoral cycles

	Total change in absolute values (people)						
	Total	Agriculture	Industry	Construction	Commerce	Health	Public administration and defence
2000-2004	-154189	-40045	-131828	6385	29360	1164	6544
2004-2007	416482	-15267	-126308	83102	200937	37045	43492
	Average annual rate in each period (%)						
2000-2004	0.84	-7.68	-1.81	0.50	1.27	0.09	1.09
2004-2007	3.01	-5.03	-2.48	7.94	10.15	3.88	8.62

Data Source: own calculations based on data from INSSE, Bucharest, 2008

Table 2. Average nominal wages in the health system compared with other sectors of the economy

	2000	2001	2002	2003	2004	2005	2006	2007	2008
Total	0.83	0.87	0.84	0.85	0.87	0.91	0.95	0.91	0.95
Agriculture	1.99	1.95	1.87	2.02	1.90	2.37	2.66	2.79	2.32
Industry	0.79	0.84	0.83	0.85	0.87	0.92	1.00	0.97	0.99
Construction	0.95	1.00	0.98	0.97	0.99	1.08	1.16	1.08	1.12
Education	0.86	0.91	0.84	0.87	0.80	0.82	0.77	0.81	0.89
Public administration	0.58	0.63	0.62	0.60	0.62	0.58	0.52	0.47	0.60

Table 3. Average hourly earnings

	Total	Agriculture	Industry	Construction	Education	Public administration	Public health
Average hourly wage (lei/hour)	7.80	5.52	8.29	6.43	8.43	12.63	7.42
Ratio Health other sectors	1.05	0.74	1.12	0.87	1.14	1.70	1.00

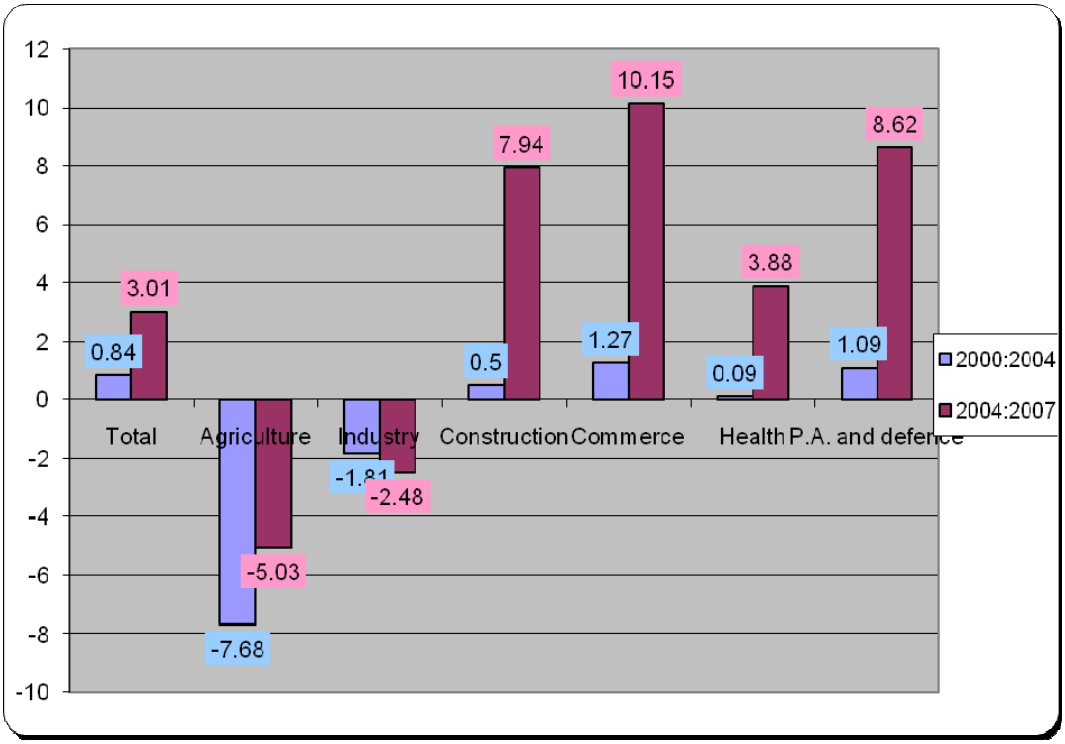

Figure 1. The annual average growth rhythms during the two election cycles

The above results show the following:

- The annual average growth in the health sector and social welfare in both periods was higher than the annual average growth in the economy.
- Personnel gains were significantly higher in public administration and defense in relation to that of health.
- Wages in this sector are below the national average salary and much lower than in administration and education. Thus, the average wage in this sector accounts for the year 2008 to only 60% of the average wage in the public administration.
- Average hourly earnings in the health system are at the level of the Average hourly earnings in the whole economy, but far below that of public administration and defense.
- The average real wages in the public health and social care system throughout the period 2000-2008 was lower than that of the public administration and defense (see Figure 2). The difference was reduced significantly in September 2008.

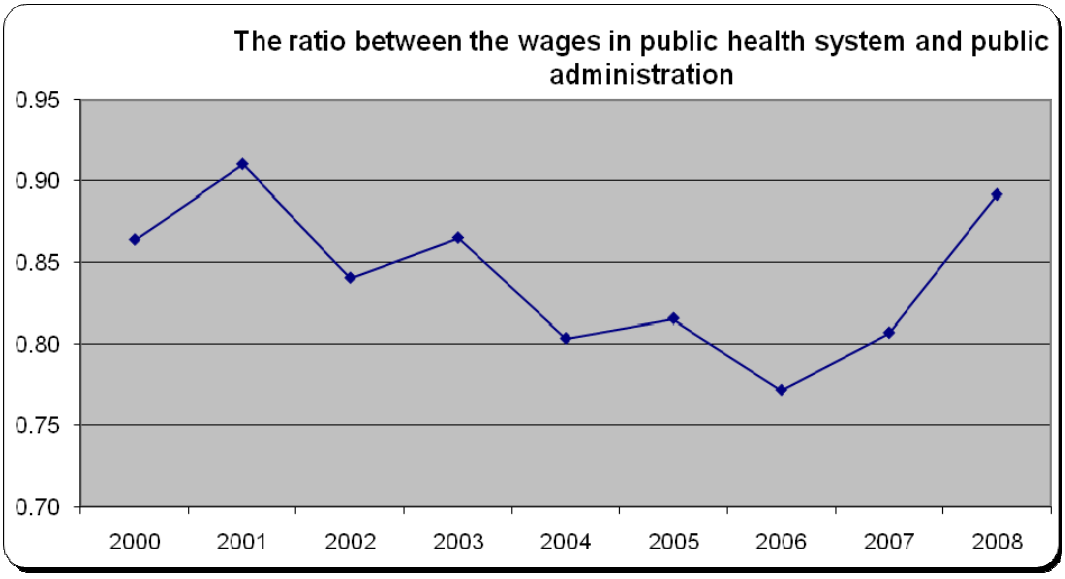

Figure 2. The evolution of ration between the real wages (1999 prices) in public health and social assistance and public administration in 2000-2004

3. Overview of the panel data models

Panel data are defined in relation to two dimensions. Thus, in this representation a variable is registered for each statistical unit in the population and for each time period from a given horizon. These types of data, take into account simultaneously both temporal dimension and the spatial dimension. There are a lot of examples of panel data that can be used in the analysis of economic and social regional level. In this paper we use panel data to highlight the effects of decentralization on some demographic characteristics that characterize the quality of life: average life expectancy and infant mortality.

We present a first example of using a panel data in economic analysis. In this paper we will estimate a model that will be used to analyze the impact of decentralization on public health system. We will use panel data.

This example is the assessment of investment issues in developing regions. In this approach, two aspects are important: defining the list of variables used in assessing the evolution of investment issues and their impact on regional economic and social development and defining the time horizon the series data are recorded. Thus, to highlight the factors that have allowed foreign investments in the developing regions in the last 20 years we mention the following categories of variables: the potential of the development area (number of enterprises with foreign capital participation per 100,000 inhabitants, the share of population employed in secondary sector, the share of population employed in agriculture, the share of population employed in services), foreign investment and fixed capital formation, labor market characteristics of the developing region (labor market pressures measured by each development region's unemployment rate, the efficient use of labor measured by the average labor productivity growth in the region, etc.) governmental decisions that are entered into the model by dummy variables which marks the emergence of a government act regulating the labor force (laws, retirement, layoff etc.), the demand at the development region level (the region's population share in total population, population density, etc.) living facilities in the developing region (the region's infrastructure, education system characteristics, the quality of the regional network of

hospitals, etc.) features of the privatization process in the region (the number of units privatized by region and by year and the number of privatizations with foreign capital, etc.).

For the variables used in the model there are data series with double dimension: regional and temporal. Data series are available at regional level in publications edited by the National Institute of Statistics.

Each series of panel data recorded at the regions level is defined by:

$$x_{it}, i = 1,...,8, t = 1,...,T$$

The data series used in the analysis are usually recorded in quarters or years. These are taken directly from official statistics and are obtained by performing statistical calculations.

If the variable Y is considered endogenous and exogenous variables are $X_1,...,X_p$, the panel data model is defined based on the relation below:

$$A_p(L)y_{it} = b_{0it} + C'_{it}X_{it} + \varepsilon_{it}, i = 1,...,R, t = 1,...,T \quad [1]$$

where $A_p(L) = 1 - a_{i1}L - ... - a_{ip}L^p$ is a polinomial of p degree, C_{it} is a column vector with a value equal to the number of exogenous variables, X_{it} is the vector of exogenous variables, and ε_{it} are the residual variables of the model that are realizations of white noises. In the above relationship R represents the number of statistical units and T the number of time units (years, quarters or months).

Relative to the introduction of the endogenous variables a panel data model can be:

1.static, in this case $A_p(L) = 1.$

2.dynamic, such as the model defined by relationship [1].

Usually, in the above introduced model it is considered that its parameters are constant over time. Under these conditions the static form of the model is defined via the linear relation:

$$y_{it} = b_{0i} + C'X_{it} + \varepsilon_{it}, i = 1,...,R, t = 1,...,T \quad [2]$$

To estimate the parameters we considered some particular cases of the above model. The data series used to estimate the parameters are of the form:

$$(y_{it}, x_{1it},..., x_{mit}, i = 1,..., R, t = 1,..., T).$$

4. The advantages of the panel data models

We present in the following several advantages of panel data models.

- **Panel data include a variety of information.**

Panel data series are composed of a large number of values. At the level of statistical regions there are recorded various statistical information. The main issues raised by the use of these data are related by the usage of the same methodology of calculation and elimination of slope or level breaks. For these reasons, for a great variation in the data series we encourage using only data from 1998. It should be noted that the series of data that will be used to estimate parameters of econometric models can be annual or quarterly.

- **Since panel data have a double index (individual and temporal), they allow to analyze the dynamics and homogeneity of the statistical units.**

At the same time we must take into account that the heterogeneity of the statistical units has two components: an observable one, which is evidenced in the regression model by C_{it} parameters corresponding to the explanatory variables in the model, and another unobservable one that is not controlled based on recorded factors.

For example, using panel data we can reveal the effects of decentralization of public health care system on the quality of life. In this analysis we must consider that the life level in a region is determined by two factors: observable factors through a series of data recorded in official statistics, and unobservable factors such as the cultural model of the population of each region, etc.

Depending on the assumptions made on unobservable heterogeneity we can define the following types of panel data models:

- The model with common constant which is defined on the basis of the following relationship:

$$y_{it} = a + c_1 x_{1it} + ... + c_m x_{mit} + \varepsilon_{it}, i = 1,..., R, t = 1,..., T \quad [3]$$

Basically this is a classic regression model estimated using data series defined without taking into account the sharing of statistical units into groups. In this case, each set of data includes a number of $R \cdot T$ values.

- Fixed effect model is defined via the linear application**:**

$$y_{it} = a + a_i + c_1 x_{1it} + ... + c_m x_{mit} + u_{it}, i = 1,..., R, t = 1,..., T \quad [4]$$

The term a_i is called the individual specific effect and highlights the endogenous characteristic value that is determined by those factors acting locally.

- The variable effect model is represented by linear application:

$$y_{it} = a + c_1 x_{1it} + ... + c_m x_{mit} + (v_i + u_{it}), i = 1,..., R, t = 1,..., T \quad [5]$$

where v_i is a random variable of zero mean and standard deviation σ_v.

• The form of the panel data allows the analysis of variance on three components: inter-individual factors, inter-temporal factors and intra-individual-temporal factors.

In the following table we consider the statistical data for a variable (e.g. the number of of employees in agriculture) in developing regions of Romania for the period 1998-2008.

Table 4. Panel data for variable *X*

	Region								Average on years
	1	2	3	4	5	6	7	8	
1998	x_{11}	x_{12}	x_{13}	x_{14}	x_{15}	x_{16}	x_{17}	x_{18}	$x_{1\bullet}$
	…	…	…	…	…	…	…	…	…
2008	x_{111}	x_{112}	x_{113}	x_{114}	x_{115}	x_{116}	x_{117}	x_{118}	$x_{11\bullet}$
Average on regions	$x_{\bullet 1}$	$x_{\bullet 2}$	$x_{\bullet 3}$	$x_{\bullet 4}$	$x_{\bullet 5}$	$x_{\bullet 6}$	$x_{\bullet 7}$	$x_{\bullet 8}$	$x_{\bullet\bullet}$

For data in the table above we calculated three types of average: in each region, on each year and at national level throughout the whole period. In these circumstances, the total dispersion of the data series is broken down into three components:

Total variance = inter-individual variance + variance inter-temporal + intra-individual-temporal variance

The variances occurring in the above relationship are calculated as follows:

- inter-individual variance is calculated on the basis of the averages at regional development level;

- inter-temporal variance is based on averages for each period of time;

- intra-individual-temporal variance is based on reporting each value in the series with respect to the the average level of the region, and annual average level of the average of all values (for all statistical units in the entire time horizon).

If the panel data are defined by $(x_{it}, i = 1,...,R, t = 1,...,T)$, then the variance decomposition is represented by the following relationship:

$$\sum_{i=1}^{R}\sum_{t=1}^{T}(x_{it} - \bar{x}_{\bullet\bullet})^2 = T\sum_{i=1}^{R}(\bar{x}_{i\bullet} - \bar{x}_{\bullet\bullet})^2 + R\sum_{t=1}^{T}(\bar{x}_{\bullet t} - \bar{x}_{\bullet\bullet})^2 + \sum_{i=1}^{R}\sum_{t=1}^{T}(x_{ij} - \bar{x}_{i\bullet} - \bar{x}_{\bullet t} + \bar{x}_{\bullet\bullet})^2 \quad [6]$$

- **In general, panel data consist of a large number of values.**

Under these conditions we witness a rise in the number of degrees of freedom and improved quality of tests used to estimate the parameters and to verify the statistical assumptions.

The main disadvantage of using panel data is related to the effects of the errors propagated by them. In this sense we must take into account Huber's comment which showed that 3% error in the panel data causes significant changes in the estimates. For this reason it must be have developed techniques to detect and eliminate possible aberrant values in the data series. In the event of a aberrant value in the data series, it is recommended either eliminating or correcting it by the interpolation operation.

Not a few times, from statistical data sources several statistical records are missing, but these can be approximated by applying the interpolation operator. In relation to lack of data from the panel data we can identify two categories of panel data: balanced data sets, if panel data are registered for all statistical units and for all time periods, and unbalanced data sets case in which on certain positions the appropriate values are not recorded.

5. Application

To estimate the impact of decentralization of public health, on some of the demographic indicators we used data sets recorded for the statistical indicators of the eight regions of economic development for the period 1998-2005.

To analyze the decentralization process in Romania, we define the following model:

$$\log(H_{it}) = a + b \cdot PIB\_R_{it} + c \cdot \log(M\_P_{it}) + d \cdot P\_P_{it} + \varepsilon_{it},\ i = \overline{1,8},\ t = \overline{1998,2005}$$

In this model we used the following variables: H_{it} a global indicator of performance used to characterize the public health system in a region, for a year. To assess this issue we appeal to the infant mortality rate, PIB_R per capita in the region, P_P the number of beds per 1,000 inhabitants and M_P the number of doctors per 1,000 inhabitants.

To estimate the parameters of the model we used statistics from the eight development regions of Romania. The data are annual and have been reported for the period 1998-2008.

Parameter estimation was done for the classical model, the fixed effect model and the variable effects model. For estimation we used the least squares method (OLS) and two stage least square method (Baltagi, 2008). The results are presented in Table 5.

For the model with fixed effects we test the null hypothesis according to which specific effects are negligible in the regions. In this case, we use a Fisher-type test. Statistical values calculated for the case in which the parameters are estimated by OLS and TSLS are higher than F values determined from the distribution table, which signals that the specific effects of the regions are significant. The results are obvious, if we consider that there are large disparities between the eight development regions in terms of economic and social development.

Table 5. Characteristics of the model with dependent variable $\log(RMI)$

	Clasic Model		Fixed effects		Random effects	
	LS	TSLS	LS	TSLS	LS	TSLS
C (coeficient) t-Statistic	0.7619 (1.84)	0.8310 (1.69)	1.7222 (3.46)	1.3773 (2.10)	1.0985 (2.61)	0.8768 (1.83)
Log(PIB_R) (coeficient) t-Statistic	-0.3424 (-5.47)	- 0.3314 (-4.34)	-0.3311 (-4.83)	- 0.3477 (-4.53)	-0.3118 (-4.98)	- 0.3554 (-4.80)
P_SSA (coeficient) t-Statistic	0.8620 (1.42)	0.5591 (0.86)	0.1015 (0.06)	2.6871 (0.78)	0.4989 (0.51)	- 0.0294 (-0.03)
log(M_P) (coeficient) t-Statistic	-0.1873 (-1.84)	- 0.2405 (-2,16)	-0.6558 (-4.06)	- 0.6895 (-3.85)	-0.2059 (-2.11)	- 0.1697 (-1.55)
P_P (coeficient) t-Statistic	-0.0050 (-0.31)	- 0.0054 (-0.30)	-0.0683 (-3.20)	- 0.0763 (-3.24)	-0.0169 (-1.11)	- 0.0184 (-1.16)
R-squared	0.8270	0.8248	0.9116	0.9070	0.6404	0.6357
F-statistic and Prob (F)	60.94 (0.0000)		41.24 (0.0000)		22.71 (0.0000)	
F-statistic (Clasic Model vs Fixed effects) and Prob (F)	6.56 (0.000)	6.06 (0.000)				
Hausman statistic and Prob (Hausman)			15.443 (0.000)	26.004 (0.000)		

The results presented in the above table shows that the infant mortality is negatively correlated with variables PIB_R, M_P and P_P and P_SSA variable has no significant influence on it. To test the orthogonality of random effect and explanatory variables we used a Hausman test (Baltaga, 2008). The values determined for both statistics, entitled to use fixed effects models to estimate the impact of decentralization on the quality of life in developing regions, to the detriment of the other two models.

6. Conclusions

The usage of the panel data has a number of advantages mainly related to the availability of data sets to estimate the parameters. But bear in mind that relatively small errors in the statistical data can determine significant errors in the estimated parameters.

The results from the above table show that the infant mortality rate is negatively correlated with the variable that characterizes the region's economic development, the number of beds and number of doctors per 1,000 inhabitants. Note that the regions specific factors have a significant influence on child mortality. The estimated model shows a lack of positive effects of decentralization on the outputs of public health.

The results should be viewed with reservation for the following reasons: to estimate parameters of data sets we used data series during 1998-2008 time period when the economy and the public health system had major changes from one period to another, the health reform is being implemented; in general the effects of decentralization process is difficult to see in a short period of time.

A more detailed analysis recommends consideration of other important statistical variables to characterize the public health system and the decentralization of public administration. It is recommended to introduce some variables in the model that takes into account the cultural and economic development in each region.

To define the analysis model one could use the life expectancy as a dependent variable (endogenous) instead of the child mortality. We believe that the chosen version in this paper is more appropriate because the infant mortality rate is a characteristic more sensitive to changes in public health care system in relation to average life expectancy.

Aknowledgement

This work was supported by CNCSIS –UEFISCDI, project number PNII – IDEI code 1814/2008, financing contract no. 763/2009

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CONCEPT OF SUSTAINABILITY – A LOGICAL APPROACH[1]

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Abstract
The paper aims to achieve a definition of the concept of sustainability and of sustainable system from a logical perspective. In this respect, it introduces and defines (through the sufficiency predicates) the concept of logically vivid system and, on this basis, are discussed a logical concept of sustainability, respectively of a sustainable system in general are discussed and built up. Sustainability is considered in light of identity preservation of the systems, as a static anchor, on one hand, and of the concept of automatic stabilizers as a dynamic anchor on the other side. Finally, the two sufficiency conditions for a logically vivid system be sustainable are identified: the presence of hyper-cycles, respectively the absence of positive feed-back.

Keywords*: sustainability, logically vivid system, automatic stabilizer, dissipativeness.*

JEL classification*: A10, O10*

Introduction

(1) What matter does the paper cover?

The paper aims at to treat the issue of system sustainability, from the point of view of logical features which could ensure on this sustainability. In this end, the paper re-visits the current definitions in the field, in order to get a more rigorous and consistent understanding of the main concept implied.

(2) Why is the studied matter important?

Generally, the current literature is working with the concept of system in a natural science view. The paper proposes a new and probable revolutionary concept, i.e. the logically vivid system. This concept is the only that can sustain in a theoretical way the crucial issue of the sustainability, because in a natural world we find not sustainability, but only durability. So, the importance of the study matter consists in a new conceptual foundation of the sustainability issue.

(3) How does the author intend to answer this matter?

The main method the authors intend to answer the matter of system sustainability is a logical one. This means identifying the sufficient and necessary predicates (attributes) that a system must verify so it be "declared" sustainable. This method is consolidated by an analysis concerning the three "C": completeness, consistency, and coherence.

(4) What is the relation between the paper and the already existent specialized literature?

Firstly, there are many misunderstandings concerning the concepts of logically vivid system, sustainability, evolution, etc.

Secondly, the concept of sustainability is defined in a "civil" way, that is un-appropriate for a scientific approach.

[1] The communication is an excerpt from the research project no. 821/2008 PNII - IDEI, „Mix of the adjustment policies in the light of the economic convergence of Romania with the European Union, financed by CNCSIS - UEFISCSU.

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Thirdly, the current literature treats the concept of sustainability in many particular cases, but very rare in an abstract consideration, so the mentioned concept cannot be used in general research.

Preliminaries

In order to discuss, in the most general manner, the problem of sustainability, we need to clarify first, which is the entity to which we refer when we are interested in sustainability. As it resulted from what we said before, sustainability is a definitory characteristic, but a characteristic of what? We will make some considerations in this matter:

a) reality presents itself, in the most general form, under the following „categories":

- numen: incognoscible essence, as the most appreciated philosophical system consider;
- phenomenon: form under which the numen appears to the knowing subject;
- process: manner of existence of the phenomenon (by process we understand, in the most common way, the variation of the phenomenon);
- system: manner of process systematization, at the level of the knowing subject.

Therefore, the knowing subject has access to its exterior reality (and interior, of course) through the system, because it must order, make intelligible what appears. It seems therefore that sustainability should be investigated in connection with the system. This is how we will proceed.

b) The system will be defined, in the most general way, as the logic sum of the following "ingredients":

- A multitude of elements, not necessarily homogenous, whose significance, for the knowing subject, doesn't require more analytical levels of examination;
- A multitude of relations, of any kind (substantial, energetic, informational, entropic) between the composing elements;
- A membrane, of whatever nature (physical, institutional, cognitive etc.) which separates the system from its environment;
- A multitude of relations between the composing elements and the exterior of the system (the accomplishment of these relations requires crossing the membrane).

Therefore, we can say that the sufficient predicates for the existence of a system are:

- A multitude[2] of *elements*[3] (discernible or not among them): $\mathbf{E}$;

- A *membrane* which includes the composing elements and which excludes everything else from the rest of the environment: $\mathbf{M}$

- A multitude of *connections between the composing elements*[4]: $\mathbf{C_I}$;

- A multitude of *connections between the system and the exterior environment*: $\mathbf{CO_O = X_S + Y_S}$, where X represents the connections which show inputs from the environment into the system, and Y represents the connections which show outputs from the system into the environment.

Therefore, the logic description of the actualization of a system is: $\mathbf{G_S = \{E, M, C_I, C_O\}}$. We consider that the sufficient predicates do not generate new necessary predicates; therefore, they coincide with the necessary predicates. Therefore, the logic description of a system is: $\mathbf{S \equiv G_S = \{E, M, C_I, C_C\}}$.

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[2] In the meaning of the theory of multitudes.

[3] Logically, even just one element is enough to make this predicate exist. The predicate which refers to the connections between the elements of the system will be understood in this case as a multitude of auto-connections (it is not necessary to suppose that this element is, in turn, a system consisting of more than one element, because we would enter the trap of the argument with infinite regression).

[4] As said before, the multitude of connections also includes the-connections.

In order to get to the analysis of the artefacts, we want to bestow an additional qualification on the system, the qualification of logically vivid system. We consider that the following additional sufficient predicate may transform the system into a logically vivid system (SLV):

- *dissipativeness*: maintenance (or even decrease) of the entropy inside the membrane, at the cost of accelerating the entropy from the environment of the system[5]; we will note this sufficient predicate by **D**.

Therefore, the logic description of SLV actualization is: $G_{SLV} = \{S, D\}$.

The existence of a SLV generates, in our opinion, the following new necessary predicates:

- *auto-poietic capacity* (self-generating, self-organizing, self-reproducing); we note this new necessary predicate by **A**; the logic formula for the generation of this new necessary predicate is: $D \rightarrow A$;

- *non-linearity* (doesn't allow predictions[6], because predictions exclude novelty[7], rather only the decrease of the incertitude regarding the future[8]); we note this new necessary predicate by **N**; the logic formula for the generation of this new necessary predicate is: $D \rightarrow N$;

- *invariance of the total complexity*[9] (maintenance in a permanent invariant state,[10] of the logic sum between the inner complexity of the SLV and its external complexity – the external complexity is also called ecological complexity and it expresses the level of SLV metabolism with its environment); we note this new necessary predicate by **I**; the logic formula for the generation of this new necessary predicate is: $SLV \rightarrow I$.

Therefore, the logic description of a given SLV is: $SLV = \{G_{SLV}, A, N, I\}$.

Let us notice that the logic description of a SLV develops two particularly important characteristics:

• *Presence of the potential for identity preservation* (or for quality preservation). This means a specific capacity of the SLV to ensure the observer that it is the same SLV. Hence, some problems which require examination: 1) why doesn't this characteristic exist in the case of the systems too; 2) why isn't this characteristic implicit in the new necessary predicate named "invariance of the total

[5] Also see our study, *Dissipative systems and sustainability*, published in Theoretic and applied economy, no. 3/2008 (the ideas from the study have also been presented and debated within the Seminar of Methodology and Logics of the Economic Knowledge „Nicholas Georgescu-Roegen", in session no. 4/2007). The study also proposed a demonstration of Prigogine's principle of the minimum production of entropy, as well as a logic model of the entropic interaction.

[6] Predictions exclude novelty, being mere morphological combinations of the known elements.

[7] As we will subsequently see, novelty is associated to emergence, which is inconsistent with computability, with the deliberative planning.

[8] Although it is possible to argue against the independence of the three new necessary predicates (it seems that non-linearity might be regarded as a necessary consequence of the self-poietic capacity), we prefer to assume this possible logical non-rigorousness, with the purpose to highlight the crucial importance of the predicate of SLV non-linearity.

[9] Let us notice that the invariance of the total complexity is not a necessary predicate of a system in general. At the same time, there is no logic connection between the (relative) invariance of the set of identity parameters of a system and the invariance of the total complexity of that system.

[10] We cannot speak with full rightness about the character of continuity (therefore we will ignore this possible attribute of the invariance of the total complexity), as long as the hypothesis of the quantum nature of the macrocosmos is not accepted at the ontological level(although the quantum nature of the microcosmos is accepted at the ontological level and, furthermore, the principle of correspondence is introduced, which makes intelligible at the level of the macroscopic epistemic subject, the directly non-intelligible microscopic).

complexity" or in the new necessary predicate „auto-poietic capacity; 3) why isn't this characteristic just the fourth new necessary predicate.

(1) The sufficient predicates used to describe the actualization of a system don't allow any kind of conclusions regarding the evolution of the system. Therefore, no evaluations can be made whether the identity of the system is preserved or not. Hence, the conclusion that the problem of the identity can be raised only in connection with the logically vivid system, regarding the actualization of that logically vivid system (regarding only the predicates of sufficiency, not regarding the new necessary predicates). Indeed, the predicate of sufficiency named dissipativeness contains the suggestion of evolution, therefore it allows to discuss the matter of SLV identity;

(2) The new necessary predicate "invariance of the total complexity" only tells us that a relation of replaceability[11] exists between the variance of the inner complexity of a SLV and the variance of its external complexity. Therefore, if there are no limitations of this replaceability (the nature of these limitations is completely obscure for us, at this moment) we can say nothing, on the basis of this new necessary predicate, about the preservation or non-preservation of SLV identity. Therefore, we cannot accept the implicit character of this characteristic in the signification of the new necessary predicate "invariance of the total complexity". This characteristic is not implicit in the new necessary predicate "auto-poietic capacity" either, because the denotation of this predicate of self-generation or self-reparation doesn't ensure us on the perfect self-regeneration or self-reparation, also because of the new necessary predicate named "non-linearity". Therefore, we may witness the return of the SLV, through its auto-poietic capacity, to an initial or previous (generally speaking) capacity, but it is obvious that the failure of a perfect return, over a specific level, causes the loss of SLV identity;

(3) This is a more difficult question. Indeed, one might consider that we have a fourth new necessary predicate, "preservation of the identity", but in this case it would mean to stipulate that any SLV is invariant, that it can not evolve in any way (or, evolution, in the broadest meaning of the word, means alteration of identity). In order to avoid the absurd situation in which any SLV is, by definition (because the new necessary predicates enter, as sufficient predicates, in the logic definition of the concept) invariant, lacking evolution, static, we need to exclude this characteristic from the multitude of the new necessary predicates. Furthermore, such a new necessary predicate would be inconsistent with the new necessary predicate "invariance of the total complexity" which, as already shown, signifies SLV variance, on condition of the replaceability between the variance of the internal complexity and the variance of the external complexity.

It is necessary to develop further the concept of identity preservation because, on its basis, we will introduce the logical conditions of sustainability. As previously mentioned, we will discuss this concept exclusively in terms of quality, or logically; the aspects of quantification, observation/recoding or measurement are not of interest for us, for the time being.

The preservation of identity can be analysed from the perspective of the nature of this preservation. Thus, we may have the following types of identity preservation[12]:

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[11] We draw attention on the following crucial aspect: the replaceability rate between the internal complexity and the external complexity is not necessarily 1 (it is obvious that it is negative), because of the new necessary predicate named "non-linearity". If this rate would be 1, it is furthermore possible to demonstrate that there is no global variation of entropy within the logic assembly "SLV-complementary environment", while we know from the second law of thermodynamics that, at the global level, there is a permanent increase of entropy. It would be interesting to study the existence of the continuous, or quantum (discrete) character of the replaceability rate between the two categories of complexity, because on the basis of these studies we might give a quantitative definition of SLV identity. For the time being, this research is beyond the scope of this study, hence we will make just some qualitative considerations.

[12] The first three classes of identity preservation originate in a genealogical perspective. Given the diversity of the classification criteria of the potential for identity preservation, the genealogical criterion seemed to be the most adequate, particularly since it is preferred in the field on nature science.

- *full identity preservation* (at individual level): it refers to the preservation of all necessary predicates of the SLV. This means that the necessary predicates $\mathbf{E}, \mathbf{M}, \mathbf{C_I}, \mathbf{C_O}$ are preserved[13];

✓ example: the system of banking saving, as individual of the system of saving

- *special identity preservation* (at species level): it refers to the preservation of the structural aspects of the analysed SLV. This means that the necessary predicates $\mathbf{E}, \mathbf{C_I}, \mathbf{C_O}$ are preserved;

✓ example: the system of banking saving, as individual of the system of using the available income;

- *general identity reservation* (at genus level): it refers to the preservation of SLV metabolism. This means that we have identity preservation in the necessary predicates $\mathbf{C_I}, \mathbf{C_O}$. The difference between the formal preservation of identity and the special preservation of identity is that the nature of SLV composing elements doesn't matter any more, rather the relations between them and between them and the environment;

✓ example: the system of using the available income as individual of the system of aggregate demand formation

- *formal identity preservation* (at the level of causality): it refers to the preservation of the generative mechanism of a SLV;

✓ example: preservation of the equation describing a specific process makes that process preserve its formal identity (that equation may represent the specific process, either graphically, or in other intelligible form which allow recognition).

• *Presence of the automatic stabilizers*. This characteristic is an immediate consequence of the auto-poietic capacity of the SLV (necessary predicate, as we have seen). The capacity of self-reparation, self-generation means the capacity to restore the initial conditions, after they have been possibly disturbed either by system functionality[14], or by its behaviour[15]. The restoration of the initial conditions signifies, theoretically, an action of negative feed-back. Therefore, this characteristic can very well be named "presence of negative feed-back". We prefer, nevertheless, to make reference to the automatic stabilizers because the negative feed-back has the connotation of purely natural process, while the automatic stabilizer al has the connotation of an artefact. In the case of the SLV which includes man/human society, almost all the mechanisms of negative feed-back are artefacts. It is obvious that similarly with the potential of identity preservation, this characteristic too, cannot be considered another necessary predicate. Indeed, if it would be a necessary predicate, it would be redundant with the necessary predicate of the auto-poietic capacity; therefore, the condition of independence of the multitude of necessary predicates would no longer be met.

1. Logic conditions of system sustainability

On the basis of what we have determined in the above paragraph, we propose to investigate the logic conditions of sustainability of a given system.

2.1 Logic concept of sustainability

From what we said so far, we obtained a definition of sustainability, at least for the economic systems. Nevertheless, we are interested in a more general definition, which to apply to any SLV, irrespective of its nature.

First, we will say that the distinction durability-sustainability has an "image" in the distinction „SLnV – SLV" (SLnV signifies logically non-vivid system). SLnV is a system in equilibrium or

[13] The attentive reader had already noticed that any sufficient predicate also is a necessary predicate, although not any necessary predicate is a sufficient predicate (for instance, the new necessary predicates are not sufficient predicates).

[14] According to the cybernetic theory, system functionality means the assembly of relations of any kind between the elements composing the system (within the membrane).

[15] According to the cybernetic theory, system behavior means the assembly of relations of any kind between the system and its environment (by crossing the membrane).

tends, irreversibly, towards a state of equilibrium[16]. The systems which are in equilibrium or which tend towards a state of equilibrium are characterised by durability. The durable systems are characterised exclusively by finality. On the other hand, SLV, the dissipative systems, are far from equilibrium or tend to go farther away from equilibrium[17]. They have a purpose. Figure 1 shows the fundamental distinctions between a SLV[18] and a SLnV:

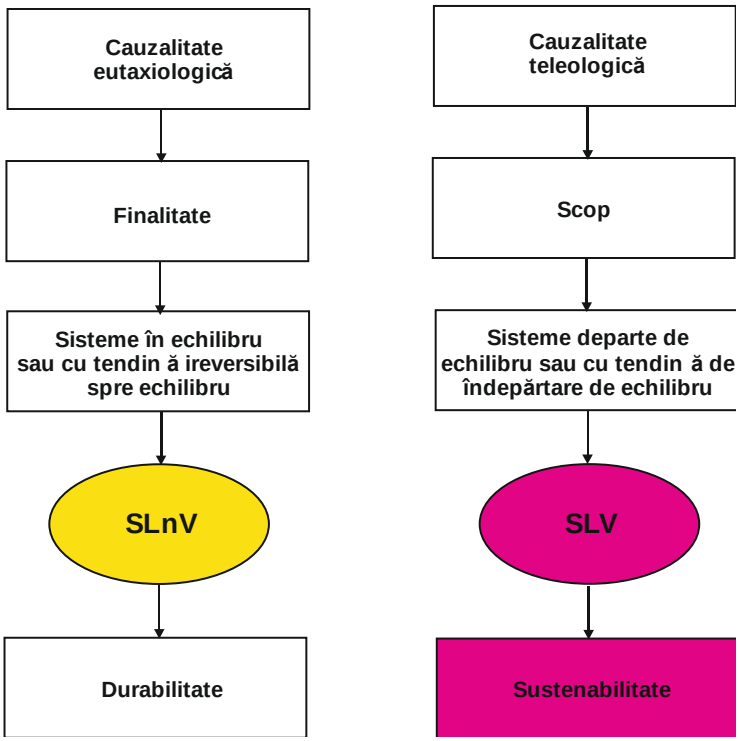

Figure 1: *Basic distinctions between SLnV and SLV. „Location" of sustainability*

Second, taking into account the necessary predicates of a SLV, it results that it has, at the same time, potential for identity preservation (by its auto-poietic capacity) and potential for identity differentiation (by non-linearity). Because of this reason, a SLV is not necessarily a sustainable system (SS). The necessary predicate of the invariance of the total complexity ensures only that the "losses" from a type of complexity are compensated by the "gains" from the other type of complexity, but it is obvious that a variation in excess of a specific level of the terms of the logic sum mentioned earlier, may result in the loss of identity preservation. The key concept here seems to be the *recognition* of the identity profile. By recognition of the identity profile of a SLV we understand the fact that the observing/recording subject notices a sufficient overlapping of the list of attributes specific to a particular SLV at the moment of reference t_r and at the moment of evaluation t_e. The significance of the syntagm "sufficient overlapping" is crucial for our discussion. Actually, we have

[16] Here, the concept of equilibrium must be taken in its most general meaning, that of entropic equilibrium.

[17] According to Prigogine's proposals (see, for instance, the *New Alliance – Metamorphosis of the science*, Political Press, Bucharest, 1984).

[18] A SLV van be both artefact and natural entity. For instance, the fiscal policy is and artefactual SLV, while an ecological pool is a natural SLV. A SLnV is always a natural entity.

here two correlated matters: the first one refers to the evaluation criterion – it is obvious that the observation/recording of the identity profile is always done from the perspective of a favouring criterion (for instance, the Turing test is done from the perspective of the criterion of rationality, more precisely, from the perspective of computability, not from a general perspective); the second refers to the threshold of observing the non-identity and it differs with the scientific background of=r general cultural background of the observing subject, with the technological possibilities to compare the two lists of SLV attributes. Once the evaluation criterion is accepted, and once the mentioned level can be detected, the operation of identity profile recognition is possible. If this identity profile is recognised, than the SLV is considered to be sustainable, otherwise it is considered to be unsustainable[19].

Therefore, on the basis of the above, we may try to give a logic definition of the concept of sustainability or, more precisely, of the concept of sustainable system. We will say the following:

A SLV is sustainable if, and only if its identity profile is preserved for an indefinite period of time (supposed to be infinite) within a tunnel[20] of recognition.

There is an extremely difficult problem that has to be discussed about this definition, problem which is not yet solved theoretically. This is about predictability within a SLV[21].

First, it seems somehow obvious that a sustainable SLV which, as the proposed definition says, has a trajectory which doesn't leave the identity profile of that system, should be a predictable system. Indeed, the recognition of the system by the observing/recording subject as the one that is already known about, should ensure on the fact that the margin of novelty[22] is so small (because the system doesn't leave a tunnel of predictability, which is a tunnel of necessary predictability, not of contingent predictability) that the future states of the system should be predictable[23]. However, things are not like that. As it is known, this predicate suspends the determinism in some points, named points of bifurcation (or fulgurant points), in which the choice of direction towards which the system will continue to evolve is the result of pure chance[24]. Therefore, due to the action of this necessary predicate, a sustainable system is not ipso facto a predictable system.

Second, a sustainable SLV is consistent with a poor predictability, so to say. We are referring exactly to the fact that, by definition, a sustainable system preserves its identity profile. This means that in the case in which the predictions limit to this preservation, they will be certainly verified. The poor predictability is what we understand by verisimilar scenarios, therefore they are not prognoses. As the scenarios are function of the model parameters, and as these parameters are the same with the parameters which control the preservation of the identity profile of the system, we draw the conclusion that, within the sustainable systems, it is possible to have poor predictability, in the form of the alternative scenarios.

[19] We are expecting subsequent research to propose a test of sustainability (of recognising the identity profile), to be used by the observing/recording subject (similar to the Turing test of computability).

[20] By definition, a tunnel is characterized by two limit thresholds (lower and upper) and by a direction of the travel given by the time arrow (therefore, ultimately, by the increase of the global entropy).

[21] The recent literature discusses the matter of the predictability, in general, for any system. An increasing number of researchers in this field reject the predictive capacity of a science as test of its scientificity.

[22] As it is known, novelty is unpredictable because it doesn't allow the mere morphological combination. Novelty implies emergence.

[23] Of course, we are speaking of predictability not in terms of probabilities (which only "increase" the microscopic indetermination for purposes of macroscopic knowledge), rather in terms of non-linearity.

[24] This time we are no longer confronted with a contingent (or, maybe, necessary) technological incapacity of the man to know the group of causal factors, incapacity which has been avoided by introducing the probabilities. We are confronted with a situation of indetermination generated by the so-called coupling of the phenomena which occurs in the dynamics of the system.

2.2 Logic conditions sufficient for a sustainable system

Identity profile recognition denotes that the examined SLV is sustainable between the two moments, t_r and t_s. But what makes us believe that sustainability preserves after the moment t_s? Actually, we have to determine just the logic conditions which, once verified, ensure us on system sustainability irrespective of the subsequent moments, $t_s^k > t_s$, where k is a time counter. There are two logic conditions for sustainability:

a) Presence of hyper-cycles, both in system functioning and in its behaviour (in the way that the two concepts, functionality and behaviour, have been defined previously);

b) Absence of the positive feedback.

(a) Presence of hyper-cycles[25]

A SLV actually is the "headquarters" of a process (or of several structurally and functionally coupled processes[26]). Consequently, it makes sense to speak about the time (irrespective whether we are speaking of an intrinsic time, proper time, or of clock time, mechanical time) of a repeatable sequence of that process (or of the envelope of several coupled processes). The period of time in which such repeatable sequence occurs (the suggestion of fractality is irresistible here) within a process will be called cycle of that process. In terms of the theory of the systems or of cybernetics, a cycle[27] can be measured by the interval of time in which an input of the system which "hosts" the process is repeated (Figure 2 gives a synoptic representation of this idea):

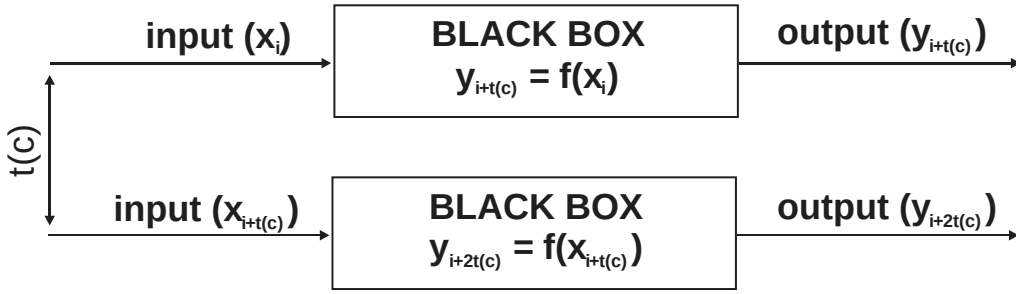

Figure 2: *Synoptic representation of the system cycle concept*

In most imaginable processes, the output can become, partially, input for the subsequent cycle of the same process or, most often, totally, or partially, input in the processes coupled to the original process. This idea which sets that an output of a process can become input in a coupled process[28] is the grounds for introducing the concept of hyper-cycle. Therefore, a hyper-cycle is a cluster, successive or concomitant, of cycles connected structurally or functionally, by which in several

[25] The concept of hyper-cycle has been inspired by the research in biochemistry of Manfred Eigen, regarding the self-organisation of the molecule (evoked in Friedrich Cramer, *Chaos and order. The complex structure of the living*, Bic All, Bucharest, 2001, p. 122).

[26] The expression „coupled" has a very precise signification here. It doesn't show a mere correlation; rather it refers to a reciprocal and permanent dependence between the coupled processes or phenomena (just about the way in which we speak, in the field of Econometry, of simultaneous equations), also from a causal perspective (although it is ironic to notice that the causal coupling is one of the phenomena or processes generating non-linearity, therefore, what we are mistakenly name non-causality or, at least, indeterminism).

[27] We consider that the duration of the cycle is constant throughout the "life" of the system. Otherwise, the acceptation of the hypothesis of a variable duration of the cycle doesn't change basically the reasoning or its conclusions.

[28] It is not necessary to add the syntagm „or within the same process", because a process is considered, by definition, to be coupled with itself.

coupled processes, the outputs from a process become partially[29] or totally, inputs for another process. This definition calls for comments:

1. The possibility of coupling the processes, as defined in this concept, implies adequacies or correlations of at least three categories:

- *Adequacy of nature*: the output of a process, which is to become input for another process, must be of the general nature of that input. The adequacy of nature occurs spontaneously within the SLV in which man is not present (it occurs, thus, by emergence), or deliberately in the SLV in which man is present (we are, of course, speaking of artefacts in this case;

- *Adequacy of cycle rate*: the rate of the process which generates the output must be equal with the rate of the process which uses this output as input, or it must by a submultiple of the latter (in this case, the first process will form stocks of output up to the coincidence between the rate of the process which uses the output as input and the corresponding number of cycles of the process which generates the output);

- *Adequacy of structure*: in the case in which the output of a process is not mono-qualitative, the coupling of the cycles of two processes involves the existence of an isomorphism between the structure of the output of a process and the structure of the process which uses the output as input. Of course, this condition is not rigid: it is possible that the input of a process consists of several outputs of several processes, so that their assembly verifies the necessary structure for that input. It all depends on the complexity of process coupling (of the cycles). Of course, the mirrored image is valid too: a poly-qualitative output may be distributed to several mono-qualitative inputs which are used as such by several processes, in agreement with the adequacy of nature that we mentioned previously. Figure 3 describes graphically these considerations inn the case of an open hyper-cycle (the input of the initial process(es) doesn't use the output of the last subsequent process(es), while Figure 4 describes graphically these considerations inn the case of a closed hyper-cycle[30] the input of the initial process(es) uses the output of the last subsequent process(es):

[29] The part from a random output of a process which doesn't form input for another process, must be consider as belonging to externalities. A externality is an output of a process whose finality is the increase of the global entropy through: decrease of the entropy in the system where this process develops in the case of the positive externalities, and increase of the entropy in the system where this process develops in the case of the negative externalities.

[30] Which, in other terms, referring exclusively to the economic systems, is expressed as active circular processes.

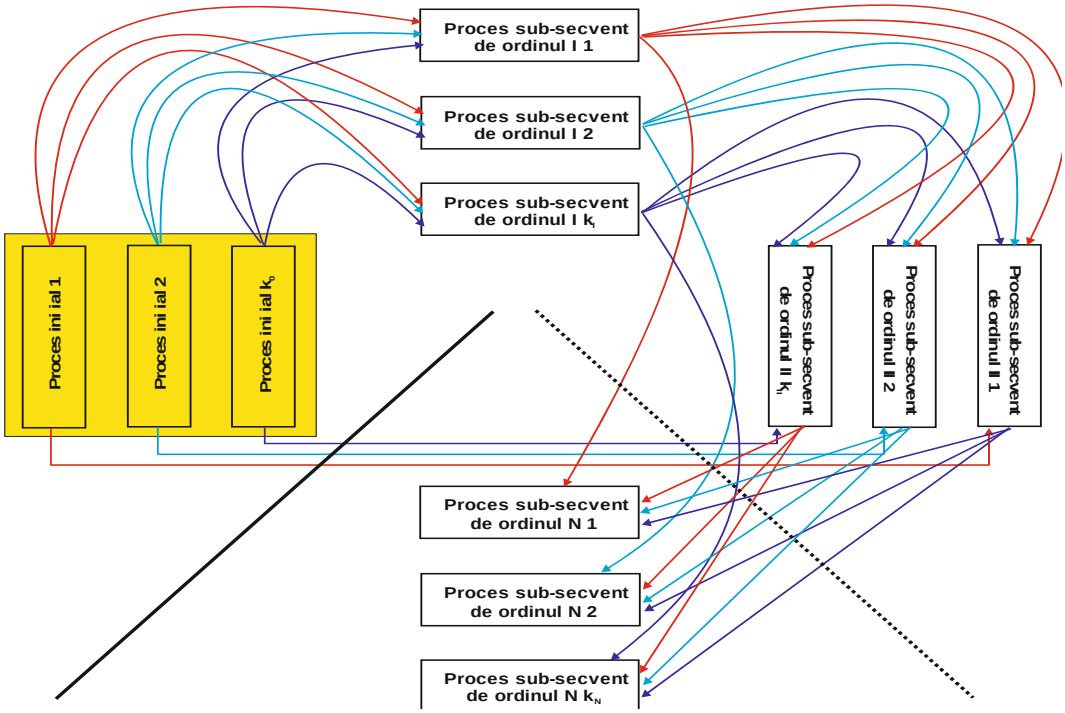

Figure 3: *Synoptic representation of an open hyper-cycle*

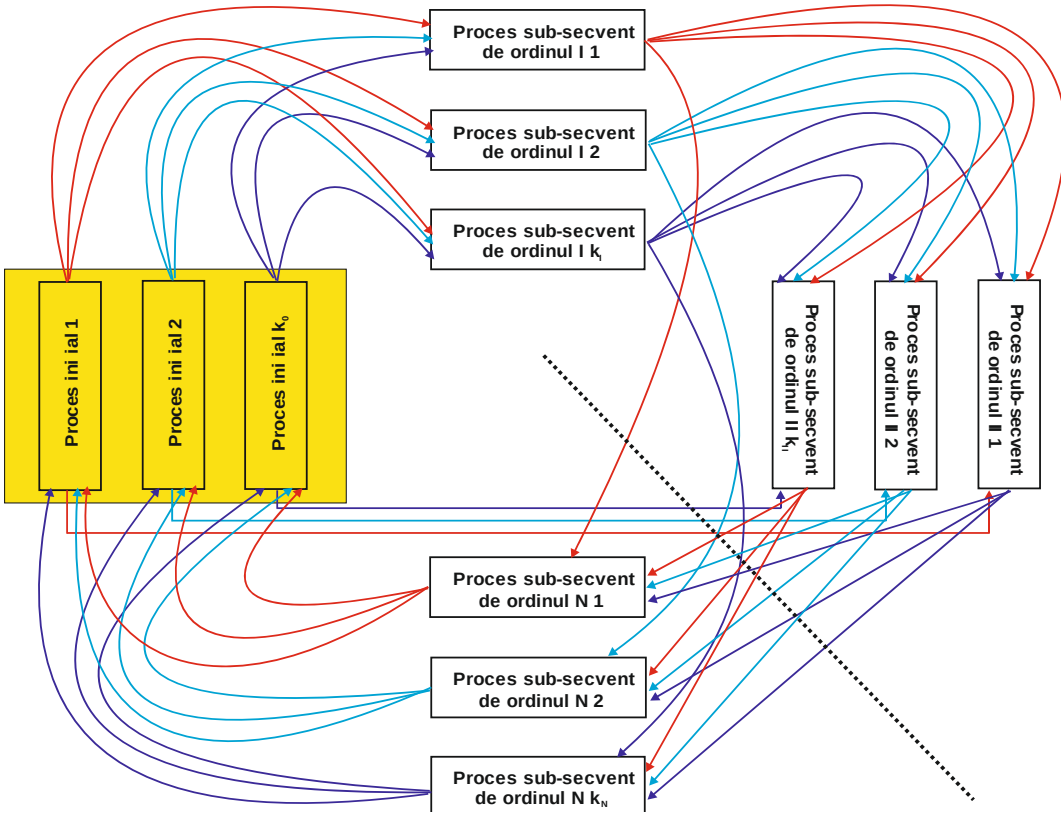

Figure 4: *Synoptic representation of a closed hyper-cycle*

3. The coupling of processes at the input – output level – refers both to the processes occurring within the membrane of the system, and between processes occurring within the membrane (from the system environment). As shown in our discussion about the necessary predicates of a SLV

4. As shown in the discussion about the necessary predicates of a SLV, the proportion of coupling between the processes within the membrane (coefficient of the internal couplings) increases in relation with the proportion of couplings between the processes within the membrane and the processes from the system environment (coefficient of external coupling) with the increase of the internal complexity in relation with the external complexity of the system (ecological complexity). Thus, the coefficient of internal couplings is much higher in man than in a river rock.

(b) Absence of the positive feed-back

The necessary predicate of the auto-poietic capacity implies automatic stabilizers, which means negative feed-back. This is obvious, because the sustainable SLV must preserve its identity profile by neutralizing or, ultimately, reversing the trend promoted by the non-linearity which necessarily appears within such systems. The presence of the automatic stabilizers doesn't ensure fully the absence of the positive feed-back. Positive feed-back often appears in the bifurcation points generated by quantitative accumulations, which cause disruptions in the process, unpredictability and emergence of novelties. The positive feed-back has the potential to take the system out of the tunnel of identity profile recognition. Consequently, we consider that the second logic condition for SLV sustainability is the absence of the positive fed-back in the processes which occur within the membrane, in the processes from the system's environment which are coupled with processes within

the system's membrane. We may have a question here: by putting this imperative condition, don't we cancel any possibility of evolution of the system, even within the limits of the tunnel of identity profile recognition? We think that the answer to this question is a negative one: the bifurcation points which produce novelty, therefore evolution within the system, are not banned by putting this condition. They are still allowed, only that their emergence on the path of the system doesn't produce dangerous escalations endangering the maintenance of the system within the limits of the tunnel of identity profile recognition. In other words, the emergence of the bifurcation points, thus of novelty, is accompanied by an immediate restabilization of the system, without giving it the opportunity[31] to develop principles of leaving the tunnel of identity profile recognition. Therefore, putting the logical condition of absence of the positive feed-back is necessary, but this is not inconsistent with the predictable evolution of the sustainable system; however, this is a weak predictability, as shown before, predictability which allows emergence, thus novelty, in the evolution of the system.

Conclusions

(1) The main outcomes of the paper

The paper delivers the following outcomes:

a) Logically rigorous definitions for system, logically vivid system, sustainability

b) Complete sets of sufficient and necessary predicates for the concepts introduced and used in the paper economy

c) The "locations" of the misunderstandings of the used concepts.

(2) The implications of the paper outcomes

(a) A new paradigm of modeling the systems by the concept of logically vivid system

(b) A new methodology to design the definitions of the concepts: the logical method (identifying of the sufficient and necessary predicates)

(c) A new methodology to ensure on the scientificity of the definitions: the three "C" analysis.

(3) Suggestions for future researches

(a) The causal relation between globalization process and sustainability feature

(b) A deeper research of the hyper-cycles associated with sustainable systems

(c) Reassessing of the automatic stabilizers as crucial predicate for the sustainable systems.

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[31] Here, the term of opportunity has its praxiological significance.

COMPARATIVE ANALYSIS OF VAT EVOLUTION IN THE EUROPEAN ECONOMIC SYSTEM

MIHAELA ANDREEA STROE*

Abstract
In this paper we study a comparative analysis of VAT in different states of the world. I made some observation on this theme because I believe that VAT is very important in carrying out transactions and the increase or decrease of this tax has a major impact upon national economies and also on the quality of life in developing countries. The papers has to pourpose to make a comparison between the American and European system of taxation with its advantages and disadvantages and, in the end to render an economic model and its statistics components. VAT is a value added tax which appeared about 50 years, initially with two purposes: one to replace certain indirect taxes, and another to reduce the budget deficit according to the faith of that time. The first country that has adopted this model was France, calling it today as value-added tax.

Keywords: *rate, tax, VAT, budget deficit*

Introduction

One of the important factors that led to this measure was established to avoid tax cascading phenomenon, namely the taxation of the same product. Today often easier and more correct, tax only the value-added product. This is why we consider taxes a necessary phenomenon . Along parallel between the U.S. and Europe which has been taken as reference models in order to discuss and debate their favorable and less favorable points, and most of them in my opinion is representative of the French model, implementation of the tax where it had a beneficial role in the economy. As an example, we use the European model which is used in the VAT and the American model. In the first chapter I talked about the effects of introducing VAT in the euro zone and pros to this measures. On the other hand we will use the U.S. model as an example for countries that have introduced this tax measure. It will be discussed the pros and cons of implementing these measures in both Europe and the USA and see why are the reasons for which VAT was implemented or not. In the next chapter I will analyze some concrete examples of Europe countries that have value added taxation system and will analyze the benefits that were subsequently introduced this measure in developing economies.

Today most European Union states have increased the rate of VAT and the effects of this measure for each economy participant will be a subject of debate. The largest VAT increase since 2010 had 5 percent, the case of Romania will be discussed and also the effects of this increase. This increase was primarily due to the population, and secondly due to the economy.

However, in addition to countries that have increased the VAT rate to reduce the budget deficit exists also the countries that have not implemented this measure, like France. Separately will discuss about tax reform and the reason which have not adopted the VAT increase in 2010 thus making a parallel with the current situation in Romania. I consider necessary the parallel between American and the taxation of European countries in order to see the effects on the population especially at the time when this method had been introduced but also to determine the need for that change in the economic environment. To see what effect had the change when decided to reduce its rate of VAT, and especially if it had the desired effect. Furthermore, I have chosen our country as a reference model to determine what effect had increased VAT revenues in 2010 and especially the

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share of VAT and its direct relationship with revenue. In this model we determine whether the increase in VAT in our country had a negative effect of higher government spending and see what steps were taken to overcome the crisis in Romania and especially their effectiveness.

At the end of the work are presented conclusions and also some methods for improving the Romanian tax now, and we will see if Romania has achieved its purpose by increasing the VAT by 5 percent, especially if taken fiscal measures will be able to recover Romania.

COMPARISONS OF TAX POLICY IN THE EUROPEAN AND ECONOMIC SYSTEM

In this comparative approach of VAT in Europe versus the United States, we will determine why the U.S. did not want to adopt this tax, value added and the advantages and disadvantages of its implementation. In a paper drafted in 2001 and suggestively named "tax systems in the world," Lawrence W. Kenny American professor says: "There is surprisingly little empirical work to explain why the countries choose different tax policies." Although between tax systems currently existing in the world there are some similarities, however, we must observe that each country has its own individuality generated by specific elements (traditions, history, religion) and in finding a common ground should be determined on the basis of which can indicate similarities and differences between two or more countries. VAT is designed to charge efficient and comprehensive personal consumption in a economic reform .TVA site was most prevalent in the second half of the 20th century and into the 21st century, and proved to be a major source for government information .TVA's revenue is used both in developed and developing countries, both at local, national and supra-national level (European Union). It is effectively an indirect tax, originally adopted in France at the initiative of M. Laure in 1954.In the following years the value added tax was adopted on 1 January 1970 to all Common Market countries tax replacing the movement of goods cascade that leads to taxation.

VAT is in fact a tax on consumption in general, calculated and applied at every stage of goods and services flow from primary production to final consumption stage. Unlike European powers, the United States of America had many attempts to implement VAT in recent years but without success. This is due to the fact that VAT is regarded as having three weak points, namely: the first, is considered to be so-called "money machine" in the hands of government, secondly it is considered that the VAT is regressive, and at last it is believed that consumption taxes are used to broaden the State tax. In 2006, Keen and Lockwood points out the existence of two types of "money machine", a poor form and poor strong. This form is characterized by the assumption that countries with VAT budget revenues higher than those without VAT, or at least the same, which could lead to a better mobilization of savings inside a better financing of certain sectors. In strongest form it is suggested that an increase in budgetary revenues results in an increase in government spending is not beneficial within an economy. Such studies showed last year the opposite, namely the American belief that the VAT is not so-called "money machine" in the hands of pro government. An another argument for applying VAT in the U.S. is that it would reduce the deficit of the budget. This contradicted by Alverson (1986) showing that the average budget deficit is higher in countries that have adopted the VAT as a form of taxation and increased more rapidly with the implementation of VAT, except in countries that have adopted this method . Ali Agha and Jonathan Haughton (1996) stating that VAT is the perfect money making machine.Take, for example when Switzerland with the introduction of this tax, budget revenues have not increased, remained the same as in the period before the introduction of VAT, but in developing countries such as New Zealand budgetary revenues have increased substantially.

VAT proponents conclude that compared with other forms of taxation, VAT is not discouraging savings and create certain ways of fair competition in international trade. It is said that the burden of VAT may be in the worst case proportional and regressive if not the denominator for purposes of measuring the tax burden was a lifetime income rather than annual income as

contradicting American economists. [1]We notice that the socialist states tend to use more than other regimes, tax sources Corporation, sales and excise taxes, so that business can be more easily monitored.There is a strong ideological interest in taxing business and a necessity lower in individual taxation to achieve social goals. Making parallels between the fiscal pressure of the EU member countries and appreciation of the level of tax burden in the European Union in general is also facing many difficulties, due to the fact that tax levels are not the same from one country to another . Disagreement is due to a variety of general and specific factors for each country.

Most important are the following:

- differences in reference periods and methods;
- social security contributions, which are quite large in some countries (including Germany), tax levels are sometimes included, sometimes not, an example of this is given by employers' social security contributions for government employees;
- required government contributions are not included in fiscal reports;
- taxes on inheritance and gift taxes are sometimes considered, sometimes it is estimated that taxes should not be included in the category. For EU countries, VAT and customs duties sometimes appear as a net value sum. In the researched work, they also show that the level of taxation is determined and influenced by many factors, and that between taxation and its base and the level of GDP there is no strict correlation.

In a brief listing of factors influence the tax burden is represented by the volume of public expenditure, which depends on various economic, social and political,to reduce the effect of regressive some countries; especially in Eastern Europe, have provided substantial reduction of VAT on consumer goods and also primary health services, and this is underlined by Angelo Faria (2001). When the consumption tax rate increases on higher income levels it means that this rate is progressive, when this ratio is proportional when we deal with a proportional tax, we say that this rate decrease is a regressive tax

Unable to pay this fee are those who feel the tax burden harder. But this regressive is reduced by certain exemptions from VAT for commodities and population. The necessary medical services to France and New Zealand tried to reduce this effect by collecting the tax on social security and its spending for poor grades. Another pro argument is that VAT is not significantly different from other fees and does not encourage such an increase in taxation or to raise government spending.

On the other hand, opponents argue that a VAT increase in taxation will bring government spending, and this form of tax raises the overall tax burden too easy.

Another appeal of VAT is that it is vulnerable to fraud significant, this is to say that fraud losses in these countries was about 10% net income of such damage VAT collected. We can remember Germany (1.5% of revenues from VAT) and the UK (about 1.5 to 2.5% of revenues from VAT).

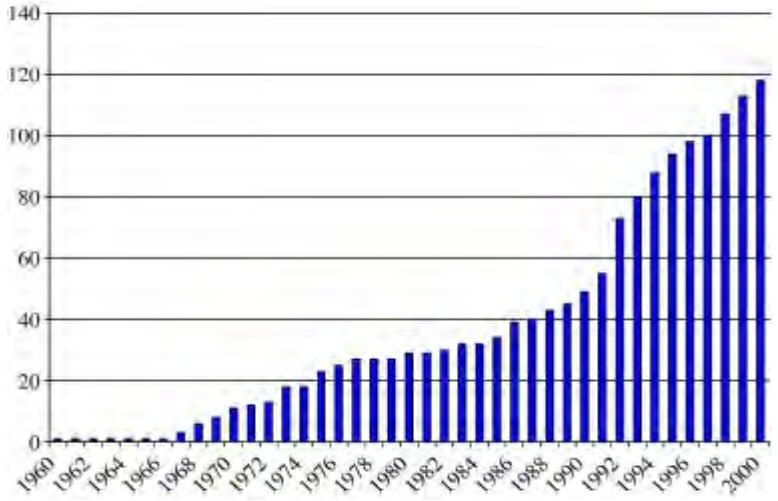
Cnossen says that tax is probably the best ever invented in terms of increasing budget revenues, but also in terms of fraud is much easier a tax fraud and RST (Retail Sales Tax) . But still, VAT fraud is significantly less than other types of consumption taxes, property taxes because it refers to different stages in production and not to the final property tax as it is used in the American system. (Retail Sales Tax)[2]. This form of taxation, perhaps better than the VAT it is much less expensive to implement because it represents just the final property tax and is much faster to implement in the tax system of a country, but has one big disadvantage: it is much easier to rig. This type of fraud is based on a fairly simple mechanism, at least in appearance: the country of origin trader VAT invoices (as performed an intra-Community, which fall into the category exempt operations with right of deduction), and the operator economic destination country applying the reverse charge for this operation (because making an intra-Community acquisition calculating and accounting for VAT on

[1] Angelo Faria (2001) - "Tax Policy IMF Fiscal Affaires Department Handbook" (P275).
[2] Bird, Richard M. & Cnossen, Sijbren. 1998 - "The Personal Income Tax: Phoenix from the ashes?".

intra-Community acquisitions, so that VAT is collected, as well as the tax deductible, but without actually pay it) .Piggot and Whalley (in 2001) illustrates that expanding the tax base of VAT in developing economies can reduce the population welfare sector informal. This deeper critique was developed by Joseph Stiglitz at the Congress IIPF 2003. Many countries in Eastern Europe have adopted lower VAT rates tax hoping to reduce the evasion that would be created with the adoption of a higher rate.

Many European countries have adopted this form of taxation as opposed to letting the United States as income levels increase further or being introduced as a substitute for existing taxes. Comparing the income tax used by countries that have adopted VAT in European countries we can say that income tax is more flexible as a tool to achieve a progressive tax.[3] However, unlike the European model, Americans have no VAT in the tray instead they have a similar sale of VAT ranging from 5% to 12% being imposed in many stages of production (RST-Retail Sales Tax). But still why VAT is better than a sales tax that excludes taxes like VAT cascade? In case of VAT, the taxation is taking place in various stages of production, so is much more difficult to nearly impossible to find certain Legal wickets.

Countries that have adopted VAT charge have chosen this path because this structure does not meet budgetary requirements. Also this method has raised a number of problems and over the years this have been intensely debated. Thus depending on the levers of government each country has its own system of taxation,so that in some states this form of consumption tax works, but in other countries like the U.S. is considered ineffective. Comparing tax rates in the world is difficult and somewhat subjective, tax laws are complex and in most countries the tax burden falling on different groups in each country. However, a strong point of this charge is that avoid cascading charge (charge applies several times on the same income) by taxing the value added at each stage of production. This practically be the main reason that most countries in Europe adopted VAT. In the chart below we see the number of countries that have implemented this form of taxation over the years:



Value Added Tax (flat tax collected divided as it is called) is calculated in Romania on increasing the value added by each undertaking participating in the cycle of making a product or performance of works that fall in the incidence of this tax circuit eliminating inequalities between

[3] John Piggott & John Whalley, 2001. - "VAT Base Broadening, Self Supply, and the Informal Sector".

phases economic products, applying the attributes on its share of all economic activities. Value added is the difference between the proceeds from the sale of goods or services and effectual payments for goods or services relating to the same stage of economic cycle. By setting the value added to avoid repeated entries external consumption (consumption from third parties) of productive enterprises. VAT tax is a single, neutral, and payment to be made in a single part. The character of this form of taxation wether you cycle through raw material to finished product realization (in this way can pass by two or more companies), is the same level as the rate of taxation, the tax is not dependent on the extent of the economic cycle, it is applyied at every stage of manufacturing value added. Operating system of value added is based on a fundamental principle that the fee charged for goods delivered and partner services rendered minus the fee for goods or services purchased or manufactured in their own units for the realization of taxable operations The object is the value of taxable goods, works and services at billing prices an also a taxable lump sum from the sale.

The mechanism by which one determine the VAT due to state budget continues to show it succinctly. The VAT account is recorded output VAT collected on sales or work product. The account is registered VAT paid input,VAT on buying by traders of material, to receive papers which were made or the payment of benefits. Reducing the output VAT results input VAT which the operator has to pay state tax (VAT to pay). If this difference is negative,output VAT is less than the input VAT, meaning that the trader has to recover this amount from the state. It is easily seen that the trader is not affected by VAT, and it pays only one who actually bear the ultimate consumer.

In fact, the producer who purchased raw materials, manufactures suppliers, although with the delivery of their share of VAT paid do not suffer a monetary loss because the asset sale will collect that amount, state and will return that value but the final consumer is not credited by the state, so that it will fully support the value added tax related. From product tax, value added is considered a consumption tax, borne by the final consumer and the state budget. Therefore an increase in the tax rate primarily affects the final consumer for the same commodity bought in a previous period will have to pay more in the current period.

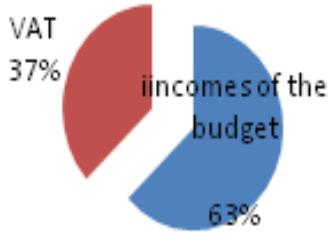
Regarding foreign trade, VAT is not paid for exports and imports. VAT levied on imports is to offset losses which occur due to taxes export. If goods were delivered to the internal state, revenues would increase.

Also, the VAT on imports representes an equalization of opportunities for companies, because if there is no VAT for importing foreign goods the competitiveness of prices would be more appyling that the national one

Countries where the product is consumed implemented VAT and not where it performs. Consequently, everything is exported, is completely absolved of paying this tax, but what is imported is taxed accordingly. VAT has a greater elasticity to economic processes in the sense that, if the business is developing , the VAT payment will be higher. If sales stagnate and VAT amount will be lower consequently in state revenues. The VAT as well as all indirect taxes "copy" the economy going. VAT is a tax, high tax efficiency, but that any indirect tax is unfair. This translates in that VAT is regressive in relation to revenue growth and do not lend themselves to a minimum non-taxable. The VAT affects more pronounced low-income people and those who affect a large proportion of their income for consumer spending. In our country the VAT was introduced for the following reasons: reasons of compatibility with the tax systems of European countries to increase resources for the state and the necessity of replacing the outdated formula has been taxed on the movement of goods. Our country's accession to EU economic structures imposed a series of changes in the national tax legislation to harmonize it with European regulations domain.In global crisis, the government of Romania was forced to increase the VAT rate from 19% to 24% to shrink the deficit this way budgetary. It is true that those who felt that this change was more low-income population small, the final consumer in the position are those that support this growth.Among European countries, Romania had the highest rate increase along with it and arousing discontent of the population who have experienced a rise in consumer prices. This increase had the intended effect,

registering a substantial increase from the state budget. With this increase in overall share of VAT revenues increased indicating an increase in revenues as the chart below illustrates:

The structure of VAT in the total incomes of the budget



Source of data: National Institute of Statistics, INS

To play multiple linear regression model we used data on the United Kingdom, between 1990 and 2007 about the total indirect taxes, excise duties, VAT and consumer price index, thus implementing the data extracted in Eviews. The base year chosen is 2000. Values are taken from the table below are expressed in millions of pounds.

Year	Total indirect taxes	Excise duties	VAT	Price index
1990	61.096	19.871	34.136	76.8
1991	66.466	21.660	37.523	82.6
1992	70.361	22.501	41.031	86.1
1993	72.591	24.267	41.762	88.3
1994	78.338	26.457	44.690	90
1995	85.507	28.167	47.539	92.4
1996	91.537	30.174	51.692	94.7
1997	96.637	31.866	54.475	96.4
1998	102.478	34.487	57.003	97.9
1999	109.161	36.471	61.415	99.2
2000	112.874	37.271	64.302	100
2001	115.007	36.597	67.051	101.2
2002	120.246	37.284	71.154	102.5
2003	127.731	38.081	77.308	103.9
2004	133.748,5	39.458,45	81.735,42	105.3
2005	135.366,6	39.289,65	83.537,46	107.5
2006	142.036,1	46.196,13	79.359,44	110
2007	155.309,3	50.612,33	87.678,99	112.5

Sursă: www.eurostat.com

The linear multiple model is:

$$\text{Im}\, p\_ind\_tot_t = \alpha + \beta_1 * accize_t + \beta_2 * TVA_t + \beta_3 * IPC_t + e_t; \qquad t=1,2,\ldots,T,$$

unde T=18.

In Eviews, the model is: Imp_Ind_Tot=C(1) + C(2)*Accize + C(3)*TVA + C(4)*IPC

Imp_Ind_Tot = 8528,4194 + 1.49457*Accize + 1.01587*TVA - 157.62403*IPC

Variable	Coefficient	Std. Error	t-Statistic	Prob.
C	8528.419	5692.535	1.498176	0.1563
ACCIZE	1.494572	0.087339	17.11226	0.0000
TVA	1.015874	0.037614	27.00770	0.0000
IPC	-157.6240	92.74270	-1.699584	0.1113
R-squared	0.999543	Mean dependent var		104249.5
Adjusted R-squared	0.999445	S.D. dependent var		28264.28
S.E. of regression	665.7775	Akaike info criterion		16.03292
Sum squared resid	6205635.	Schwarz criterion		16.23078
Log likelihood	-140.2963	F-statistic		10208.15
Durbin-Watson stat	1.623409	Prob(F-statistic)		0.000000

Tabel 1 The results for testing the parameters model in Eviews

For testing the parameters model,it is used the t test

Test student

The hypotheses are:

- The nule hypotheses, H_0 : $\alpha = 0$ or $\beta_t = 0$, t = 1,2,3
- The alternative hypotheses, H_1 : $\alpha \neq 0$ or $\beta_t \neq 0$, t = 1,2,3

Thus, the coefficient of excises is $\hat{\beta}_1$ = 1.4945, the stndard error $SE(\hat{\beta}_1)$ = 0.087339, and the statistics $\hat{t}_1$ = 17.11226, calculated thus: $\hat{t}_1 = \frac{\hat{\beta}_1}{SE(\hat{\beta})_1} = \frac{Coefficient}{Std.Error}$; the value p (*p value*) = 0.0000, which shows hat the volum of excises in the total indirect taxes is an important factor.

The VAT coefficient is $\hat{\beta}_2 = 1.015874$, the standard error $SE(\hat{\beta}) = 0.037614$, and statistics $\hat{t}_2$ = 27.0077. The value of this probability is 0.0000, so VAT is another significant component of total indirect taxes estimated regression model.

The coefficient of the price index is $\hat{\beta}_3 =$ -157.624, standard error $SE(\hat{\beta}_3) = 92.7427$, thus the statistics $\hat{t}_3 =$ -1.699584. But the probability for this indicator is 0.1113, which exceeds the threshold of 0.05. But student test (t test) has an associated p-value of 0.1113 that is close, so we can say, by assuming a 11.13% risk of error that we are doing by rejecting the null hypothesis is still small, so we can to reject, and thus influence the CPI's total indirect taxes.

The intercept is $\hat{\alpha}$ =8528.419, the standard error $SE(\hat{\alpha})$ =5692.535, the statistics $\hat{t}_\alpha$ = 1.498176, and the p value is 0.1563. Although he exceeds the probability of 0.05 applying the t test we can say that we take a risk that the value of 15.63% to be 0 and thus reject the null hypothesis, accepting the fact that free time is significant for multiple regression model chosen.

Report of determination (R^2) indicates what percentage is explained by the significant influence. It is calculated as: $R^2 = \frac{SPAR}{SPAT} = 1 - \frac{\sum e_t^2}{SPAT}$. It is used in assessing model quality. It can take only values falling in the interval [0,1]. The values are closer to 1, the model is better. The value that we take here is 0.999543, and thus we can say that the regression model is good. Approximately 99.95% of total indirect taxes are explained by multiple linear regression model chosen.

S.E. regression is the following indicator of our table, calculated as follows:

$SEof\ \text{Re}\ gression = \sqrt{\frac{\sum r_i^2}{n-4}}$, where r represents the errors; $\sum r_i^2$ = Sum Square Resid.

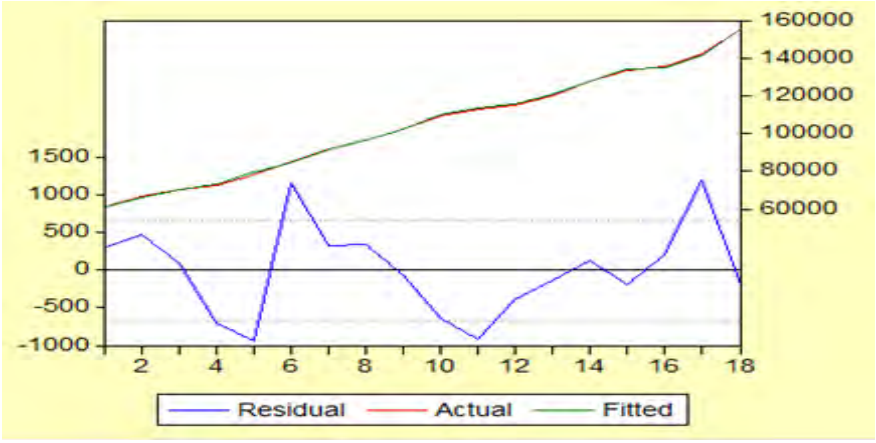
Then SE of Regression= $\sqrt{\frac{6205635}{14}} = 665.7774$.

$$\text{Im}\, p\_ind\_\hat{tot}_t = \hat{\alpha} + \hat{\beta}_1 * accize + \hat{\beta}_2 * TVA + \hat{\beta}_3 * IPC$$

$$\text{Im}\, p\_ind\_\hat{tot}_t = 8528.419 + 1.494572 * accize_t + 1.015874 * TVA_t - 157.624 * IPC_t.$$

The previous table contains the value of the residuals for each among from the 18 calculated:

$$r_t = \text{Im}\, p\_ind\_tot_t - \text{Im}\, p\_ind\_\hat{tot}_t$$



Tabel 3: The values for residuals, actual and fitted indirect taxes

Charts explaining residue values were also extracted from Eviews as follows: the below graph were residues is calculated as total indirect taxes chart taken from table in nominal source, represented by the red line (Actual) and total indirect taxes taken chart adjusted value, represented by the green line (Fitted). The blue line, is represented precisely by the difference of the residuals of the other two values above

Actual	Fitted	Residual	Residual Plot
61096.0	60799.4	296.586	
66466.0	65999.8	466.249	
70361.0	70268.7	92.3128	
72591.0	73303.9	-712.936	
78338.0	79283.6	-945.565	
85507.0	84355.2	1151.79	
91537.0	91211.2	325.800	
96637.0	96299.2	337.766	
102478.	102548.	-70.1937	
109161.	109791.	-629.569	
112874.	113793.	-918.955	
115007.	115389.	-382.114	
120246.	120379.	-133.085	
127731.	127601.	129.720	
133748.	133937.	-188.511	
135367.	135169.	198.039	
142036.	140852.	1183.66	
155309.	155510.	-201.003	

Tabel 4:The values for residuals, actual and fitted indirect taxes

It can be noted that the nominal values are almost equal, so the lines overlap almost second chart thus resulting in low values of their residues.

F test is used to test the validity of the model as a whole.

It is calculated as the ratio between the variation explained by regression and regression unexplained variation each of which is in turn divided by their degrees of freedom. The calculation formula looks like this:

$$F = \frac{\sum(\hat{y}_i - \bar{y})^2 / k}{\sum(y_i - \hat{y}_i)^2 / (T - k - 1)},$$ with k = number of variables for the model, here 3 and T = number of observations 18.

Analyzing the data in our model we see that F = 10208.15 and a probability of 0.00000. Therefore, we accept that overall multiple linear regression model is better studied.

The multicoliniarity test: The test of Klein

For the multiple linear model chosen:

$$\mathrm{Im}\, p\_ind\_tot_t = \alpha + \beta_1 * accize_t + \beta_2 * TVA_t + \beta_3 * IPC_t + e_t;$$

The hypotheses are:

$H_0 : \exists\ r^2_{x_i,x_j} > R^2$ is the multicoliniarity phenomenon;

$H_1 : r^2_{x_i,x_j} < R^2$ it is not the multicoliniarity phenomenon;

From EVIEWS the obtained results:

Correlation Matrix			
	TVA	**IPC**	**IMP_IND**
TVA	1.000000	0.967591	0.991579
IPC	0.967591	1.000000	0.980201
IMD IND	0.991579	0.980201	1.000000

Tabel 5: The correlation matrix

Value is 0.9995 and find that is greater than the pearson coefficients so multicoliniarity phenomenon is not present in the multiple regression model.

To check homoscedasticity

Homoscedasticity refers to the hypothesis that the regression model that states that errors must have the same variance model: for any t = 1,..., T. Homoscedasticity presence or not we can identify both graphically and by statistical tests. Graph residuals can not say for sure that neither the existence nor the homoscedasticity heteroskedasticity. The best known test is White's test to test the following hypotheses:

The nule hypothese $H_0 : \sigma_i^2 = \sigma^2$ for all i =1,...,T

The alternative hypothese $H_1 : \sigma_i^2 \neq \sigma^2$ for at least one i.

White Heteroskedasticity Test:

F-statistic	0.653726	Probability	0.730593
Obs*R-squared	7.628003	Probability	0.572025

Test Equation:
Dependent Variable: RESID^2
Method: Least Squares
Date: 01/23/10 Time: 12:25
Sample: 1 18
Included observations: 18

Variable	Coefficient	Std. Error	t-Statistic	Prob.
C	-1.23E+08	1.56E+08	-0.785164	0.4550
ACCIZE	-4400.584	5096.226	-0.863499	0.4130
ACCIZE^2	-0.086030	0.070530	-1.219766	0.2573
ACCIZE*TVA	0.019991	0.043870	0.455694	0.6607
ACCIZE*IPC	93.46943	86.50170	1.080550	0.3114
TVA	-1082.017	2819.240	-0.383798	0.7111
TVA^2	-0.003665	0.014057	-0.260728	0.8009
TVA*IPC	7.316386	40.42917	0.180968	0.8609
IPC	4585351.	5405744.	0.848237	0.4210
IPC^2	-41077.56	46417.93	-0.884950	0.4020

R-squared	0.423778	Mean dependent var	344757.5
Adjusted R-squared	-0.224472	S.D. dependent var	461276.3
S.E. of regression	510429.2	Akaike info criterion	29.42407
Sum squared resid	2.08E+12	Schwarz criterion	29.91872
Log likelihood	-254.8167	F-statistic	0.653726
Durbin-Watson stat	1.888994	Prob(F-statistic)	0.730593

Tabel 6: The White test applied for our model for test homoscedasticity

For the initial model has been build:

$$e_t^2 = \alpha_0 + \alpha_1 * accize + \alpha_2 * TVA + \alpha_3 * IPC + \alpha_4 * accize^2 + \alpha_5 * TVA^2 + \alpha_6 * IPC^2 + \alpha_7 * accize * TVA + \alpha_8 * accize * IPC + \alpha_9 * TVA * IPC + v_i$$

New errors v_i are normally distributed and the independent of e_i .

In these circumstances I have the null hypothesis: the alternative: not all α parameters are zero. If we accept the null hypothesis when the hypothesis homoscedasticity accept, and if there are different parameters of 0 accept heteroscedasticity. Output table for this new model obtained by regression apply t test of significance for each coefficient separately. The probability is 0.455 for the free time that exceeds the threshold of 0.05 and 0.8 is smaller than that are in the area of uncertainty. In this interval are coefficients of variables with two exceptions, the coefficient of VAT and the coefficient of CPI. For later, we can accept the null hypothesis. Also for F-test probability is quite high and again located in the area of uncertainty, p = 0.73059. Considering the value of p we could say that we reject the null hypothesis (presence of heteroskedasticity) with an error of 73%, therefore we can accept the null hypothesis (presence homoscedasticity) with an error of 27% (100% -73%).

The autocorrelation analysis of the first rank:

The Durbin – Watson test: $\text{cov}(e_t, e_{t-1}) = 0$

For the analysed equation:

$\text{Im}\, p\_ind\_tot_t = \alpha + \beta_1 * accize_t + \beta_2 * TVA_t + \beta_3 * IPC_t + e_t$;first-order autocorrelation of errors is expressed by the relation: $e_t = \rho e_{t-1} + v_t$, for t=2,...,T where v_t ~N(0, σ_t^2). DW statistical test used pair of hypotheses: H_0: ρ = 0 (the nule hypotheses); $H_1 : \rho \neq 0$ (the alternative hypotheses). DW statistics are tabulated, its values depend on the specified significance level, the number of observations in the sample and the number of variables influence the regression model. This, for a specified significance level, has two critical values is obtained from the DW tables.

Reject the null hypothesis regions are defined as:

If $DW \in (d_2, 4-d_2)$, it does not autocorrelation,if $DW \in (0, d_1)$ the positive autocorrelation of the residuals;if $DW \in (4-d_1, 4)$ the negative autocorrelation of the residuals;if the DW is between the two intervals (d_1, d_2) or $(4-d_2, 4-d_1)$ the test is not conclusive.In the model analyzed, DW statistics = 1.6234. For a significance level of 5%, a total of 18 observations and four variables influence the statistics are tabulated values: 0.93 and 1.69. The value obtained in the model belongs to the range so we can not rule on the autocorrelation of disturbances.

After analyzing the data entered in the multiple regression model, for best results on homoscedasticity, autocorrelation of errors, or model of normality may enter more observations to capture the relations between them

Conclusions

The model which explained the relationship between the indirect taxes, VAT, CPI and excises is a valid model and the majority of parameters are significant. The relationship is linear and strong between the four variables. It was studied the hypotheses for testing our model.

I think that it is a strong relationship between that four variables because the taxes represent an important factor for the quality of people's life. If people are pressured by the taxes, they cannot concentrate for increase their educational level and they are only oriented how to obtained money.

The model can be improved by analyzing a long series of data and can be extended for many countries and the obtained results can be compared and can be established which country has the better taxation system.

VAT is in fact a tax on consumption, calculated and applied at every stage of goods and services flow from primary production to final consumption stage.

Many European countries have adopted this form of taxation as opposed to United States as income levels increased further or were introduced as a substitute for existing taxes. Comparing the income tax used by countries that have adopted VAT in European countries it can be said that income tax is more flexible as a tool to achieve a progressive tax. Comparing tax rates in the world is difficult and somewhat subjective, tax laws are complex and in most countries the tax burden falling on different groups in each country.

Value Added Tax is calculated in Romania on increasing the value added by each undertaking participating in the cycle of making a product or performance of works that fall in the incidence of this tax circuit eliminating inequalities between phases economic products, applying the attributes on its share of all economic activities.

Fiscal pressure generated by the size of taxes paid by taxpayers is high in Romania and distribute.In Romania VAT became the target of argued opinions due to the tax burden on the population and especially small and medium businesses, besides direct taxes population supports a series of indirect taxes which currently holds the principal place within fiscal resources.

A high taxation, a „sick" economy can only have negative consequences because of the disrupt demand for goods and services and less likely investments. Among various tax savings in order to attract resources used by the State budget, those which are pressured are significant tax: personal income tax, consumption taxes and social contributions. I believe that indirect taxes are very burdensome for taxpayers and the dimensions of income and wages are lower compared to the fees and charges incurred by individuals.

For a more judicious distribution of income the tax system is necessary for policymakers to consider how it is constructed, the criteria underly the differentiation of taxes and how they participate in the formation of budgetary resources.

I appreciate that in the current period, the configuration of our country's tax revenue will over-tippe the balance in favor of indirect taxes along with the increase in VAT to 24%, resulting in increased tax burden on labor, with extremely negative effects on investment and savings.

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GLOBALIZATION AND ECONOMICAL-SOCIAL INFLUENCES

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Abstract
Globalization represents a myriad of processes of undeniable complexity and variable dynamics, which cover various society areas. It can depict various aspects of phenomenon, ideology, strategy, or all in one place. Globalization is with no doubt a complex concept that bears diverse significations which refer to many sides: the economical, the political, the cultural one etc. Most authors view as particularly important the economic side of globalization, while they seem to be looking over the political, social or cultural aspects of this phenomenon. Thus the optimists view contemporary globalization as a new phase in which all the world's states are subjected to sanctions from the global market, while skeptics argue that the globalization phenomenon determines chain reactions, incontrollable here and there, in conditions of a present crisis, precisely through the interdependency between states.

***Keywords**: Globalization, economic processes and phenomena, cross-border borders, network economy, deregulation, globalization-worldwide expansion, scale economies, creation of multinational companies.*

Introduction

In favor or against globalization? This is a question that will forever be a concern for the economical, social, financial or administrative world, until the worldwide crisis will inevitably appear. Although the globalization's fundamental tendencies assume: increasing the degree of economical liberalization, opening national economies, increasing the degree of interaction between such. These tendencies only take place in the contet of the progress recorded in international transports, of the unprecedented development of informatics technologies and telecommunications and of the economic increase in general. Therefore, globalization has been considered throughout time to be a final stage of space enlargement of the companies' economical activities, having as effect not only the multiplication of markets but especially the forming of a unique global market. But, as it is known, economical downturn and growth have a certain cycle, so by accepting the cycle process of the growth and recession periods we also automatically accept the occurence of world crises. However, in a globalization era in which the world's states are interconnected, the crisis started in the United States will have a domino effect on the collapse of other states' economies. The mortgage crisis from US affected Great Britain, Spain, Ireland, Germany and Italy, generally all the developed states strongly dependent on the Unites States' economy. Limiting loaning strongly affects small and middle enterprises, reduces the consumption and increases the will of people to save money.

Many developing countries will face competitiveness decline, due to decreasing exports, according to specialists[1], these countries being close to appealing for help from the International Monetary Fund.

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[1] Suzanne Rosselet – McCauley, Criza globală: cine va supraviețui?, Centrul de Competitivitate IMD World, februarie 2009.

Literature review

The study of the globalization phenomenon, of competitiveness and competitive advantage, also their modification under the conditions of economical crises as well as the role of foreign investments in diminishing economical crisis, are subjects of major impact on the research area. Over time specialized literature has benefited of studies made by many prestigious authors, among which John H. Dunning, William Northaus, Kirsty Hugues, Robert Solow, Gilbert Abraham – Frois, or Ngaire Woods. In Romanian economic literature the special contribution was made by the researchers Alexandra Horobet, Anda Mazilu, Costea Munteanu, Vasile Dan, Liviu Voinea etc.

Theoretical background

1. Conceptual Definition of the Globalization Process

Globalization continues to be depicted in different ways in the specialized literature. In the 2001[2] economy dictionary, globalization is regarded as a "*method or system of long-term reception and approach on the great contemporary problems, generated by the interaction of multiple economical, technical, political, social, cultural, ecological processes and phenomena, and the planning by the international community to settle them on a wide perspective"*. In some papers, signed by Paul Bairoch and Richard Kozul Wright (*Globalization Myths: Some Historical Reflections on Integration, Industrialization, and Growth in the World Economy – 1996)* and from 1997 by professors Michael Bordo and Kornelia Krajnyák (*Globalization in Historical Perspective, World Economic Outlook, Globalization Opportunities and Challenges*, May 1997, IMF, Washington), the process of globalization manifested in the second half of the XXth century is considered to resume some phenomena that took place one century ago in the global economy.

In the paper *Globalisierung der Unsicherheit – Arbeit im Schatten, schmutziges Geld und informelle Politik* (2002)[3], Elmar Altvater considers globalization to be the surmounting process of the borders appeared along history. Thus it becomes synonym to the erosion (but not disappearance) of the national states' sovereignty and is presented as the market economy's "detachment" from moral norms and from the connections that are institutionalized between societies …" For Anthony Giddens (2007)[4] the same phenomenon of globalization represents "…the intensification of social relations everywhere, through which places separated by a large distance are thus able to interconnect so that events taking place in an area are marked by processes taking place many kilometers away and vice versa…" Globalization represents a process or a set of processes that take the form of a transformation in the spatial organization of social relations and transactions – analyzed in terms of extensions, intensity, velocity and their impact – generating transcontinental or interregional fluxes and networks of activity, interaction and power enforcement[5].

A more pragmatic position is expressed by Professor Bruno Amoroso from Roskilde University in Denmark, who in the *"On globalization. Capitalism in the 21st Century"* paper[6], considers globalization as being a manifest of the transnational triadic capitalism with its basic institutions: transnational corporations, international organisms and lobby in the global market conditions.

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[2] Dicționar de economie (2001), ediția a doua, Editura Economică, București, pg.216 .

[3] Altvater, Elmar und Birgit Mahnkopf (2002) - Globalisierung des Unsicherheit: Arbeit im Schatten, Schmutziges Geld und informelle Politik, Münster: Westfälisches Dampfboot .

[4] Anthony Giddens (2007) - *Europe In The Global Age*, Polity Press, Cambridge CB2 1UR, UK.

[5] Held, David, McGrew, Antony, Goldblatt, David, Perraton, Jonathan (2004) - Transformări globale. Politică, economie și cultură, Editura Polirom, Iași, pg.40.

[6] Amoroso Bruno (2001) - On globalization. Capitalism in the 21st Century, Macmillan Press Ltd., N.Y. 2001.

The globalization process has generated the beginning and consolidation of multinational and transnational corporations which subsequently become the foundation for maintaining and amplifying the globalization process on a global scale.

Globalization has been scientifically analyzed and developed in the large American schools (Harvard, Columbia, Stanford), as well as in some English universities that promote the neo-liberal doctrine and sustain free trading between the world's states. The main institutional actors of globalization are: the state, multinational firms, nongovernmental organizations. The fundamental tendencies of globalization refer to: the increase of economical liberalization grade, opening of national economies, the increase of the interaction degree between them. Obviously these tendencies take place in the context of the revolution faced by international transports, of unprecedented development of the informatics technologies and telecommunications that projected on other coordinates the multinational firms' activity and the cross-borders movement of capitals.

Over time, globalization has been considered to be a last stage of space enlargement of the companies' economical activities, having as an effect not only the multiplication of markets but especially the forming of a unique global market. In other words, globalization represents the process through which geographical distance becomes a less important factor in establishing and developing economical, political, social-cultural cross-border relations. Globalization manifests in all life domains: political, economical, cultural, scientific, and has an impact on the human condition, being able to generate satisfactions for those who approach it to their advantage and unpleasantness for those who are marginalized.

The latest specialized literature draws attention on the fact that economical systems change from the theoretical model to *the network economy* (the term of global network was introduced by Prof. Richter Emanuel, PhD). The network is presented, from an economical point of view, as a resource allocation system in which problems of fluxes optimization are considered, as well as of finding scale economies, of deregulation or maintenance of the so-called natural monopolies. The network model is increasingly present in contemporary economy because it proclaims the superiority of administrating information fluxes by means of decentralized structures instead of those hierarchical and rigid.

To summarize the earlier mentioned tendencies in a unitary formula, we consider the definition formulated by John Dunning in his paper "The Advent of Alliance Capitalism"[7] to be the best that sustains the significance and directions of development of the globalization process:

The globalizing of economical life raises three large categories of problems for all states , which they cannot solve on national or on continental integration level:

1. problems of economical nature that can no longer be solved trough the industrialization model that has led to waste, pollution and unemployment, emphasizing the mimesis of the production structures that generate competition;

2. problems of social nature: unemployment, but also polarizing societies, trough extending poverty, demographical problems and the migration of economical workforce;

3. problems regarding the degradation of the natural environment, climate change and the dangers of irreversible perturbation of the planet's geo-biochemical equilibriums.

National identity in the contemporary globalization conditions "is determined by the particularities through which a human community reacts to stimulants provided by the modifications of the natural environment and social climate"[8].

Globalization of economical life, with its history and as a reality of our time, can be regarded as a phase of the evolution process of the capitalist economy the beginning of which was identified

[7] Apărută în volumul " The New Globalism and Developing Countries", edited by Jhon H. Dunning and Khalil A. Hamdani, United Nations University Press, New York, 1997.

[8] Popescu D. Maria (1999) – *Globalizarea şi dezvoltarea trivalentă*, Editura Expert, Col. Sec. XX, Bucureşti .

by Fernand Braudel[9] from very ancient times. Over the last three millenniums, a single power centre has been exerting its domination at a time. Now, for the first time, we assist to the concomitant existence of more power centers. Some researchers mention the movement of the center from America to the Pacific (Japan, China, Indonesia, Singapore, Korea). Others sustain the existence of three centers: America, European Union and Japan with the South-East Asian region.

2. Globalization – Worldwide Expansion

In the UN and IMF documents and studies, in English language, the term "globalization" is used, while in French, as well as in the publications in this language, the term of "worldwide expansion" is used. Both linguistic expressions designate the same process.

Specialized Romanian literature uses more frequently the term of globalization although, sometimes, "worldwide expansion" is also used. However, the economic meaning attributed to the concept of globalization differs from one source to another.

The Economy Dictionary (Economic Publishing House, 1999) defines worldwide expansion as a process revealing the fact that the activities carried out by certain firms become the expression of some economical operations developed on a global scale, both in respect with production and trading. This worldwide expansion process is of objective nature, which occurred a long time ago, but has intensified over the last decades, being promoted by multinational and transnational companies. From an economic point of view, the worldwide expansion represents the method in which those certain firms capitalize the competitive advantages created on a global scale under the incidence of numerous existing differences between the countries and regions of the world. Multinational corporations thus exploit for their own purpose all economical advantages, and the production and trading acts become more profitable due to extending the rationality parameters from local, national or regional-international to global level.

The International Monetary Fund report from May 1997, entitled "World Economic Outlook. Globalization. Opportunities and challenges" says that the globalization phenomenon represents "the tight international growing integration of the goods and services markets as well as those of capital".

Also the International Labor Organization report entitled "L'emploi dans le monde 1996/1997. Les politiques nationals a'heure de la mondalisation" mentions that the term globalization is used, in a limited sense "to designate the global wave of liberalizing exchanges, investments and capital flows as well as the increasing importance of all these flows and international competition in global economy[10]. It can be noticed that this document, which originates from the UN institution handling labor problems, also considers that labor markets are not presently included in the globalization process.

Worldwide expansion expresses the development stage of non-boundaries states, where everything is almost accessible, being realized through communication, solidarity increase and interdependencies. Worldwide expansion represents the mankind's stage that began to take shape in the 1970's and, especially, after 1980 when the internationalization's result (which affect only certain countries and activities) was distinguished from globalization (which adds to the elimination of distances and obstacles related to space, the technologies and information related to time).

Worldwide expansion is remarkable due to the expansion of human activities throughout the globe, despite the unequal penetration. In economic life, worldwide expansion encountered the fewest obstacles, thus a spectacular modification took place in the nature of international trades from the second half of the 20th century. However, economy is not the only domain of the worldwide expansion – the political, habits and cultural ones are just a few of the sectors that are increasingly dependant on the global success. The actual conflicts, humanitarian dramas, poverty persistency, take a global aspect and the cultural and demographic particularity becomes conspicuous, while on all

[9] Braudel Fernand (1985) - *La dynamique du capitalisme*, Paris, Arthaud .
[10] Badrus Gheorghe, Rădăceanu Eduard (1999) - *Globalitate şi management*, Editura All Beck, Bucureşti, pg. 4.

meridians the same music is being played, the same information and images are being broadcast, often being dominated by an American influence.

In fact, the worldwide expansion is often identified with the generalization of market economy, doubled by the adhesion to plural democracy values and human rights. To this extent, the day of November 9th, 1989, on which the Berlin wall fell, symbolized the end of the world's division in two ideological units, also marking an important phase of the worldwide expansion process. For the first time in history the entire world gradually rediscovers itself around the same basic rules promoted by international organizations (UN, IMF, Global Market, etc.) that have truly become worldwide.

Worldwide expansion allows for the avoidance of high costs, the establishment of scale economies, diminishment of high costs, exploitation of different markets' imperfection and of the asymmetrical nature of information.

3. The Consequences of the Financial Economical Crisis in USA

The economical expansion during 2002 -2007 began with a problem – the shattered illusion of the American capital, in 2000-2001, that had a substantial effect, concerning wealth, on the American households. In order to reduce the duration and severity of the resulted downturn, the Federal Reserve aggressively tempered the monetary politics by reducing either the interest rate to federal funds, or the discount rate, 27 times between January 2001 and June 2003, producing the collapse of interest rate to federal funds from 6.5 percent to 1.0 percent in the mentioned period. This way, the aggravation determined by the downturn was prevented by the stimulation of an unprecedented development of the real estate market that afterwards rapidly became a real estate mirage. The financial capital accumulated in the real estate market compensated the loss recorded in the real estate market during 2000-2002. The increased prices in the real estate domain supplied a massive increase of expenditures and the continuous expansionist monetary politics of the Federal Reserve maintained the United States' economy flooded by excessive liquidity. Another fundamental ingredient at the base of the persistent low rates of the real American (or global) interest was directing developing countries into accumulating large amounts of American assets, motivated by the experiences accumulated by them during previous crises and this was possible due to their positive working capital. Because of this, the United States was able to finance their massive deficit on a long term without radically changing the real rates of interest or those of the real exchange rate. At the same time, Wall Street recorded profound financial innovations created by the attempt to obtain higher profit benefits in an environment with low interest rates. A large part of these innovations was made by the firms with unregulated activities and the new financial instruments used were too complicated to be regulated. If we organize a retrospective analysis we will notice the existence of reasons that determined the choice of these monetary politics. The Federal Reserve has never considered preventing the inflation of the assets' price to be part of its mandate. In addition, the increase of productivity and stagnation of the real average wages level in the USA during the expansion period were interpreted as signs of a surplus in the labor force market.

As a consequence, policies tended to support the liberalization of financial markets and were sometimes doubled by careless additional supervision. Other developed economies faced the same unfavorable impact because when the illusion of rapid circulation of capital flows was shattered, and other central banks also decreased their interest, indeed slower than the Federal Reserve, their economies recovered just as fast. In a few other developed economies the real estate mirage has grown and, in some cases, it was even larger than the American one. In this context, neither was our country differentiated in the international practice, using the easily given consumer loans and the expansion of the values circulated on the real estate market. If to all this we add the unusual desire for expenditure, we can have the complete precursory view for the global crisis' beginning.

4. The Consequences of the Financial – Economical Crisis in the World

Although this generalized crisis first occurred in the United States, said country was not the only one affected by the shocks and collapse of the consumer's trust. Many countries, both developed and emergent markets, have recently registered unrealistic increases on the financial assets market. The rapid growth of real estate prices was caused not only by the basic principles of the countries such as Ireland, United Kingdom and Australia, according to IMF (2008), while countries like China and Russia had faced before the crisis staggering levels on their assets markets, generated by the frenzy of speculations.

The phenomenon of worldwide expansion is represented by: financial integration and the constituency of cross-border holdings of mutual funds, speculative funds, branches of developed countries' banks and insurance companies that perpetuated perturbations and contributed to propagating the collapse of assets' prices in other countries as well. Many developed states in the European Union suffered from the capital market's internationalization.

The South Asian countries adopted a multi-billion dollars plan in order to sustain the banking system. USB, the largest bank in Switzerland, received from the government an infusion of capital of EUR 3.8 billion and, also, the central bank created a special fund where USB would be able to deposit "toxic assets" in a value of no more than USD 60 billion (EUR 44 billion). Another large Swiss bank, Credit Suisse Group, collected CHF 10 billion (EUR 6.5 billion) from private investors and announced loses for the third trimester. ECB supplied liquidities of EUR 5 billion for the Central Bank of Hungary that asked for and obtained support from IMF and the World Bank (the total value of contributions is of EUR 20 billion).

The portfolio investments will decrease because the larger fear of risks determines the capital maintenance in internal markets. Although, historically, the direct foreign investments have proven to have a higher flexibility to shocks, they are also expected to drop. In addition, the developing countries with a future access to capital will pay higher interest because of the exodus towards more secure markets and the higher aversion towards risks. The global deceleration will reduce the requirement of consumer goods and industrial products, thus decreasing the earnings from exports and as the labor force markets will decline, the workers from abroad will probably suffer over the disproportioned impacts on their incomes, which will reduce deliveries.

Approximately half of the developing countries started to face working capital deficits of over 5 percent from the GDP and, in some cases, the deficits are situated around the value of 10 percent. These economies are very vulnerable to the oscillations of these diverse sources of external financing. Due to the large investments inflow in the last years, an extremely large number of investment projects are already developing. As the investment's financings will decrease, two consequences will possibly appear, both of them of negative nature. In some cases the projects will not be finished and, as a consequence, will become unproductive and will burden the balance sheets of the banks with risky loans. In other cases, if the projects are ended, they will create a capacity of excessive production resulted from the global deceleration, thus increasing the risk of deflation.

These factors will have as consequence the decline of the increasing collective GDP of the developing countries down to less than 5 percent, as compared to the average 7 percent in 2004-2007. Moreover, the effects felt by the developing countries might not limit to the decrease of the revenues resulted from investments and exports and a deceleration of the increasing GDP. The danger also exists for all emerging markets to enter an individual crisis, as for instance if their own internal assets market starts collapsing (or even in the case in which the real market values will suffer a decline) and weaken their own banking systems. The drastic falls of stock markets in the developing countries already indicated the investors' worries regarding the future on a medium term, and the decline of the portfolio's values can also have significant effects of the wealth on consumption, emphasizing the effects of decreasing. The countries with deficits of the large payment and fiscal balances will be the most vulnerable. The aggravating factor of the developing economies' problems is the fact that these shocks will be simultaneous.

5. The Consequences of the Economical – Financial Crisis in Romania

In Romania the indirect effects of the crisis could be noticed. In the year 2008 we faced a limited impact of the financial crisis on the Romanian economy. The annual rate of inflation (6.3%) was on a descending trend but maintained itself on high levels over the variation interval, the economic growth rate being high in 2008 as well, the working capital deficit significantly increased (13.4% from GDP) and the budget deficit reached a record level of 5.4% of the GDP. Through prudential and administrative measures, NBR constantly acted to moderate the speed of the increasing loans granted to the private sector and for sustaining the loaning in national currency to the detriment of that in foreign currency.

The local banks no longer have a major role in loaning companies but remain the main vehicle in the case of population. Crediting has been aimed towards SME and strongly towards trading and services companies. SME are modestly financed by banks. Only 15% of the SME appeal to external sources of financing such as bank loans. The main sources of financing for the SME are their own shareholders and commercial credits. The internal bank loan represents approximately 12% of the liabilities, while in other European Union countries these are a lot higher (Germany 30%, Austria 16%, Italy and Spain 23%, Belgium 18%).

The population continues to have a high potential of crediting demand. The 11/2008 regulation regarding the population's crediting creates conditions for changing the search for quantity with searching quality. The new indebt levels are higher than the actual values implemented by banks in the case of clients of smaller risk. Some banks are more exigent than the NBR's recommendations. The cards are the product that keeps on developing. On a short term, EUR 5.4 billion external financial credits are due in the case of companies and EUR 3.6 billion as loans from the mother companies. Not renewing parts of these credits has caused the financing from local banks. Also, the indebted population's impossibility of paying their loans because of the collapse or restructuring of large companies, which had been previously profitable, generated the aggravation of the Romanian banks' financial situation. In this context, Romania called for support from the International Monetary Fund and in 2010 adopted measures of austerity which were genuinely severe but were aimed at re-launching the economy.

Conclusions

The advantages of worldwide expansion brought by the freedom of human actions without borders, the rapid and unhindered circulation of the production and especially of capitals, the unprecedented growth of technology, exchange of information and productivity, all of these can be rapidly affected by the beginning of an economical-financial crisis of epic proportions. The multinational corporations (MNC), the main actor and beneficiary of worldwide expansion, have actually known a different expansion, actually influencing all areas of economical-social life. It can be said that nowadays these have a great impact over: the technical progress and economical development of the origin as well as host states, of the increase of services sector's power, also referring to environmental issues, management and political and legal aspects. However, these multinational corporations are the ones to determine the externalization of the crisis, through the umbilical connections with the economy of other states.

Nevertheless, as we mentioned in the introduction, the economical crises of overproduction have a cyclic evolution demonstrated by many economists (Nikolai Kondratiev *The Major Economic Cycles* 1925). They come and go, but the amplitude of the fictive capital transfers causes powerful and more difficult to control trails in the financial banking system.

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ECONOMICS OF HUMAN RESOURCES

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Abstract
The purpose of this paper is to analyze human resources in terms of quantitative and qualitative side with special focus on the human capital accumulation influence. The paper examines the human resources trough human capital accumulation in terms of modern theory of human resources, educational capital, health, unemployment and migration. The findings presented in this work are based on theoretical economy publications and data collected from research materials. Sources of information include: documents from organizations - the EUROSTAT, INSSE - studies from publications, books, periodicals, and the Internet. The paper describes and analyzes human resources characteristics, human resource capacities, social and economic benefits of human capital accumulation based on economy, and the government plans and policies on health, education and labor market.

Keywords: *human capital, education, work force, unemployment, investment*

Introduction

The study of the economics of human resources is characterized by complexity of the processes, but also by the factor of particular importance given to human resources in recent decades. Whether it's the Japanese model "Shushin Koyo", German method "working islands", American model based on ownership, human resources plays a crucial role and are rated as "one of the most important investments of the organization whose results become evident over time." (Manolescu, 2001). Given the importance of this factor, the paper examines the human capital accumulation trough Human Resources in terms of modern theory of Human Resources, educational equity, health, unemployment and migration. The desire to analyze human resources in terms of human capital accumulation is based on recent studies (in the last decades) of eminent authors, some of them Nobel laureates for their contribution to Human Capital Development Theory (e.g. Gary Becker). First, Human Capital Theory was focused on proving that by investing people will get a higher human capital which will be used to gain higher incomes accordingly to knowledge held. Secondly, specialists (Schultz, Becker, Mincer and others) analyzed its components in terms of human capital (educational capital and social - health capital), but also from the perspective of human capital - labor migration, human capital - unemployment, human capital - poverty. Thus, through this research, some experts were concerned with the problem that their economy now found an explanation through human capital theory, namely through the use and development of human resources.

Scientist G. Becker explains the extraordinary economic success of Japan and Taiwan and other Asian countries through massive investment in human capital. He claims that, having the lack of natural resources and facing discrimination imposed by the West, Asian countries have developed rapidly, building on a well-trained workforce, educated and hard working class.[1] Another item brought in for human resources development is the adaptation to new technologies required in the production process and in the economy overall. Therefore, education and training are helpful to keep pace with technological change and productivity in advanced manufacturing and services sectors. Recent studies show that industries which progresses more rapidly in particular attract better

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[1] Becker, 1997, p.26.

educated workers and offer tuition in the workplace.[2] A similar idea was also supported by another Nobel Laureate - Theodore Schultz - recognizing that "an integral part of the modernization of the economies of low-income countries is to decrease the economic importance of cultivated land and the increasing importance of human capital, skills materialized in knowledge"[3].

Therefore, the qualitative dimension of human resources has an important role in a country's economic growth. In addition to investments that are made at the microeconomic level, it is needed also for the state concerns for the development of appropriate policies adequate to increase the quality of the human factor in that certain state.

Thus, starting from major studies in the field to enhance the primary role of human resources, this paper will consider more qualitative dimension of human resources and will make references that are considered to be important for understanding the concept related to the quantitative dimension of human resources.

Paper content

In economic theory, human resources have been analyzed in numerous scientific treated. Depending on the period of time, on the economic currents, on the scientific nature of authors, employees, workers, human resources were presented in a multitude of facets. Use of terms has been closely linked to the role that it was assigned. Following the terminology used has been over time different, depending on the social order and according to historical period.

If in the past the task of the employees was work, mostly the rough work, the name used was "labor force" - because people were valued for their working force - or "manpower", referring to the description of the work, using mainly hands for process the work material. The concept of "manpower" used today, along with the new term "human resources", possessed all the physical and intellectual skills that people use in the process of obtaining goods and services and was used to describe or characterize the mass working and not the individual with distinct needs and personality. In the traditional theory of the enterprise employees were seen through the prism of how they are serving, in a discipline certain predetermined operations.

Labor force category was introduced in the means of production once with the transition from feudalism to capitalism; when the scope of the productive forces has broadened considerably. From that moment man began to be treated as "productive force" as well as other means of production. Socialist ordering brought a new perspective on the labor theory by introducing human-producer, owner, beneficiary, but that theory has not changed anything in the merchandise character of labor, but replaced the specific of the feudal relations with the relations characteristic for capitalism. This triple-stage status remained only the goal.

All these changes have led to changes in the contract of employment because it is no longer just work, but the human factor of production, namely the ability to work, all available skills, information skills qualifications, experience, etc.. Also in today's society, working and working ability of an individual is not becoming, through the act of selling, the whole property of the one who pays the work-product, as it provides a certain amount of labor, which is given by its own rules of ergonomics and those dictated by social security regulations. In modern market economy, the human factor has changed the nature and how it can make the growth performance of the organization.

It is interesting to note that changes in industry and general economic development have led to successive changes of the role of labor in those periods. Thus:

[2] Idem.
[3] Laureatii Premiului Nobel, vol 2, p. 202.

Feudal Ordering	**The rise of the Capitalism**	**Modern Period**
Raw labor exploited;	Changes imposed by industrialization and the industrial revolution;	Require increasingly more use of the individual's intellectual capacity;
This was done and purchased only for daily necessary goods living;	Use of cash payment for salary as an expression of the work provided;	Prized qualities are creativity, intelligence;
Relations between labor owners and its beneficiaries were the relations of domination and bondage.	Raw labor during this period still represents the majority;	They are increasingly better paid than raw labor;
	Relations between labor owners and its beneficiaries were poorly regulated and allowed the abuse of labor with a payment that was not reflecting the true value of the work	The individual has a double status - manufacturer and customer

Table 1. Characteristics of labor in specific periods

Thus, if at the beginning it was mainly used the term "manpower", industrialization and technical revolution imposed the introduction of additional terms to include and emphasize the complexity of today's working process, which, in addition to the raw work, requires the more and more use of the individual's intellectual capacity. In today's society, employment qualities such as creativity, intelligence and other intellectual abilities began to be valued and paid better than raw labor. As a result, in the new context of global economic development elements such as human capital, creative potential, etc. become particularly relevant. Some authors even emphasizes that it requires a reconsideration of the general acceptance linked to the concept of human resources-related since the work content has changed radically. In this sense, defining for human resources are: initiative, creativity and ability, learning capacity and use of information technologies and the neo-technology.

Economic theory indicates that the labor factor raises two issues related to *quantitative* and *qualitative* nature. Professor M. Roman[4] makes an important methodological distinction meant to discern a possible operating error in terms of work versus the concept of human resource. Thus, labor resources are economic in nature, linked to man's capacity to work, unlike human resources, which represents its dual nature - economic and social. Human resources represent the total population of a country, to affirm its economic dimension, through direct or indirect participation in the labor market, and its spiritual dimension (social), through the accumulation of knowledge.

Quantitative level is connected, first, to the existence of labor resources in the society and within the size of that segment actually performing work, and secondly, the working hours, i.e. the number of weekly working hours, according to regulations in existing in the society.

In terms of labor resources of a country, they are closely related to the population of that nation. Within this we include the following categories[5]:

- Adult population (with the legal age for employment) is determined by subtracting the total population of a country the young people and older people;

[4] Roman, p. 8, Accessed February 3, 2011. http://www.biblioteca-digitala.ase ro/biblioteca/carte2. asp?id=257&idb=.

[5] Cornescu and Platis, 2002, p. 40.

- Active population consists of what remains after subtracting from the adult population incapacitated adults;
- Active workforce available, all the working persons which remain after eliminating the housewives, students of legal age full-time employment;
- Employment that is determined by subtracting the number of available active population unemployed persons;
- The working population employed - resulting in employment by eliminating all those who work in their households and establishments.

Human resources of a country are made up of working age people and able to work. Working age limits are determined by the country through legislation. The size and dynamics of labor resources depend on a number of demographic and economic factors such as:

- Birth;
- Mortality;
- Life expectancy, living conditions, etc.

Also, work duration, in number of weekly working hours, is an important factor that can increase or decrease the work amount, therefore the volume of work available to a given country. This factor has, in turn, a series of economic, social, and political determinations.

Qualitative level of work is enhanced by training level, the amount of general knowledge, technical, scientific, etc. Quality of work is reflected, therefore in the training and qualification of carriers of this factor. Qualification is presented as a prerequisite and an essential condition of modern production, one of the major factors to increase efficiency.

Quality of work, seen through potentiating qualification, highlights the work capacity of human resources in society. In other words, this is the prerequisite for raising work efficiency. Therefore, the company is interested in increasing the quality of work, acting for it in the following areas[6]:

- Increase the general level of education and training of human resources;
- Ensuring a high level of health;
- Promote an effective system to motivate employees;
- Ensuring a high quality also for the other inputs.

Theodore Schultz[7] was referring to the quality of the population as a rare recourse, it has an economic value and its acquisition has a cost. In the analysis of human behavior that determine the quality and volume acquired during the time the key analysis is the relationship between benefit from an additional qualities and costs of acquiring them. When the benefit outweighs the cost, the quality stock of the population increases.

In time the increase of demand for quality determines the investments for children's instruction and improving the quality for a part of adults, reduce demand for quantity, quality and quantity are substitutes, and the decrease for the demand of quantity stimulates the option to have and raise a smaller number of children.

Also, Nobel laureate Theodore Schultz notes that Human Capital Theory considers the health of any person as a stock, of health capital respectively. Thus:

- A part of the initial stock is inherited, and part is acquired;
- Stock depreciates over time, and the depreciation rate is increasing rapidly towards the end of life.

Health investments have costs for the acquisition and maintenance costs. A longer life provides additional incentives:

- To acquire more education investment to future earnings;
- Parents invest more in their children;

[6] Cornescu and Platis, 2002, p. 41
[7] Laureații premiului Nobel în Economie, p. 209

- Training at the workplace becomes more attractive;
- Health capital and other forms of human capital tend to increase the productivity of workers;
- Better health leads to higher productivity per man-hour at work.

Economists Paul Samuelson and William Nordhaus[8] highlight the differences between the salaries of professional categories. Therefore, these differences are due to:

- The work seen as compensation differentiators. Labor is different in terms of its attractiveness, therefore it should be paid more to attract those people to work. Jobs requiring great physical effort, fatigue and low social prestige, with periods of inactivity, or seasonal work involving risks tend to be less attractive.
- Differences between people: quality of work. One of the main determinants of the salaries gap is between the qualitative differences between people, differences that can result from psychic or physical capacities, education acquired in the family and at school, training and experience.

The two authors mentioned above, explain the existence of higher salaries to graduates of higher education, bringing the example of doctors, lawyers, engineers, as they invest money in training and their professional development, and the money they receive as income should be considered as the return of investment made in the accumulation of human capital - education revenue is derived from making them a high-ranking workers. Categories with a high degree of training begin their careers with higher salaries; revenue is growing faster than the income of the categories with a lower degree of preparedness. But it should be noted that, in general, at the beginning of participation in the workforce the income is increasing with advancing age until they reach a common peak within 45-54 years and decline in the last age group. Since work occupation is amended along with age, most able to work down the hierarchy at a time. The earnings for different work occupations could indicate reaching a peak earlier for unskilled workers, mainly because unskilled older are less able than younger people. Higher education capital implies a higher value of the workforce due to increased productivity, implying a higher payment if it is sold (salary reflects, in general, the marginal productivity of labor, which increases with education level, as illustrated by the human capital). Human capital theory implies that salary differences reflect different productivity of employees. Experienced employees have higher productivity and receive a higher salary. The salary of a specialist includes a reward for hard work and reward for the work invested in education spending. For example, in Romania, according to National Institute of Statistics[9], in 2006 the highest average salary was in financial - banking field (2260 lei/month) where, as we know, trained is very important. Lower wages were situated in hotel and restaurant industry (534lei/month), agriculture and forestry (504lei/month). These two industries, usually operates with seasonal unskilled and poorly motivated workers.

Workers health care develops human capital by improving physical and mental capacities of the human and influences productivity by reducing time lost due to illness. As investment in workers' health are included expenses for labor protection, aimed to protect the life and health of working personnel, ensuring good working conditions, prevention of professional diseases and accidents, reducing physical and mental effort.

Another group of measures directed towards the development of human capital of the enterprise are measures related to workers' mobility: career development, coordination of qualitative and quantitative composition of employees. Occupational mobility of workers requires investment related to the period of vocational and psychological adjustment.

In early 2000, Professor Aurel Manolescu pointed out that "of all enterprise functions, personnel function which has probably the most spectacular and most constant development known

[8] Samuelson and Nordhaus, 2001, p. 280

[9] INSSE.Accessed,26,January2011. http://www.insse ro/cms/files/statistici/Statistica%20teritoriala%202008/rom/22 htm.

during the past ten years. This trend will continue also in the future, referring both to the content function and the profile of people who exercise it." Human resource management is a necessary for those organizations that tend to be performance leaders in their field of activity. The significance of human resources in achieving this goal is that they work through their complex action and ensure the enhancement of other resources. Human resources, depending on the qualities and skills embedded determine the effective use and exploitation of other existing and available resources at a time in the company. Unlike all other resources of the company, which are depreciating both physical and moral, human resources is the only resource that can be able to increase its value over time.

Another very important element that affects human resources is *migration* on the labor market. The portability of human capital explained by Becker[10], is a migratory behavior of those who feel threatened its own stock of human capital. Individuals, who make decisions to migrate, are generally richer in human capital, and their migratory movement is from the poorer to the developed areas. It directly affects human capital stocks at Community level which may induce marked discrepancies from one community to another within the same or between different societies. Such disparities have long term effects in terms of personal communities or societies in question and may lead to segregation. The decision to invest in human capital at macro level can be directed to discourage migration of individuals with above average education in poor areas in educational equity, while local investments in building human capital. The alternative may be to maintain this gap. Moreover, in some cases, migration of individuals, rich in human capital (both education and health) may be a solution in case of poor areas in resources and represented as lacking development opportunities, for reasons beyond human will. Massive departure of young people and educated individuals (with a superior work force) may lead to the dissolution of poor communities, while migrants can gain access to superior social and natural environmental conditions.

The phenomena of globalization and economic integration forward, now, new challenges for human capital theory. Therefore, the effects of human capital mobility between nations is generating debate on the relationship between distributive justice, global human capital and individual right to free movement and external opportunities, respectively the rights of nation states which made public investment in human capital of migrants. For example, according to Eurostat statistics[11], in 2009 across the European Union as a whole, Turkish citizens made up the biggest group of non-nationals (see Figure 1). This group comprised 2.4 million people in 2009, or 7.5 % of all non-nationals living in the EU. The second biggest group was Romanians living in another EU Member State (6.2 % of the non-national population), followed by Moroccans. The group of non-nationals with the most significant increase over the period 2001 to 2009 was Romanians, whose number living in other Member States increased more than six fold over the period considered (from 0.3 million in 2001 to 2.0 million people by 2009).

[10] Becker, 1997, p. 265

[11] Eurostat. Accessed January 26, 2011. http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Migration_and_migrant_population_statistics.

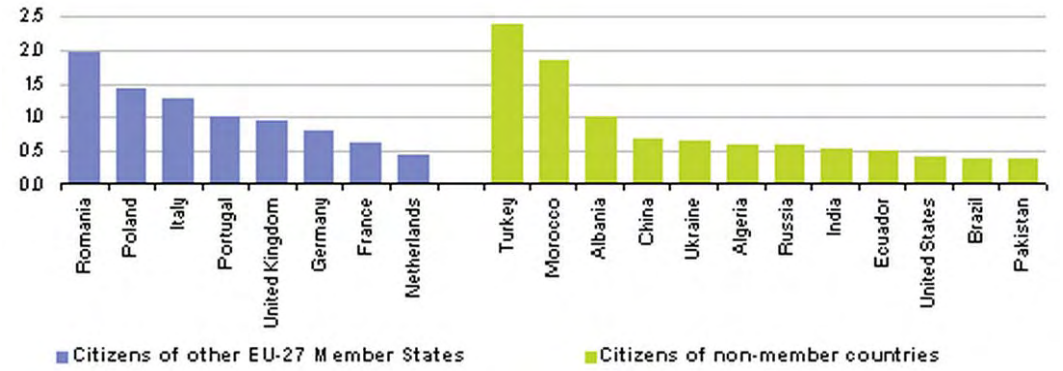

Figure 1. Migration population statistics

Worldwide and in this case in the European Union, the global redistribution processes occur because of past investment efforts of less developed countries, deficient human capital, are present benefit for the destination countries of migrants. A negative aspect of labor migration in Romania, in particular, is disqualifying employment. Typically, most people who migrate in search of a job, having a high enough training, is committed to work seasonal, unskilled. Many migrants are exposed to hazardous working conditions, living in shabby conditions, exploitation in employment and inadequate access to medical services.

This raises another problem about the relationship between *human capital and poverty*. Economist Theodore Schultz argued that the link between human capital and poverty goes to a macro level. For the individual, household, this link is exemplary illustrated in the collection of articles written by Theodore Schultz and published in 1993 under the name of The Economics of Being Poor. On the one hand, health is an essential resource for individual development, in particular for the production of income. Impairment of health stock of individual / households lead to reduce labor, which a social actor can use to meet its needs. On the other hand, higher education capital implies a higher amount of labor due to increased productivity, implying a higher payment if it is sold .In addition, a higher level of training requires greater flexibility in adapting to specific conditions of the labor market, helping to avoid the risk of unemployment. Secondly, poverty may cause degradation of the human capital stock, obstructing the maintenance and development costs of it (lack of economic resources is associated with the impossibility of purchasing health services and education). Thus, you can enter a vicious circle of poverty permanent generator. Thirdly, as James Hackman (1999)[12] noted, the gap between the wages of more educated employees and less educated employees is increasing, resulting in levels of increasingly higher inequality, with negative effects in terms of chronic poverty. Hackman sees as a need to improve skills of the less skilled workers and points the importance of capital development, of education development as a way to prevent impoverishment, by making their education systems effective, especially through investment in training of individuals. Similarly, Thomas Davenport[13] (1999) builds a model of the employee as an investor in human (education) capital. He notes that in recent years the number of highly specialized jobs increased at all levels of education at the expense of unskilled or low specialized work. Continuously investing in education is thus a priority for individuals and insurance for the low risks of unemployment and poverty. On the other hand, companies can achieve a higher return by investing in the education of their employees rather than to increase economic capital stock. Effects in terms of labor productivity

[12] In Voicu, Accessed January 27, 2011. http://www.iccv ro/oldiccv/romana/dictionar/bog/bog_capum htm.
[13] Idem.

can be seen immediately; employees become more creative and having a high decisional independence and can react more efficiently with the best solutions in new and unexpected situations.

According with Gary Becker[14] the duration of training at work varies from approximately one hour in some simple activities (such as washing dishes), up to several years, for complicated tasks. Becker quoted Jacob Mincer who suggests that total investment in training at work can be almost as big as the investment in education. Changing employment is more common among lower skilled workers than among skilled workers.

Acquiring knowledge and skills through *Training at Work*. Many workers increase their productivity, acquiring new skills and perfecting old ones at work. Future productivity can be improved only by fee because otherwise there would be an unlimited demand for training programs. The cost includes the value of time and effort consumed by people trained, the knowledge taught by others, as well as equipment and materials used.

Becker mentioned that are two different types of training professions:

- General education - increases the marginal productivity of those trained in exactly the same way for companies that provide these programs, as well as others. The knowledge gained can be used in other firms.

- Specific training - increasing productivity in the sector, but not elsewhere.

General education. To underline the importance of job training there are several elements that highlight the Training Overview:

- Is useful in many other companies besides those which providing this program;

- Most training programs enhance workplace, apparently, the future marginal productivity of workers in firms that offer these programs, but the general preparation determines the marginal increase in their production in many other companies;

- Wage rates will rise as much / with exactly the same amount as the marginal production and thus firms offering such training programs will not obtain any profit.

In this context, Becker raises the question bellow: "Is it then reasonable for firms to promote general education programs that do not derive any profit?" The answer is that companies will promote the general education programs only if they are not obliged to bear the costs. Persons eligible for these programs will be willing to pay the costs because without, their future wages will not increase. Those qualified will earn lower during training because in that period are paid and trained at the same time and will earn later in life because then the profit is collected.

Companies which do not pay salaries accordingly to qualification would have difficulty in meeting market demand for skilled labor and tend to be less profitable than other firms. Companies that pay the costs of preparation, but at the same time, provide below-market wages for skilled personnel will be in the most difficult situation because they will attract too many people willing to receive training and too few skilled workers. Gary Backer underlines that companies which can qualify workers must share with outside firms the costs because this firms can use these workers in future without incurring any cost.

Specific Training. It has a specific character, can be defined as a training program with no effect on productivity of workers participating in courses and who will work in other firms.

A better qualification allows a more efficient workload. Firms that have a very strong monopoly of the application could be isolated from other competing firms, and virtually all their investment in work force is specific. Companies located in labor markets extremely competitive would face a constant threat of attack from other companies and could have smaller amounts available for these specific investments. If a company has paid the costs of a specific training program for employees who leave to take another job, her main expense would be partially wasted because it will not be able to charge any profit thereafter. Also, a fired worker, which paid the costs for specific training program would be unable to collect any profit

[14] Becker, 1997, p. 31-60.

Fluctuation labor - becomes important when the costs are charged to the employee or company, and this is certainly the effect of specific training. A firm is affected by the departure of an employee because it cannot find qualified new worker as profitable as those who leave the firm. Similarly, an employee who bears the cost of specific training program would suffer a loss if it is fired because he could not find a job with same conditions elsewhere. Companies that bear the cost of specific training might consider the fluctuating labor to get a profit large enough from the personnel left to compensate the loss caused by those leaving the company. Companies could, however, perform better, recognizing that the probability of departure is not fixed but depends on salary. Thus, to reduce the probability of failure, companies can offer once with finalizing the training courses higher wages than those that might be received elsewhere. Some aspects of this problem would improve, but other could go worse because higher wages would lead to a bid for higher qualified personnel than demand which will require a rationalization.

Rational firms pay employees with the general training same salaries and for those with specific skills a higher salary than they could obtain elsewhere. Employees with specific skills are less willing to leave the workplace compared to the general skills workers, firms are less concerned to dismiss such employees - the unemployment rates are inversely correlated with the volume of specific training. Fluctuation would be minimal for highly specialized employees and the maximum for those who have received general training so that their productivity will be a smaller increase in companies that have provided training than elsewhere (for eg. School). Specialized Workers receive initially higher wages than they could obtain in other companies, and wage growth in the latter should be higher than the initial difference for these workers to consider leaving. Thus, the rate of leaving the job and a temporary layoff rate among those with a specific qualification should be relatively small and have minimal fluctuations over the business cycle.

Conclusions

This paper explored the most representative literature on human capital and its impact on the Human Resources in Modern Economy. The literature reviews show that the qualitative dimension of human resources has an important role in a country's economic growth. In addition to investments that are made at the microeconomic level, it is needed also for the state concerns for the development of appropriate policies adequate to increase the quality of the human factor in that certain state. As Theodore Schultz and others have demonstrated, the main source of improvements in productivity through time has been the substitution of ideas, skills and knowledge for physical resources and manual labor. But the acquisition of human capital requires resources that poor people everywhere have difficulties to acquire. Because there are limited resources for human capital formation, especially in poor countries, ways must be found to enable people to acquire these resources and to use them efficiently in the production of knowledge and skills. The choosing to continue studies creates prerequisites for higher future earnings. Gary Becker in his analyses showed that people with higher education will have higher earnings than those with education in secondary schools, and the latter mentioned will earn more than those who have not managed to finish high school. The choice to continue their studies is based on cost-benefit analysis. For people with low income, mostly, costs seem to be much larger than the immediate benefits. On the other hand, investment in human capital does not aim only individual level but also at organizational and state level (in policies). From an economic point of view, transaction-costs indicate that firm gains a competitive advantage when they own firm-specific resources that cannot be copied by rivals. Thus, as the uniqueness of human capital increases, firm have incentives to invest resources into its management and the aim to reduce risks and capitalize on productive potentials. In the same time, individuals need to enhance their competency skills in order to be competitive in their organizations. Studies also clearly substantiate the fact that financial performance is positively impacted through the consideration of human capitals. State intervention through policies not only helps increase human capital, but also the state

regulations can discourage migration of individuals with above average education in poor areas in educational equity, while local investments in building human capital.

This paper represents a starting point for future research in human resources regarding human capital investment, especially for a further investigation approaching the situation of human capital in Romania.

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FOREIGN DIRECT INVESTEMENTS FLOWS IN BLACK SEA ECONOMIC COOPERATION

RADU-MARCEL JOIA*

Abstract

We live in a time when the world's economy is in a constantly change. Foreign direct investments flows are in actual economy one of the most dynamic and prospective part of the world's economy being in a continuous globalization. These international financial flows determine the traders who take part at the world's economy to know to adopt a specific management in the international affairs field. We are viewers of an unprecedented expansion of foreign direct investments.

The main objective of the paper is to analyze the foreign direct investments flows in Black Sea Economic Cooperation. This study is based on UNCTAD reports and on an econometrical model which gives us the possibility to create different analysis concerning FDI flow in this cooperation. So we defined a simple regression model, in which the dependent variable is represented by Nominal and real GDP, total and per capita, variable explicated by FDI flows, using as method the Least Squared, including 19 observations. Through this paper, we tried to illustrate the relation between the FDI flows and the economic growth rate in the past years in Romania, member of Black Sea Economic region.

In line with a general upward trend in FDI to Central and Eastern Europe, inward FDI to the Russian Federation held steady between 1998 and 2001, at an annual average of $2.8 billion. In Black Sea Economic region, Russian average is the biggest one, Russia being a leader country in warding FDI. The Russian Federation is by far the leading investor country in the region, accounting for more than 75% of its annual outflows. Inward and outward direct investments flows in Russia have reached in 2009 an amount of $38,722 billion. In Romania, following years of stagnation at very low levels, 1991 to 1997, FDI flows reached $1.1 billion in 2002. Inflows to Bulgaria peaked at $1 billion in 2000; the surge is largely due to flows from developed countries. Inward and outward direct investments flows in Romania has reached the highest level in 2008, when the total amount was $13,909 billion, in 2009, the world crisis, has influenced the trends in Romania, so the flows have reached only $6,329 billion.

So our analyze is based on seeing the evolution of the FDI flows in this economic region, specifically the case of Romania and based on the results of the Least Squared method we will extract some conclusions concerning the dependency that exists between FDI flows and GDP.

Keywords: *FDI flows, Black Sea Economic Cooperation, inward and outward of FDI, economical growth rate, Nominal and real GDP, total and per capita.*

1. Introduction

Investments are a part of GDP, is one element that determines a country's economic growth. As we know, from a macro perspective, there are two types of economic disparities, the expansionary gap respectively a recession one. When we have an expansionary gap, it is characterized by heating of the economy, all the components of GDP is rising. Over time, Romania has gone through the gaps so expansionary, but also gap characterized by recession. The period 2004-2008 was an expansionary economic cycle, and this is illustrated by the size of FDI flows in our country.

In 1992, Romania together with 11 other BSEC countries formed an organization in Eastern Europe, which wants to bring harmony from demographic and economic point of view, especially in this region with great growth potential. Becoming chairman of the BSEC, Romania wants to promote and to develop the region, respecting economic and social principles. The FDI flows analysis is based on the statistical databases extracted from the UNCTAD website, actual data that demonstrate that

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this organization, representative for Black Sea region is one with a huge economic potential, FDI flows reaching impressive values. We chose as an example of our detailed analysis, Romania, a representative country for this organization, along with Russia, motivated also by the fact that at present it holds the presidency of this global organization.

Principles and areas of cooperation in the Black Sea Economic Cooperation

The 25th June 1992 was the date when the Heads of State and Government of eleven countries: Albania, Armenia, Azerbaijan, Bulgaria, Georgia, Greece, Moldova, Romania, the Russian Federation, Turkey and Ukraine signed in Istanbul the Summit Declaration and the Bosphorus Statement giving birth to the Black Sea Economic Cooperation (BSEC).

It came into existence as a unique and promising model of multilateral political and economic initiative aimed at fostering interaction and harmony among the Member States, as well as to ensure peace, stability and prosperity encouraging friendly and good-neighbourly relations in the Black Sea region.

The BSEC Headquarters - the Permanent International Secretariat of the Organization of the Black Sea Economic Cooperation (BSEC PERMIS) - was established in March 1994 in Istanbul. With the entry into force of its Charter on 1 May 1999, BSEC acquired international legal identity and was transformed into a full-fledged regional economic organization: **ORGANIZATION OF THE BLACK SEA ECONOMIC COOPERATION.** With the accession of Serbia and Montenegro in April 2004, the Organization's Member States increased to twelve member state.

Through this declaration the Founding members determined to promote a lasting and closer cooperation among the states of BSEC Region, conscious of the growing role importance of regional initiatives in promoting progress and shaping contemporary international life. This cooperation is first of all an economical one, aware of the potential of the Founding Members and the opportunities for enhancing the mutually advantageous economic cooperation.

This cooperation share the common vision of the Founding Members of their regional cooperation as a part of the integration process in Europe, based on human rights and fundamental freedoms, prosperity through economic liberty, social justice, and equal security and stability which is open for interaction with other countries, regional initiatives and international organizations and financial institutions.

This organization is determined to resolve economic cooperation as a contribution to the achievement of a higher degree of integration of the Founding Members into the world economy, expressing the desire of their countries and people for constructive and fruitful collaboration in wide ranging fields of economic activity with the aim of turning the BSEC Region into one of peace, stability and prosperity.

Which are the principles and the objectives of this organization? The following principles and objectives shall be promoted through the BSEC activities at various levels:

- to act in a spirit of friendship and good neighborliness and enhance mutual respect and confidence, dialogue and cooperation among the Member States;
- to further develop and diversify bilateral and multilateral cooperation on the basis of the principles and rules of international law;
- to act for improving the business environment and promoting individual and collective initiative of the enterprises and companies directly involved in the process of economic cooperation;
- to develop economic collaboration in a manner not contravening the inter-national obligations of the Member States including those deriving from their membership to international organizations or institutions of an integrative or other nature and not preventing the promotion of their relations with third parties;
- to take into account the specific economic conditions and interests of the Member States involved;

• to further encourage the participation in the BSEC process of economic cooperation of other interested states, international economic and financial institutions as well as enterprises and companies[1].

In accordance with the agreed principles and with the aim of utilizing more effectively their human, natural and other resources for attaining a sustained growth of their national economies and the social well-being of their peoples, the Member States shall cooperate in the following areas: *trade and economic development*, banking and finance, communications, energy, transport, agriculture and agro-industry, health care and pharmaceutics, environmental protection, tourism, science and technology, exchange of statistical data and economic information, collaboration between customs and other border authorities, human contacts, combating organized crime, illicit trafficking of drugs, weapons and radioactive materials, all acts of terrorism and illegal migration, or in any other related area, following a decision of the Council.

Romanian chairmanship of the organization of the black sea economic cooperation

BSEC is a regional organization whose principles and objectives aimed at developing and diversifying the bilateral and multilateral economic cooperation based on principles and norms of international law. In order to accomplish these objectives, the BSEC is working to improve the business environment and promoting individual and collective initiatives of companies involved in economic cooperation.

Romania considers that the political valences of the intrinsic organization and a solid economic cooperation and dialogue, including at political level, creates a solid basis for cooperation of the BSEC Member States and the region. Thus, good neighborly relations, mutual trust, dialogue and cooperation between Member States, are characteristics for BSEC.

Wider Black Sea Region has a considerable human and economic potential, whose effective use may also help to overcome the negative effects of international economic context. The strategic position of the BSEC Member States defines the Black Sea area as a hub of transport corridors and trade routes. However, the region has substantial natural resources, including energy. These arguments explain the growing international interest to the region.

BSEC was among the first initiatives launched in the Black Sea on 25 June 1992, when Heads of State or Government of eleven countries - Albania, Armenia, Azerbaijan, Bulgaria, Georgia, Greece, Moldova, Romania, Russian Federation, Turkey and Ukraine signed the "Istanbul Declaration". With the entry into force of its Charter on 1 May 1999, BSEC acquired international organization status, becoming an economical cooperation organization the most representative and well developed from an institutional perspective, for a geographical area of 20 million square kilometers (Black Sea littoral states, the Balkans and the Caucasus).

Along with its economic mission defined by the statutory documents, the BSEC is a useful platform for meetings and consultations at various levels, bringing a distinct contribution, implicit in the BSEC regional confidence building. As EU member states from the Black Sea region (along with Bulgaria and Greece) and the BSEC founding state, the fundamental premise of **chairmanship of the organization of the black sea economic cooperation** from Romania, based on the organization's governing documents, is to **increase cooperation and dialogue with BSEC**, both to strengthen and increase economic cooperation and to achieve a positive impact on relations between all Member States.

Prior to the current mandate of **chairmanship of the organization of the black sea economic cooperation** which will be exercised during the period January to June 2011, Romania has also held similar qualities in 1996, 2000, 2006.

[1] Charter of the Organization of the Black Sea Economic Cooperation, The Charter entered into force on 1 May 1999.

The dominant actions of Romania in BSEC has been and will continue to be full participation in economic projects whose effects are multiplied and added value certain activities on all sizes and all BSEC members.

Thus, Romania's actions as **chairman** of BSEC will pursue revitalization of economic cooperation, and emphasizing practical results-oriented nature of the organization's projects.

2. FDI flows in Black Sea Economic Cooperation

BSEC is one of the most important organizations in Eastern Europe, and it is included in UNCTAD statistics concerning economical growth. We tried to analyze the FDI flows in this region. So as we can see, in Table 1 we have all the data concerning FDI flows for the 12 countries which are members of Black Sea Economic Cooperation. The source of the data is UNCTAD statistics and reports; the data is presented from 1990 to 2009. So we presented 19 observations, for each year and for each country the FDI flows.

After making a brief analyze on Table 1 we can observe that from 1990 to 2009, only Greece and Turkey have had constantly inward and outward foreign direct investments and the biggest flows as we can see are in Russia. So in BSEC, Russian Federation has a very big influence concerning the FDI flows and the economical situation. If we compare each year starting with 2000 we can see that Russia has a leadership position in inward and outward investments.

Table 1 – FDI flows in Black Sea Economic Cooperation 1980-2009

Year/ Economy	Albania	Armenia	Azerbaijan	Bulgaria	Georgia	Greece	Moldova	Romania	Russia	Serbia	Turkey	Ukraine
1990	0	0	0	4	0	1.005	0	**0**	**0**	0	684	0
1991	0	0	0	56	0	1.135	0	**40**	**0**	0	810	0
1992	20	2	0	42	0	1.144	17	**77**	**1.161**	0	844	200
1993	68	1	0	40	0	977	14	**94**	**1.211**	0	636	200
1994	53	9	22	105	8	981	12	**341**	**690**	0	608	159
1995	70	25	155	90	6	1.053	67	**419**	**2.066**	0	885	267
1996	90	18	591	109	54	1.058	24	**263**	**2.579**	0	722	521
1997	48	52	1.051	505	243	984	79	**1 215**	**4.865**	0	805	623
1998	45	221	948	537	265	71	76	**2.031**	**2.761**	0	940	743
1999	41	122	355	819	82	562	38	**1.027**	**3.309**	0	783	496
2000	144	104	130	1.016	131	1.108	128	**1.057**	**2.714**	0	980	595
2001	206	70	227	809	110	1.589	103	**1 158**	**2.748**	0	3.352	792
2002	135	111	1 392	923	160	50	84	**1 141**	**3.461**	0	1.081	693
2003	178	121	3 285	2.089	335	1.275	74	**2 196**	**7.958**	0	1.693	1.424
2004	346	248	3 556	3.397	492	2.102	146	**6.436**	**15.444**	0	2.779	1.715
2005	264	239	1.680	3.916	453	623	191	**6.483**	**12.886**	0	10.010	7.808
2006	325	453	-584	7.804	1.170	5.355	233	**11.367**	**29.701**	0	20.223	5.604
2007	662	661	-4.749	12.388	1.750	2.111	539	**9 921**	**55.073**	0	22.023	9.891
2008	988	1.132	14	9.795	1.564	4.499	708	**13.909**	**75.461**	2.995	18.148	10.913
2009	*979*	*838*	*473*	*4.467*	*764*	*3.355*	*86*	***6.329***	***38.722***	*1.920*	*7.611*	*4.816*

(US Dollars at current prices and current exchange rates in millions)

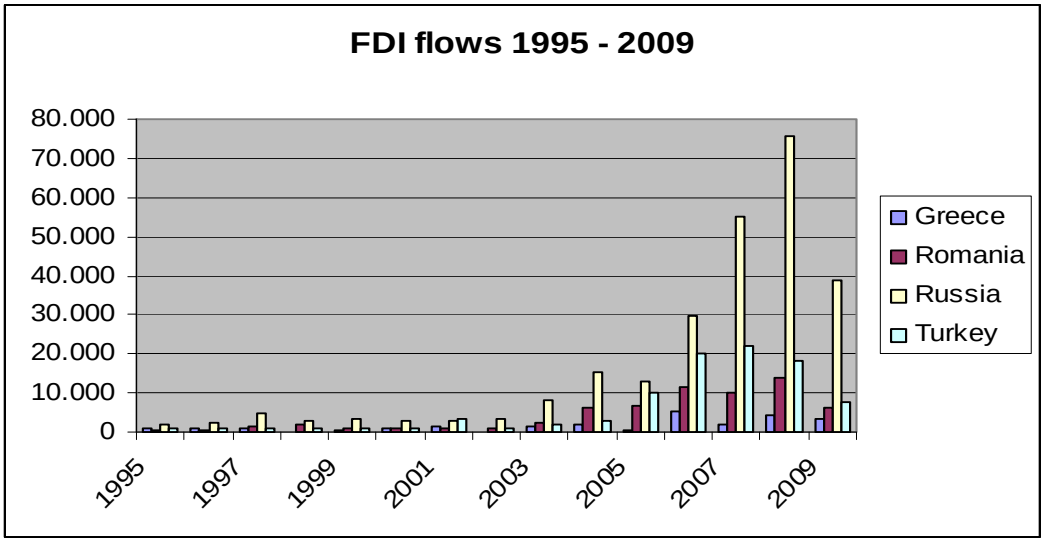
Source: Data extracted from UNCTAD statistics (http://unctadstat.unctad.org/TableViewer/tableView.aspx)

"2006 was a year when FDI flows have raised significantly compared to previous years, which makes it a reference year. During this period, inflows into developed countries increased by 47%, reaching a turnover of $ 857 billion, those to developing countries increased by 21% and in the process of transition towards a market economy increased by 68%, record growth rates for this category of countries..... And with regard to Eastern Europe, Russian Federation is the most significant host country of these investment flows."[2]

In Figure 1, we selected from the Table 1 the countries more significant, Greece and Turkey, because this two countries have had constantly FDI flows during 29 years, from 1980 to 2009, and Romania and Russian Federation, because both having direct contact with Black Sea had the opportunity to attract more FDI. We selected Russia because it is the leader of FDI flows in this economical region.

"2007 was a year of steady growth of FDI, even though in its second half the financial crisis began. As a result we can say that globally FDI flows rose by 30% to a rate of $ 2.063 billion. In addition, reinvested profits accounted for 30% of total FDI."[3] As the authors of this article said, 2007 was an year of expansion of FDI; as we can see in Figure 1, starting with 2006 and 2007, FDI flows in this region have growned, the most significant growth being in Russia in 2008, followed by Turkey and Romania in the same year. Globally "2008 marks the end of a cycle of expansion of foreign direct investment, cycle that began in 2004"[4]. As we can see from Table 1 in 2009 all the FDI flows are affected comparing with the expansion from 2004 to 2008.

Figure 1 – FDI flows 1995 – 2009 in BSEC



Source: Data extracted from Table 1, UNCTAD statistics (http://unctadstat.unctad.org/TableViewer/tableView.aspx)

[2] Huidumac – Petrescu, C. E., **Joia, R.,** Hurduzeu, Gh., Vlad, L. B., *„Expansiunea investitiilor straine directe – factor determinant al globalizarii"*, revista Economie teoretică şi aplicată, Volumul XVIII (2011), No. 1(554), pp. 166-175, ISSN 1844-0029, CNCSIS categoria B+, volum indexat EBSCO Publishing, DOAJ, ICAAP si EconPapers.

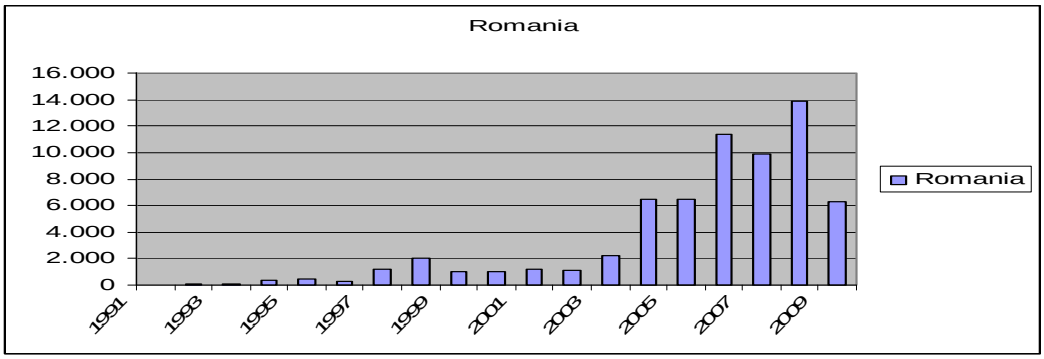
[3] Huidumac – Petrescu, C. E., **Joia, R.,** Hurduzeu, Gh., Vlad, L. B., *„Expansiunea investitiilor straine directe – factor determinant al globalizarii"*, revista Economie teoretică şi aplicată, Volumul XVIII (2011), No. 1(554), pp. 166-175, ISSN 1844-0029, CNCSIS categoria B+, volum indexat EBSCO Publishing, DOAJ, ICAAP si EconPapers.

[4] Idem.

2009 was a year of considerable reduction in the FDI flows area, continuing their trend to be like in 2008, according to UNCTAD, World Investment Prospects Survey 2009-2011, June 2009. In 2009, FDI flows fell by 46% over the same period of 2008 in emerging countries. The 4 analyzed countries are in this category, developing ones. The results of 2009 show negative effects of FDI flows, their reduction being a drastic one, as we can see from Table 1.

Now we will make an analysis on Romania, to see the evolution of FDI flows, as one of the most important members of BSEC.

Figure 2 – FDI flows 1991-2009



In terms of our country, we can expect the upward trend of FDI from 2004 to 2008 is preserved, so this can be seen in Figure 2 and in Table 1. Year 2004 brings a great increase in foreign investment flows in our country, their value tripling over the previous year. This cycle of four years of expansion of FDI has led to considerable economic growth seen in the value of the gross domestic product, the main indicator of economical growth. This time, a period of economic expansion, by a macroeconomic point of view, an expansionary gap, a heating of the economy, which has been determined also by the growth of FDI flows.

Peak reached in terms of attraction, namely the direct foreign investment, was the 2006 and 2008, when the flows have reached impressive values, if we compare our values with other's BSEC countries. Romania is part of the leading countries in terms of expansion of FDI flows, together with Russia, the leader, and Turkey (see in Table 1). But the global economic crisis in this region makes its appearance later, and in 2009, full year of recession, its impact is felt. In Romania, FDI flows, reached half of the value from the previous year, effectively halving the share of the value recorded in the previous period, the growth indicator has recorded a disappointing value compared with previous years, years of heating of the economy.

Based on data presented in Table 2, data extracted from UNCTAD.org, we made a small econometric analysis on the dependency that exists between FDI flows and Nominal and real GDP, total and per capita. We created a simple regression model, where the dependent variable is Nominal and real GDP, total and per capita, and the independent or explanatory variable is represented by the value of FDI flows. In this model we wanted to analyze whether a positive or negative change in flows determines in what proportion the GDP.

Table 2 – Real GDP vs. FDI flows

Year	Nominal and real GDP, total and per capita (US Dollars at current prices and current exchange rates in millions)	FDI flows (US Dollars at current prices and current exchange rates in millions)
1991	29.054,33	40
1992	19.715,60	77
1993	26.546,04	94
1994	30.283,94	341
1995	35.726,50	419
1996	35.563,02	263
1997	35.533,25	1.215
1998	**42.115,35**	**2.031**
1999	35.592,24	1.027
2000	37.025,35	1.057
2001	40.180,94	1.158
2002	45.988,51	1.141
2003	59.466,02	2.196
2004	75.794,73	6.436
2005	99.172,61	6.483
2006	**122.695,85**	**11.367**
2007	169.285,96	9.921
2008	**203.317,15**	**13.909**
2009	160.318,74	6.329

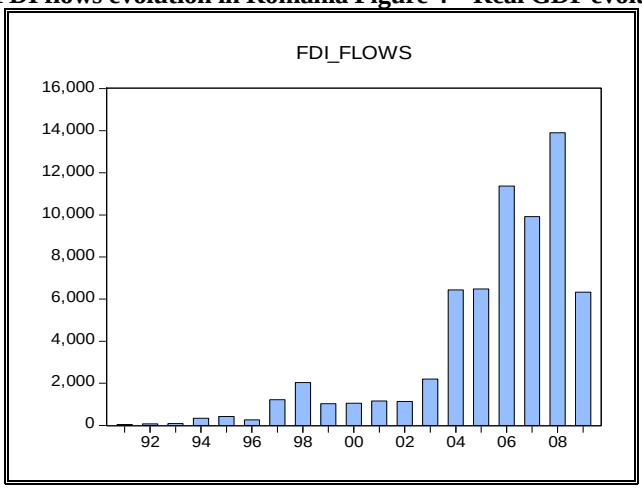
Source: Data extracted from UNCTAD statistics (http://unctadstat.unctad.org/TableViewer/tableView.aspx

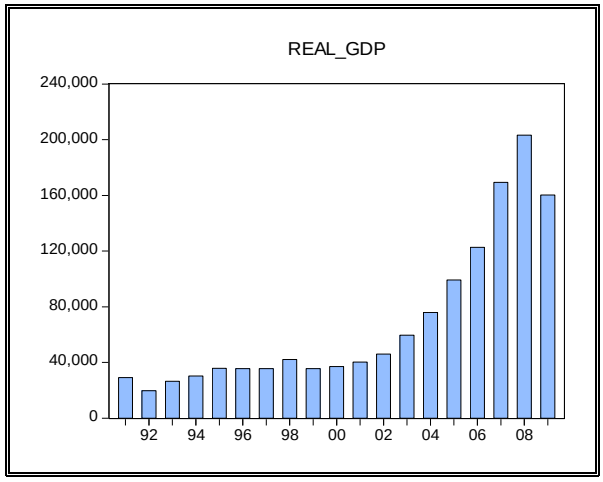
We analyzed the economic period since 1991, because until 1990, Romania hasn't been an open economy, because of the political system. Beginning with 1990, Romania started to attract investment flows. If performing a brief analysis of the data presented in Table 2 we can see that starting from 1991 to 1998 there is an upward trend of FDI flows. 1999 represents a break, halving the amount of FDI flows since 1998 and remain stable for a certain period of time. Of course this can be explained by political factors that influenced in a greater measure the FDI flows.

Phenomena that have occurred internationally with FDI flows, namely, their growth in the business cycle 2004 - 2008 are held in Romania too (see in Figure 3). According to statistics provided by UNCTAD, we can observe that 2004 is a year in which the FDI flows have tripled the amount recorded in 2003, following an upward trend and in 2006 they reached an impressive value, same in 2008. So our strong FDI's glory years are 2006 and 2008. Unfortunately, the economic crisis hasn't prevented our country and 2009 is a year in which its effects are felt, FDI is affected.

Looking at Figures 3 and 4, we can see that every change in FDI flows will lead to a modification of the GDP, which we underline a significant dependence between the two variables.

Figure 3 – FDI flows evolution in Romania Figure 4 – Real GDP evolution in Romania





Simple regression model is widely used in applications of economic theory, but we chose the model application to the existence of a linear relationship between real GDP and FDI Flows. As mentioned above, real GDP is explained variable and FDI Flows is an explanatory variable or independent. The model has been defined by the following equation:

REAL_GDP i = bi + a FDI_FLOWS i + ε i, where:

- ✓ **REAL_GDP** - Nominal and real GDP, total and per capita – dependent variable;
- ✓ **REAL_GDP i** - Nominal and real GDP, total and per capita share;
- ✓ **FDI_FLOWS** – FDI flows – independent or explanatory variable;
- ✓ **FDI_FLOWS i** – FDI flows share;
- ✓ a, b – model parametres;
- ✓ ε = residual variable;
- ✓ i = 1.....19

This model is analyzed by the simple regression method in conditions which do not specify the existence of other exogenous variables that depend on real GDP. In the conduct of research we needed more data series, so by default and data sources. Thus, we sought statistical database on the UNCTAD website.

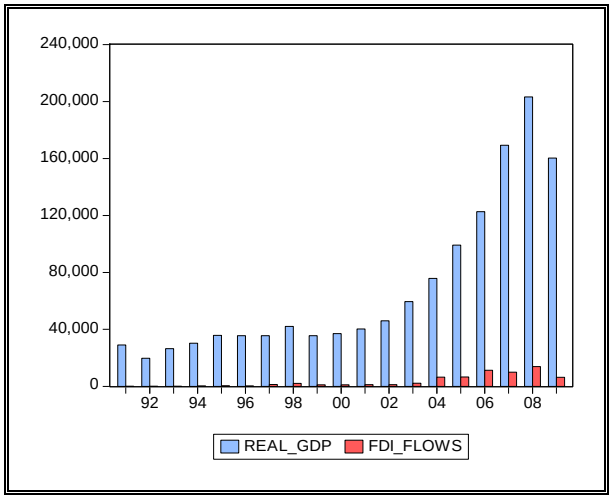
To determine the previous econometric model, by estimating two parameters, bi, a, are needed real databases for the two variables REAL_GDPi and FDI_FLOWSi. The data series used are those corresponding to Table 2. Data series are designed for a total of 19 years, from 1991 to 2009, so there are 19 observations, i = 1 ....19.

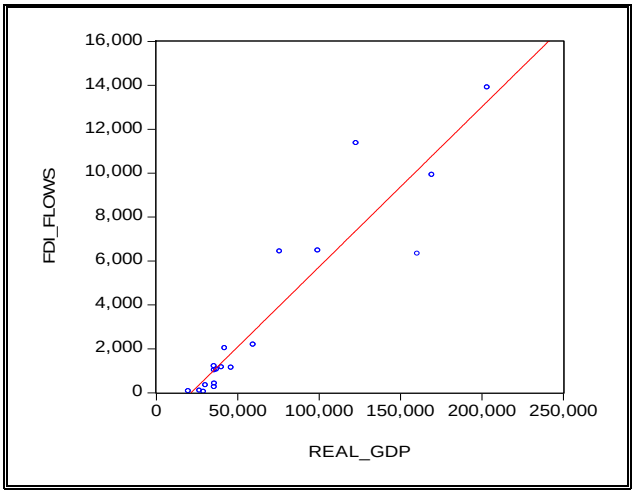
Data on real GDP and FDI flows have annual frequency refers to Romania during 1991-2009, and did not need any transformation. Units of measurement for both variables are U.S. Dollars at current prices and current exchange rates in millions. The two data sets are used to calculate descriptive indicators, development of graphics and statistical estimation. To obtain the required characteristics of the original series regression model requires no additional processing in this case.

Based on the data series can make graphics, data interpretation (see in Figure 3 and 4). Depending on the measurement scale that is each feature, we can calculate a number of descriptive indicators, alternative indicators to describe and characterize the shape distribution. These indicators can be calculated separately for each variable or several variables simultaneously. Equally, we can develop a histogram.

For a better illustration of the evolution of both explained and explanatory variables we created different graphs, illustrated in Figure 5 and 6.

Figure 5 – Real GDP vs. FDI flows Figure 6 – Scatter with Regression





Thus, in Figure 6 we can observe the linear dependence that exists between real GDP and FDI flows. Such an explanatory variable affects real GDP in a proportion of 87.80%, according to calculations made through **Least Squares Method,** calculations illustrated in Table 3.

Table 3 - Least Squares Method

Dependent Variable: REAL GDP				
Method: Least Squares				
Sample: 1991 2009				
Included observations: 19				
	Coefficient	Std. Error	t-Statistic	Prob.
FDI FLOWS	12.04560	1.088876	**11.06242**	0.0000
C	27071.14	5912.561	4.578581	0.0003
R-squared	**0.878029**	Mean dependent var		68598.74
Adjusted R-squared	**0.870854**	S.D. dependent var		55406.32
S.E. of regression	19911.32	Akaike info criterion		22.73526
Sum squared resid	6.74E+09	Schwarz criterion		22.83468
Log likelihood	-213.9850	Hannan-Quinn criter.		22.75209
F-statistic	**122.3770**	Durbin-Watson stat		1.480325
Prob(F-statistic)	0.000000			

Following the interpretation of these results, the GDP variation depends on a ratio of 87.80% by the FDI flows. Real GDP is equal to 12.04560 x FDI_FLOWS + 27071.14.

We can see that the parameters are significantly different from zero, so that when p = 0, F is 122.3770, so the model is valid. After the calculations are done we can observe:

- regression slope value is 12.04560, statistically higher than 1, which does not show a marginal propensity to make investments; if the slope was less than 1, had a marginal propensity to investment, the slope is positive, so the parameters are significant and is a significant dependence between variables, it showed also by the value of R-squared, which is 0.878029, an addiction of 87.80% between the two variables analyzed;
- FDI_FLOWS coefficient and C coefficient are different from zero, rejecting the null hypothesis, t-statistic evaluation (high in both cases) and P-value equal to 0;
- Between the value of F statistics and t, which corresponds to the regression slope, check that relationship, t2 = F (11.06242 squared = 122.3770).
- From small values of the calculated probabilities and from those of t student statistics we reject the null hypothesis and conclude that the parameters are significant.
- The value of Adjusted R-squared shows that the dependent variable variation is explained 87.08% by the model.
- F test or Fisher Test has more meanings: F-statistic has a high value, of 122.3770, and the probability calculated for F-statistic is 0, so our regression model is correct, confirmed by the R-squared and Adjusted R-squared, which have values close to 1.
- R squared/Adjusted R shows the dependent variable variation R squared = **0.878029,** which means that FDI_FLOWS explain 87.80% of REAL_GDP variation.
- Durbin Watson test - we can verify the hypothesis of autocorrelation. It is better if this value is close to "2", because the relationship with first order autocorrelation coefficient r or ρ = DW = 2 (1-r). The coefficient measures the connection / correlation / dependency between two variables. The value of Durbin Watson statistic is 1.480325, close to 2, which indicates that errors are independent and leads to the conclusion that the dependency equation is correctly specified.

As a conclusion to our analyze we can say that following years of stagnation at very low levels, FDI flows to Romania suddenly jumped to more than US$ 1 billion in 1997 and remained around that level through 2001 (see table 2). Accordingly, the country's FDI stock rose eight-fold during the second half of the 1990s to reach about US$ 7 billion in 2000 (see table 4), the fifth largest in size in Central and Eastern Europe. As we can see, 9 years later, Romania achieved a stock of FDI of US$ 73.983 billion in 2009, Russia being the Leader with US$ 252.456 billion.

Table 4 – FDI stock in BSEC
(US Dollars at current prices and current exchange rates in millions)

An/Economy	Bulgaria	Greece	Romania	Russia	Turkey	Ukraine
1991	168	6.816	**44**	0	11.960	0
1992	210	7.960	**122**	0	12.804	284
1993	250	8.937	**215**	183	13.440	484
1994	355	9.918	**402**	3.280	14.048	484
1995	445	10.971	**821**	5.601	14.933	897
1996	554	12.029	**1.097**	8.145	15.655	1.438
1997	1.059	13.013	**2.417**	13.612	16.460	2.064
1998	1.597	13.084	**4.527**	12.912	17.400	2.801
1999	2.184	15.890	**5.472**	18.303	18.183	3.248
2000	2.704	14.113	**6.953**	32.204	19.163	3.875
2001	2.945	13.941	**8.339**	52.919	19.534	4.801
2002	4.074	15.561	**7.846**	70.884	18.684	5.924
2003	6.371	22.454	**12.202**	96.729	33.518	7.566

2004	10.108	28.482	**20.486**	122.295	38.598	9.606
2005	13.851	29.189	**25.816**	180.228	71.182	17.209
2006	23.482	41.288	**45.452**	265.873	95.326	23.125
2007	37.862	53.221	**62.961**	491.232	153.124	38.059
2008	44.446	38.119	**67.911**	213.734	70.118	46.997
2009	50.727	44.927	**73.983**	252.456	77.729	52.021

Source: Data extracted from UNCTAD statistics (http://unctadstat.unctad.org/TableViewer/tableView.aspx

As we could see in the econometrical model, there is a significant dependence between the GDP and the FDI flows. Our model is based on real database and we could see that in proportion of 87.80%, the GDP is explained by the FDI flows. That means that the FDI flows not only has an influence on GDP value, but also their proportion during the time has gowned. In a next paper we will analyze the relation between FDI stock and GDP, to see if there is any difference.

3. Conclusions

Black Sea Economic Cooperation is a regional organization whose principles and objectives are developing and diversifying the geographical region, with such an amazing economical potential. First of all this organization has an economical purpose, more that social and demographical.

Romania considers that good neighborly relations, mutual trust, dialogue and cooperation between Member States, are characteristics for BSEC. Black Sea Region has a considerable human and economic potential, whose effective use may also help to overcome the negative effects of international economic context. The strategic position of the BSEC Member States defines the Black Sea area as a hub of transport corridors and trade routes. However, the region has substantial natural resources, including energy. These arguments explain the growing international interest to the region.

In terms of our country, Romania, the FDI flows from 2004 to 2008 increased. This cycle of four years of expansion of FDI has led to considerable economic growth seen in the value of the gross domestic product, the main indicator of economical growth. This time, a period of economic expansion, by a macroeconomic point of view, an expansionary gap, a heating of the economy, which has been determined also by the growth of FDI flows.

Peak reached in terms of attraction, namely the direct foreign investment, was the 2006 and 2008, when the flows have reached impressive values, if we compare our values with other's BSEC countries. Romania is part of the leading countries in terms of expansion of FDI flows, together with Russia, the leader, and Turkey. 2009 was a year of considerable reduction in the FDI flows area. In 2009, FDI flows fell by 46% over the same period of 2008 in emerging countries.

We made a small econometric analysis on the dependency that exists between FDI flows and Nominal and real GDP, total and per capita. We could see in the econometrical model, there is a significant dependence between the GDP and the FDI flows. Our model is based on real database and we could see that in proportion of 87.80%, the GDP is explained by the FDI flows. That means that the FDI flows not only has an influence on GDP value, but also their proportion during the time has gowned. In a next paper we will analyze the relation between FDI stock and GDP, to see if there is any difference.

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THE IMPORTANCE OF GOODS PRODUCTION AND INTERMEDIATE CONSUMPTION FOR AN INCREASED GDP

RADU-MARCEL JOIA*

Abstract
Human existence is conditioned, of course, by the consumption of goods to meet the needs. Using the property to obtain other goods in this way is not consumption, but production. Goods that are the object of consumption can be natural or economic (created or produced by man). The natural goods that we can find in the human consumption, even if there are extremely important, there are not the subject of our attention because they are a gift of nature. In economics, the effect that a good is predicted to have during or after it is consumed is designated by the term of utility. In the context of a severe economic crisis, which determines a real sacrifice of consumer's wishes, under the impact of budgetary constraint, the utility and the consumer optimum suffer various modifications.
Increasingly limited resources and low incomes lead to more people sacrifices concerning the goods that they will consume, respectively purchase. So we consume less, we produce less, causing a reduction in GDP. The economical crisis, through its effects has changed the people consumption habitudes by editing it according to the available resources. Manufacturers, in the absence of profits will be forced to find new solutions to attract consumers.
The main objective of this paper is to highlight the relationship that exists between the consumption, goods and services production and GDP. In terms of economics, the goods and services production and intermediate consumption directly influence GDP, as two independent variables and dependent GDP. We performed a simple regression model based on a series of data in Romania, during 1995-2009, to evidence the importance of the two independent variables in obtaining an increased GDP.

Keywords: goods and services production, intermediate consumption, increased GDP, budgetary constraint, economical crisis.

1. Introduction

Man and society, to exist, are forced to satisfy the needs and because nature provides ready-made only a little of the necessary, they must ensure all the others. The activities of all kinds through which people achieve the necessary form economic activity or economics. In essence, these are acts or transactions that are exercised by the people and nature together forming together the economy (of one area, one country, one region etc..). What causes people to act economically are: insufficient resources that nature provides ready-made, the needs while in time are growing and diversifying.

Needs are demands determined by the nature or by the social life. They represent the aspirations, expectations or human's unfulfilled desires. The needs nature and intensity are different in time and space. There are individual, collective and social needs; they are felt by each person in every way and in different intensities; the needs are different both in terms of how we perceive them and how to meet them. In comparison with the limited means the people have to meet their needs, they are much bigger and different and tend to grow and diversify quickest than the means of satisfying them. Resource limits are permanent but fluctuating in time.

Resources are the means of any kind which serve to satisfy needs or, depending on the progress of science, art and technology, are likely to serve this purpose. They are designed as both consumption and production (economic activities). In essence, resources are assets. Some resources are used directly in individual consumption, others are used in economic activities and there is another category used to make resources reserves.

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2. The dependence between GDP and goods production and intermediate consumption

Simple regression model is concerned with describing and evaluating the relationship between a dependent variable and one or more independent variables. Analyzed using regression functions, called regression functions, how the variable outcome (dependent) evolves in relation to changing one or more known variables (independent). The general form of the simple regression model: $f(x) = \alpha + \beta x$, where α, β are the parameters of linear regression function. If addiction is a stochastic, then: $y = f(x) + \varepsilon$, where ε is called error of significance and has a known probability distribution - is a random variable.

We created a simple regression model through which we tried to explore one of the most important economic aggregates, namely GDP. For this application we chose the GDP calculated by the method of production. In the application GDP calculated by the method of production is denoted by PIB_PR, representing the dependent variable. Through this application we tried to analyze the influence the production of goods and services (PBS) has on GDP calculated by the method of production. So in other words independent variable, the dependent variable is influencing the production of goods and services, denoted by PBS.

We defined a simple regression model, in which the estimated variable is represented by PIB_PR and explanatory variable is PBS. Of course GDP calculated by the method of production is also affected by other variables such as intermediate consumption, for example, the variable will be analyzed in another application, also through a simple regression model. We could estimate the dependence using a multiple regression model, but we want to show each independent variable influence on GDP, separately.

The decision to analyze the relationship between GDP by production method and the actual production of goods and services was taken from the study of two macroeconomic reference books. Depending on the method that underlies its determination, the GDP can be defined in three ways: GDP by production approach, GDP by expenditure approach and the income approach GDP. GDP represents the value calculated by the method of production of goods and services for final consumption, intermediate consumption being excluded, within a country, is a flow variable representing the sum of gross value added (GVA) carried out within the national economy, the rule of GDP site calculated at market prices, which include indirect taxes and excise taxes. In other words, we can observe other variables that influence the dependent variable in our model.

Simple regression model is widely used in applications of economic theory, but we chose the model application to the existence of a linear relationship between PIB_PR and PBS. As mentioned above, is PIB_PR represents GDP calculated by the method of production, explained variable, and PBS is the production of goods and services, representing the explanatory or independent variable. The model has been defined by the following equation:

$$\mathbf{PIB\_PR\ i = bi + a\ PBS + \varepsilon\ i,}$$

- ✓ PIB_PR – GDP calculated by the method of production - the dependent variable;
- ✓ PIB_PRi – GDP share calculated by the method of production;
- ✓ PBS – production of goods and services - independent variable;
- ✓ PBSi – production of goods and services share;
- ✓ a, b – model parameters;
- ✓ ε = residual variable;
- ✓ i = 1.....15

This model is analyzed by simple regression model in conditions which we do not specify the existence of other exogenous variables on which the GDP by production method depends. In the conduct of the research, I needed more data series. Thus, we sought statistical databases on various specialized websites, especially the annual statistical yearbooks.

To determine the previous econometric model, by estimating two parameters, bi and a, there are needed real data sets for the two variable PIB_PRi and PBSi. The data series used are those for GDP and production of goods and services, imported after processing in Excel and displayed in the table. 1. Data series are designed for a total of 15 years, from 1995 until 2009, so there are 15 observations, i = 1.... 15.

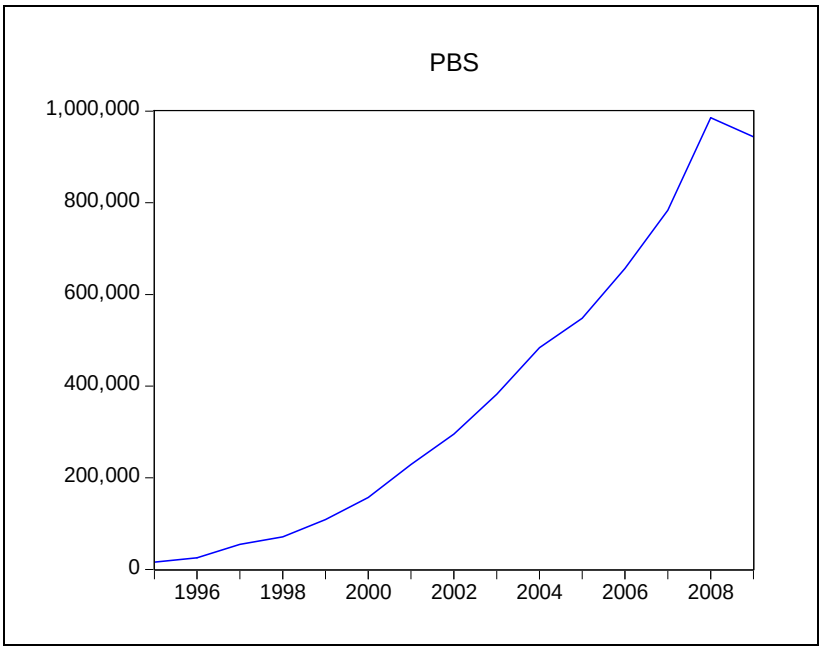
Table 1 – GDP by production method and production of goods and services evolution from 1995 until 2009, in Romania

AN	PIB_PR	PBS
1995	**7648,9**	**16004**
1996	**11384,2**	**25354,4**
1997	**25529,8**	**54366,2**
1998	**37055,1**	**71346,2**
1999	**55191,4**	**108872**
2000	**80984,6**	**156917,5**
2001	**117945,8**	**228796,5**
2002	**152017**	**295622,9**
2003	**197427,6**	**381863,6**
2004	**247368**	**483917,4**
2005	**288954,6**	**547894,3**
2006	**344650,6**	**656511,9**
2007	**416006,8**	**784007,5**
2008	**514700**	**985670,9**
2009	**491273,7**	**943867,3**

Source: National Statistic Institution, www.insse ro

Data on GDP and the production of goods and services have annual frequency refers to Romania during 1995-2009, and did not need any transformation. Units of measurement for both variables are million. The two data sets are used to calculate descriptive indicators, development of graphics and statistical estimation. To obtain the required characteristics of the original series regression model requires no additional processing in this case.

Based on the data series can make graphics for data interpretation. Depending on the measurement scale that is each feature, we can calculate a number of descriptive indicators, such as average, minimum and maximum outliers, alternative indicators to describe and characterize the shape distribution. These indicators can be calculated separately for each variable or several variables simultaneously. Equally, we can develop and histogram.



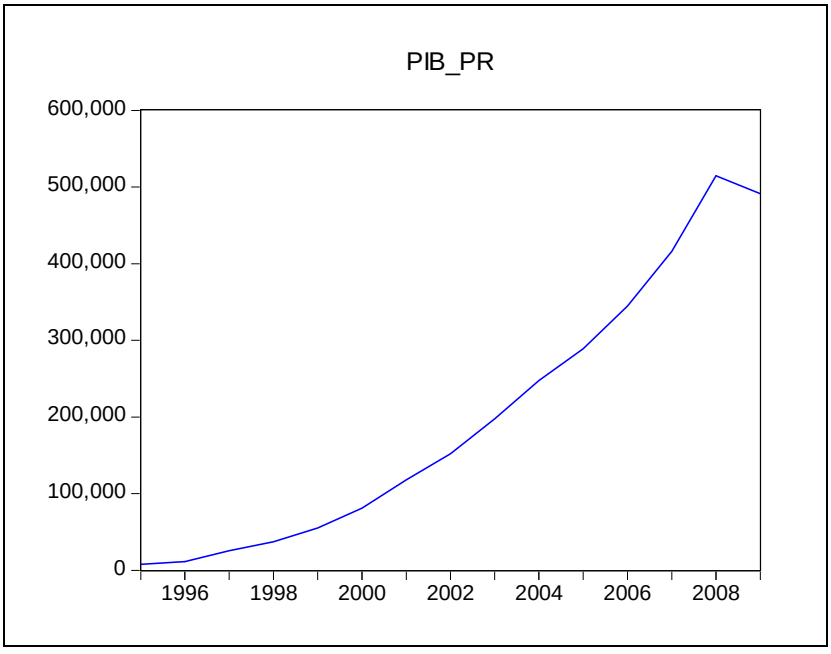
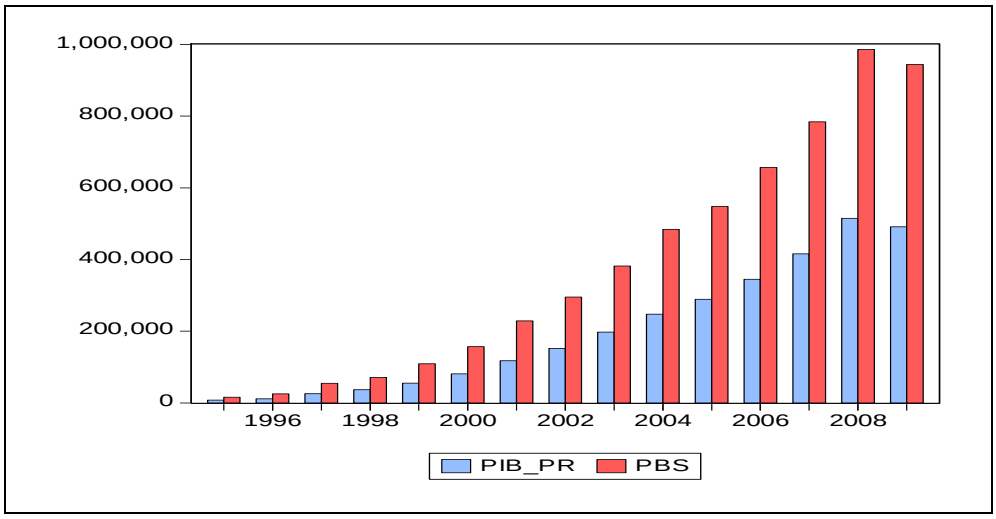


Figure 1: PBS evolution from 1995 until 2009 Figure 2: PIB_PR evolution from 1995 until 2009

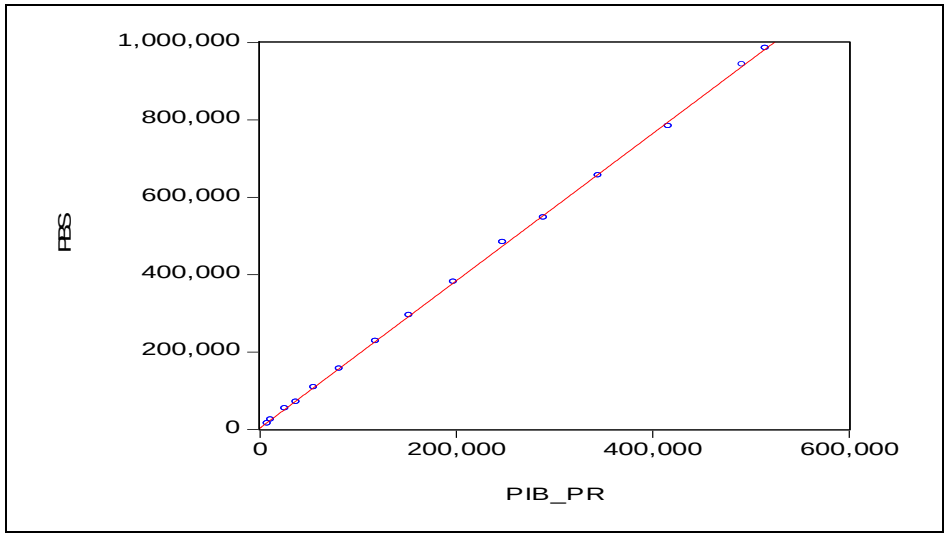
For a better illustration of the evolution of both explained and explanatory variables we created the following graph:

Figure 3: PIB_PR and PBS evolution from 1995 until 2009



After elaborating the histogram we can say that the two variables are highly dependent on one another, PBS greatly influencing PIB_PR, demonstrated by Adjusted R-squared that shows that the variation of the dependent variable is explained by the model rate of 99.97%. This shows the dependence between two variables.

Figure 4: PIB_PR vs. PBS



Following the interpretation of these results, the variation of GDP calculated by the method depends on the production rate of 99.97% in the production of goods and services. GDP by production approach is equal to 0.525499 x PBS - 1917.091. This equation reveals that between 1995 - 2009 minimum production of goods and services was 1917.091 million annually.

We can see that the parameters are significantly different from zero, so that when p = 0, F is 62809.83, so the model is valid. So we can say that the production of goods and services determine a rate of 99.97% variation PIB_PR.

Since the dependence between the independent and dependent variable in the model analysis, we conducted other tests on the explanatory variable. So we conducted an analysis to see if PBS is normally distributed.

Table 2 - Empirical Distribution Test for PBS

Empirical Distribution Test for PBS				
Sample: 1995 2009				
Included observations: 15				
Method	**Value**	**Adj. Value**	**Probability**	
Lilliefors (D)	0.149528	NA	> 0.1	
Cramer-von Mises (W2)	0.077164	0.079736	0.2089	
Watson (U2)	0.071135	0.073507	0.2186	
Anderson-Darling (A2)	0.522227	0.553560	0.1535	
Parameter	**Value**	**Std. Error**	**z-Statistic**	**Prob.**
MU	382734.2	86634.77	4.417790	0.0000
SIGMA	335535.0	63410.16	5.291503	0.0000
Log likelihood	-211.6363	Mean dependent var.		382734.2
No. of Coefficients	2	S.D. dependent var.		335535.0

We used the method of least squares for **PIB_PR i = bi + a PBS + ε i** and got:

Table 3 - Method: Least Squares

Dependent Variable: PIB_PR				
Method: Least Squares				
Sample: 1995 2009				
Included observations: 15				
	Coefficient	**Std. Error**	**t-Statistic**	**Prob.**
PBS	**0.525499**	0.002097	**250.6189**	0.0000
C	-1917.091	1051.675	-1.822892	0.0914
R-squared	**0.999793**	Mean dependent var		199209.2
Adjusted R-squared	**0.999777**	S.D. dependent var		176341.4
S.E. of regression	2632.447	Akaike info criterion		18.71278

Sum squared resid	90087116	Schwarz criterion	18.80719
Log likelihood	-138.3459	Hannan-Quinn criter.	18.71178
F-statistic	**62809.83**	Durbin-Watson stat	1.854276
Prob(F-statistic)	0.000000		

After the calculations are done we can observe:

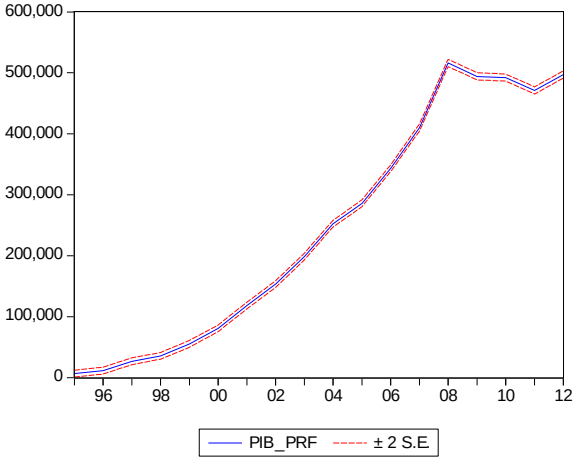
- regression slope value is 0.525499, statistically lower than 1, which show a marginal propensity to product; if the slope is less than 1, it has a marginal propensity to production, the slope is positive, so the parameters are significant and is a significant dependence between variables, it showed also by the value of R-squared, which is 0.999793, an addiction of 99.97% between the two variables analyzed;
- PBS coefficient and C coefficient is different from zero, rejecting the null hypothesis, t-statistic evaluation (high in both cases) and P-value equal to 0;
- Between the value of F statistics and t, which corresponds to the regression slope, check that relationship, t2 = F (250.6189 squared = 62809.83).
- From small values of the calculated probabilities and from those of t student statistics we reject the null hypothesis and conclude that the parameters are significant.
- The value of Adjusted R-squared shows that the dependent variable variation is explained 99.97% by the model.
- F test or Fisher Test has more meanings: F-statistic has a high value, of 62809.83, and the probability calculated for F-statistic is 0, so our regression model is correct, confirmed by the R-squared and Adjusted R-squared, which have values close to 1.
- R squared/Adjusted R shows the dependent variable variation R squared = **0.999793,** which means that PBS explain 99.97% of PIB_PR variation;
- Durbin Watson test - we can verify the hypothesis of autocorrelation. It is better if this value is close to "2", because the relationship with first order autocorrelation coefficient r or ρ = DW = 2 (1-r). The coefficient measures the connection / correlation / dependency between two variables. The value of Durbin Watson statistic is 1.854276, close to 2, which indicates that errors are independent and leads to the conclusion that the dependency equation is correctly specified.

Predicted values of GDP if the production will be 940,000.0, 900,000.0, and 950,000.0 in the next three years are presented in Figure 5. To this end we have covered these steps:

- We resized the data series by introducing three values for the following 3 years, range from 15 to baseline values will be 18 by the command: proc / structure / resize, we introduced the three prospective data;

- We expected the three values of GDP, depending on the values set for the production forecast command. In our case we obtain the following chart:

Figure 5 – Forecast GDP 2012



Forecast: PIB_PRF
Actual: PIB_PR
Forecast sample: 1995 2012
Included observations: 15

Root Mean Squared Error	2450.675
Mean Absolute Error	1804.273
Mean Abs. Percent Error	2.140805
Theil Inequality Coefficient	0.004675
Bias Proportion	0.000000
Variance Proportion	0.000052
Covariance Proportion	0.999948

Upon implementation of this process, we can see that the dependency relationship between two variables is very close. On a fall PBS, GDP will register a decrease and an increase in the explanatory variable, will be its growth. In other words we can conclude that the two variables are directly proportional, increasing and decreasing in the same way.

Our model was made also for the intermediate consumption. We created the same model, where the only difference was the explanatory variable, which was the intermediate consumption. We used the data from the National Statistic Institute for the same period and we got the following results. We started our analysis based on the following equation:

PIB_PR i = bi + a CI + ε i,

- ✓ PIB_PR – GDP calculated by the method of production - the dependent variable;
- ✓ PIB_PRi – GDP share calculated by the method of production;
- ✓ CI – intermediate consumption - independent variable;
- ✓ CIi – intermediate consumption share;
- ✓ a, b – model parameters;
- ✓ ε = residual variable;
- ✓ i = 1.....15

The results are presented in Table 4.

Table 4 - Method: Least Squares

Dependent Variable: PIB_PR				
Method: Least Squares				
Sample: 1995 2009				
Included observations: 15				
	Coefficient	Std. Error	t-Statistic	Prob.

CI	0.987052	0.005935	**166.3173**	0.0000
C	-3225.837	1590.667	-2.027978	0.0636
R-squared	**0.999530**	Mean dependent var		199209.2
Adjusted R-squared	0.999494	S.D. dependent var		176341.4
S.E. of regression	3966.241	Akaike info criterion		19.53259
Sum squared resid	2.05E+08	Schwarz criterion		19.62700
Log likelihood	-144.4944	Hannan-Quinn criter.		19.53159
F-statistic	**27661.43**	Durbin-Watson stat		**2.189366**
Prob(F-statistic)	0.000000			

After the calculations are done we can observe:

- regression slope value is 0.987052, statistically lower than 1, which show a marginal propensity to consumption; if the slope is less than 1, it has a marginal propensity to consumption, the slope is positive, so the parameters are significant and is a significant dependence between variables, it showed also by the value of R-squared, which is 0.999530, an addiction of 99.95% between the two variables analyzed;
- CI coefficient and C coefficient is different from zero, rejecting the null hypothesis, t-statistic evaluation (high in both cases) and P-value equal to 0;
- Between the value of F statistics and t, which corresponds to the regression slope, check that relationship, t2 = F (166.3173 squared = 27661.43).
- From small values of the calculated probabilities and from those of t student statistics we reject the null hypothesis and conclude that the parameters are significant.
- The value of Adjusted R-squared shows that the dependent variable variation is explained 99.95% by the model.
- F test or Fisher Test has more meanings: F-statistic has a high value, of 27661.43, and the probability calculated for F-statistic is 0, so our regression model is correct, confirmed by the R-squared and Adjusted R-squared, which have values close to 1.
- R squared/Adjusted R shows the dependent variable variation R squared = **0.999530,** which means that CI explain 99.95% of PIB_PR variation;
- Durbin Watson test - we can verify the hypothesis of autocorrelation. It is better if this value is close to "2", because the relationship with first order autocorrelation coefficient r or ρ = DW = 2 (1-r). The coefficient measures the connection / correlation / dependency between two variables. The value of Durbin Watson statistic is **2.189366**, more than 2, which indicates that errors are independent and leads to the conclusion that the dependency equation is correctly specified.

3. Conclusions

Production method - determine GDP as the sum of gross value added (GVA) of final goods (whose production was completed) completed a given period, usually one year. Capital consumption for the production of new goods of any kind is not included in GDP and is called Intermediate consumption.

Economic growth is the process by which economic activities taken in their assembly in a country produce more goods. It is apparent from the upturn in macroeconomic variables or aggregates and especially of the GDP, GNP and VN - both at country level and per capita. In reality there may be an increase in GDP in the country but a decrease in GDP per capita for the population

grew faster than production. When the results of economic activity (GDP) and population increase at the same rate so that the results of per capita (GDP / capita) remains constant we deal with zero growth. This latter type of growth is the expression of the inability of existing resources in terms of economic policy and population growth to meet needs. As we can see, GDP represents the most important aggregate for an economical growth.

We tried to explain the dependency between GDP and production, and GDP ad Intermediate consumption. As we can see in this analyze, if we want an economical growth we have to stimulate the production and the intermediate consumption. Stimulating these two variables, we will stimulate the growth of GDP. This relative, of course, because here we talk about the GDP calculated through production method.

The logic of the capitalist economy (market) growth is, first, aggregate supply source but by its very nature induces the formation of a very large part of aggregate demand as it needs inputs (machinery, equipment, raw materials, materials, etc..) and labor. Therefore, achieving economic growth has become a central goal of any economic policy. Obviously, economic policy starts from the premise of achieving economic growth based on economic potential, the exploitation of its opportunities at the highest level. In this respect, the starting point is therefore growth potential and the goal is potential GDP - the highest level of production that can be achieved over a relatively long or longer and not as an exception, in terms of stability prices and natural unemployment.

In reality the economies are often affected by economic fluctuations or increases in prices and worrying levels of unemployment which makes it impossible to use the full potential they have. Therefore policies should remember that real growth objective embodied in a certain level of real GDP that is not possible under existing concrete. The difference between potential and actual GDP is the potential production that can not be achieved due to which, through appropriate measures, could provide greater economic growth. Indicators of economic growth (GDP, GNP, VN) are quantities that are expressed in nominal and real value. In nominal terms, their values are calculated as current prices charged in the period, while in real terms are established by making use of constant prices or that is comparable to prices in an earlier period taken as a reference to remove influence of price increases during the calculation. Calculated in real terms remove the influence of price changes (increase or decrease them).

So as we can see, the analysi done in this paper shows the importance of knowing each variable and the proportion of influence, because then we can take the best policies of economical growth.

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Others

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USING SIMULTANEOUS EQUATIONS MODELS TO ANALYZE THE CAUSES OF CORRUPTION AND ITS IMPLICATIONS

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Abstract
For a country that is in the process of integration into EU structures, reducing the corruption is a good sign for attracting foreign investment and developing the economic environment. The paper estimates the parameters of a simultaneous equation model based on data sets obtained at a sample of employees in public administration. Statistical sample consist in 407 people and the maximum allowable error was estimated at ± 2.5%. For the effective development of the statistical questionnaire we identified major themes of public administration that are directly related to the problem of corruption: managing the institution, the civil service, transparency in the system, the decentralization process, causes and effects of corruption and the quality of the reform in the public administration. Based on the questionnaire we defined primary and secondary variables that have been used to define the model with simultaneous equations. For the variables in the model they have been divided into endogenous and exogenous.

Keywords*: simultaneous equations model, two stages least square method, corruption, public health system, Hausman statistics*

1. Introduction

During the transition, the level of corruption in Romania stood at the highest values among the countries of Eastern Europe. The reasons for this are various. The high level of corruption has led to significant social and economic losses: the reduction of foreign investment, reduction of production capacities in industry, construction, agriculture etc. through fraudulent privatization and liquidation of them, inefficient use of funds from the state and local communities.

There are a number of applications of simultaneous equations models for the analysis of social phenomena in the literature, while the parameters are estimated using data series that are obtained through the application of statistical surveys.

The major problems that arise in the definition and use of simultaneous equations models that uses the data sets obtained from a sample are related to two aspects: the definition of endogenous variables list, and the definition instrumental variables list that are used in parameter estimation by the two stages least squares method. Each of the two issues has an important role in obtaining conclusive results.

2. The simultaneous equations model for corruption analysis

To define the simultaneous equations model we considered two categories of variables: the endogenous variables that are specified in the model by the vectorial variable $\mathbf{y_i}$ and the exogenous variables included in the model by the variable $\mathbf{x_i}$. Under these conditions the simultaneous equations model is defined in the structural form as:

$$\mathbf{B}\mathbf{y}_i + \mathbf{C}\mathbf{x}_i = \boldsymbol{\varepsilon}_i \quad [1]$$

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where the residuum vector follows a normal distribution $\boldsymbol{\varepsilon}_i \to N(\mathbf{0},\boldsymbol{\Omega}), i = 1,...,G,$ and the matrix $\Omega = (\sigma_{ij})_{i,j=1,\ ,G}$.

To define this model, first, the following problem should be solved: the separation of the variables in the model in endogenous and exogenous. Moreover, among these variables can be identified causal relationships.

For a correct division of the variables in endogenous and exogenous variables, we will consider the analysis of the causal relationship that exists between different variables. In applying statistical tests to be taken into account that data series are recorded at the level of a statistical sample and are not recorded values for a variable for a certain period of time.

Solving the second problem is important for correct estimation of the parameters. This decision must be taken when the parameters of the model with simultaneous equations is estimated by the method of two-stage least squares (TSLS). Please note that in literature there is no uniform approach in choosing the list of instrumental variables in simultaneous equations models used to analyze issues related to corruption (Bai and Wei, 2000) (Kaufmann et al., 1999).

3. Aplication

In the following we present the application of the model with simultaneous equations for the analysis of some important issues in the public health system. The model thus defined can be used to analyze particular aspects of the system such as the quality of the reform of the system, the size of non-academic behavior in the public health system, government policy on health characteristics, education level of population for preventing or agravation of a disease, etc.

To estimate the parameters we used data sets obtained from a representative sample from Bucharest. The volume of the sample was 407 people, and the survey results are guaranteed with a probability of 95%, given that there was a representation error of ± 2.5%. For the data collection process we used a two-stage sampling plan. The first step was the health units in Bucharest (hospitals, health centers, clinics) that have been treated as primary sampling units. The second step was the doctors in each primary sampling units.

To define the endogenous and exogenous variables and the equations of the model we considered the following hypotheses:

- To define the variable that quantify the quality of the public health system reform it must be considered that the medical personnel opinion on this issue is in relation to quality of the public health system financing, the reform measures taken at the medical institutions, the quality of decentralization in the health system, drug procurement system characteristics and quality of employment and promotion system for staff in public health system;
- The effects of the reform process in this system are observable in the first period by increasing public health expenditure, the improvement of the quality of the national health care programs undertaken by the ministry, the ministry's decision to increase transparency at the medical units level, etc.
- The reform process must support measures to improve the health education of the population;
- The results of the reform process are perceived at the population level by reducing the corruption in the public health system, improving the medical care, etc.

The model is defined by the following equations:

$$RSS = f_1(CF, CSE, TMS, PDS, ESP, \mathbf{VP}) + \varepsilon_1$$

$$TMS = f_2(PDS, RSS, COR, \mathbf{VP}) + \varepsilon_2$$

$$ESP = f_3(PCS, PAC, ACS, DPE, UDP) + \varepsilon_3$$

$$COR = f_4(RSS, CSE, TMS, SCP, GSM, \mathbf{VP}) + \varepsilon_4$$

Within these linear models we used the following variables: the quality of the public health system reform (RSS), the quality of the factors influencing the achievement of a qualitative medical act (CF) and rating system of the institution and employees (CSE); the transparency of the ministry in making decisions about the ongoing reform (TMS); the ministry's policy in the area (PDS); the health education of the population (ESP), the interviewed person characteristics, including gender of the person, age and category of staff defined in the model on the basis of the vector variable VP; transparency of decisions from the public health system (TMS), the corruption at the national level (COR), the health education of the population (ESP), the frequency of application, at the end of a treatment period for a new medical examination (PCS), the extent to which people give enough importance to their health (PAC), factors related to the accessibility of citizens to primary, secondary and tertiary health care (ACS), the usefulness of developing health education and prevention programs for the population (UDP), the evaluation system of the quality of the medical services (CSE), changing the executives based on the political criteria (SCP) and medical staff satisfaction (GSM).

The simultaneous equations model variables are divided into endogenous and exogenous, as follows:

- Endogenous variables: RSS, TMS, ESP and COR;
- Exogenous variables: CF, CSE, PDS, GEN, ANI, PER, PCS, PAC, ACS, DPE, UDP, SCP, GSM and CSE.

In the following parameters for the four equations are estimated by two methods: the method of least squares (OLS) and two stages least square method (TSLS). The results are presented in Tables 1 and 2.

In the following we present the most important variables used in the model:

- RSS is a variable defined to measure the opinion on the quality of health care reform process in the public health system. To define we envisaged six components: the financing of the system, the procurement of the drugs, the decentralization process in the health system, the employment and promotion system of the medical personnel with secondary and higher education and the reform measures implemented in the medical units. For measuring the opinion of physicians on each of the six questions we used a scale with five values: 1 - very poor, 2, 3, 4, 5-very good. This variable is an aggregate variable that is defined on the basis of the six primary variables;
- CF is an aggregate variable used to measure the quality of the factors that contribute to a qualitative medical act in the public health units. To measure the values of these characteristics we used a scale with five values that are defined as: 1-very poor, 2, 3, 4, 5 - very good. The aggregate variable is calculated as the arithmetic mean of five primary variables defined directly on the basis of the questionnaire;
- CSE is an aggregate variable that is calculated as the average of three primary variables. It is used to estimate the quality of the assessment system of health services rendered to beneficiaries. To define the primary variables we used a scale with four values: 1 - unsatisfactory, 2, 3, 4 - very good.
- TMS is an aggregate variable used to assess transparency in ministry decision-making about the reform process. It is calculated as the arithmetic average of the two primary variables defined on the questionnaire. The measurement scale used has four values: 1 - unsatisfactory, 2, 3, 4 - very good;
- PDS is an aggregate variable used to assess the quality of government health policy in terms of volume of public health expenditure, the quality of national health programs run by the ministry and the transparent use of funds for compensated and free drugs in the primary care. The range is 1 - unsatisfactory, 2, 3, 4 - very good. This is calculated as an arithmetic average of the three primary variables;

- ESP is a variable used to measure the aggregate level of population health education and disease prevention or progression. The range is 1 - most people do not give importance to prevent the emergence or worsening of a disease, 2, 3, 4, 5 - most people consider this issue very important. It is calculated as the arithmetic average of the two primary variables;
- COR is an aggregate variable used to measure the corruption at the national level according to the medical staff with higher education. The range is 1 - there is no corruption, 2, 3, 4, 5 - there is a widespread corruption. It is calculated as the arithmetic average of the five variables defined directly from the questionnaire.
- PCS quantifies the extent to which patients that received a medical treatment calls for a new specialist advice. The range is 1 a small part of them, 2, 3, 4, 5 - with few exceptions, all patients.
- PAC is a variable used for an overall assessment of the extent to which people give enough importance to their health. The range is 1 - do not give enough importance to their health, 2, 3, 4, 5 – gives a great importance to health. It is determined based on the arithmetic average of two primary variables;
- ACS is a variable that measures the degree of accessibility of citizens to the primary, secondary and tertiary health care system. The range is 1 - poor accessibility, 2, 3, 4, 5 - highest availability to the medical act. It is calculated by means of three primary variables;
- DPE is an aggregate variable used to assess the overall contribution of public institutions to develop health education programs and prevention of disease among the population. The range is 1 - unsatisfactory, 2, 3, 4 - very good. The aggregate variable is calculated as an average of four primary variables;
- UDP is a primary variable used to assess the usefulness of health education programs and prevention among the population. The range is 1 - not useful, 2, 3, 4, 5 - totally useful;
- SCP is a primary variable used to assess to what extent the political level influences the changing of the management personnel based on political criteria. The range is 1 – there are no changes in the leadership based on political criteria, 2, 3, 4 – changing the personnel based on political criteria is a current practice;
- GSM is an aggregate variable defined to evaluate medical staff satisfaction. The range is 1 - not satisfied at all, 2, 3, 4, 5 - completely satisfied. It is calculated as the average of five primary variables that are defined directly on the questionnaire.

For each variable defined above we can computed a number of indicators to characterize the central tendency, dispersion and the asymmetry of the distribution. In this case, we used questionnaires with valid responses to questions used to define the underlying primary variables that define the aggregate variable.

To estimate the parameters of the four regression models we used only statistical questionnaires that have valid answers to all questions underlying the definition of the aggregate variables in the regression equation.

For a successful application of the method of two stages least squares in (TSLS) in the application it must be defined a list of instrumental variables. They must meet a number of conditions (Andrew and Bourbonnais 2008) to obtain suitable results.

For the second stage an important role is played by the definition of the list of instrumental variables. In this context the exogeneity of the variables of the model is analyzed. An important tool in this approach is the Hausman test (Hausman, 1978). It seeks to check the effectiveness and consistency of estimators. In this regard the following two hypotheses are defined.

The first is the case when the list of instrumental variables is correctly specified. The estimator of the parameter $\boldsymbol{\beta}$ obtained by the OLS, denoted by $\hat{\boldsymbol{\beta}}_0$, is effectively and consistent. In

this case the explanatory variables of regression model $\mathbf{y} = \mathbf{X\beta} + \mathbf{u}$ are not correlated with residual variables, so $H_0 : \text{cov}(\mathbf{u}, \mathbf{X}) = \mathbf{0}$.

In the second case, the list of instrumental variables is not correctly specified. The estimator for the parameter $\boldsymbol{\beta}$ obtained by the OLS, denoted by $\hat{\boldsymbol{\beta}}_1$, is effective and inconsistent. Residual variables are correlated with one or more explanatory variables, so $H_1 : \text{cov}(\mathbf{u}, \mathbf{X}) \neq \mathbf{0}$.

The difference between the two estimators is $\hat{\mathbf{d}} = \hat{\boldsymbol{\beta}}_1 - \hat{\boldsymbol{\beta}}_0$, and the Hausman test statistics is:

$$H = \hat{\mathbf{d}}'(\text{var}(\hat{\boldsymbol{\beta}}_1) - \text{var}(\hat{\boldsymbol{\beta}}_0))^{-1}\hat{\mathbf{d}} \rightarrow \chi^2(r)$$

where r is the number of endogenous varibles from the list of explicative varibles, so of the variables $X_i, i = 1,...,r$ that verify the following $\text{cov}(u, X_i) \neq 0$.

If the statistics value is greater than the tabulated value, then we reject the null hypothesis, considering in this case that the second estimator gives more appropriate results.

Table 1. The parameters of the equations estimated by OLS

Explicative variable	Depedant variable RSS		Depedant variable TMS		Depedant variable ESP		Depedant variable COR	
	parameters	t-Student statistics	parameters	t-Student statistics	parameters	t-Student statistics	parameters	t-Student statistics
CF	0,309	8.784 (0,000)*						
CSE	0,017	0,406 (0,635)					0,029	0,415 (0,679)
TMS	0,041	1,010 (0,313)					0,125	1,939 (0,053)
PDS	0,393	6,746 (0,000)	0,758	11,359 (0,000)				
ESP	0,141	4,024 (0,000)						
GEN	- 0,027	0,539 (0,590)	0,043	0,645 (0,520)			0,061	1,418 (0,157)
ANI	0,047	2.074 (0,039)	0,018	0,623 (0,533)			0,155	3,195 (0,002)
PER	- 0,042	1.649 (0,100)	0,013	0,396 (0,692)			0,320	8,021 (0,000)
RSS			0,131	2,468 (0,014)			-0,028	-0,354 (0,725)
COR			0,045	1,412 (0,159)				
PCS					0,084	2,200 (0,028)		
PAC					0,520	11,188 (0,000)		
ACS					0,040	1,123 (0,262)		
DPE					0,204	4,513 (0,000)		
UDP					0,009	0,373 (0,709)		

SCP							0,186	3,043 (0,002)
GSM							0,758	8,357 (0,000)
F	1296,9 (0.00)*		563.8 (0.00)		429.9 (0.00)		566.1 (0.00)	

* the values for α are given in brackets

Table 2. The parameters of the equations estimated by TSLS

Explicative variable	Depedant variable RSS		Depedant variable TMS		Depedant variable ESP		Depedant variable COR	
	parameters	t-Student statistics	parameters	t-Student statistics	parameters	t-Student statistics	parameters	t-Student statistics
CF	0,463	3,408 (0,001)						
CSE								
TMS	-0,058	-0,572 (0,568)					0,369	1,459 (0,001)
PDS	0,549	1,836 (0,067)	1,672	3,111 (0,0020)				
ESP	0,178	2,536 (0,012)						
GEN							1,802	1,738 (0,083)
ANI	-0,094	-0,736 (0,462)					-1,085	-2,272 (0,024)
PER							0,062	-0,132 (0,895)
RSS			-0,372	-0,971 (0,332)				
COR			0,024	0,332 (0,740)				
PCS					-0,079	-0,648 (0,517)		
PAC					1,025	2,228 (0,026)		
ACS					-0,132	-0,557 (0,578)		
DPE					0,021	0,151 (0,880)		
UDP								
SCP							0,612	2,607 (0,009)
GSM							0,384	1,226 (0,221)
Variable list	CF, CSE, PDS, ANI, PER, PCS, PAC, ACS, DPE, UDP, SCP, GSM, CSE, COR, FLC, RCO, GSM, FMM		CF, CSE, COR, FLC, RCO, GSM, FMM		CF, CSE, PDS, ANI, PER, UDP		RSS, CF, CSE, PDS, ESP, PCS, DPE, FMM, ACS	

* the values for α are given in brackets

4. Conclusions

To increase the efficiency of the public health services is necessary to implement measures that will lead to major changes in the public health system. The new philosophy of operation of the health system will cause a reduction in corruption in the system and increase the quality of medical care.

To identify important aspects of health system operation an important tool is the statistical questionnaire. Its application to medical personnel will identify positive and negative aspects of the system.

The simultaneous equations model is used to analyze some aspects of functioning of the public health system. To define the model we used four endogenous variables and thirteen exogenous variables. The variables used in the model are mostly aggregated variables that are calculated as the average primary variables. They are defined based on statistical questions in the questionnaire taking into account the measurement scales used for each question in the questionnaire. For writing the four equations we start from a set of assumptions. The four equations are used for the assertion of some observations regarding the quality of the system reform and its implications for the quality of the medical services provided to citizens, identifying the characteristics of government health policy, evaluating the effect of public health education in preventing and worsening of a disease, assessing the extent of non-academic behavior in the public health system and its implications for the reform process and the quality of medical services provided to citizens.

For the identification of the four equations we used variables regarding the system behavior, the degree of satisfaction of physicians and physicians' personal characteristics. The results highlight the different opinions of doctors in relation to personal characteristics considered. In three of the four models the parameters that correspond to these variables are different from zero. To analyze the variable used to measure the levels of the health education we used a regression model with a series of explanatory variables related to the attention that people give to health (PAC), the practice of patients seeking care and new investigations at the end treatment period (PCS), the extent to which institutions or organizations are involved in developing health education programs in the population (DPE), population accessibility to health services (ACS) and the usefulness of these types of programs (UDP). To define the equation that describes the influence of corruption and non-academic conduct we considered the results of descriptive analysis of data series on corruption levels and intensity of factors acting to reduce it.

Aknowledgement

This work was supported by CNCSIS – UEFISCDI, project number PNII – IDEI code 1814/2008, financing contract no. 763/2009

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RESEARCH AND INNOVATION – THE CHANCE OF ROMANIA'S ECONOMIC AND FINANCIAL PROGRESS

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DUMITRU CIUCUR [**]

Abstract
This paper aims at highlighting the importance of scientific research and economic innovation for economic and financial progress of Romania in the long term. Stem analysis is the gradual accumulation of organic connection between science and how it is used, in a productive vision deeply understood both in the public and private spaces. Financial and economic progress involves scientific research and innovation as the ideal long-term and daily movement of the economy in the short term. So we should keep in mind that not everything is equally urgent and important, in a correct view of the labor and force of the economic and financial effort.

Keywords: *economic and financial progress, research, innovation, development*

1. Human economy and the osmosis of research and innovation

Human economy relies on great scientific and technical discoveries, on extensive environmental improvements, demo-economic and on behavioral changes beneficial to the entire population. The new economy involves multiple and profound reforms, of a structural effectiveness, considering that scientific research contributes to the expansion of both wealth and poverty. It also contributes to the substitution of raw labor with information or knowledge and to the rational use of sophisticated economic, financial and management mechanisms on national and global levels.

The emergence of new systems of economic activity undermines the pillars of the old economic system, transforming all – individual life, business, politics, morality, nation-state – and placing the economy on the verge of the deepest switch, according to the trend of a lasting, sustainable economy, global and eventually cosmic. Such issues are directly related to the very essence of economy because **the economy is a consistent mix of relational activities, in which one selects *what, how* and *how much* to produce in order to achieve his goals of development and personality manifestation within the community, being himself the product of nature and society.**

The content and the continuous transformation of economy reflects the manner in which **individuals manage to correlate their unlimited needs, constantly diversifying, with scarce resources that have alternative uses.** The tension between needs and resources is permanent and is reflected by human satisfaction or dissatisfaction on the individual and society level, by inequities, gaps or relative stability. "Without such a system which is able to produce food, to process it, to wrap and distribute it, which is able to produce fabric, to provide medical and educational services, to regulate and maintain order, to make itself ready to defend the community, life would be very hard."[1] During this complex process, each individual finds himself in transition through life, permanently recording joy or bitterness. Thus, **economy is the real form of human social action, it itself is in continuous transition**. Economical life is man's unceasing struggle with the principles of rarity, impossible and unknown, with the limits of freedom in order to transform them in certain, possible

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[1] J. K. Galbraith, *Economic Science and Public Interest*, Politica Publishing House, Bucharest, 1983, p. 11.

and known elements of everyday life. "The true problem is that in real life, normally, we do not have the possibility of choosing between risky and certain situations, but only between degrees of risk and different possible results".[2]

Within this struggle with the limits of our existence, man and human community are in permanent transition to adjust to the natural environment, simultaneously constituting a **specific living environment**. Human economy cannot stop its movement, transformation or transition. **Any simplistic, insufficiently precise understanding about finalizing the transition in economy is counterproductive**. The transition proves itself the permanent form of human evolution with the help of science, research and innovation, and the costs of the transition through life interest each individual and the social community as a whole.

The chance of economic and financial progress is **the osmosis of human economy with research and innovation**, which ensures an effective, high-performance human action.

Our demarche pursues two concepts: the filiation of ideas and classical situation. **The filiation of ideas** reveals the efforts for understanding economic phenomena, for creating, perfecting and reconsideration of economical theory, in an endless process. **The classical situation** means consolidating, correlating and synthesizing scientific acquisitions to the certain moment, including appreciating present status in the direction of future development in economic science.

In every era, people were preoccupied to understand internal relations of their action for material existence, starting from observing the limitation and rarity of economic resources. The totality of reflections which refer to economic activities in society (ideas, theories, doctrines, ideologies) forms an **economic thinking**, which has an emphasized historical feature.

Economic reflections can be common and specialized. **Common economic knowledge** stand in reflections which are possible to be made by all people, as participants to ordinary life, without them handling knowledge and necessary instruments to thoroughly understand economic reality. **Specialized economic knowledge** is the scientific knowledge, consisting of people's reflections who participate to economic life on the grounds of prior professional training, specialized and having corresponding research instruments for economic problems and showing results of their research and discoveries. Thus, scientific knowledge exists since a long time, since, in economy, the passage has been made from manufacturing to industrial capitalism. Therefore, we do not consider entirely justified the expression according to which, nowadays, economic life passes to scientific knowledge. Though, it actually means the passage to a new stage of **scientific knowledge, that of elevated, wise scientific knowledge**, which is to contribute to solving the above shown tension.

In such circumstances we emphasize the importance that scientific research and innovation form an organic logical and historical unity. **The second dimension** considers that economic phenomena are, in their essence, social phenomena conceived and established always with a precise human finality. **The third dimension** is in the tension between unlimited human needs, permanent, and limited economic resources, rare, expensive and more difficult to obtain. Thus, the access to natural and economic-financial resources, national and global, is ensured by the context of long term tendency of consolidating the dependency on foreign resources. **The fourth dimension** considers demand of growth and diversification of scientific-innovation exchange of Romania with all countries in the communitarian European area and in extra-communitarian.

Economic scientific research means the action of examining thoroughly, of studying, of analyzing rationally, at system level, phenomena and economic processes, this to obtain new elements materialized in novel variants of understanding their essence, of their internal causality and new possibilities of improvement.

Economic innovation represents the action of change, of introducing in a process or a system, an already known novelty which is supposed to solve the economic problem, to ensure dynamic optimization of rare and limited resources use.

[2] Orio Giarini and Walter Stahel, *The Limits of Certainty*, Camro Publishing House, Bucharest, 1996, p. 256.

Understood as such, research and innovation are harmonized in an objective manner, are mutually conditioned, determining the growth of productivity, of systemic economic efficiency. As a consequence, these two concepts exist and function in their unity, ensuring obtaining from a unity of resources spent an economic effect more socially useful.

The distinction between these two notions is realized, especially, by the social need of boosting relational dynamics between research and innovation. Such a dynamics must lead to a new specific human behavior, of researching by innovation and innovating by research, especially in the conditions of economic-financial resources are rarer, more expensive and more difficult to obtain.

As a consequence, economic scientific research and innovation prove to be an **authentic axis of economic development**, an anatomic and functional ensemble, which maintains the elements of economic system, defined by own content and permanent dialectic movement. In the presentation of our paper we use with priority the expression of scientific research, understanding, though, its intimate unity with innovation.

Scientific research is materialized nowadays in the tensions of change, being an expression of rational perceptibility of economic evolution by those who have a creative gift, of inventing and innovating and, also, have the motivation of being involved in such matters. Research and innovation actors think according to their interest, correlated with public agenda inherited from a revolution which, like all the others in history, imply an ensemble of quality transformation from an entire system or from its components, lasting an instant and leaving behind a whole century.

Scientific economic research implies essential change in the behavior, in science and technology, in education or in family, in religion and so on. All these hold in an essential proportion of economic creativity. **Creativity** means, above all, creation of New, then its reception and consumption. In the conditions of very fast technical-scientific progress, with low creativity degree, in economy the complex problems of present development could not be solved efficiently. As a perspective, heroes of a country will be the authors of most daring and important accomplishments in science, technology, economy and culture, moving the competition between countries from military environment to great values of human creativity environment. New and original ideas will become decisive, though not by them. It must be known that in their way multiple blockings appear, determined especially by the system of training and education, as well as the psycho-social climate. Any participant in economic life can be creative, though for this reason multiple conditions are imposed, which are related to the specific person, to creativity levels, to individual structures and creativity group, to identification instruments, to creativity evaluation and so on.

Creativity contents are in its **novelty and originality**, thus an economic good, as impossible to imitate and with further effects, as harshly judged by contemporaries, being appreciated as fantasy, useless. Though, such a situation does not discourage geniuses to exist and manifest, opening new tracks to technical-economical efficiency.

Specialists consider that creative minds always imply: imagination (capacity of accomplishing infinity of new associations, by composition and decomposition of ideas), judgement (combining imagined ideas, reuniting in the same class of those homogenous and rejecting the inappropriate), taste (the internal sense of delimitating aesthetic by unaesthetic, decent by insignificant).

Creativity as a composite element of scientific research, as a psychological formation of great complexity is materialized in many and diverse effects such as: productivity, value, quality, utility and so on. These are not limitative, though they must be connected with many others such as: ingenuity, novelty, originality, dare and so on.

Creativity is, as a matter of fact, a **social need**, which must ensure economy development, though its accomplishment depends on removing inappropriate mentalities. We point out, for this matter, that presently in Romania, but also in other more developed countries, some negative cultural-educational phenomena manifest, such as: preference for a more complete education than stimulating the development of an original and creative thinking (conformist specialists, with diverse stereotypes); passive character, non-creative of some actions which develop during free time; more

appreciation for scholars than for those with original ideas, who are somehow tolerated; many people's frustration because of the lack of creative effectiveness; tendency towards multiplication of same modalities of superficial, inefficient behavior in personal life, and so on.

Profound understanding of the essence and functions of scientific research and economic innovation presumes also capturing the main tendencies of economic science, as organic part of science in its totality and coherence, which influences quality development of economy on grounds of an adequate scientific research.

In the frame of science system, economic science develops permanently related to other sciences and, especially, with sciences of nature. Revolution in natural sciences, starting with physics, brings back to exegetes' attention the concept of **perfect prediction**, as an object of economic science. For this matter, an elitist trend of economic thinking accepts the **transformation of economic science into an exact science**, as any natural science. Therefore, notions, theories and economic science methodology should be profoundly restructured. For example, the theory of economic equilibrium, having as a genesis the progress of mechanical physics of Newton, is about to give way nowadays, on grounds of modern physics revolution, to disequilibrium, to chaos.

Another tendency of economic science is represented by the **movement towards interdisciplinarity and multidisciplinarity.** Causes are found in the complexity of analyzed object; science penetration in every section of economic life; technology input and use of instrumental methods in order to achieve scientific knowledge; creation of a tighter link between raw science and applied science, between fundamental theoretical disciplines and those experimentally-applied; emphasizing the historical dimension of science; transition to theories with a high degree of structural organization, open to both natural and human created environment, and so on.

In such frame, emphasizing the importance of **social significance that economic phenomenon (social by its essence) holds, is imposed.** Therefore, when making decisions of economic politics, one must consider the dimension and social impact that they bear; otherwise heavy costs, economic, social and ecologic imbalance, would be generated, and it would be hard or impossible to manage them. Economic science holds, before all, a **powerful social determination**. As a consequence, facts and acts of economy can satisfy every man's needs, giving him the dignity and allowing him to fully take advantage of human essence's own rights and liberties.

2. Directions of reasoning in research and innovation for economic and financial progress

The first direction of this reasoning results from the fact that along with some elements of "civil global society" **comes again the social problem**, as opposed to forces behind the globalization process.

In such circumstances, economic science enters more in direct contact with natural sciences, with juridical sciences, with technical sciences and so on. It must approach the more complex individual, that is as a consumer, a labor resource, as governor, which opens new tracks of investigation and offers more refined instruments for measurement, perfecting and capitalization of economic analysis in itself. Experience of totalitarian systems in the past century shows us that only in democracy it is possible to have economic development and plenary affirmation of human aspiration, regarding the rights and fundamental liberties of the human being. For such reason, to reduce the citizen only to his consumer dimension generates premises of a new type of totalitarianism, overly dangerous.

Thus, economic science includes in the research field also **the present role of the state**. Though, it concerns the state as organizer of social cohesion, the regulating state, the judge state and not ultimately state as economic actor. Such vision about state in actuality rehabilitates the public service and its social utility, meaning that population demands broad and quality public services to

international standards and performances, of health, education, social protection. Health, culture, personal safety cannot and must not be transformed into goods only for market's sake.

Another direction of reasoning in economic science, implicitly in economical research, represents **the growth of mathematics application in researching economic phenomena and processes**. Mathematics proves to be an essential and indispensable instrument for elaborating models, for analyzing and explaining of profound sides of economic processes and phenomena, for their prediction, for discovering elements of relative truth in economy.

Using mathematics in growing proportions in economic research derives from the thoughts of Alexander Rosenburg, well-known specialist, who states that "economic science is not a discipline, but a particular theory, of extreme character and, thus, by its nature, mathematical"[3]. Still, economy is not the field of absolute supremacy of the mathematic instrument. For this reason Anghel Rugina underlined that "in reality, roots of nowadays problems could be expressed only in quantity"[4]. By extension, the relationship between economic science and mathematics must be understood and applied correctly, as the relationship between any science branches, ensuring their unity, implicitly necessary, through the compatibility of rational systems.

An obvious reasoning direction of economic scientific research and innovation regards the **integrative approach of economic phenomena**. This means the transition from the classical, analytical model, to the synthetic-integrative model of economic thinking. Thus, integrative disciplines are constituted, such as: cybernetics, communication theory, systems theory, semiotics and others, that favor the transfer of methods, principles and concepts between science branches.

This way, a movement of science and economic research is established, towards **logics competence field**, blending common, empirical knowledge with the scientific, systematized one. Different logical models are built with the help of generalizations of essential aspects, common to a mass of homogenous phenomena. Thus, economic science fulfils more systemic functions such as: **methodological function** by which critical analysis and methodical evaluations of real facts are accomplished, passing beyond their immediate appearance and reaching their essence, which favors the putting in order and systematization of empirical material; **heuristic function**, meaning the discovery of new facts and laws; **explicative** function, that is understanding of known facts; **prospective or predictive function**, which allows anticipating the relations between facts, establishing new predictions concerning the way economic reality will look like in the future.

We reveal, as well, the fact that ideas of causality, of probability and so on, gain more and more space in the economic science and research, using also, insistently, logical methods such as formalization or model building.

From the epistemological standpoint, the most difficult problem that economic scientific research faces is the **testability or verification of results**. Unlike natural and technical sciences, where there are relatively wide testing possibilities, in economic science these are more limited because of the specificity of the economic phenomenon, which directly implies the human being, with its own system of needs and interests, as well as due to high social cost of experiments. Practically, economists exclude the possibility of laboratory experiment, on people and groups of people.

We underline that other forms of experiment, such as econometric testing, inquiries and surveys, simulation, scenarios play and important part in investigation and evaluation of the economic phenomenon. Therefore, experiment, despite its critiques, is the main procedure of verifying assumptions and building scientific conclusions.

[3] Mark Blaug, *Economic Theory in Retrospective*, Didactic and Pedagogic Publishing House, Bucharest, 1992.
[4] Anghel Rugina, *Principia Oeconomica*, Romanian Academy Publishing House, Bucharest, 1993.

Conclusions

We must emphasize one more time that the chance of Romania's economic and financial progress is the osmosis of human action with scientific research and innovation within the Romanian economic space as a whole and in all periods of evolution, including conditions of crisis. The major internal and external imbalances, of financial-economic and also social nature that we perceive are, for scientific research and innovation, an unprecedented challenge, a duty to attend irreproachable standards as concerns the behavior in economy, moral issues and fairness. This duty must be directly coupled with proactive management involving high professional competence and performance on the micro, meso and macro- levels, on the complex path of real convergence with the economy of the developed world.

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A SIMPLE ASSESSMENT OF FISCAL SUSTAINABILITY FOR THE ROMANIAN ECONOMY

ALEXANDRU LEONTE[*]

Abstract
The financial crisis has seriously impacted the economies around the world, emerging and developed alike. With interest rates at historical low levels, constrained in many cases by the zero lower bound, the emphasis is put on fiscal policy to restore the economies on the path of sustainable growth. This paper attempts to shed light on the issue of fiscal sustainability of the Romanian economy, by checking if the intertemporal fiscal constraint of the government is respected. According to the constraint, the current value of debt equals the sum of the discounted values of future government surpluses, which means that the government is not financing itself through a Ponzi scheme. I build on the econometric approach used in papers such as Hamilton and Flavin (1986), Hakkio and Rush (1991), Quintos (1995), Santos Bravo and Silvestre (2002), Bohn (2007). More specifically, I focus on the time series properties of government debt, revenue and expenditure, determining: i) the order of integration for the government debt series; ii) whether or not government revenue and expenditure are cointegrated. Thus I am able to evaluate the strength of the fiscal position of the Romanian economy and to see the impact of the financial crisis on this position.

***Keywords**: fiscal policy, intertemporal budget constraint, cointegration*

Introduction

The financial crisis has seriously impacted the economies around the world, emerging and developed alike. One of the most important consequences is the current sovereign debt crisis, affecting a number of countries including members of the European Union (EU) and the euro area. Economies which promoted an unsustainable growth, with unconsolidated budgets and a large volume of debt, currently encounter difficulties financing that debt.

Against this background, this paper studies the fiscal sustainability of the Romanian economy, by checking if the intertemporal fiscal constraint (henceforth IFC) of the government is respected. According to the constraint, the current value of debt equals the sum of the discounted values of future government surpluses, which means that the government is not financing itself through a Ponzi scheme. More details are given in the following section which contains a theoretical presentation of the problem and an empirical application.

Previous papers study and derive necessary and sufficient conditions for the IFC to hold. For example, Hamilton and Flavin (1986) notice that the government can have a permanent deficit including interest payments on debt, and still the constraint would be respected, however, not in the case of a permanent deficit excluding interest payments on debt. Trehan and Walsh (1991) consider in their analysis two cases: constant and variable interest rate. They show that if interest rate is a positive stochastic process, a sufficient condition for the IFC is that the first difference of the debt series is stationary (and the debt series is integrated of order 1 – I(1)). Focusing on government revenue and expenditures, Hakkio and Rush (1991) show that if the two variables are cointegrated, the IFC holds, even though expenses rise faster than revenue. Still, they argue that in this case, government credibility is affected which makes financing deficits more difficult. Quintos (1995) distinguishes between a strong and a weak condition for fiscal sustainability: she shows that revenue and expenditure cointegration is a sufficient but not necessary condition for the bubble term in the fiscal constraint to converge to 0, still a faster convergence is achieved when the debt process is

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stationary or I(1) (this corresponds to the strong condition). Empirical testing of the IFC relies on econometric tests to see if these conditions (stationarity of the debt process, cointegration between expenditures and revenues, etc.) hold. The studies mentioned above focus on the U.S. economy, and similar approaches have been put forward in papers that focus on other economies (see Afonso (2004) for a review). Recent papers in this strand of literature study the IFC for groups of countries using panel data (see for example Prohl and Schneider (2006), Afonso and Rault (2007)), which allows them to capture fiscal spillover effects. Bohn (2007) adopts a critical point of view with regard to the unit root and cointegration tests used in the literature. He proves that the IFC is satisfied if public debt follows an integrated process of any finite order (this is also shown in Bergman (2001)) and argues that the strict econometric approach delivers weak conditions, in a sense that one can show that the IBC is satisfied, and still that economy could default.

This paper studies the sustainability of the fiscal position of the Romanian economy, by determining: i) the order of integration of the government debt series; ii) whether or not government revenue and expenditure are cointegrated. This study has two main motivations. First of all, it is instructive to analyze the fiscal position of a country, to better understand the risks the country is facing, especially in the current economic context. Even though the level of government debt is relatively low compared with the other countries of the EU, according to Reinhart and Rogoff (2009), as debt levels rise to historical limits (as is the case for the Romanian economy), risk premia begin to rise sharply, and so the economic situation will deteriorate. The second reason concerns the impact of fiscal policy on economic growth. A fiscally sound country is able to provide public investments and at the same time its credibility attracts foreign investors.

Paper content

In this section I briefly present the theoretical background of the paper, following Bohn (2007). Then I review the results of my case study of the Romanian economy.

Theoretical background

In every period, the government's budget constraint is:

$$B_t = G_t^0 - T_t + (1 + r_t) \cdot B_{t-1} \quad (1).$$

The government uses currently issued debt (B_t) to cover its deficit (G_t^0 represents public spending excluding debt payments and T_t represents public revenue) and the payments on the previous period's debt. The following notations are often used:

$$\Delta B_t = B_t - B_{t-1} = G_t^0 + r_t \cdot B_{t-1} - T_t \quad (2)$$

ΔB_t is the first difference of government debt and the period's *with interest deficit*. Excluding the interest payment from (2), we get the period's primary or no interest deficit:

$$DEF_t = G_t^0 - T_t \quad (3)$$

In order to obtain the IPC for each period's budget constraint, assumptions are made regarding the interest rate process. The most common are:

- ✓ The interest rate is positive and constant: $r_t = r > 0$
- ✓ The interest rate is uncorrelated over time with a positive constant conditional expectation: $E_t r_{t+1} = r > 0$
- ✓ The interest rate is a stationary process with mean $r > 0$.

For the last assumption, additional restrictions may be imposed to assure that the process G_t has similar properties to G_t^0, where:

$$G_t = G_t^0 + (r_t - r) \cdot B_t \quad (4)$$

is government adjusted spending.

For either assumption, writing (1) for period *t+1*, with information from the current period *t*, and defining $G_t = G_t^0$ in the first two cases, we get:

$$B_t = \frac{1}{1+r} E_t (T_{t+1} - G_{t+1} + B_{t+1}) \quad (5)$$

Iterating forward, we obtain:

$$B_t = \left(\frac{1}{1+r}\right)^N \cdot E_t B_{t+N} + \sum_{i=i}^{N} \left(\frac{1}{1+r}\right)^i \cdot (T_{t+i} - G_{t+i}) \quad (6)$$

Taking $N \to +\infty$ in (6), the result is:

$$B_t = \lim_{N \to +\infty} \left(\frac{1}{1+r}\right)^N \cdot E_t B_{t+N} + \sum_{i=i}^{+\infty} \left(\frac{1}{1+r}\right)^i \cdot (T_{t+i} - G_{t+i}) \quad (7)$$

The IPC is respected if and only if the first term of the right-hand side of (7) is 0, that is:

$$\lim_{N \to +\infty} \left(\frac{1}{1+r}\right)^N \cdot E_t B_{t+N} = 0 \quad (8).$$

This corresponds to the government not financing its activity through a Ponzi scheme, so that the current value of debt equals the discounted value of future government surpluses.

Bohn (2007) shows that any stochastic process that is integrated of a finite order (and even a mildly explosive process) satisfies (8) and thus the IPC, but follows Quintos (1995) and argues for a qualitative evaluation, the general idea being that the larger the order of integration for the debt series, the *weaker* the sustainability of government finances (even though strictly speaking the IPC continues to hold and (8) is respected, the convergence is much slower the higher the integration order of debt).

With regard to the relation between government revenue and expenditure, first one can define the government spending including interest payments on debt as:

$$G_t^r = G_t^0 + r_t \cdot B_{t-1} \quad (9)$$

With this notation, from (2) we obtain:

$$\Delta B_t = G_t^r - T_t \quad (10)$$

Bohn (2007) shows that G_t^r is $I(m_G)$ and T_t is $I(m_T)$, than the IPC holds if B_t is $I(m)$ and $m \le \max(m_G, m_T)+1$. However, if both G_t^r and T_t are $I(1)$ and cointegrated such that:

$$T_t = \mu + b \cdot G_t^r + \varepsilon_t \quad (11)$$

with ε_t stationary, from (10) we get that:

$$\Delta B_t = -\mu + (1-b) \cdot G_t^r - \varepsilon_t \quad (12)$$

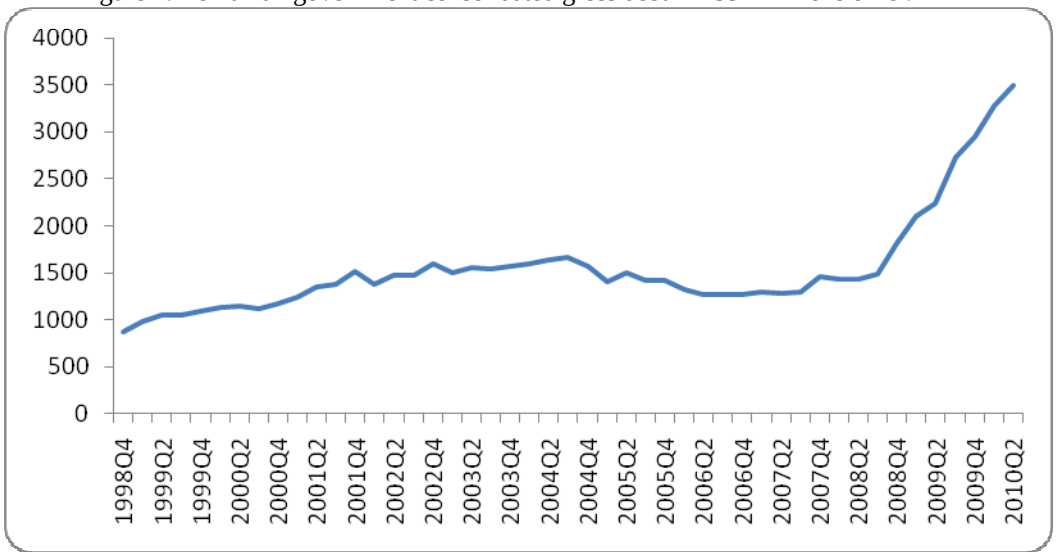
which means that ΔB_t is either stationary or $I(1)$, so B_t is either $I(1)$ or $I(2)$. In this case, convergence in (8) is much faster.

Empirical results

I test the IPC for the Romanian economy by determining: i) the order of integration for the government debt series; ii) whether or not government revenue and expenditure is cointegrated. The sample consists of quarterly data covering the period 1998Q4 – 2010Q2 for the government debt series and 1995Q1 – 2010Q2 for government revenue and expenditure. The variables are expressed in real terms, more precisely, they are expressed in 1994 lei, the series in nominal terms is deflated using the Consumer Price Index. Other possibilities are to work with per – capital values or with percentages of GDP. The data source is the Eurostat.

Figure 1 shows government consolidated gross debt for the analyzed period.

Figure 1: Romanian government consolidated gross debt in 1994 millions of lei.



Source: Eurostat

A visual inspection reveals that the series is stationary up to the year 2008, when it registers a significant increase. Keeping in mind that the fiscal situation of an economy is more sustainable if the convergence in (8) is faster, an increase in the order of integration of the series in 2008 would signify a deterioration of the fiscal position. I formally test this using the *Augumented Dickey – Fuller* and the *Kwiatkowski – Philips – Schmidt – Shin* tests. The results of the tests are highlighted in Table 1. The tests are applied to the natural logarithm of the raw series, as there is no visible pattern of seasonality.

Table 1: Stationarity tests for ln (gov debt)

Test	**Sample**	**Test statistic**	**Theoretical statistic**
ADF	1998Q4 – 2010Q2	3,84	-2,60 (10%)
KPSS	1998Q4 – 2010Q2	0,51	0,46 (5%)
ADF	1998Q4 – 2008Q3	-2,58	-2,61 (10%)
KPSS	1998Q4 – 2008Q3	0,34	0,35 (10%)
ADF	2008Q4 – 2010Q2	0,37	-2,80(10%)
KPSS	2008Q4 – 2010Q2	0,40	0,35 (10%)

Source: my own calculations in Eviews 5

Both tests reveal that the whole sample is non-stationary. The ADF cannot reject the null hypothesis that the series has a unit root, and the KPSS rejects the null that the series is stationary at the 95% level. Running the tests on two subsamples (one runs from the start of the available data to the third quarter of 2008 and would correspond to "normal times" in the economy, while the other would correspond to "crisis times") reveals that the first period is characterized by "more stationarity" than the second. The ADF rejects the null at a 89% level of confidence (the p-value is 0,1042), still the KPSS also comes very close to rejecting the null at the 90% level. Because of the contradictory results, one cannot say based on only the two tests whether the series is stationary or not. It is possible to gain more insight using appropriate fractional integration tests. Testing stationarity on the second sample should be taken with a grain of salt, because of the small number of

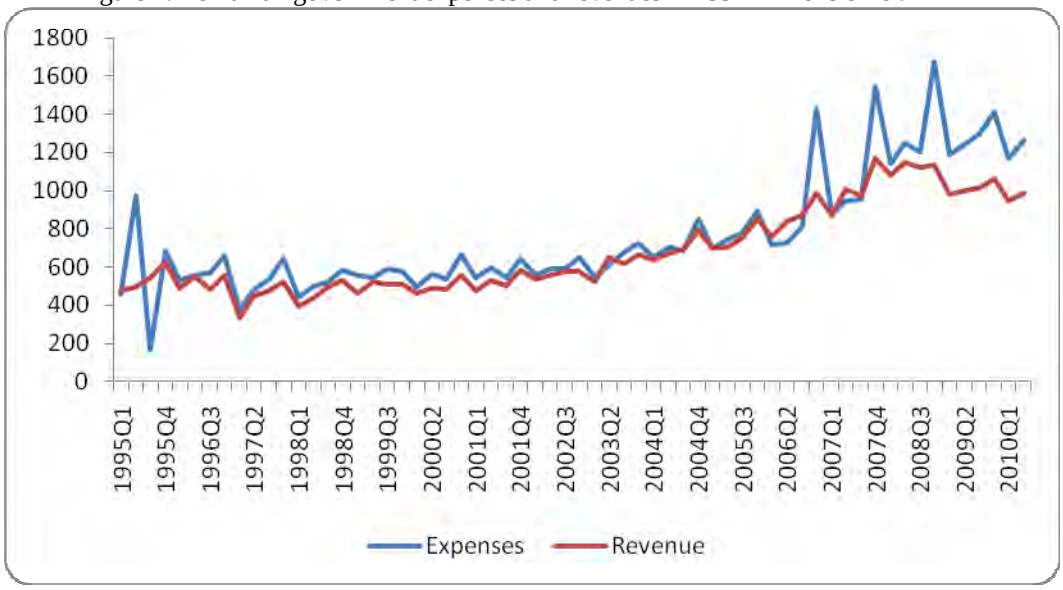
observations. However, both tests indicate the same result of non-stationarity (ADF cannot reject the null and KPSS rejects the null at the 90% level of confidence).

With respect to the order of integration of the debt series, the ADF reveals that for the whole sample, the series is *I(2)*. For the first period, we can almost reject the null of a unit root with 90% confidence, so in the first period, debt is *I(0)*. For the second sub-sample, debt is *I(1)*, we can reject the null for the first difference series with 99% confidence.

These results indicate that that the fiscal position has deteriorated in the second period. The government contracted loans to finance its expenses, at the same time pursuing a fiscal consolidation agenda which implied a decrease in the level of the budget deficit, while public revenues were dropping as a result of the crisis. Even though strictly speaking, the IPC is respected, maintaining credibility is crucial in order for the government to finance itself.

The second empirical test refers to revenue and expenses cointegration. If two series are not stationary, and are integrated of the same order (we shall see that this is the case in this study), most of their linear combinations are also integrated of the same order. However, if there is a linear combination that is stationary, the two initial time series are cointegrated. Intuitively, cointegration can be interpreted as the two series which have nonstationary trajectories never drifting off too far away from each other. Referring to government finances, one can say that they are sustainable even if expenses are on a path of growth, if revenues move "together" with expenses. Figure 2 shows the two time series for the period 1995Q1 – 2010Q2.

Figure 2: Romanian government expenses and revenues in 1994 millions of lei.



Source: Eurostat.

Both series but especially government expenses display seasonal patterns, so I shall perform a seasonal adjustment for both series using the Census X12 method implemented in Eviews.

In order to test for cointegration two methodologies are employed, Engle – Granger test and Johansen. Both of them require that the order of integration of the initial series be determined, which is done using the ADF and KPSS tests. They reveal that the series are *I(1)*. The results are displayed in table 2.

Both tests indicate the series are *I(1)*.

Table 2: Order of integration for government income and expenditure

Test	**Series**	**Test statistic**	**Theoretical statistic**	**Conclusion**
ADF	Exp: level	3,53	-2,59 (10%)	unit root
ADF	Exp: 1 diff	-15,28	-3,56(1%)	no unit root
KPSS	Exp: level	0,79	0,73 (1%)	not stationary
KPSS	Exp: 1 diff	0,34	0,35 (10%)	stationary
ADF	Rev: level	0,43	-2,59 (10%)	unit root
ADF	Rev: 1 diff	-9,24	-3,56(1%)	no unit root
KPSS	Rev: level	0,75	0,73 (1%)	not stationary
KPSS	Rev: 1 diff	0,34	0,35 (10%)	stationary

Source: my own calculations in Eviews 5

The Engle-Granger methodology consists of regressing the two series and verifying to see if the residuals are stationary. I estimate regression (11) and use the ADF to see if the series $\hat{\varepsilon}_t$ is stationary. I do this for the whole sample and the two sub-samples. The results are displayed in table 3.

For the whole sample, the test indicates the existence of cointegration between government expenditures and income. However, sub-sample testing reveals that the cointegration relation is not consistent with the second part of the studied period. This points to a negative impact of the economic crisis on the sustainability of public finances in Romania, though the second sample is of a very short length, and the results should be interpreted with caution for the second sub-sample.

Table 3: Engle-Granger test for government revenue and expenses

Sample	$\hat{b}$	$R^2 - adj.$	**ADF stat.**	**Conclusion**
1995Q1 – 2010Q2	0,69***	85,11%	-1,78*	cointegrated
1995Q1 – 2008Q3	0,77***	81,92%	-7,79***	cointegrated
2008Q4 – 2010Q2	0,1	-2,29%	-1,08	not cointegrated

Source: my own calculations in Eviews 5

Note: * corresponds to a 90% level of confidence, *** corresponds to a 99% level of confidence.

The second methodology I apply is the Johansen test. As noticed in (Enders, 2004), this is nothing more than a generalization (basically, an extension to a multivariate case) of the Dickey – Fuller procedure. It involves building the following model:

$$\Delta x_t = \pi \cdot x_{t-1} + \sum_{i=1}^{p-1} \pi_i \cdot \Delta x_{t-i} + \varepsilon_t \quad (13)$$

The residuals in (13) are stationary. *x* is a vector that contains the variables for which cointegration is being tested, in our case, $x_t = \left(G_t^r \quad T_t\right)^{trans}$. The rank of the matrix π equals the number of cointegration relations between the variables in *x*. Since the latter is a (2,1) vector, this means that π is a (2,2) matrix, and its rank can either be 0, 1 or 2. If the rank is 0, this means that $\pi = 0_2$ and both series are unit root processes with no linear combination of them being stationary. If π is full-rank, both series are stationary. If the rank is 1, the variables are cointegrated. Determining the rank of π is done using the maximum eigenvalue and the trace statistics. More details are available in (Enders, 2004).

I use the Johansen procedure for the entire sample and the firs sub-sample. The small number of observations in the second sample makes it difficult to draw meaningful conclusions. I use two specifications of the model depicted by (13), one that includes an intercept in the cointegrating equation and the VAR (I shall call it specification A) and another that includes an intercept and a trend in the cointegrating equation and an intercept in the VAR (specification B). I include a maximum of 4 lags in the VAR. The Johansen test results are displayed in table 4.

Based on the results in table 4, it can be concluded that there is a cointegration relation between government revenues and expenditures for the first sub-sample and the whole sample. It would seem that government finances are in a sustainable position, however due to the small number of observations in the second sub-sample, the impact of the economic crisis is rather unclear.

Table 4: Johansen test results

Sample	Specification	Lag(s)	Trace stat.	Max. eigenval. stat.	Conclusion
full	A	1	34,61***	34,38***	cointegrated
full	A	2	16,07**	15,04**	cointegrated
full	A	3	15,95**	15,13**	cointegrated
full	A	4	15,07*	12,55*	cointegrated
full	B	1	40,58***	37,69***	cointegrated
full	B	2	25,79*	15,37	mixed
full	B	3	26,76**	15,14	mixed
full	B	4	29,38**	17,28*	cointegrated
1st subs.	A	1	52,33***	47,13***	cointegrated
1st subs.	A	2	19,44**	15,42**	cointegrated
1st subs.	A	3	17,64**	12,61*	cointegrated
1st subs.	A	4	10,56	9,70	not cointegrated
1st subs.	B	1	57,01***	47,21***	Cointegrated
1st subs.	B	2	31,06**	17,53*	Cointegrated
1st subs.	B	3	31,21***	18,95*	Cointegrated
1st subs.	B	4	29,34**	21,16**	Cointegrated

Source: my own calculations in Eviews 5

Conclusions

In this paper I used an econometric approach consisting of unit root and cointegration tests to see if the debt issuing process of the Romanian government is sustainable or is in fact a Ponzi – scheme. In the current context, this issue is very important as more and more countries experience a decrease in public revenues and rely on public debt to finance their expenses.

Unit root testing has revealed that public debt has been stationary until the beginning of the crisis, while in the second sub-sample, it is a *I(1)* process. Cointegration tests between government revenues and expenditures have shown that between 1995 and the second half of 2008, they are cointegrated. For the second sub-sample, the Engle – Granger methodology indicates lack of cointegration. Overall results point to a generally sound fiscal position of the Romanian government, however, the economic crisis had a consistent negative impact.

An interesting avenue to continue this research would be to study the relationship between government deficit and debt, by estimating a fiscal reaction function.

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ECONOMIC ASPECTS OF MASS-MEDIA AND THE CHANGES GENERATED BY THE ECONOMIC CRISIS

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Abstract
In this paper we intend to describe the economic implications of mass-media in correlation with the recent socio-economic changes generated by the economic crisis. We take into consideration the dual market on which mass-media evolves: the mass-media products market, and the advertising market, keeping in mind that the behavior of a mass-media institution on one market, can have direct implication on the other market. We analyze the relation between mass-media and the public (audience), the cost for creating mass-media products, the ways in which mass-media reduces costs and the ways of increasing their profits. As mass-media must always adapt to the social changes and to the public, we take our analysis further and we describe how the recent economic changes influenced the mass-media consumption trends and mass-media profits on all the main communication channels: TV, radio, outdoor, internet, newspapers/magazines. This analysis is performed at both a global and a local level, for Romania. In the end we predict how other key changes may affect the economic model approach of the mass-media institutions on short and middle terms.

Keywords: *mass-media, economic crisis, costs, profits, predictions*

Introduction

Our purpose in this theoretic paper is to present the complex economic mechanisms of mass media.

We consider important in this paper the fact that we also take into consideration the complex economic situation generated by the economic crisis and we analyze the evolution of mass-media in correspondence with the complex socio-economic modifications.

We rely our study on classic literature regarding mass-media but also on recent economic figures provided by research reports.

Media market is very diverse and complex, with some specific notes from other markets. With the industrialization of the nineteenth century, the press has passed from one entity that referred particularly to intellectuals, to an industrialized one, which creates products for mass consumption.

Media products are usually perishable goods. The news today does not become obsolete the day after, the programs or movies that are now enjoying success, tomorrow may be outdated, the football game has an impact when it is broadcast live and loses its importance when it is reran. Perishable product compels the media to continually create new content and not allow gaps in the provision of certain products. Providing the product is affordable for people and through an extensive distribution channel in order to reach a large audience in a short time.

Media market is closely related to public needs and preferences. Therefore, these needs and tastes are unpredictable and change very quickly. As a result, media institutions can not establish long-term production policy.

This makes prediction impossible for media institutions to be more vulnerable. Therefore, "media industry is more concerned than other industries, to limit production costs or find alternative financing on the one hand and constantly expand their distribution area on the other side" (Mihai Coman 2007, p. 46).

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Most of the times, the amounts invested to produce a media product, can not be recovered, if it is unsuccessful. Therefore, many institutions test their various shows, programs or products before they are broadcast, with the help of the marketing research. Also, often, a TV series is released after several pilot episodes, to test the public reaction to it and it continues if the reaction is positive. Many programs are stopped after a few appearances for the simple reason that it failed to attract sufficient audiences and production costs per program are greater than the resulted profit.

Costs

To attain a product, media bears multiple costs. Broadly, we can classify these costs as production costs and distribution costs.

Production costs include: raw materials (paper, ink, tapes, etc.), energy, equipment, work force, information costs and cultural goods purchased, from specialized suppliers.

Through media development, the majority of costs have increased. For example, the price of paper has increased because it has been reduced the cutting of trees and the availability of raw materials declined, but the demand of the many publishers has increased. The technological evolution facilitated the appearance of the increasingly more efficient equipment and institutions, out of the desire to produce quality goods as valuable are increasingly turning to new technologies. Obsolescence requires a more rapid replacement of equipment and a range of investment and the next one came to be often less than the time needed to recoup the investment (estimates made for the press in Western Europe have shown that the investment required to launch a publication pays off in 3-4 years, and to launch a television channel in 8-10 years).

Human resources in the media industry are a highly qualified workforce and journalists have often enjoyed higher incomes than other professionals. This greater investment in staff is explained by its indispensability. In the history of the press there are few strikes, and employers know that any work interruption results in the loss of income- generating audience. Even if the media industry staff is more expensive for the institution, the costs are not very high. It represents 10% in the USA and 15% in France of the publication's budget.

Costs for information and cultural goods have also known a dramatic increase, due to the increase in production prices and prices related to copyright. Increased costs associated to information and cultural goods have led many media institutions to stop the production of these goods and to focus more on the distribution of goods that are produced outside their institutions. Information is often purchased by subscription or per production from multiple vendors. Statistics show that in the U.S., games or talk-shows cost about 120,000 $ an episode of TV series with one-hour costs between 0.8 and 1.4 million $. These figures vary depending on the success of those products an episode from a successful movie can reach or exceed $ 2 million.

In the distribution of goods, costs vary depending on the type of media. The print media costs include: mailing, transportation, fees for news agents (kiosks or mail), market prospection, managing subscriptions, promotion, costs related to returns (materials not sold and sent back by the publisher). "For print media, distribution costs can go up to 50% of the total costs of the institution" (Toussaint - Desmoulins, 1992, p. 46), Netherlands 17%, 40-45% in Switzerland, France 36-40 %, 20-25% in Spain, Italy 20-23%, Germany 19% (J. Gabszewicz, N. Sonnac, 2006, p. 22).

For the audiovisual, distribution costs are those amounts of money paid to the operators to facilitate the broadcast of programs by radio, cable or satellite. If their distribution costs are much lower than production costs, the purchase rights to broadcast certain products or acquire the right to broadcast some events.

Ways to reduce production costs and obtain profit

To reduce costs associated with the media process and for profit media institutions resort to different resources. Among these are: the association of producers in networks, trusts, retail sales,

sale / lease access rights, the sale of advertising space, alternative funding through grants, sponsorships, fee reductions.

The television network is an organization developed in parallel with the trusts. A network consists of several stations, which emit the same program simultaneously. Often, they are affiliated to a central station, which is responsible for the broadcasting. Among the advantages of networks are: sharing the costs of production between the different members of networks, increased revenue from advertising (each station provides its own audience, the audience is larger and the price negotiated for the advertising space is more profitable).

News media trusts represent the integration of the media institutions in a complex conglomerate. They are generated by the absorption of other institutions or voluntary association. Since the inception of the written press, there were organizations that by which institutions were putting together their information, materials and distribution networks.

The press group can absorb institutions tangent with their activity. The assimilation can be horizontal when they attract organizations that produce goods of the same kind (mass communication products - media print, radio, television, film, etc.) or vertically, by assimilating organizations that provide support to the main activity by auxiliary activities (production, raw materials, distribution, etc.).

Among the benefits of trusts are: reducing costs, the power to spread information on multiple channels simultaneously, optimizing management and administration by handling it in trust for all organizations and handling the tasks of a small number of employees, providing the best framework for professional training in the field through the audience than they have, a great advertising potential for customers advertising.

Among the largest media groups are: International News Corporation, Time-Warner, Disney-ABC CapCities, Hearst, Gannett (USA), Matra-Hachette-Filipachi, Hers, Maxwell (England), Bertelsmann. In Romania, the most important media groups are: Media Pro Group, Group Ringier, Intact Group, Reality-Academy group Catavencu, ARBO Media, RPG, Sanoma-Hearst, WAZ, Truth.

With the joint trusts a number of risks occur. Among these, the most important is related to the monopole of a few groups. For example, in 1990 the media was controlled by 23 groups. In 1997, their number was 10 (J. Dominik, 1983, p. 196, BH Bagdikian, 1997, p. 13). These giant groups, thus becomes a great power of coverage and extensively directing the public's opinion. "Critics regard these trusts as structural enemies of democracy and accuse the employer's groups that they have hidden political interests (related to the promotion of economic interests); they consider that the pressure exerted by employers on the editorial board is the source of unilateral presentation of issues of general interest, the blocking of some aspects of reality, privileging some voices favorable to group interests and eliminate the opposite voices from the public sphere "(M. Coman, 2007, p. 56).

Another risk is the prospect for viability of the trusts, their desire to maximize profits. With mergers or acquisitions of new institutions, they are looking for new ways to reduce costs and often taking place the layoffs of journalists. The products of these trusts are suffering too and they change as they need to address and capture a wide audience. Therefore, they are simple products that can be easily understood by many people, that address to an average audience but large and/ or products that look for spectacular to interest and capture attention. At the same time the rush for audience neglects the function of education and culture of the media and gives a greater importance to the function of entertainment.

As a way of obtaining profit, retail sales are prominent in print media. Selling or leasing the access rights requires user's subscription to public radio and television programs, cable TV fee, pay-per-view fee paid for certain programs or special programs.

As advertising is concerned, for most press institutions it is the most important source of income. Advertising is a form of "ad aired by a commercial company or institution, public and private, in connection with a business transaction, a business, a job or profession, to promote the

input for a fee, goods or services'' (http://www.activision-advertising ro/articole/5-publicitate---definitie). To achieve this goal, the organizations listed are buying space from media institutions, which they use in their own interest.

Press institutions may appeal mostly to one of these mean or may use several simultaneously. For example, newspapers profit by retail selling, but also by selling ad space. Television benefits from broadcasting and the sale of advertising space. To reduce other assimilated costs, an institution may or may not, as I said, to be included in a trust.

To summarize, we see that the media operates on two markets: media's own market (news, programs, entertainment, movies, etc.) and the advertising market. R. Picard (1997, p. 17) believes that due to this phenomenon, the media product „participates in two separate markets and the market's behavior affects the behavior on the other market''. The media institutions get their income from the sale of their own products (price embedded in the retail sale, in the case of newspapers, access fees for cable television services, etc.) and by selling advertising space.

The convergence point of these two markets is the audience. Advertisers, business men and politicians appeal to media to transmit their messages, the reason being that through it, it reaches a large audience, and costs per unit are low. In the case of advertising, media institutions are actually selling their audience and as a show has more viewers, the advertiser paid price is higher.

In Romania, the total amount invested in advertising in 2008, according to the media agents estimates amounted to a value between 530 and 607 million euro. According to Alfa Cont Media Watch data who are considering investments in ratecard, the first three companies among from 2007 are found on the same positions in 2008, that is Procter & Gamble at No. 1 with 335 million euro invested in 2008, Unilever with 187 million euro and L 'Oreal with 176 million euro on the following positions. The media institutions obtain funding from other sources such as state companies, firms, foundations, individuals.

The state intervenes both directly and indirectly in financing. State contribution into the realm of public interest, thus understanding, to ensure equal and generalized to a public good (information or cultural values), regardless of the core where those values are concentrated or the financial capacity of each. The direct contribution of the state implies the endorsement of the state of the media institutions, by legal regulations and financial resources. The state can intervene to reduce costs (distribution and production). For these types of interventions the state uses resources from specific taxes (radio and television fees) or the global budget. The state participation in the public services budget is distributed uneven in different countries. The state direct intervention does not confine only to public television or radio. He can finance newspapers, magazines, books, movies, specialized institutions, provided that they address the public interest. In France, in 2004, the state supported the press by 1.3 billion euro (approx. 12% of the turnover of the press).

A media market analysis during the economic crisis

The media market is evolving in direct connection with society. Any social, economic, political disruption influences directly the media industry.

The period of economic crisis, which began in 2008 and still to continue in 2010 and in some countries in 2011, represents a good opportunity to do analysis to reveal precisely the relationship between the economic development of a society and economic transformation of media. .

U.S. market, where economic crisis began, decreased by 12.3% in 2009 to 125.3 billion euro, compared with the previous year, according to data provided by research firm Media Kantar.

The data provided by the same research company shows that in the last quarter of 2009, advertising expenses fell by six percent compared with the same period of the last year, this low decrease indicating a possible rebound.

The economic recovery is confirmed by the fact that the U.S the recession in advertising began to diminish in the last two months of 2009 and early 2010 (according to preliminary figures from the first quarter of 2010).

Looking to the average expenses recorded depending on the media, Internet display advertising expenditures rose by 7.3% in 2009, helped by investments in the telecom area auto and travel area. Television in the U.S. continued to lead the competition with other media and cable television declined by 1.4 percent in 2009. Print media has suffered a lot due to the withdrawal of advertising in publications, registering a decrease of 19.7% over 2009.

According to advertisers, in 2009, the top 10 advertisers spent cumulated 16,556.1 millions of dollars in measurable media, representing a decrease of only 0.9% compared to 2008. Procter & Gamble is again leading the way, spending 2714.3 millions, 15.6 percent less than the previous year. Verizon Communications has maintained the second position, a drop of just 6.9%. Despite a 30% drop in the sale of cars sold, General Motors, spent 1.3% more on advertising and managed to be the only car company in the top 10. Three of the advertisers have spent more in 2009: Wal-Mart has increased the budget by 35.4 percent, 32.7%, and Sprint Nextel rose 29.9%.

The investments of the top 10 categories in which advertising has been made decreased by 10.7% in 2009 and have made a total of 70,739.4 millions of dollars. The top rankings are Automotive, which has registered investment of 10,977.6 millions, 23.4% less than the previous year. Telecom is the category ranked second with an amount of 8606.8 millions registering a growth of 1.6%. Another two other categories that had increases were Food & Candy, which increased by 3.5% ($ 6.261 millions) and Pharma by 3.9 percent ($ 4751.8 millions).

Globally, however, is noticed an optimism regarding the rebound of the global economy, which is also reflected in the advertising industry, increasing budgets in the first quarter of 2010 for the first time in over two and half years (according to the report IPA / BDO Bellwether, cited by Brandrepublic.com).

According to the study, involving 300 companies, the marketing budgets for 21% of the respondents were raised in the first quarter of 2010.

In addition, marketers have shown optimistic about the economic development in 2010 and said that they would continue to increase the advertising budget.

Approximately 42% of executives said they were confident in the financial evolution of the companies that they control, while 31% affirmed their optimism on positive developments in their industry.

It should be noted that online advertising budgets have been increased for the third consecutive quarter, online medium with the highest growth rate.

Romanian advertising market

Media market in Romania started to decline in October 2008, experiencing the financial crisis. Basically, decreases were recorded in all types of mediums (TV, radio, print, Internet, cinema, outdoor).

In 2009, media market fell by 37% to a level even lower than it was in 2006. The most affected medium was the printing (decrease of 55%), followed by the street advertising (down 40%), TV (34%), radio (28%), cinema and Internet (19%).

Television took from the share of the other mediums 3%, due to falling prices for television advertising, and because of various programs and stations and the tendency of people to spend more time watching TV during the economic crisis. The print market has declined in the audience, most shops and newspapers and declining circulation. Some titles have begun to focus on the online version, others were closed. The radio market had similar problems with the print media. Many local stations have closed and others have become more active on the Internet. Street advertising has been severely hit by the crisis, especially because there is no possibility of measurement of the audience and increased cost for larger sizes formats and specific locations. Street advertising operators have not increased the number of billboards displayed, their number remaining similar to 2008. The Internet has increased the rate compared to other communication mediums, with the smallest

decrease. This was due to the increasing number of users, the possibilities for existing customization and targeting and enjoyed greater confidence compared with the television and print.

The Initiative Media estimates show that the advertising market will continue to decline by 9% in 2010 compared to 2009. Despite lower investment in advertising, television and online site is expected to take the share of the other mediums. Print and street advertising will still be the most affected mediums (minus 27% and minus 17%) while the radio will drop less (minus 10%). TV will fall by 6% and the Internet is expected to grow by 12%. It is estimated that the print will lose share in favor of online and radio.

According to the ROADS study ("Online Advertising Romanian Study") conducted by the IAB and PricewaterhouseCoopers Romania Romania, Romania online advertising market in 2009 amounted to approximately 65.2 million lei (15.5 million), down 10 % compared to 2008. The market has been, however, an increase of 3% (first half of 2009 compared to second half of 2008). Despite a decline of 10% the online advertising market was in 2009 with 53% higher than in 2007.

Ruxandra Bandilă (Marketing, Communications and Business Development Director of PricewaterhouseCoopers Romania) believes that "The latest edition of the Roads study shows that online advertising market has exceeded the critical moment of the crisis and had a slightly upward trend in the second half of 2010, which is remarkable taking into account the general economic development."

However, if on foreign markets economic growth is real, instability in Romania will make tough the assessment of the economical growth and the media growth, any scenario is possible.

Predictions regarding the media markets trend

According to the latest report of the specialized group in technology, media and telecommunications (TMT) of Deloitte, the global recession and digitization are the main challenges facing media companies, new trends and anticipated events will change the balance of forces industry and even the prospects of other sectors. Deloitte's report is based on the opinions of companies and experts, the contributions of 7,000 partners and senior specialists of the member firms of Deloitte Touche Tohmatsu, and discussions with financial analysts, specialized analysts and various organizations specializing in the field.

Regarding the evolutive trends, it is considered that the use of television and radio will maintain its supremacy. In 2010-2011, most video and audio content will be consumed in the programs established by the media profile. Over 90% of the television and over 80% of the audio will be accessible through traditional channels. Furthermore, because of the acquisition of new TV equipment or launching new services (high definition HD or 3D, special movie channels), such consumption type might even increase. Statistical figures show that the sales of televisions have remained relatively high in developing countries, where the progress of television is evident, amid a significant increase in ad revenue. In many countries, the penetration rate of the HD systems steadily increases.

Electronic Books and reading newspapers electronically begin to enjoy an increasingly high success. The success of books in electronic format is a challenge for writers and for publishing houses. While they are easy to purchase, the low price for such a book indicates a change of economic model. Low prices are no novelty for the publishing houses, but such practices have now been reserved for a small number of books, not for hundreds of thousands of titles. Perhaps the book industry will need a new model of income distribution. Also, a number of new technologies facilitates the sales increase of electronic books (eBook readers, personal computers, smart phones, etc.).

The Internet brings new features in terms of access to information. There are many discussions whether the access to online content of the newspapers and magazines to have a fee, but the chances for these discussions to be translated into real actions and outcomes are low. Deloitte specialists believes that only a small proportion of the world publications could implement such

models and much less could profit in this way. Even if there is a possibility that some online initiatives to apprehend a fee to obtain an important success, these will be few and the revenue for the online business will still come from advertising.

It is noted that the practice of putting the entire publication available online and free of charge appears to accelerate the decline in the number of subscribers to the printed version of the publications. In the future it is expected for the industry to intend to alleviate this continued migration of the existing subscribers of the printed version online.

It is expected that the largest media distribution platforms - Internet and television - will be filled increasingly more in the future. Advertising will be one of the largest recipients of simultaneous use of the Internet and television.

The value of the advertising market broadcasted on the TV is estimated at 180 billion dollars globally in 2010, while online advertising could reach 63 billion dollars.

Studies have shown that the combined use of online channels and TV channels can generate a 47% more interest in a brand than if the two channels are used separately. Advertisements on TV can immediately redirect users to related sites; this way, a product viewed in an advertising break can be purchased even before the program is resumed.

The success of last year's 3D film generated high expectations for a similar leap in television. In 2010 it witnessed a significant launch of 3D TV, including the launch of first 3D television channels in Europe and North America, the first3D TVs and cameras. Even so, the debut will be hampered by significant challenges.

3D technology has a significant potential increase in television revenue, but the number of subscribers, revenues from subscriptions or sales of equipment as well as the available content could be neglected for another 1-2 years. A large share of the initial challenges will be due to consumer confusion, the main obstacle being the lack of a 3D unique standard TV. Thus, one of the immediate key objectives would be to establish and promote a single definition of the 3D television.

Predictions regarding online advertising

Online advertising budgets are expected to increase in value and at a pace much faster than the rest of the advertising market. Even if the recession has affected this segment too, the decline is much smaller than that registered by any other advertising category. In other words, even if the online medium had a negative growth, the market share continues to grow. It is estimated that online advertising will increase its share of the industry from around 10% in 2009 to 15% at the end of 2011.

The performance in the first half of the last year shows that traditional media markets most vulnerable to online sites are magazines and newspapers, followed by radio and outdoor advertising segment. Television seems to resist best in the face of this trend.

The risk is that the online offensive to affect the traditional advertising manner, which can result in an abrupt and permanent reduction in revenues and margins. In this case, the entire advertising and promotion ecosystem must be strengthened to control costs in a more aggressive and to identify new business models.

In Romania, taking into account the considerable difference between spending for online advertising in Romania and those recorded in other European Union countries, we believe that online advertising has a good growth potential. In fact, the current economic crisis could prove beneficial to bring about changes for the online advertising more and more advertisers are allocating a substantial budget for this. We must not forget that digital mediums offers increased efficiency with regard to a specific audience and allow more precise measurement of the impact of certain advertisements.

Conclusions

We have shown that mass-media market is very complex and very vurnerable to any socio-economic changes. In order to survive, a mass-media institution doesn’t need only to reduce costs,

but also to keep an eye on new opportunities and market niches that may be explored. Further studies may approach the alternative income sources for mass-media and posible marketing niches, as well as the best strategies for dealing with them.

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COORDINATES OF ROMANIAN SUSTAINABLE DEVELOPMENT

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Abstract
Strategic objective of macroeconomic management, sustainable development implies the identification of an interaction space between economic, social, environmental and technological systems, in a dynamic and flexible process of functioning. Starting from fundamental macroeconomic principles, the paper synthesizes relevant aspects concerning planning, as main instrument of macroeconomic management and macroeconomic modelling, as a basis of substantiating development strategies. Likewise, the paper presents a mix of politics which operationalization could register Romania on sustainable development coordinates.

Keywords: *sustainable development, macroeconomic management, planning, macroeconomic modelling, strategic objectives, development politics.*

1. Introduction

Romania has come, over the passed few years, an ample and complex process of systemic transformation, of legal, institutional and organizational frame readjustment, having strategic objectives in settling a democratic system and building a functional, modern and competitive economy. Economy reforming took place by a compacting process of structures, of resources control, privatization and economic sectors restructuration, of ensuring a balanced and predictable business environment.

In implementation of structural reformation, Romania permanently benefits of support and consultancy from European Union and international financial institution (World Bank, International Monetary Fund, European Bank for Reconstruction and Development and so on), by multiannual reforming programmes of public administration, law and budgetary systems, of privatization support, bank and state enterprises restructuring, improvement of business environment, assistance in preparation for integrating in economic and institutional structures of European Union.[1]

The National Strategic Reference Framework 2007/2013 (CSNR), approved by European Committee in 2007, establishes intervention priorities of Structural Instruments of European Union[1]. Likewise, CSNR connects between priorities of National Development Plan 2007 – 2013 and those of European Union, established by Community Strategic Orientation concerning Cohesion and by revised Lisbon Strategy[7].

European Commission has allocated Romania, for 2007-2013, a total amount of approximately 19,67 billion euro, from which 19, 21 billion for Convergence objective and 0, 46 billion for European Territorial Cooperation objective. Reforming and Convergence programme answer the accomplishment efforts of convergence targets by defining direction of action at national level for subscribing to politics objectives and European strategies.

In 2010, European Commission launched "Europe of 2020" Strategy, for a smart economic growth, ecologic and in favour of inclusion. Romanian, as a state member of European Union, assumed general targets of "Europe of 2020" Strategy, as well as national development targets subsumed to European document [2].

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[1] European Fund of Regional Development, Social European Fun and Cohesion Fund.

It is necessary to promote an integrated system of planning to reunite national politics with European politics in terms of a wholesome coordination. Also, "Europe of 2020" Strategy, as a central document of planning of public politics, will be filled with precise objective in priority domains form national perspective.

2. Macroeconomic principles

From conceptual point of view, macroeconomic could be defined as the ensemble of economic activities seen in their unit and interdependency, which takes place in a political-cultural frame and constituted in a historical ethics, within state borders.[12] Mezoeconomics reunites economics activities in frames, subframes and regions, while microeconomics describes the total of economic process in economic unities, approached through existent interaction between these.

In time, macroeconomics has been the subject of many controversies. Research in this area had as a result the elaboration of five principles which compose the so-called "macroeconomics core"[4] nowadays, these principles are accepted by the majority of macroeconomics specialists. The macroeconomics core presents a double dimension: theoretical and applicative. The theoretical dimension comes from the scientific substantiation of principles, which develops a methodological support of macroeconomics, while the practical dimension is derivate from the significant impact of such nucleus on options of macroeconomic politics.

According to first principle, in national economy quasitotality, the real gross domestic product is fluctuant around a climbing trend.[13] This trend is determined by the offer manifested on economy ensemble, while the fluctuation of real gross domestic product is a consequence of registered modification within the sphere of demand. The second principle states there is no compromise on long term between inflation and unemployment [14]. The essence of such principle resides in the fact that monetary expansion acceleration is reflected on long term in inflation rate growth, without having an impact on unemployment decrease.

Accepting compromise on short term between inflation and unemployment develops the content of a third principle of macroeconomics core. There are different opinions on what concerns the efficiency of monetary politics reported to the fiscal one, though, unanimously recognized the fact that macroeconomic politics have the role of fading gross domestic product fluctuation by balancing aggregate nominal demand.

The fourth principle underlines that anticipation is a factor which influences macroeconomic politics' effect. The principle emphasizes a connection between the level of credibility of macroeconomic politics and the short term cost of disinflation. Nevertheless, last principle recommends fitting macroeconomic politics, which in uncertain terms, are landmarks of macroeconomic politics. This core represents the theoretical-methodological fundament of macroeconomic management.

3. Planning and macroeconomic management

Constructing a modern and competitive economy needs an efficient management at macroeconomic level, which main instrument is planning. Macroeconomic planning was institutionalized in developed countries right after World War II. In these states were established national plans or economical – social development projects. In the second half of '70's and the beginning of '80's was registered a reduction of manifested interest for planning. Presently, the problem of planning and its importance in a modern economy represents a controversy in the world of economists. In our opinion, macroeconomic planning is absolutely necessary in contemporary economic context, marked by profound evolution, complex and unpredictable. It is important to mention the fact that planning presents a pronounced international dimension, becoming a global phenomenon. Some authors appreciate that planning is present also in interstate and superstate economic structures, which give content to international economic integration, including economical-social life globalization process[11]. Use of macroeconomic planning is determined by a series of

objective factors, between which we remind: insufficiency of information offered by market; its incapacity of adequately allocating resources; modifying economic agents' behaviour, by transition from organizing production with the purpose of immediate profit, to organizing on long term; the impure and imperfect nature of existent competiveness in present economies.

Macroeconomic planning includes two stages, such as: diagnosis-analysis of national economic system and projecting national strategy of economic development. The diagnosis – analysis of national economy aims to an evaluation of internal economic potential, as well as identifying progressive landmarks in international economic environment. The national strategy of development is planned on the basis of diagnosis-analysis of economy. As a fact, the strategy constitutes the result of macroeconomic planning activity, the "national product" with which a state enters the existent competition on grounds of elaborating partial – sector strategies, of branch, of sub-branch and regional. Strategy constitutes an essential premise of economic progress, creating, by means of present times, a bridge to connect past and future. Strategy defines first exterior concretization of paradigm "start thinking to finish". Such paradigm is based on the principle "All things are created twice", meaning there is an initial creation, of mental order and a second physical creation.[3]

Projecting strategies of development represents a complex step with the help of macroeconomic modelling activity. In the second half of XX century we witnessed an accelerated development of macroeconomic modelling, as a consequence of progress registered in areas such as macroeconomic, national accounting, econometrics and calculus techniques. Thus, in states with advanced economy, were created informational banks and macro-models, one of the most important being the Institute of Statistics and Quantity Economics in Hamburg.

The macroeconomic model is a mathematic construction made by variables which condition one another and have a significant impact on functioning mechanism of a national economy. Academician Emilian Dobrescu appreciates that a macroeconomic model could be expressed by a function such as[5]:

$$ST_T = \phi\ [ST_t, EX_\tau, AP_T, OP_T, R]$$

where:

ST_T = vector of indicators which mark economic system status in T time;

STt = historical information, consisting in data referring to economic system status in previous time;

EX_τ = variables expected or planned, representing anticipated evaluation of indicators which significantly influence the decisions of economic operators ($\tau \geq T$);

AP_T = values determined by algorithms of calculus outside the specific model;

OPT = optional or control parameters which mark politics with great impact on business environment (public expenses, international position of economy, monetary politics, operating mode of markets);

R = set of relations through which values of models are connected (balance relations, behavioural equations, objective functions).

Nowadays, we find a great number of macroeconomic models worldwide, fact which indicates a significant importance given to modelling by states with advanced economy, as a support to project activity of development strategies. Necessity of macroeconomic planning is confirmed, therefore, also by recent activity registered internationally.

4. Romanian politics of sustainable development

The fundamental objective of sustainable development is identifying a space of interaction between economic, social, environmental and technological systems, in a dynamic process and flexible of functioning[9].

Sustainable development is defined, in essence, by the following coordinates[12]: permanent compatibility of man created environment with natural environment; equality of chances of generations who coexist succeeding each other in time and space; interpretation of present by future, under introducing as a purpose lasting development of ecologic security, instead of maximizing profit; moving the gravity centre in ensuring general welfare from quantity and intensity of economic growth to its quality; organic integration of ecologic assets with human assets.

For subscribing to sustainability trajectory, Romania must fulfil the following strategic objectives on short, medium and long term[7]:

- 2013 horizon – organic embodying of principles and lasting development practice in the sum of programmes and public politics of Romania, as a member state of European Union;
- 2020 horizon – reaching present medium level of community countries to main indicators of sustainable development;
- Romania's significant approximation to the medium level of the year of European Union member states from the point of view of sustainable development indicators.

Sustainable development of Romanian economy implies the operationalization of a mix of economic politics structured by the following main axes[7,8]:

- Economic competitiveness increase and economic development based on knowledge;
- Development and modernization of transportation infrastructure;
- Protection and improvement of environmental quality;
- Developing human resources, promoting occupancy and social inclusion, as well as reinforcement of administrative capacity;
- Developing rural economy and productivity growth in agriculture;
- Decrease of development disparities countrywide;

First priority axis of development has three major directions:

- Improvement of market access for enterprises, especially small and medium ones, by sustain of productive investment, by certifying enterprises and products, by creating an environment favourable to business financing, by developing business infrastructure (incubators, business centres, emerging clusters), as well as by promoting the Romanian touristic potential;
- Developing economy based on knowledge by promoting research and innovation as well as by efficiency of modern electronic public services (e-Governance, e-Education and e-Health);
- Energy efficiency improvement and value renewable resources of energy.

The transportation strategy targets an infrastructure modernisation in trans-European transportation and connectivity networks, developing transportation infrastructure of national interest, improving afferent services and sustainable development in transportation sector, by promoting intermodality, by traffic security enhancement on all transportation modes, as well as by decreasing the impact of transportation work and activities on the environment.

Environmental policy has as main targets to provide public utilities services at highest standards of quality and necessary quantity, development of integrated systems of waste management, improvement of sector systems of environmental management, developing systems of natural resources management (preservation of biologic diversity, ecologic reconstruction of deteriorated systems, prevention and intervention in case of natural hazards and so on), as well as infrastructure modernisation of air protection.

The fourth axis of development implies to fundament and to adopt measures of structuring on the following directions:

- Developing human assets, by investment which target initial educational system, disseminators of learning (human resources from education), content of learning (diversification and providing quality to educational offers) and professional formation system continues;
- Promoting fully occupying (are taken into concern the growth of adaptability of work labour and enterprises; development of initiative for social partners; improving transition from school

to work places, promoting entrepreneurial culture in education and formation, identifying and capitalizing all opportunities of labour market integration and so on);

- Promoting social inclusion (main domains of intervention are integration on labour market and fighting discrimination, improving access and participation to initial education and continues to vulnerable groups, developing an efficient system of social services destined to marginalization risk reduction and social exclusion);
- Developing administrative capacity and good governing, by creating a public administration – central and local – which to become an important factor of competitiveness, of development, progress and cohesion.

Rural economy development and raise of productivity in agriculture have as strategic objective building a competitive agriculture based on knowledge and private initiative, along with protection of natural, cultural and historical patrimony in rural areas of Romania. Thus there will be taken actions in directions such as increase competitiveness in agrifood and forest economy, raising standard of life in rural areas, sustainable economic development of farms and forest exploit, as well as promoting "LEADER" initiatives, by which it is expected to increase rural community capacity to develop business initiatives based on partnerships.

Diminishing disparities of development between country regions implies, mainly, improving transportation infrastructure, health, social and education services, developing business infrastructure and supporting local business activities with innovation character, increase the degree of touristic attraction of certain regions by creating an adequate infrastructure and improving specific services, developing alternative ways of tourism, protecting and promoting natural and cultural patrimony locally and regionally, renewing urban areas affected by industrial restructuration or which handle serious social-economic problems, such as European territorial cooperation at crossborder level, transnational and interregional.

Reaching strategic objective within the six national priorities of development represents support for a sustainable economic development. Increase long term competiveness in Romanian economy, developing basic infrastructure in conformity with European standards and continuous improvement of local human asset are the fundamental premises of Romanian integration in economic, institutional and social architecture of European Union.

5. Conclusions

In structural reform implementation, Romania beneficiated of support and consultancy from European Union and international financial institutions by multiannual programmes of reform in public administration, law and budgetary system, support of privatization and bank restructuration, as well as state enterprises, improvement of business environment, as well as assistance in preparation to integrate in economic and community institutional structures.

European committee allocated Romania, for 2007 – 2013, the total amount of 19, 67 billion Euros, from which 19, 21 billion for Convergence objective and 0, 46 for European Territorial Cooperation programme. Convergence Reform and Programme answer the efforts to accomplish convergence targets by defining directions of actions at national level for framing politics objectives and European strategies. Romania assumed general targets of "Europe of 2020" Strategy, launched in European Committee in 2010, as well as national objective in development subsumed to European document.

After accomplished research in macroeconomics the so-called "macroeconomics nucleus" appeared, which presents a theoretical-methodological dimension as well as a practical-applicative dimension. First dimension derives from scientific substantiation of principles, which is a methodological support of macroeconomics, while the second has in sight the significant impact of this nucleus on macroeconomic politics options.

Creating and consolidating a functional economic system, modern and competitive, needs a performing management a macroeconomic level. Main instrument of macroeconomic management, macroeconomic planning needs a diagnosis-analysis of national economic system, followed by projection of national strategy of economic development. Diagnosis-analysis of national economy has as main objectives evaluation of internal economic potential, also indentifying landmarks of evolution in international economic environment. Based on diagnosis-analysis the national strategy of economic development is projected. Actually, the strategy is the result of activity in macroeconomic planning, "national product" with which a state enters international competition.

For subscribing the sustainable development trajectory, Romania must operationalize a mix of economic politics structured on the following main axes: increase of economic competiveness and economic development based on knowledge; development and modernization of transportation infrastructure; protecting and improving environmental quality; developing human resources, promoting social occupancy and inclusion, as well as enhancement of administrative capacity; developing rural economy and increase agriculture productivity; diminishing disparities of development countrywide.

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ROMANIA'S MACROECONOMIC ACHIEVEMENTSFOR JOINING THE UNIQUE EUROPEAN CURENCY

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Abstract

The Romanian government has announced plans to join the eurozone by 2015. Currently, the leu is not yet part of ERM II but plans to join in 2010-2012. The economic advantages of the monetary union grow with expansion of the Euro zone. There is also a high level of skepticism; the main fear about the Euro is the inflation –that is considerable promoted by the Euro currency's exchange rate in comparison with 2002; another restraint is due to member states inability to establish their own interest rates. The IMF arose the option of joining the Euro zone criteria relaxing. A one-sided Euro's joining was suggested by International Monetary Fund on March-April 2009, in a confidential report mentioned by The Financial Times as the emergent states in Central and Eastern Europe to be able to pass to the unique currency, but not being represented in the Central European Bank Board. By its side, CEB considers that emergent states of the European Union must not pass to the unique currency unilaterally, because such a fact could under-mine the trust in Euro currency worldwide. This option would hardly deepen the macroeconomic controversies inside the Euro zone and would contradict the previous conditions already imposed. An acceptable solution could be the fastening of emergent countries joining the Exchange Rate Mechanism 2, after they are aware of risks arisen by such a step. The European Commission endorses in the Convergence Report on 2010 that Romania doesn't meet any criteria needed by passing to the unique European currency, respectively: prices stability; budget position of the government; stability of exchange rate; interest convergence on long run and there are also law impediments. Our paper discusses arguments for a faster passing to the Euro currency versus arguments for a late joining the Euro currency in Romania.

***Keywords**: Euro currency, the economic depression, stability of exchange rate, monetary policy, the financial depression.*

Introduction

Theoretical foundation of optimum currency area (OCA) was pioneered by Mundell (1961) and further developed by McKinnon (1963), Kenen (1969), Tavlas (1993), Bayoumi and Eichengreen (1996) and others. Frankel and Rose (1996), found a strong positive relationship between business cycles correlation and trade integration as the participation to a currency union increases the integration of collateral trade which lead to greater business cycles synchronization; Beside the nominal convergence criteria, the states who want to join a monetary union have to take into consideration also the real convergence criteria: business cycle synchronization, demand and supply shocks correlation, market flexibility, etc; Among OCA's properties business cycle synchronization features prominently; Synchronization of Business Cycles: Artis and Zhang (1997,1999), Artis (2003), Darvas and Szapary (2004),Massmann and Mitchell (2003), Fidrmuc and Korhonen (2006);Demand and supply shocks correlation: Blanchard and Quah (1989) and further Bayoumi and Eichengreen (1992), Frenkel and Nickel (2002), etc; The theory of optimum currency areas tries to identify more exactly thereport between the benefits and costs and the opportune moment of entrance in a monetary union. The pioneer of this theory is Robert Mundell (1961):"The Theory of Optimum Currency Areas", American Economic Review 51 (September 1961), pp. 717 – 725, a classic paper. What seemed to be a utopia in 1961 became a reality in 1999. „The European states may agree on a simple act […], they may establish a currency authority or a central bank. This

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is a possible solution, and may be even the ideal solution. From a political point of view, it is very complicated, almost utopian." R. Mundell (1973).The optimality of a currency area is defined within the terms of certain properties (criteria), among which the economic integration of the member states, the mobility of the factors of production, the similarity of the production structure. According to a definition, it is optimum for a country to adopt the currency of the monetary union if the benefits associated to this decision exceed the costs. There is an extremely wide literature with respect to the optimum currency areas, but all articles and books in the field are focused on the manner in which a country may assure the internal stability with the policies remained available after the loss of the monetary autonomy and the rate of exchange policy. This literature refers to the possibilities of insuring a macroeconomic balance (internal and external balance) after an asymmetric shock, namely a shock which affects a country of the union, but not the others. The internal balance refers to bringing the unemployment rate to the level of the natural rate and to the insurance of economic increase. The external balance refers to assuring the balance of payments, seen as balance equilibrium This paper has the merit of elaborating a synthesis of the evolution of the concept of unique currency, as well as the assessment of the performances of the countries which adhered to the Economic and Monetary Union from the point of view of the mechanisms of operation of their economies. It also deals with the steps necessary for a careful preparation of adopting the unique currency by Romania, the efforts and the progresses made by our country in the process of macro stabilization, the main directory lines of the monetary policy in the last years and last but not least a careful assessment of the impact and implications of adopting Euro in Romania

Paper content

1.Economic advantajes of the euro zone 's extension

The Euro currency is public assets, bringing many advantages to envolved countries. This removes the exchange rate risk for the member countries, by diminishing the interest rate, and allows to those countries to benefit by the advantage of prices stability, the basic purpose of ECB. Also, it creates the conditions for an integrated market, a liquid and compact one, among the participating countries. Once the expansion of Euro zone is done, more EU member states will enjoy these advantages. Much more, some of the advantages of the monetary union, as removing the incertainity of exchange rate, are higher. A currency exchange will not be needed, nor the payment of added taxes for that transactions in the countries inside the Euro zone. Although, to achieve the maximum potential of these advantages, a country must be prepared for passing to Euro currency. The stage will be evaluated on the Maastricht convergence criteria basis.Member States of Euro currency zone gain from being parts of a wider currency block. It is more difficult, for example, for those that speculate to make a quick profit from currency exchange and by this way to remove a great part of pressure affecting the value. A trip in Euro currency zone countries is easier for the EU citizens, with no currency exchange expenses. Also, it's an easier task to compare the prices of goods and services, contributing to a better home market work and suporting a healthy competition, with benefits for consumers.The economic and prices stability as a whole brought by Euro currency is benefic for entire economic environment, from individuals to large companies.

2.The skepticism about the euro currency zone

The main fear about the Euro is the prices inflation –that is considerable promoted by the Euro currency's exchange rate in comparison with 2002. An average citizen could be able to face the conversion from previous currency into Euro. But only those that are systematically registering the prices have a clare vision upon changes of prices for a large quantity of goods. In this context there is another phenomenon: as the use of previous currency was longer, as the sensation that prices grew is stronger. The reason is that the actual prices in Euro are compared with former prices. Often it is neglected the fact that the previous currency would generate higher prices because of inflation. The most frequent restraint is due to member states inability to establish their own interest rates. The

member states incapacity to modify interest rates means that they can't decrease the interest rates unilaterally to encourage the investments or to grow them to stimulate savings. A unique European currency means a European unique monetary policy and that needs answers to several questions.

3.Opinions concerning a faster pass to euro currency in the context of economic depression

3. 1. One-sided pass to Euro currency

A one-sided Euro's joining was suggested by International Monetary Fund on March-April 2009, in a confidential report mentioned by The Financial Times as the emergent states in Central and Eastern Europe to be able to pass to the unique currency, but not being represented in the Central European Bank Board. According to the report, such a fact would solve the problems of off-shore debts of those countries and would take-off the incertitude on markets in the region. The European Commission rejected the information suggesting that the report is overfulfilled and said that European Union took several decisions to help the Eastern Europe countries to pass the financial depression. The Central European Bank considers that emergent states of the European Union must not pass to the unique currency unilaterally, because such a fact could under-mine the trust in Euro currency worldwide. This option would hardly deepen the macroeconomic controversies inside the Euro zone and would contradict the previous conditions already imposed. An acceptable solution could be the fastening of emergent countries joining the ERM 2, after they are aware of risks arisen by such a step. Entering in ERM 2 means to take the responsibility to keep a stabile exchanging course for a determined period, but this implies risks. For the countries that are targeting the exchange rate (the Baltic states and Bulgaria) the perfect solution is to pass to the Euro zone as soon as possible, but they don't fulfil the conditions for that. For those four countries at least, a one-sided pass to Euro currency could be a solution. Those countries would not be accepted as full-members of the Euro zone, would not take part to political decisions of the Euro zone, could not rise funds from Central European Bank and would not affect the statistics of the Euro zone, but they would remove the exchange rate risk and would be members of a liquid Euro market. Their main next purpose would become to be promoted from the position of semi-member to that of full-member inside the Euro zone. In a way, a one-sided pass to Euro currency could discredit the joining rules; in the end, these countries will pass to Euro currency taking upon themselves all the risks and pay for them from their own reserves. Some analysts consider that by this way the costs would fall for all the European Union countries. The other four applicant countries for the Euro zone (Czech Republic, Poland, Romania, Hungary) are the greatest economies in the region, and their size makes the sudden change of national currency a more risky, more complex and less realistic process. Their floating exchange rate regim makes the change vulnerable to speculations. Although some advantages would be for Romania (removal of exchange rate risk), as long as there are not fulfilled all the criteria for convergence, more riks appear, generated by the inadecvate macroeconomic statement for this approach.

3.2 Change of criteria for passing to the Euro zone

On the background of the new economic depression it was arisen the problem of *relaxing criteria* for passing to the Euro currency. Western countries' leaders gave different answers during discussions refering to this subject. Although leaders as Angela Merkel (Germany's Cancelor, a country considered the most uncompromising about respecting the passing rules to the Euro currency) considered that the decision concerning *pre-joining period* could be re-examined, the criteria of passing to the Euro zone were not modified. Most leaders reject the idea of more flexible criteria that are limiting the level of budget deficit, public debt and inflation. Behalf of the Czech Presidency of the European Union, MirekTopolanek declared that there is a wide consensus among the 27 members of the Union upon the fact that would be an "error the play rules to be changed at this moment". Several leaders of the EU countries said they agree an acceleration of passing for the East European countries, but they don't discuss about relaxing criteria, nor exceptions to the rules.

Fulfiling criteria also means to ensure the sustenability of nominal convergence indices. Lithuania had been refused to join the Euro zone on 1st January 2007, because it didn't fulfiled the criterium about prices stability in the referred year and the inflation rate surpassed the accepted level. Although the inflation rate is a moving target, known *post factum*, it was considered that a sustenable inflation low rate is not enough, implying many risks.

4.Eu member states and passing to euro

The less member states non-members of the Euro zone can join the Euro zone faster than greater countries. Estonia, Lithuania and Slovenia joined to ERM 2 on June 2004 (less than two month since the moment of their adjoining to EU), and in May 2005, Cyprus, Malta and Latvia made the same thing. The Baltic states are preparing to pass to the Euro zone as soon as the economic conditions will permit them to. At the begining these countries planed to be ready for passing to Euro in 2007-2008. All of them are fighting to fulfil the inflation criteria seriously and also the need of re-considering the national targets being realistic. The non- EU micro-states as Vatican, San Marino and Monaco, passed to Euro as a part of the union with states they are involved to, EU members. Andorra, Montenegro and Kosovo passed to Euro zone one-sidedly. On contrary, although Slovakia entered the ERM 2 in 2005, it seems to be accepted not very soon, while bigger states as Bulgaria, Czech Republic, Hungary, Poland and Romania still didn't that. Czech Republic and Hungary planed to pass to the Euro zone in 2010, and both of them have now a delay and didn't proposed a new date. Poland has no official date-target yet for passing to Euro currency. Bulgaria proposed its dead-line for 2010 but certainly will be a longer time to wait, as long as Romania seems to pass to the Euro zone about 2014.The public opinion of some new entered countries into the EU is changing. Many citizens feel that the benefits of a member statement could be seen very few. They are very suspicious about finding themselves into a way to get a stable position about the limiting economic policy that seem be represented by the Economic Monetary Union. They can see the most of economies inside the Euro zone fighting for economic growth, as long as their own economies had been growing faster some years ago. If the main performance for the new accepted states is to reach the same economic performances as older states into the Union, as fast as this is possible; so it arises the question: why such a rush to impose more difficult economic policies, that make these tasks more and more difficult. The new member states could see that the older ones dislike to suport them to develop, being afraid of their potential competition in the future. Much more, some new member states feel that economic criteria required are more strictly imposed than the already adopted Economic Stability and Growth Reformed Pact that is working now.

5. Romania' way towards the euro zone

5.1.Analyse belonging the Convergence Report – May 2010

Romania doesn't fulfil any criteria for passing to unique European currency, it is said by the European Commission in its Convergence Report on 2010, respectively: prices stability; budget position of the Government; stability of exchange rate.Convergence of interest on long run, but also faces law obstacles. Behind the *economic problems*, as a too high inflation or rather high variations of national currency during the last two years, due to the economic global depression, *Romania also has legislative problems.*The Commission considers that the law referring to the statement of National Bank of Romania is not aligned to European standards yet, neither concerning the independence of institution, nor about the interdiction to grant loans to financial institutions, excepting "the rescue aid". Strictly referring to economic criteria, the Commission emphasizes that Romania had a too high rate of inflation since 2007, the year of joining EU, to present day, for passing to the Euro zone. Actually the procedure for excessive deficit is started by the Commission against Romania, the dead-line for reducing the deficit below 3% of GDP being 2012. The deficit was 5.4% for 2008 and rose to 8.3% for 2009. For this year the deficit is estimated to 8% of GDP. Another problem is the public debt that will rise from 30.5% this year to 35.8% of GDP for the next

year. Although the Joining Treatise stipulates that the maximum level of the public debt could be 60% of GDP, the economists consider that Romania can't afford such a big debt, its economy being rather weak. Romania doesn't seem for a moment being interested in joining the Euroland in 2015 as it was predicted, a more reasonable horizon being 2018. Actually it is not known if the costs of passing to the unique currency could be higher than the future benefits. We need an anchor like passing to Euro currency, but it is better to look realistically. For an economy with such sized GDP, the Euro currency "umbrella" could offer protection.

Table nr.1
Arguments for a fast passing vs. Arguments for a late passing to Euro currency in Romania

Arguments for a fast passing to Euro currency	*Arguments for a late passing to Euro currency*
Faster benefits due the exchange rate disappearance, implying a sustenable economic growth stimulation.	Delaying in structural reforms implementation would have negative effects on long run if the passing to Euro currency is made too soon.
Actually we have a high exchange rate risk due to the high level of indebting in foreign currency (the exchange rate could be sooner a propagator of shocks than an instrument for adjustment).	High inflation pressures – low potential for prices convergence.
The delay could lower the motivation for making structural reforms.	A low correlation of Romanian economic cycle with that of the Euro zone; the synchronization of the business cycle is a pre-condition to diminish the asymetric shocks risks.
The actual essemby of policies would continue to be stimulated.	The low sustenability of the public finance – a high pressure on expenses and a very low level of budget rises.
The trade affairs with the Euro zone would make possible a faster passing technically.	A different structure of economy.
	The low level of the real convergence (GDP per capita).
	Difficulties on the labour market.
	A longer independence for monetary policy and exchange rate.
	It would facilitate the progress of real and nominal convergence.

5.2.Possiblescren-plays for Romania's passing to Euro currency
5.2.1.A delay on long run for passing to Euro currency
(1) Advantages
A longer period to fulfil the structural adjustments still not made
A better progress of real and nominal convergence

The synchronization of the business cycle in Romania with that in the Euro zone countries (pre-condition to diminish the asymetric shocks risks).

A longer independence for monetary policy and exchange rate

(2) Disadvantages

Higher transacting costs together exchange rate risks, that could inhibit investments and economic growth

The possibility to delay some structural reforms and to relax the macroeconomic policies (mainly in fiscal and salary fields) if a long run is decided for passing to the Euro currency

The unclear message given to international capital markets, the delaying could be atributed to some structural or economic policy weakness, hard to be seen by investors

5.2.2..An accelerated passing to Euro currency on a short run

(1) Advantages

Faster benefits due the exchange rate disappearance, implying a sustenable economic growth stimulation

Lowering motivations for relaxing the rhytm of structural reforms

Stimulating the consistency of macroeconomic policies assambly

(2) Disadvantages

The loss of monetary and exchange rate independence would move the pressure of structural adjustments to the economic activity and labour market, in the actual condition of a limited flexibility of Romanian economy

The lack of synchronization between Romanian business cycle and the Euro zone countries would increase the risk of asymetric shocks, very difficult to be controlled without independent monetary and exchange rate policy

The difficulty to find a representative central parity for a stable exchange rate Leu/Euro, that could delay on long run the belonging to ERM2

A higher probability to act the Balassa-Samuelson effect in the first part of the economic adjustment process after the moment of joining EU, it having cosequences upon targeting inflation and/or the national currency growing up

A limited period to finish the target inflation effectiveness as a monetary policy

A passing to Euro currency would remove the exchange rate risk, and lower the costs for firms in commercial activities, that meaning a higher stability for Romanian economy. But the exchange rate decided at the moment of passing is very important; a low rate for Leu means an increasing in prices. On the other hand, the salaries couldn't grow easily, and the National Bank of Romania couldn't decide the interest rates and the inflation would be hardly controlled. But, the purpose of passing to Euro currency remains an available improvement for the future coherent policies.

Conclusions

The papers offers a short in time to the idea of monetary unionwhich allows us a more objective appreciation of the political dimensions of themonetary unions, approaching with accuracy the history and the bases ofcreation of the European Monetary System (SME) and especially the political andeconomic context of the time. There are presented the basic elements of SME, the stages and effects of UEM incorporation.Thepaper presents the European integration regarded synthetically, which is reduced to the incorporation and use by the members of the monetaryunion of the unique currency, which replaces the national currencies. "The currency is a macroeconomic phenomenon, and by this a political phenomenon", the monetary integration is therefore, in its essence, an integration from thepolitical perspective. The currency, regarded as institution, has a social-politicalnature and relies on the "trust of the agents in the system which proposed and warrants it". From a functional perspective, the currency fulfils the role of unique tool of transactions, of reserve,

of valueand cash or of value standard. The institution of unique currency – EURO – is a synthetic expression of European monetary integration and the visible sign of the European Monetary Union. EURO imposes the formation of the consciousness that all members of this union belong to a sole monetary space and compels the citizens of the member states of the Union to acknowledge it as material form of the right of obtaining by it a part of the goods and services offered for sale on the territory of the Union. Robert Muldell, the author of the theory of „optimum currency areas", stated that Euro would be a factor of understanding, prosperity and peace. Is presented the evolution and the impact of adopting Euro. The creation and acceptance of the unique currency, was without any doubt an act of trust in Europe, and at the same time a challenge in the context of global economy. All changes generated by the passing to unique currency wereincurred for the increase of the capacity of competing in a globalization economy, the passing to Euro being favoured by the economic stability whichallowed the subsequent development of he member states, without the risk of inflation.is presented the impact of creating the unique currency Euro TheEuro currency was a protection wall before the financial crisis, registering an increased interest of the countries of the European Union (UE) which were not convinced of the importance of a unique method, as Denmark and Sweden, as well as of Iceland, which is not even a part of the communitarian block. "During this period of crisis, Euro protects the companies in front of volatilisation of the

rate of exchange, which affected them strongly during the previous periods of recession", stated the president of the European Committee, Jose Manuel Barroso But Euro has other advantages as well. Being the second global currency, after dollar, the European unique currency - in which are denominated 27% of the global currency reserves – is considered as important as the dollar and yen on global plan and allows the avoidance of some monetary crises. However, the Euro area shall be affected by the adverse representation oninternational plan, not having individual representatives within the internationalorganisations, such as the International Monetary Fund or the Group of Seven (G7). A special attention is paid to the manner in which Romania was situated in the process of preparation of adhering to the European Union, by stating the advantages and costs of this demarche. The quality of EU member has a major impact on our country with respect to the economic, political and social dimensions. The economic implications shall be preponderant, but radical mutations shall also be registered in the political, security, social and cultural fields. From the political perspective, the mechanisms of taking decisions shall have to be reconfigured, in the sense of a transfer of competences to the communitarian institutions. At the same time, Romania shall benefit of the possibility of participating, within the Union, to the collective complex decisional processes, having thus the possibility to promote and protect, better, its own interests. The development of the economy shall not be performed homogenously between the economic sectors, since there shall always be

relative losers and winners. The introduction of unique currency raises problems of strategy and tactic for the economy of Romania. It is accepted the idea that Romania is interested and preoccupied of the future of Euro in the international system of payments and, as a reserve currency, of the evolution of Euro- American dollar rate of exchange, of the connections which may be established between leu and Euro. Euro involves a series of modifications both in the global economy and in the Romanian economy. "All the people agrees that the occurrence of the sole currency shall involve transformations of historical importance, but also that our possibilities of anticipating the nature of these transformations are extremely limited".(Romano Prodi, "A vision on Europe", 2001). The paper confirms some previous results in the literature, concerning the quantitative and qualitative properties of the business cycles which vary across detrending techniques by extracting different types of information from the initial data (Canova, 1998). Most of the CEECs showed a certain tendency to move toward higher synchronization level, especially during 2004-2008, however Romania, Hungary and Bulgaria still register the most reduced business cycle correlations among CEECs. This study support strong correlations between the GDP cyclical component of the Baltic States and Euro zone after 2004, explained by the collapse of trade with Russia and reorientation toward Western countries. The study support also the endogeneity

hypothesis of the optimum currency area criteria which tells that a common market intensifies the bilateral trade with impact on higher business cycle synchronization degree. However, we observe the clear impact of the financial crisis on the last analyzed subperiod, where all the correlation coefficients increased significantly as most of the countries faced strong GDP contractions. Demand shocks for most of the countries included in the study, are negatively correlated with few exceptions (France and Poland), while supply shocks are positive and strong for France and Poland, while for Germany and Italy is negative and seems relatively week. In Romania's case, demand disturbances are negatively correlated with the Euro zone and are quite significant for the analyzed period; supply disturbances are important and positive due to the different policies and exchange rate regimes in time. The major result of our paper is that, Romania as well as others CEECs countries still need time to progress and to real converge toward Euro zone, in order to reduce the costs of loosing the monetary and the exchange rate policy independence.

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THE CONNECTIONS OF MONETARY POLICIES WITH THE EVOLUTION OF INTEGRATION AND GLOBALIZATION

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Abstract
The last decades have marked a tumultuous acceleration of historical and political processes and this produced significant changes in the geopolitical sphere, which continues to influence the economy, the financial markets and international relations, with effects on the construction of a new global balance.
The unprecedented development of financial relations and monetary policies has contributed to their internationalization, to the homogenization of the financial markets and of some regulations regarding their efficiency.

***Keywords**: Bilateralism, regionalism, globalization, financial and monetary volatilization, general and financial-monetary integration, efficiency of monetary policies, etc.*

Introduction

The economic and financial-monetary relations have long preceded the appearance of the first states. Especially commercial links are very old and at first they were completely independent of state social formations. Therefore, bilateralism as a relation between two economic operators is the concept with the longest history, daily needs requiring the exchange of products.

Despite these trends, autarchy dominated economic life from its beginnings to the great geographical discoveries and the Industrial Revolution.

Economic "coagulation" continued and widened gradually until today, reaching various forms, interconnected levels that were unbelievable some time ago, representing a balancing factor at regional and international level. Current developments confirm the old forecasts referring to the indissoluble relationship between the economic and financial-monetary factor and international stability.

Literature review

1. Integration, globalization

One of the problems developed by economists and monetarists in the last decades is that of economic and financial-monetary integration involving the interests of states, classes, nations.

Etymologically “to integrate” means to include, to incorporate into a whole. The French economist Jean Weiller tries to broaden the definition of integration. For him, "integration is not simply an addition, but in a given space, it means increasing the possibilities for coordination of plans of decision centers, in order to form a single economic system. To study integration means to rise above the market and to focus the attention on decisions, expectations and intentions". This definition takes into account the West-European integration and the “centers of decision "are the authorities and the bodies of different national states.

For economists like Viner, Seitovschi, Haberler, integration would be simply the bringing

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into contact of the economies by removing all barriers that stand in the way of their exchanges. This integration would be nothing else but the creation of a vast free market, formed as a result of the unification of two or more economies. In this case, as André Marshall considers, we can not talk about integration, but about a juxtaposition of economies which keep their own character and become more or less independent, each of them undergoing consequences that appear in their neighbors' countries. The real integration, as André Marshall says, is the one designed in the structural and voluntarist meaning of the word. "It combines various elements of an economic assembly so that it looks like a space of solidarity."

François Perroux defines the concept of integration based on the Western European integration. "The integration act unites the elements to form a whole or enhances the cohesion of an existing whole. To integrate Europe will be, supposing that the elements of Europe are the nations, to gather them in a whole entity, that deserves by means of its cohesion, to be called European, or to increase the cohesion of an existing whole, that will be legitimate to be called Europe".

In the economic field, Perroux considers that integration aims to replace the national balances established in each European nation, between each European nation and other nations in Europe and beyond, with a new balance of an assembly formed by the European nations, which is considered more favorable and stable for its own benefit. André Marchall, starting from the definition of Western European integration based on solidarity, considers this could be of four kinds, namely:

a) Economic, which, except from the coordination of national policies or the application of a common policy, can be the result of the many and complex economic ties woven over the borders between member nations producers: industrialists, bankers, merchants.

b) Social, i.e. it appears what Myrdal called "equal opportunity" that involves, contrary to economic integration, the intervention of national and European public powers. If economic integration can be private in nature, social integration cannot be conceived otherwise than institutional.

c) Political, when in Western Europe the management unity is achieved and the conditions for creation and operation of a supranational authority are met, the integrated whole will be structured as each nation is structured.

d) Territorial, this is real integration because it is economic, monetary, social and political, all at the same time.

Unfortunately, we find that André Marchall, as other economists also do, omits one of the fundamental integrations which determines the four types, the **financial-monetary one**.

In this way, we consider that Perroux's considerations, namely that there are three forms of integration, are more comprehensive:

a) market integration

b) integration through investments

c) integration by means of institutions

These forms are, ultimately, different steps in the integration process.

Market integration is the simplest form of integration, which aims to create a common market - economic and financial-monetary - by removing the Customs barriers and ensuring the free movement of goods and money in the area. The financial and monetary integration has an important role in forming the common market, and its element of crucial importance is the free convertibility and movement of national currencies.

The unification of Western Europe, from an economic point of view, resulted in a vast market, which allows the existence of an economy on a higher level, similar to the American or Asian ones.

However, under the shelter of a formula like "the vast territorial unity", "the optimal size", they motivate and protect the greedy expansionist policy of large capitalist countries and imperialist monopolies against small countries, which, under the disguise of integration, seek to plunder the latter's natural wealth and subdue them economically and politically.

Another argument frequently invoked by economists to justify European integration is the development of productive forces, the very rapid contemporary technical progress.

Andre Marchal argues that in its structural sense, integration is impossible to occur unless the following conditions are met:

1. Geographic proximity - Statistics show that neighboring countries have a greater commercial exchange and that despite the progress of the means of transport, distance is an obstacle. He said that "here there is one of the irrefutable superiority of EMU on free trade area which groups seven countries geographically spread: Austria, Denmark, Norway, Portugal, United Kingdom, Sweden, Switzerland."

2. Similar development levels and the homogeneity of the structures."This means, Andre Marchal says, that territorial integrity must unite not complementary economies, but similar economies, with a view to restructure them in a broader framework - which undoubtedly arises numerous problems and obstacles, but which proves to be advantageous. While, on the other way round, the union of complementary economies, which do not arise any problem, seems to be of no utility, because it simply embodies the status quo. "

3. Psychological conditions: the will to become united in order to form a balanced economic complex.

Listing these conditions that would make the economic integration sound and politically acceptable, Andre Marchal shows that it can not be extended to too many countries. That is why no one can speak of global integration, but only of a regional one.

An extremely important observation and at the same time a correct one is made by Myrdal in connection with the worsening regional disparities in terms of integration, because of the mechanism of "circular and cumulative causation". The complete liberalization of trade following the completion of customs unity, labor force, capital, generates a double cumulative process of enrichment of the rich areas and impoverishment the poor regions.

We must understand that European integration does not take place in an international "vacuum". European Union countries are open economies with close links with the world. Therefore, the development of the European Union will be seriously affected also by economic, monetary and political events outside the Community.

On the other hand, the EU is a major player on the world stage, an actor whose actions have a significant impact on the global economic system. All these challenges and evolutions are ultimately the key to progress and to the perpetuation of competition.

2. The impact of the Monetary Union (MU) on the globalization of capital markets

The Capital Liberalization Directive adopted in June 1988 is the document that governs the European Economic Community's full liberalization of capital movements.

EU Treaty agreed between Member States shall prohibit any restriction on capital movements and payments between Member States and shall, in principle, ensure the strength of the European integration, without which the single market cannot be fully supported and carried out.

The full harmonization of the capital market is also hampered by the national characteristics of money markets, resulting mainly from the level of inflation.

The expansion of world trade, seconded by the capital flows, the unprecedented progress of science and technology, the transition of the communist economic system to a market economy have generated the acceleration of the regional and global integration process, which basically represents increased business opportunities for the banks, financial institutions, firms and financial investors.

A brief overview of these events relate to the expansion of the eurocurrency market, the birth and strengthening of the European Union, the growing importance of multinational companies, plus

the financial crises, the oil shocks, the debt crisis, the collapse of communism in Russia and in Eastern Europe.

At the beginning of the third millennium, globalization has become a fact. In these circumstances governments, international financial institutions, businessmen/businesswomen will have to face challenges, the so called "new rules of the game."

Globalization involves both a series of positive, innovative and dynamic aspects, but also many negative, disturbing and marginalized aspects. In terms of the positive effects, the relations between states and individuals are deeper than ever. World exports in the year 2009 are over 22% of GDP, compared to 17% in 1970.

Direct investments abroad in 2009 were over 11 times higher than the level of the 70s. This process of global integration is the result of **changes in the political view,** namely: to promote economic efficiency by:

1.the liberalization of domestic capital markets, financial services and the three factors of production;

2. State disengagement regarding many economic activities although at the origin of the process there are recent innovations in communications technology, integration is still partial: *borders remain a closed path, especially for low-skilled labor force.*

However, these trends mask some differences: **big progress, but also huge drawbacks, shortcomings and inequalities between countries and regions, poverty is everywhere today**. In industrialized countries, poverty is still obscured by statistics and one in eight is affected either by long-term unemployment or a life expectancy below 60 years, or an income below the national poverty line and a brief training level without the possibility of overcoming the situation.

In some countries, human poverty indicator shows large disparities by regions, for example, in the case of India where the poverty level is twice higher in Bihar state, in comparison to Kerala region. At the same time, the inequalities between men and women are still striking. In many developed countries, women are almost totally excluded from political life. Women occupy more than 30% of parliamentary seats in only five countries in the world and in other 31 countries, their presence in the Parliament is below 3%.

If financial markets or the markets of crime collapse, in the case of AIDS transmission and of the greenhouse effect, the risk of propagation of disturbances is huge. Planetary hazards, such as the global financial crisis started in 2007, are growing beyond the national and international capacity of intervention or response.

The main feature of the economic and financial environment is **the alternation of the phases of expansion with those of recession and the financial and monetary volatility**.

The financial crisis in America, Europe and Asia has destabilized the lives of millions of people, reduced the prospects of economic growth in the world. The analysis of the crisis allows the release of some important conclusions as regards the financial market:

a) **First of all, the instability is the characteristic of globalized financial markets**. A key element in triggering the Asian crisis, for example, was the instant and massive injection of capital for a short term, followed by an equally abrupt withdrawal.

b) **The second important conclusion** that is released from the crisis is **the increased caution with which the governments should open access to capital for the short term**, highly speculative, especially when the regulatory institutions of the financial market are infantile.

How are we going to live with this node of divergence? Will globalization defeat with her good intentions of equilibrium in a kingdom dominated by the Faustian spirit and intelligence or terrorism? It remains to be noticed what will be the answer to these questions.

Who will benefit most from the change? This is not the case of European exchange offices. The sector of IT and business consulting companies will take full advantage of the integration and stability of the currency, as a consequence of a strong demand for the adaptation of

information systems. Finally, the whole economy will benefit as a result of integration and currency stability, which is the fundamental goal of the project.

Capital markets have prepared themselves. The state bonds issued after 1999 have been issued in Euro and those in circulation have been converted. As regards the future of the financial centers, the opinions are divided and we cannot make reliable estimates yet. **If Britain will enter the monetary union, London would be able to dominate the capital market.** Smaller financial centers, for example, Brussels and Milan will restrict its activities. **Otherwise there is a risk that the offshore market in the UK to divert a portion of its profits volume of financial activities generated by the euro area**. Competition among financial centers and institutions will increase, and the result will be the production of alliances on continental markets.

London has an advantage over the competition in terms of financial liberalization, and this allows it to exploit the natural tendency of concentration which is found in the finance industry.

Making use of the "opting out" clause, the UK yet avoids the rigorous monetary policy and the discipline imposed by the ECB, London still retaining its status of offshore center. At the same time, London's advantage is reduced, increasingly, in favor of Paris that offers superior security guarantees for financial transactions.

In terms of derived products from the capital market, the Single currency triggers a uniformity of the futures contracts. At the same time, the listing of securities in euro allows a better comparison and creates new opportunities for arbitrage.

Potential efficiency and success in the financial sector depend, ultimately, on the ability of MU to achieve full financial integration of member countries, to create a more uniform system of practices on financial markets and achieve the fullest possible transparency in the system of quotation and evaluation.

The efficiency and the scope for monetary policy and the statute of the central bank are inseparable.

The impact of external constraints should not be generalized: no country can completely abandon the wave of adjustments, operating continuously. It follows therefore that **a certain degree of independence** must be considered and maintained at all times, **which does not mean isolation** from the process of internationalization. Economic independence is now discretion and security, allowing us to retreat from the game when "cards are bad" and it also means maintaining the autonomy of decision. Independence is connected to the national interest and to the quality of the most precious capital, the human capital. A country that does not make any efforts in this direction, in terms of **nutrition, health, education, comfort and civilization** in general, everything that is related to the **quality of life** today, is likely to disappear sooner or later, from the geopolitical landscape. Today, when we know too well how many forces are raging, many inequalities overwhelm us, and it is clear that this goal is not simple at all.

Two foreign policies are essentially required today:

- **the competition policy;**
- **the cooperation policy.**

The Competition policy is the cornerstone of the margin of maneuver. If we fail to provide a satisfactory level of competitiveness, we expect a dependent position, of a colony or satellite.

Although it was said from the beginning that once the currency are allowed to float freely, they will solve all the problems and the adjustments will be made by themselves, they arrived shortly afterwards to the flotation controlled by central banks, but still this was not effective. Then the coordination of monetary policies appeared, and at present we can also talk about the coordination of economic policies, within the EU and G7.

3. The debut of EURO – in between success and skepticism

"**E Day**", i.e. the euro day, on 1 January 2002, when over 300 million people in Europe began to have one thing in common: the same currency.

Conversion is the second part of a long process, conceived in two stages. *The first step*, the introduction of electronic euro was made in January 1999, when imports and exports in and from the EU were calculated using the single currency. After 1 January 2002, consumers in 16 European countries and tourists visiting these countries stopped using the Franc, the Mark and the national Lira and began to pay for food, train tickets or consumer goods with the new banknotes of the single currency.

Moving to a single currency was not simply a matter of monetary logistics. The immediate or long-term consequences, good or bad, are enormous.

Skepticism and mistrust, this could be the position taken by the Western analysts as regards the shift to the single currency, after 1 January 2002.

• *Skepticism*, because almost 40% of the 300 million citizens of the EU member states do not realize that they do not have their national currencies anymore in their pockets. The same thing can be said also about small and medium enterprises. The managers of these companies have not tried too hard to understand the phenomenon of transition to the single currency. For them the critical moment came when they had to start paying salaries in euro.

• *Lack of confidence* comes today from gloomy forecasts regarding the economic growth, inflation and high growth of public debt ratio in GDP in the 16 Member States. A few months before "E Day" it was increasingly clear that Europe had problems. At the beginning of 2010, ECB forecasts an inflation rate of 3-4%.

In order to gain confidence in the single currency, it is important not to cause any syncope after switching from the national currencies to the euro, not to lead to delays in payments, and not be the case of temporary currency crises and to reduce the volatility of the exchange rate.

Of course, you can make a series of possible scenarios, based on the current regulations and the confidence in the single currency.

The European unification is more than an alliance or an association under the tutelage of a super-national authority. It is possible for it to exist only by self-limiting the proud movement of the national entities and by means of the conscious delegation of powers that belonged to the national entities.

Conclusions

The monetary policies are proved to be a catalyst for general economic and financial stability – regional and global. The euro zone should regain its status of reliable and stabilizing factor in international financial-monetary relations.

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THE SCOPE OF GLOBALIZATION AND ITS IMPACT ON THE ECONOMIC AND FINANCIAL-BANKING SECTOR

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Abstract
Currently, on the grand scene of social-human life, we may encounter all possible social players … Should we follow "movement" as a fundamental social and historical phenomenon, we shall find that the world has become, to a large extent, a single societal system, as a result of the development of interdependence connections affecting each and every one of us. The envisaged global system is not just an environment within which particular societies develop and evolve, as separate systems. Through the social, economic, financial and political ties, through the communication systems crossing interstate borders, it turns into a new system, with a trend towards materially restraining the action of its subsequent systems, decisively containing the fate of those living in each of them. The general term used to characterize this increasing interdependence of the human society is that of globalization.

Keywords: *The scope of globalization: organizing information networks; space and time compression; space and time unification; financial-banking networks; universally diversified society; opposite paradigms – financial individualization and globalization; zonal and regional blocks.*

Introduction

Globalization is not a mere process of increasing world unity. The globalization of social relations firstly requires a reassessment of time and space in social life. People's life is increasingly influenced by the events occurring far from the social context in which they are carrying out their daily activities. From this point of view, globalization is not a novelty, since it started to develop two-three centuries ago, as the scientific and technical discoveries had become more prominent on a regional and universal scale. Ever since then, from the beginnings, the globalization of social-economic and financial relations has been associated with inequalities between various parts of the world.

Nowadays, a new battle is being carried out in the competition field, namely that for mastering information.[1] A *new field* is thus *opened to financial-banking,* industrial and commercial *strategies*, but also for the military and political ones. New relations appear between state and economic institutions, between the public and the private sector, between the state and the market.

Therefore, globalization appears to be one of the most significant changes that the modern world has confronted with. Many of the current fundamental problems, such as ecological issues, avoiding world-scale conflicts, or financial crises are of international importance, as regards their purpose.

Literature Review

Despite the pronounced increase of economic, financial and cultural interdependence, the world system is characterized by inequality and divided into a "mosaic" of states, whose concerns may be common but also divergent. Currently, there is no proof, and there shall be none in the near future, of a political consensus capable to go beyond the states' conflicting interests. However, it is more than certain that eventually it shall be possible to create a world government, but it shall be the

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[1] *Jean-Francois Lyotard*, Condiția post modernă, *Bucharest, Babei Publishing House, 1999, page 21*.

result of a lengthy process. In many aspects, the world is becoming more united and certain sources of conflict between nation-states or regions tend to disappear.

World homogenization thus appears as a first dimension of globalization. At present, universal standards replace particular homogeneity, specific to territorial units, with slight differences. The differences between territorial units and their inner differences which were mutually exclusive, are being replaced, through expansion, by a certain level of standardization and equalization, representing the "new spatial infrastructure", accompanied by free movement of material goods, capital, people and ideas, at regional and global level.

A similar and intense process is undergoing at a more limited regional scale. European integration sought among other unifying measures, to create "Europe without borders", in removing mutual exclusivity – under the conditions where certain closed systems coexist at the level of nation-states – requiring, among others, the accomplishment of a common organizational, economic and financial culture, either as a diffusion process of such an existing culture, or as a collective participative process, meant to create a new one.

Globalization has not yet produced an international institutional entity, with a legal status, capable to efficiently control and manage the homogenization process, the existing tensions or to create a redistribution or prosperity and peace in the world.

In the attempt to identify the scope of globalization, we find that it is about to become individualized, seeking to find its way, and its means of accomplishment and consolidation. Thus, in the given conditions, globalization is mainly marked by the means of communication, via Internet, due to which the geographic distance has disappeared, being measured by entirely different criteria – technological, economic, financial, etc. - which imposes a new universal world. Cybernetics and electronics, numerical networks, and the Internet have already removed borders in certain fields, such as: transport and communication, trade and financial-banking transactions.

The world that we are living in is a world of communications – globalized communications – where information is standardized, dematerialized, symbolic, direct, without intermediation, a world where information travels with amazing intensity and velocity, sending on a long distance both positive effects and the shock of negative effects, further to the complexity, complementarity and connections in which all nation-states are engaged, be it voluntarily or otherwise.

Such an example is the appearance of electronic trade, accompanied by new electronic financial and banking instruments (payment, credit, settlement instruments and the like), fluidizing the circulation of money and commercial swaps, facilitating remote transactions, with no necessity to travel, where the demand and supply are exchanged through the Internet, thus ensuring a network system where web pages and sites provide information on stocks, varieties, prices, warehouses, conditions, etc. – through which most swaps are materialized, the market is modernized, and the capital and the goods continue to circulate. In this context, the network system raises new legal problems (access, promotion, competition, taxation, control, protection, incrimination etc.), subordinated to a new economic order. .

Life therefore imposes that the reorganization of networks at world level be founded on technical and legal norms, regulating the network usage system, the obligations, liabilities and sanctions, in other words, an international legal framework, all the more so since the organized crime phenomenon has spread on the Internet (fraud, money laundering, goods and human traffic, robberies, network hacking, etc.) which may cause the unbalance of world order, by their impact.

This aspect of globalization therefore concerns both the increase of the spatial framework of event interdependence and the intensification of extensions based on connections, on the complementarity of differences, and on the competitiveness of alternatives. More and more often, people's behavior and activities in certain areas have repercussions that go beyond local, national or regional borders, and sooner or later they reach world dimensions. In general, the broader the time framework, the greater the participation to individual and collective activities with world impact. An increased sensitivity towards world-scale differences can be detected in this process, differences that

make up the bases of competitive and complementary interaction, exceeding the level of the nation-state.

Once the "space time compression" intensifies, it becomes impossible to "solve" problems by avoiding them from a spatial point of view. Since world level interdependences increase constantly, and once the fact that there is a "single world" is acknowledged, the possibilities for isolated partial solutions is diminished both for the individual, and for the local community or the nation-state. For instance, environment protection measures become general and mandatory, independently from the available material resources coming from outside the borders. Therefore, we shall uphold the idea pursuant to which the greater the globalization level, the more limited the range of "escape alternatives".

From the aforementioned notions, another aspect of globalization arises, consisting of the *trend to unify space and time.* Such as, from the spatial point of view, globalization tends to go beyond local, particular space, to the global, unique space, we may also speak of the unification of local times into a global time, by exceeding temporal discontinuity, based on the unification of non-simultaneous rhythms of various activities, and on the inclusion thereof in the world spaces. We are considering the *services* that are currently *most integrated in the world expansionist processes* (such as banking services and stock markets), which can no longer afford the daily breaks according to the local time. In the large cities of the world, there is a number of activities and institutions working constantly according to the "global time", such as international airports or the hotel industry. Thus, once the new information, techniques and technologies have appeared, time differences no longer exclude one region or another from the global system, the trend being to ensure the active universal time synchronization.

Another aspect of globalization as a historical process consists of the fact that *it induces a new step in civilization, that of the global society, of a universally diversified society.*

Reconsidering the world market, sustained economic and financial competition, the appearance of multinational and supranational corporations, power poles, the decline of the socialist/communist alternative, and many other factors, have brought the states to the position of seriously revising the role they used to play in time.

Globalization sweeps away all adversities trying to prevent its progress. It is *developed*, in general, *independently from the will of the states, of the governments, of the markets and civilizations*, liberalizing and unifying mostly by the force of combining the scientific and technical progress, such as information networks, communication technologies, to their particular technologies, to the management of various activities. The economic frontiers have an increased mobility, determined by the increase of regional integration and cooperation processes and by globalization. Customs connections, free zones, economic, political, cultural and even political complementarities, amplify such processes and trends, simulating and imposing – in a natural manner – partnership for development and peace and the spirit of solidarity.

Therefore, globalization is not strictly limited to economy and the means of putting it into action, in a higher generalizing form. It concerns the elements of civilization in all aspects, starting from the political, management and global organization ones, going through the economic, financial and social, to the military aspect.

Globalization brings about radical changes in communications, economy and finance, in reconfiguring internal markets, in the institutional and environmental system, in distribution and redistribution, in lifestyle, in human relations and mentalities, inducing a new morale, all the above being determined by the progress to be accomplished at all levels of human activity and existence, in shaping the universal man.

In this context, there appears the paradigm of social and spatial development, with its two opposite terms: *individualization* and *globalization.* The latter has drawn great interest in recent years, while most discourses have not been focused on concept definitions, but rather on highly differentiated approaches of the phenomenon.

Globalization is a process increasing the determining frameworks of social change, at the level of the world as a whole. Thus, while social change was first approached at local and national level, the concern for globalization has increased the interest in explaining relations between territorial units and the world, as a whole, and the debates have been focused on the problems concerning the "local-global" relation, and on multilevel surveys.

Our planet is actually o diversity of a whole, a system created from subsystems with different identities.

The level of globalization may be appraised to the extent where territorial subsystems are open and allow– when they can – the access of world forces as a whole. Where territorial communities stay closed at local, national or regional level, they create a set of closed and homogenous systems, possibly on the inside. Therefore, the larger the availability and participation of the subsystems, the more they shall get closer and resemble the global system, global features replacing local ones. Potentially, we are getting closer to the situation where the world as a whole shall be mirrored in any subsystem, and at the same time, each subsystem, town, region or nation-state shall be mirrored by the whole; each component becomes singled out, becomes more similar to the whole, while the whole manifests itself increasingly at component level, and local conflicts become global social issues.

The question that stays open is the one regarding the manner in which we could go beyond the mere listing of the other indicators of globalization, such as the operations of multinational and transnational, corporations, be they economic or financial, satellite communications, the existence of a universally accepted language, the ecological problems of the modern world or the global approach to security and peace.

The world we live in is a world of zonal and regional blocks, determined by the need for capitalization and common protection of the economic, financial, and human resources, and by the more or less conscious preparation for the integration in a global world (society, market, civilization). It is a world dominated by interests and economic and social inequality, national and supranational oligopolistic concentrations, determining policies and strategies with potentially destabilizing consequences (particularly for underdeveloped countries), supranational, zonal and global, financial and banking institutions and the like, with their own policies and strategies, ignoring many times the local particularities (development level, resources, opportunities, traditions, etc.). Paradoxically or not, the existence and development of transnational societies of the large corporations, cartels and monopolies, and their mergers, are the sprouts giving birth to a large extent, to global economy, to the needs of global society, with their related institutions and mechanisms.

At the same time, state involvement in a system of networks shall generate deep changes in the configuration of nation-states, in reducing their role as regards international or interstate organizations and transnational corporations, and in redefining the power positions within the international relations system.

Conclusions

Globalization, as a process, constitutes, beyond the objectivity of the extent of communications and of the information revolution, a political issue with implications beyond all fields of activity, including the military one.

The political aspect is the one which, eventually, establishes the politics of globalization, the directions and strategies, the steps towards creating the global society. It is the one creating and undoing alliances of all types, developing, limiting and structuring the markets, causing changes of state sovereignty, troubling the existing identity structures, etc. all determined by the factor of interest, supposedly the higher human interest...

In this context, globalization appears as the greatest defiance and challenge of the century, but also as a threat. Since the "global society" or the "world system" does not appear merely based on the

interdependence and mutual connections of its parts, globalization is able to go forward either in the direction of freedom, or in the one of domination. The classic example is the relations between "centre" and "periphery" (considered at scale…).

The intensification, vastness and spatial extent of integrating processes involves the harmonization of the participating states' decisions, of the common programs and projects in promoting the most objective goals, strategies and economic, social, financial, political and military strategies and priorities for the given area. These measures and joint efforts lead to a new dimension of international cooperation, creating a new pulse, arising from the promotion of regional, community and global relations.

Under the conditions of the objectivation of this process, where economies, markets, capitals, etc. no longer have frontiers, where competitiveness, competition and efficiency become reference factors, the defining role of man, education, professionalism, pragmatism, intelligence and ingenuity, and its power to adapt to a more mobile world, are increasing as well.

Sustainable human development remains the main (human) feature, ensuring development in general, social democratization, human dignity, solidarity, participation to the decision making process, balanced distribution, natural environment protection, etc.

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THE ROLE OF INFORMATION TECHNOLOGIES IN REDUCING OF SOCIAL EXCLUSION IN THE PROCESS OF KNOWLEDGE SOCIETY AND THE SAMPLE OF CALL CENTERS IN TURKEY

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Abstract
The emerging of knowledge societies brought about a lot of transformations in societies in the last decades. At first, these effects have been appeared in the developed and then in the developing world not only urban area also rural. The diffusion of the technologies that is invented on the mentality of knowledge society, have been effecting all life and promising to have major changes by providing access the opportunities for training and education, media and social networks and remodeling the way we do business, the nature of work and economy. In this concept, the internet, as a tool of the knowledge society, has also been regarded an important instrument in developing the rural regions around the globe. By connecting different parts of the world, the internet and other tools of information technologies create new job opportunities for individuals and companies. There are many people who cannot have and reach to the good education as well as the job opportunities in the rural areas as much as there is in urban areas. Many state institutions and companies have easily been investing to the rural area because of information technologies' low level entry costs. Especially, many of them open new call centers in the poor areas of countries. the purpose of this paper is that the role of information technologies in the rural area is going to be evaluated on the call centers sample in Turkey. First part of the study, the literature is reviewed about knowledge society and information technologies. In the second part, the benefits of information technologies for individuals who live in the rural areas and some model applications are explained. In the final part, call centers that established by state and private companies are investigated according to their employment and training effects for the poor in the rural areas.

Keywords: *Knowledge Society, Information Technologies, Rural Development, call centers*

Introduction

Today's one of the most important problem for societies is economic stabilization including sustainable development and decreasing unemployment. This is an intertwined problem and it cannot be solved without structural changes which are the usage of high tech in industries, investment in rural area, education and training updated according to new technologies as well as information technologies, both state and private sector compatibility and legal and regulatory platform for new emerging sectors and jobs. In this paper, call center jobs, as an emerging sector and is supported information technologies, is to be investigated in the transition period. Of course, it is seen a lot opportunities and threats for the sectors by producing new jobs and employment opportunities in the sector and reducing employment in the others. Although, popular jobs require high level qualification in the knowledge society, call centers jobs are rather different in terms of workers' qualification levels, flexibility and investment. Especially, the number of call center can be increased in the short time and the required workers and qualifications can be met from local area. That is why, call centers are seen a source of employment and a dynamic element for young educated local people by state and private companies. There is a shift from developed countries to developing countries such as India, China, Malaysia and Turkey in call centers investments.

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With the stability in politics and economics in the last decade, Turkey is taking new investments in many sectors and also call centers sector both by foreign and domestic companies. On the one hand, Turkey has many advantages such as, cheap and educated labor, closeness to the developed region, high unemployment rate and young population, companies want to invest to the call center jobs. On the other hand, Turkish state offers some investment incentives for the east of Turkey in order to decrease unemployment and economic stability. In the last three years, many foreign and domestic companies established their call centers in the region in order to reduce their operation costs. Although, call centers sector is not much so big as it is in India, the sector is promising and supporting in decreasing unemployment and development of rural area in the east of Turkey. By investing and decreasing unemployment in the region, people are included in social and economic life, reached education and training opportunities and had hopes for their future.

Although the subject of call center is known in the developed world, it is not enough studied in Turkey since there is no related databases. The purpose of this paper is that the role of information technologies in the rural area is going to be evaluated on the call centers sample in Turkey. First part of the study, the literature is reviewed about knowledge society and information technologies. In the second part, the benefits of information technologies for individuals who live in the rural areas and some model applications are explained. In the final part, call centers that established by state and private companies are investigated according to their employment and training effects for the poor in the rural areas.

1. The Effects of Information Technologies in the Process of Knowledge Society

Information and communication technologies (ICTs) have become increasingly important drivers of economic growth during the last two decades. They were a major source of productivity growth during the 1990s in many developed countries. The diffusion of ICTs has been argued to permanently change the rate of sustainable economic growth, and ICTs have frequently been described as core technologies of the emerging knowledge-based economies (Tuomi, 2004, 3). Knowledge does not consist of ICT alone, without a social, political and cultural context, ICT and knowledge economy will not flourish (Evers, 2001, 17). A knowledge economy needs to be supported with an environment from legal to societal.

Information technologies is seen an important driver of economic and technologic development as well as cultural and social change. By using information technologies, reaching, using and reproducing of information bring about both new knowledge and transformational change of society. In this process, people keep new mentality in which new knowledge is used again and again to produce value added services and products. The development of the information society and the wide-spread diffusion of Information and Communication Technologies give rise to new digital skills and competences that are necessary for employment, education and training, self-development and participation in society.

Knowledge society defines a broader role for ICTs as a tool for lifelong learning for citizens, enabling knowledge workers to improve skills and their capacity to innovate by accessing knowledge via the Internet from the public domain. Individuals have more freedom and greater possibilities for self realization. Individuals can be empowered in dealing with the governments and service providers through improved channels of interactive feedback. Communities can be empowered to participate in planning processes through access to information and using the Internet for advocacy of views. Countries develop a comparative advantage that is based on application of knowledge rather than only cheap labour (Bhatnagar, 2006).

ICT-related policies are being developed to support of a wide range of important goals and aspirations associated with the development agendas of low income countries as well as developing countries (Mansel, 2009, 3). There are a lot of cases in the countries where information technologies is an engine of development in many ways (Tiwari, 2008, 448). Both ICT production and use have been associated with economic development and growth through their multifaceted impacts on

employment creation, exports, innovation, increased productivity and other 'spillover' effects. These beneficial impacts have led many transition economies to promote, to a greater or lesser extent, the production and use of this technology (Harindaranath, 2008, 34).

2. The Development Impact of Information Technologies in Rural Area

Technological innovations in the last two decades have led to a restructuring and reorganization of work. The emergence of information and technology-driven economies has expanded the service sector and redefined notions of time, space, distance, production, consumption and boundaries on the global stage. It has changed the social, economic, cultural and political environment and the nature of global interaction. New communication technologies and investment in telecommunications infrastructure have made the long-distance transfer of information realizable and inexpensive. Not only developed countries, but also developing and less developed countries reap the benefits of these opportunities have low entry barriers, provide employment and development and offer new skills as training source both in urban and poor rural area.

Emerging information technologies also changed the type of businesses and the way people do business and processes. Along with ongoing Taylorization of work processes, these changes have made possible the rapid globalization of services such that many services previously produced only locally are now outsourced or 'offshored'. These services include call centers, software development, financial services, stock market research and medical transcriptions (Abraham, 2008, 198). Call centers are representative of new service activities that have expanded in recent years, with intensified cost pressures in liberalized markets and new restructuring opportunities provided by advanced information technologies. They also have a number of characteristics that might be expected to lead to convergence on a low wage, Taylorized model of work design: low capital requirements, high mobility and often easily rationalized task content (Doellgast, 2009, 350). Call Centers are Fuelled by advances in information technology and the plummeting costs of data transmission; firms have found it cost effective to provide service and sales to customers through remote technology mediated centers (Holman, 2007, 1).

Over the past decade, call centers which is called o**utsourcing industries** often refers to the delegation of non-core operations from internal production to an external entity specializing in the management of that operation. The decision to outsource is often made in the interest of lowering firm costs, redirecting or conserving energy directed at the competencies of a particular business, or to make more efficient use of worldwide labor, capital, technology and resources have experienced phenomenal growth in virtually every country around the world (justcareers.com, 2011). The call center industry, in particular, is one of the most rapidly growing areas of work globally. It epitomizes some of the key contemporary issues concerning the shifting nature of work, labor relations, economic development and regulations (Abraham, 2008, 198).

2.1. Call Centers A New Type of The Organizations

In recent years call centers have become one of the fastest growing areas of employment in many countries. It must be noted, however, from the outset that call centers do not constitute a sector but a specific form of work organization. Customer telephone enquiries, which formerly were scattered among specialized company departments, are transferred to a centralized call-centre. The purposes of this operation are both to provide a more client-oriented service and to improve the efficiency of processing customer enquiries.

Some authors see call center jobs characterized by high degree of computerization and standardization of work. Because of these features, this type of work usually depicted as an unskilled work with high time pressure and de-humanization of work. That's why some authors describe it as an expression of "Taylorism". Consistent and tight technological surveillance and repetitive work cause stress which later result in job dissatisfaction among these employees (Yılmaz and Keser, 2008, 24). The setting up of call-centers entails a new division of labor within or between firms, one

that is frequently characterized by the standardization and fragmentation of tasks. In addition Weinkopf agree that call-centers are frequently seen as a prototype of 'neo-taylorism' in the services sector (Weinkopf, 2002, 457). In this organizations, the fatigue and stress that can result from the aggressive management of highly intense and tightly quantified call work can make groups of call centre workers mental and physical tired (Fisher, 2004, 158). Workers' work is closely monitored, tightly controlled, and highly routinized thanks to extensive reliance on highly sophisticated computer technology (D'Cruz, 2006, 342). The type of work in call centre is of itself demanding, repetitive, and often stressful. This is reflected in high levels of turnover and absenteeism (Lewig, 2003, 367).

Macro-economic and socio-political climate are driving important changes in the nature of employment and work (Rainnie, 2008,197). A call center is an example of how modern information technology has rendered it possible to create new and improved forms of communication between customers and companies including the public administration. Broadly defined, a call center is a communication platform from which firms deliver services to customers via remote, real time contact (Norling, 2001, 155). As a form of neo-taylorist work organization, call-centers go against the trend towards more cooperative forms of work found in many services (Weinkopf, 2002, 463). In this mean, the pattern shows the trinity such as person, computer and network as the new work unit. The trinity has become a kind of smallest component in the companies, a module possible to combine with other modules creating a limitless network for cooperation (Norling, 2001, 158).

With the shift towards a more competitive ICT-based services industry, call centers are fast becoming characteristic institutions of today's information economy. These novel institutions which provide enhanced services to their customers represent distant or external sites of corporate entities and respond to an increasingly sophisticated and discerning clientele. Within the 'customer services and care' industry, two simultaneous trends are apparent. The first is the establishment of call centers within countries which are key players in the digital economy; the second is the phenomenal growth of such centers in the developing world, where Information Technology Enabled Services are increasingly outsourced to low waged, multilingual countries with relatively low overhead costs (Ng and Mitter, 2005, 210).

2.2. Popular Countries in Call Center Sector

The current relocation of service sector jobs is a consequence of global business strategies as well as technological advances. The convergence of communications and networking technologies has made it possible to digitize a vast amount of information that can be transported, processed and retrieved to and from a distant location at little cost. From a technical and productivity standpoint, an information-processing worker sitting 6,000 miles away might as well be in the next cubicle and on the local area network. In this scenario, with the cost of telephony steadily falling, the advantages of relocating ICTs-related and ICTs-enabled jobs from USA or UK to India, Malaysia or Ghana are obvious (Ng and Mitter, 2005, 212).

A recent survey by the Indian National Association of Software and Service Companies (NASSCOM) found that almost two out of five *Fortune 500* companies currently outsource some of their software requirements to India. Union in the UK have predicted that up to 200,000 jobs in the finance sector would leave, mostly to India, as companies take advantage of India's cheaper labor cost. The cheaper labor cost is only one consideration for choosing India as a desired site for relocation of work. There are more IT engineers in Bangalore (150,000) than in the Silicon Valley (120,000), creating an enabling cyber culture. India now produces two million college graduates a year (a number which is expected to double by 2010), 80 percent of the graduates are English speaking (The Economist, 11 December, 2003). It would cost a company US $13,000 to hire a fresh graduate with combined information technology (IT), engineering and business skills from the Indian Institute of Management in India, while a Stanford University graduate in the US with similar qualifications will be paid about US $95,000. But the cost differentials are equally noticeable in the

relatively low skilled end of the information processing sector such as customer care services, medical transcription, processing of airline tickets, accounting and tax returns forms. The average annual wage of an employee in a call center in the UK is £12,500 compared to the £1,200 average annual wage of a similar employee in India (Ng and Mitter, 2005, 212).

The computerization of work has made it easier to connect to the capabilities that exist in countries like China, Ireland, Australia, Canada, and the Philippines, and it is accelerating the trend toward offshore outsourcing of services (Gereffi, 2004, 7). Despite the mobility of call flows and the scale economies of serving large geographic markets, most call center markets are not international: while 86% of centers serve the local, regional, or national market in their own country, only 14% serve the international market. The exceptions to this pattern are those countries that have specialized as global subcontractors India, and to a lesser extent, Ireland and Canada. In a survey examined by Holman, the proportion of call centers serving international customers is 73% in India, 37% in Ireland, and 35% in Canada. Canada is rarely noticed as a major provider of subcontracting services, but its proximity to the US and shared language, time zone, culture, government provided health care, and low exchange rate to the US dollar has made it an increasingly important locus of subcontractors for US corporations (Holman, 2007, 5).

The spread of call center services is also occurring in a way that is different from that found in manufacturing. Thus, while call centers are geographically mobile, their spread is quite uneven, shaped particularly by language and culture. Most centers providing international services follow historic patterns of linguistic ties: between France and Morocco; between Spain and Latin America; between the UK and US and other English speaking countries such as Ireland, India, Canada, and South Africa (Holman, 2007, 5).

India and the Philippines have seen a mushrooming of outsourced call centers, providing white-collar employment to many who would have found it difficult to obtain employment after secondary and tertiary education. On the other hand, in Malaysia, the contact center business is geared primarily towards the local market, but with projected regional and global ventures in the pipeline. Multinational companies have started setting up in-house call centers that serve the region, providing the much-needed push to upgrade the industry (Ng and Mitter, 2005, 211).

2.3. The Employment Opportunities of Call Centers

Call centers represent a blend of old and new employment features that are only partially grasped by existing theoretical alternatives. Labor process theory suggests that call centers are best depicted as new electronic assembly lines of fragmented, low skill service labor. Second-wave post-industrial theory represents call centers as a significant foray into the information/knowledge economy (Russell, 2002, 467). Number of employees working in call centers rapidly increasing in developed and developing countries Call center employment figures in developing countries represent a different picture. Because not only local companies establish call centers but also multinational companies prefer developing countries because of low wages and high unemployment among blue and white-collar workers (Yılmaz and Keser, 2008, 32).

Customer service is critical to the success of any organization that deals with customers, and strong customer service can build sales and visibility as companies try to distinguish themselves from competitors. In many industries, gaining a competitive edge and retaining customers will be increasingly important over the next decade. This is particularly true in industries such as financial services, communications, and utilities, which already employ numerous customer service representatives. Centralized call centers will provide an effective method for delivering a high level of customer service. Employment of customer service representatives may grow at a faster rate in call centers than in other areas. However, this growth may be tempered: a variety of factors, including technological improvements, make it increasingly feasible and cost-effective for call centers to be built or relocated outside of the Developed Countries where labor cost relatively high (McDanie, 2007, 5).

Call centre employment has been growing exponentially both domestically and globally. They are growing at an astonishing 40% per year globally. In Australia, call centre growth is forecast at around 20 –25% annually (Lewig, 2003, 367). About 160 000 workers are employed in 4000 different call centers in Australia, while employment growth is calculated to be in the order of 25 per cent per annum domestically and 40 per cent globally. Given these trends, call centre employment has become a significant factor in recent job growth. Examination of call centre work has the potential to shed further light on what is unique in the contemporary employment relationship (Russell, 2002, 468).

The globalization of services started with multinational firms in fields like accounting and consulting setting up offices in offshore locations to access new markets, followed by the movement of centralized labor-intensive functions, often referred to in services as "back-office" work (such as call centers and bill processing) to places with pools of educated, low-cost labor (Gereffi, 2004,14). According to Weinkopf, the number of call-centre jobs in 13 European countries in 2000 was 736 700, among which the United Kingdom, with 243 000 or 37%, had by far the highest number. Next came Germany with 148 000 or 17% and France with 104 900 or 14%. In fourth place came the Netherlands with 57 000 jobs, while the figures for other countries were rather low. For the year 2000 the number of call-centers in the United Kingdom was estimated at around 5 000, about twice as many as in France or Germany (each with around 2 500). Spain and Italy as fast-growing markets with respectively 5 and 4% of the European call-centre market, while the extent of call-centers in Portugal, Greece and the Scandinavian countries was estimated to be rather low, at least in 2000 (Weinkopf, 2002, 458).

As an important country, the USA has different policies in terms of call centers' diffusion and employment. Although call centers are found in all States, customer service representatives who work in call centers tend to be concentrated geographically. Four States—California, Texas, Florida, and New York—employ 30 percent of customer service representatives. Delaware, Arizona, South Dakota, and Utah, have the highest concentration of workers in this occupation, with customer service representatives comprising over 2 percent of total employment in these States. The United States has lost 250,000 call center jobs to India and the Philippines since 2001. That's part of a much larger trend. 3.3 million service industry jobs, including call centers, and $136 billion in wages, will move to countries like India, Russia, China and the Philippines (McDanie, 2007, 5).

Call centers jobs easily increase the employment since it offers flexible working opportunities from young, students to mothers. Especially, there may be many reasons for the use of college educated workers. Some call centers have specifically located near college campuses to take advantage of student labor, and at least some of these students may continue working in call centers after graduating. Some college graduates may view call center work as a temporary or transitional job before fully entering the labor market, while others may face a tight labor market and work in jobs that under utilize their skills (Holman, 2007, 13). There is an exception of some call center jobs may not be fit for student such as those providing tech services or serving large business may require relatively professional skills. Call centers are complex workplaces. They are also a huge and growing source of employment (McPhail, 2004, 77), and on-going studies into the experiences of those who work there, and into ways to improve their work-lives, will continue to be valuable in the future.

2.4. Call Center Jobs Reduce Migration

An additional benefit of call center jobs is in the reduction of migration for young and skilled workers. Call centers are attracting younger educated workers, the exact demographic group that many regions have trouble keeping. The new and dynamic information technologies jobs such as call centers could help to motivate some of them to stay, offering them better work at home than they could find through migration. This potential benefit is hard to understate because the loss of young talent is a major hurdle to countries worldwide. Making jobs come to them, rather than uprooting citizens to find jobs, is ultimately more efficient and effective for poverty alleviation and growth (Zielinski, 2005).

One of the glaring ironies of the global labor market is the number of high-skilled well educated immigrants working in menial and low-skilled positions throughout North America and Europe. It is not uncommon to find African and Asian doctors driving taxis in Washington, D.C. Communication technologies will allow specialists to practice their trade where they live rather than where the market dictates. The positive externalities associated with this change have the potential to be significant. Students would be motivated to study subjects that are now in local demand and entrepreneurs will be able to use their creative talents at home with a stable market of paid professionals. Another benefit that call centers can bring, regards the type and nature of the new jobs. Often the countries attracting this kind of employment do not have a history of service sector employment and so call center positions can stimulate the updating of skill sets (Zielinski, 2005).

3. Call Centers In Turkey

Customer relationship management is crucial for today's costumer oriented companies; because of this necessity, companies establish call centers with an increasing pace not only in developed countries but also in developing countries like Turkey ranging from financial services like banking to telecommunication sector. Multinational companies also increase the number of call centers in developing countries by outsourcing their call center work to countries with relatively low wages (Yılmaz and Keser, 2008, 23).

Turkey is one of these countries with increasing employment numbers in call centers. Turkey is getting much attractive both inside and outside since political stability in better than before, employment costs are pretty low, unemployment is high including youth educated, companies take into consideration their customer services, current legal ground is proper for subcontracting jobs which encourage the companies to outsource their services to the call centers, easy transportation possibilities in the cities of east and the call centers are supported by the state in terms of infrastructure, taxes and others.

Turkey has a lot of advantages to be a regional center in international competition and attract foreign direct investments (Call Center Association, 2009);

- Cultural closeness with Europe
- Geographical proximity to developed areas
- Young and dynamic population
- Qualified human resources
- Relatively qualified technologic infrastructure

Richardson and Belt list 7 benefits of call centers in suburb and rural area which is less developed (Richardson, 2001, 86):

— They create employment which does not displace other local work.

— Call centers are capital intensive and bring new capital and technological investment.

— Call centers have the potential to bring new types of employment to the ares.

— Call centers' employment can stimulate the updating of skill sets, including keyboard skills, customer service skills, communications skills, team-working skills, and the ability to pick up product knowledge quickly and flexibly.

— Call centers bring a new work culture to an area, which, though "not unproblematical", can play a role in modernizing the area

— Many Call centers have more commitment to training than in other office-type work (albeit relatively narrow training).

— Call centers create work for women and youth.

It is expected that there are more than 900 call centers in 12 different sectors in Turkey in 2008. The number of call centers increased about 11% according to previous year. The number is not

much but it is promising for the increasing of employment in the near future. Since youth unemployment is high in total unemployment rate, call centers is going to bring new employment opportunities for young educated generations. There is a 20% growth on employment in the call centers sector in 2008. Many companies who offers call centers services plan to enhance their services in East and Southeast cities of Turkey not in the cities such as İstanbul, Ankara and İzmir which are the third biggest cities. In this mean, poorer areas of Turkey will have more employment opportunities than rich areas (Tarakçı, 2008, 57).

Business world in Turkey is giving much importance to the customer services is an important support to the growing of call centers in the country. Call centers are increasingly growing in serving both for the Turkish companies and foreign companies. As of 2005, the call sector services companies have been getting new customers from outside of Turkey. Especially, many companies from Germany where there are lots of Turkish people started to work with Turkeys' call centers companies. The extend of the numbers of migrated people who expected to be more than 3 million from Turkey is an important factor in Germany (Tarakçı, 2008, 57).

Because of call centers' cost advantage about 30% and workforce potential, new investments will continue in the East of Turkey. The market of call center is expected to grow 12%. The current number of workers in call centers in Turkey is 35.000. The total revenue of call centers sector is about 1 billion TL. There are two trends of establishment of call centers. On the one hand, the current call centers in the West of Turkey, especially in big cities, are moving to the East of Turkey. On the other hand, new call centers companies would like to start in the East of Turkey, especially in Erzurum, Erzincan, Gümüşhane and Diyarbakır. Of course, there still are many call centers in other cities out of east side such as Yalova, Antalya, Uşak, Bursa and Kocaeli.

70% of call centers workers are woman, 65% of workers are graduated from university, 35% of the workers are high school graduate and average age of workers are between 26-28. Although the sector is 15 years old, it is pretty effective and has an expert profile and that's why it attracts attention in the region so that gets awards from Europe and the World. The call center sector is promising in Turkey by providing growth and employment, investments, supporting to regional development and private and public sector and getting an opportunity to become an important sector in international competitive arena. Its growth between 2003 and 2008 was 100%, between 2008 and 2013 15% yearly is expected and employment potential will be 65.000 in 2013(Call Center Association, 2009).

To provide the continuation of service and personal quality, it is expected that the establishment of new call centers will be supported by the state. In particular, in cities in the east where educated youth unemployment is very high and people don't have much alternatives in open jobs. Doing so, companies are going to see more stable labor and 30% lower labor cost than to the west of Turkey. Elif Gözen is a Manager in the Connect Company in the service sector, says that "unemployed people in İstanbul may choose the open jobs, but people have no alternatives to choose an open job and the people try to achieve in better manner and continue the current position in cities in the east of Turkey".

A company which offers call center services to the many companies such as Mercedes, Coca-Cola, Algida, aims to move their services to the East of Turkey. Also, many foreign companies who get their call center services from India, cancels to work with Indian companies and want to work with Turkish companies. Turkcell, is the biggest GSM cell company in Turkey, established a call center in Erzurum in the east by providing employment opportunities for region's young educated people. Today, Turkcell is the second biggest employer in the Erzurum with this investment. Avea, is the other operator in GSM cell sector, established a call center in Erzincan is a small city in the east. Avea points out that, "our call center service was in Istanbul and because of traffic every day 3-4 hours were spending on the traffic by giving rise low productivity and increase transportation costs. By moving to Erzincan, the company got rid of these kinds of extra costs as well as cheap labor prices Türk Telekom, is only service provider for land phones, established its third biggest call center

in Erzincan. Türk Telekom employs 2.700 people East and Southeast of Turkey at their call centers and 609 of them currently working in Erzincan and the number will be 1200 after 1 year (Kuvel, 2010).

In order to provide the development of call center sector and produce more value add services following items are much important (Call Center Association, 2009);

- Academic programs should be established to provide proper qualified human resources for the call center sector
- The costs of telecommunication must be much competitive to be able compete with rival countries
- The establishment and development of technoparks and infrastructure should be supported for information and communication technologies as well as broadband internet
- Increasing special investment and employment encouragements should be applied for the sector by state
- Increase transportation opportunities

Conclusions

The effect and role of information and communication technologies have been increasing on daily social, cultural and economical life, in work place and on the type we do business. Many societies benefit from the developments of these technologies both developed and developing as well as poor countries. 40 % of Turkey's population is under 22 years old which is defined pretty young. Although there is a big percentage of young population, there are no much employment opportunities for this part of society.

Turkey, as an emerging country, is becoming an attractive country by domestic and foreign investors. Consequently, this trend brought about a lot of flourishing new sectors that are supported by information and communication technologies. With the investment incentives and other opportunities such as young population and tendency the usage of ICTs in the society, especially in the poor areas of Turkey, has caused the emerging of new jobs and sectors such as call centers. During the investigation, it is seen that, Turkey faces a lot of opportunities with call centers jobs. First of all, call center jobs as a employment model, has been providing many employment opportunities for the young educated but unemployed people. It will help country's unemployment problem which is structural. Secondly, many young educated and unemployed people who feel more excluded as social and economical will be included with the call center jobs. Thirdly, unemployment is not only a structural but also a matching problem. There a lot of open jobs and job seekers but they are not matched since geographical and mobility hardships. When companies move or establish the call center companies in the east of the Turkey, the people will not search a job and migrate to the west of Turkey. Open jobs and job seekers will be matched by investing to the region. Finally, call center jobs on the one hand will attract other investments to the poor areas and on the other hand will trigger education, training and on the job development for the benefits of all society as well as young.

Because call center is a new sector, it needs to be examined more in the development process in the future. It seems the sector's size is going to grow and the growth should be supported by making new projections in education system, on transportation and urbanization, on information and communication technologies and economic incentives. By doing so, call center sector can meet the requirements of international and national companies and have a serious effect on the development process of Turkey.

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THE INFLUENCE OF LENDING ACTIVITY OVER CONSUMER'S BEHAVIOR

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Abstract
Lending activity involves an embedding of general principles which require the analysis of risks incorporated in banking operations, both from a consumer and bank perspective.
Correlated with economic environment shifts, the consumer's definition concentrates a series of individual and group necessities with a decisive role in a possible lending decision.
As socio-economic issue, the consumer is oriented at lending when his income in order to buy goods or services is not satisfactory.
This paper aims at presenting the consumer hypostasis resulted from lending activities, identifying its purposes and risks.

Keywords*: Lending, environment shifts, lending risks, consumer's behavior, individual necessities*

Introduction

According to Michael Solomon, Gary Bamossy, Soren Askegaard, Hogg, K. Margaret, "a consumer is generally thought of as a person who identifies a need or desire, makes a purchase and then disposes of the product during the consumption process"[1].

Richard E. Beck and Susan M. Siegel highlight that "Consumer lending includes all types of credit extended to consumers, either individually or jointly, primarily for buying goods and services for their personal use"[2].

Sustaining Professor Arjun Chaudhuri, Fairfield University, Connecticut, "Consumer behavior is the study of how and why people consume products and services. All behavior can broadly be attributed to three classic influences – the particular characteristics of the individual, the environment that surrounds the individual (culture, subculture, family, friends) and the inherited genetics that constitute the biological makeup of the individual (personality, attitudes, needs)".[3]

Loan consumer rights, along with other addendums, are stipulated in GEO no. 50/2010 regarding loan contracts for consumers, published in Official Monitor, Part I no.389 per June 11th 2010.

The notion of "creditor" includes all legal entities, branches of credit institution and non-banking financial institutions that operate in Romania and grant or undertake to grant loans in its commercial of professional activity.

The consumer, represented by the individual who is acting in purposes structured outside his professional or commercial activities, enters in the lending area activity trough the loan agreement.

In terms of Richard E. Beck and Susan M. Siegel, "a consumer is a natural person who is primarily or secondarily liable on a credit contract- in other words, the individual ultimately

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responsible for repaying the loan and a consumer credit is borrowed funds used for personal, family, household, or agriculture – not for commercial or business purposes."[4]

According to the law in force, the credit agreement refers to that agreement in which a creditor, in front of whom the credit consumers are protected, grant, undertake or stipulates the possibility of granting to a credit consumer, as a deferred payment, a loan or another similar financial facility, except the agreement for continuous service or good supply of similar kind, when the consumer pays for this services or goods in rates, throughout their supply period.

Conceptual framework

Coming to aid the consumers, we mention that a credit agreement can be modified according to the new law in force in two ways, namely by addendums and trough the direct effect of the law over the contract.

The first way – trough addendums, the creditor is obliged to evidence the proof that all diligences have been made in way to inform the consumer over signing this kind of addendum. If the creditor is trying to introduce a clause by which he tries to evade the legal provisions, it is considered void, whether the consumer signed it or not.

The second way – trough the direct effect of law over the contract, situation that carries the name "tacit acceptance" is when the consumer does not sign any addendums, no matter the reason or cause.

According to law, it is forbidden the creditor to unilaterally change the agreement, this law restates the "requirement of full contract" that is to include all the charges and costs and the info in respect of which the consumer has no choice, without making references to general business conditions, to general pricing and taxes lists or any other reference.

All these interdictions, addendums and determinations in the credit agreement framework represent the action of the law maker in order to protect the consumer in front of abusive behavior that can appear in banking practice.

The law in force impose and require from banks the following conditions: full and correct informing from the pre-agreement stage forward over the whole contractual agreement, compliance to honest advertising for their offer of credit product, the complete agreement rule, with no references to general business regulations, the pricing and tax list and any other fees or any other references, the interdiction to increase the fees, prices or any other costs over the full ongoing credit agreement, the inclusion of variable interest calculation in the credit agreements and prohibits the unilateral settlement of the interest over the ongoing contract, procedures for amending the credit contract addendums and the impossibility of tacit acceptance of new conditions by the consumer if they do not meet the legal provisions, meaning to provide a document attesting the closing credit-debt settlement.

The quadrant reflected in GEO no. 50/2010 is exposing, in its appendixes both the theoretical info necessary in the loaning relationship and the precise mathematical formulas for annul effective interest calculation and the fact, that for the approved loan there cannot be charged with other than certain fees: file analysis fee or account management fee (this fees cannot be simultaneously collected), compensation in case of prepayment, the insurance costs, penalties for payment delay, unique fee for services at consumer's demand.

In the legal matters it is stipulated that the information, for any customer, must be, clearly and concise over a representative example, visible and easy to read, in the same visual field and with the same character font size.

This elements are: the interest rate of the loan (fixe and/ or variable) together with the info regarding any other fees and costs included in the total cost of credit, the total credit amount, the effective annual interest rate, the duration of the loan, in case of a form of deferred payment for a

[4] Beck, E.R. Jr., Siegel, M. S., Consumer Lending, American Bankers Association, 2001, p. 3.

specific good or service, the purchase price and the amount of any payment in advance and by the case, the total amount payable by the consumer and the total amount of rates.

The creditor, and if necessary, the intermediary shall provide to the consumer, based on the terms and loan conditions offered by the creditor, and where appropriate the expressed preferences and provided elements of the customer, information that is necessary to provide the consumer the meanings for a comparison on offers in order to take an informed decision on whether to conclude a loan agreement.

The information should be provided well in advance, but not less than 15 days (this period can be reduces by written agreement of the consumer) before the consumer is to sign a credit agreement or to accept an offer: on paper copy or other sustainable support.

The information provided refers to: the type of credit, the identity and registered office address and the working point of the creditor, the total loan and conditions governing the drawdown, the duration of the loan, if a credit is given in the form of deferred payment for a specific good or service, the interest rate of the credit; conditions governing the application of the borrowing rate, the interest rate calculation formula, and deadlines, conditions and procedures for interest rate change and, if different rates apply in different circumstances, above all the applicable rates, the effective annual interest rate and total amount payable by the consumer, illustrated by a representative example which is mentioning all the assumptions used to calculate that rate, if the consumer informed the creditor of one or more components for the preferred credit, and the duration of the loan and the total loan amount, the lender must consider these components, the management fees of one or more accounts recording both payments transactions, and drawdown, unless the opening of an account is optional, along with charges for using a mean of payment for both payment and drawdown, any other costs resulting from the credit agreement together with credit conditions, can be changed; existence of taxes, fees and costs which the consumer must pay in connection with the completion, publication and / or the registration of the credit agreement and any attached documents, including notary fees.

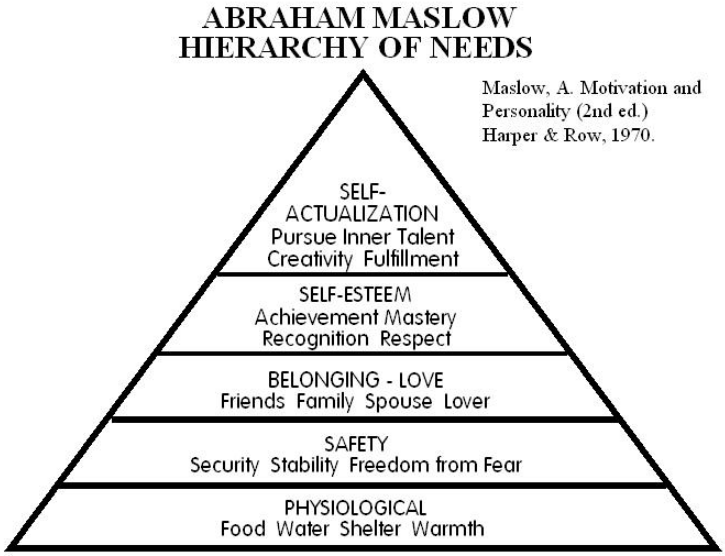
The obligation, when the case, to conclude a agreement for a credit enhancement service is mandatory in order to obtain the loan itself or in order to obtain it in accordance with terms and conditions.

The interest rate, applicable in case of late payments and measures for its adjustment and any other costs incurred by the violation of the agreement, a warning regarding the consequences of missing payments, requested guarantees, the existence or absence of withdraw right, the right of early payment and, if its applicable, the info regarding the creditor's right to compensate and the way it is going to be settled according to terms, the consumer's right to be immediately and costs free informed over the result of database search on trustworthiness, the consumer's right to request and receive a free copy of the draft credit agreement.

Social and economic approach

From a consumer's point of view, lending activity refers at the action taken to contract a loan in order to satisfy their needs or desires (loans for personal needs, loans for buying a home etc).

In order to highlight an overview for consumer behavior, we shall begin with Maslow's pyramid, which establishes the hierarchy of needs.



Professor Geoffrey P. Lantos describes Abraham Maslow`s classification of motives as a hierarchical ladder and an influential system for explaining human and consumer motivation.

Therefore, safety (security) needs involve **physiological and psychological needs** concerned with the need to establish stability and consistency of life, **social needs** (love and belonging, affection, affiliation, oriented toward loving and being loved by others, affiliation social recognition, being accepted by people, and satisfied through relationships, social groups, friends, acquaintances, advisors, **esteem needs** represented by self-worth, self-confidence, and self- respect**, self-actualization needs** related to fulfilling personal potential and devotion.[5]

The factors that influence the consumer's behavior in economic activities startup, according to Phillip Kotler's classification are the following: socio-cultural factors, psychological factors, personal factors, economical factors and demographical factors.

If we extend this factor's influence in consumer's decision assuming for a getting a loan agreement, a individualized vision of it is created.

The socio-cultural factors can be represented by family, educational level, culture, social status, reference groups, social classes.

Under economic-social aspect, the education grants a primordial role in the decision of getting a loan agreement. As a foundation of this decision, the consumer must analyze, with a high level of responsibility, every detail that comes from the consumer-bank relationship. A consumer must realize if he can afford the gradual coverage or prepayment of the loaned amount, if his own behavior or his way of life folds with the terms and requirements of bank's agreement.

Contracting a loan involves a series of steps, a stable trajectory that make the demarcation from a consumer that can assume the risks involved and another one, that will not reach the stage of primary intention, which will reach another option that will cover their needs.

The physiological factors include: motivation, beliefs, attitude, perception, learning.

The correlation between the involved risks of contracting a loan and the benefits of a good financial and banking management involves a homogenization of beliefs with perceptions, the motivation and behavior elements developed ongoing, in concordance with the saying of the American president James Abraham Garfield (1831-1881): "a right motivation is stronger than the force".

[5] Lantos, P. G., Consumer behaviour in action: real-life applications for marketing managers, Library of Congress Cataloging-in-Publication Data.

The personal factors refer to: age, incomes, way of life, sex, occupation, personality.

Earnings, as a household level, influence the loaning activity trough the coverage of default rate, of commissions and interest provided and also, the reach of its initial purpose.

The age, along with the incomes gained, are representing a condition at contracting a loan, achieving a interdependency strictly base on gaining some results that are going to place the consumer and the credit institution also, in the comfort zone granted by the trustworthiness and seriousness on both sides.

The economic factors include the specifics of the micro environment and macro environment. The great picture of the economy can evidence a crisis situation or a situation that involves the growth of the economy.

The great picture of the economy shapes the population's decision to contract a loan, trough the economical-financial evolution prism. When the growth of the economy, at the whole state level is high, the consumer is willing to contract a credit loan, while the risks are very low or even covered.

In the opposite situation of economic growth, meaning the situation of crisis, the population's decision regarding the contract of loan is subjected to a developed reasoning, with uncertain results considering the general fluctuating activity caused by globally and country changes.

Demographic factors are putting their mark over the crediting activity, evidencing the following notions: birth rate, natural growth – in terms of credit institution, they can be seen as part of a process that develops the idea of potential subject apparition: clients, loan bearers; mortality – carries out the implicit risk assumed by banks, the type of their habitat - rural or urban – the origin of households can fit the consumer both in the optimum and unanimously accepted pattern of accepted client and in the not meeting the conditions for a loan agreement. The type of habitat gains accentuated relevance when it is cumulated with the other environmental factors.

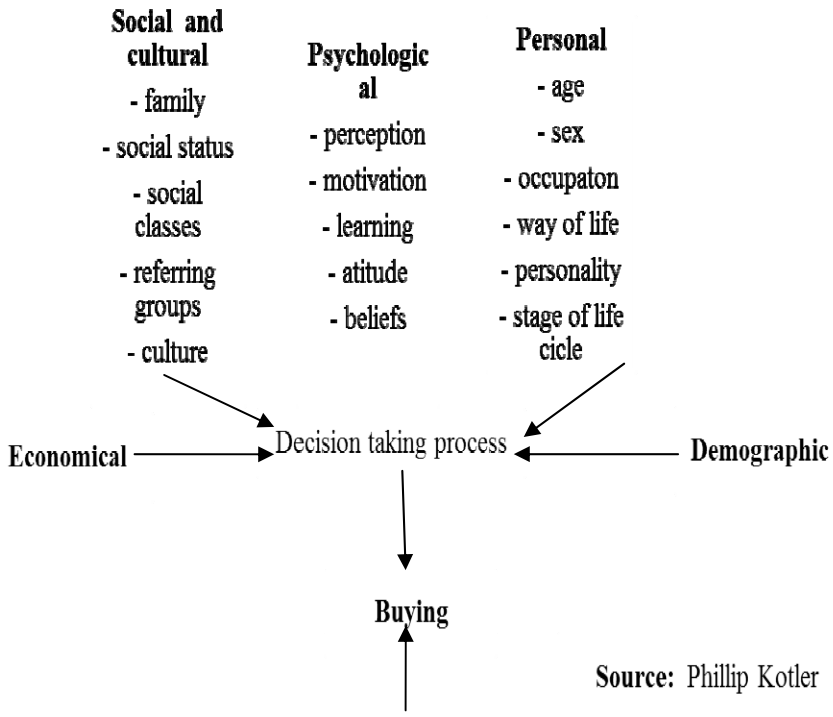


Figure no. 1. Factors that influence consumer behavior[6]

[6] Kotler, P., Armstrong G., Saunders, J., Wong, V., Principiile marketingului, Editura Teora, Bucuresti, 1999.

According to leading micro-economists Angus Deaton and John Muellbauer, "consumer behavior is frequently presented in term of preferences, on the one hand, and possibilities on the other. The emphasis in the discussions commonly placed on preferences, on the axioms of choice, on utility functions and their properties. The specification of which choices are actually available is given a secondary place and, frequently, only very simple possibilities are being considered.[7]

Conclusions

The influence of lending activity is directly proportional to the degree of the risk involved. Higher the level of risk assumed by the consumer and uncovered by financial basis, the higher the fluctuating behavior, instable, behavior that relies in the uncontrollable nature of the economical discontinuities and in the population's incapacity to maintain its solvency resulting from household income level.

Because of unforeseen situation of pseudo-forecasts unpleasant situations for both the bank and the consumer appear. Initially, the bank charges penalties and commissions depending on the contracted loan, so, scripting, the bank benefits of incomes that gradually increase as a result of accounts maintenance and other banking operations. Factual, the bank suffers because the liquidities are not cashed-in, when the person that contracted the loan is in the incapacity of payment and does not own any valuable goods from which the bank, as creditor, could cover the entire loaning structure per individual.

"Consumer behavior reflects the totality of consumer`s decisions with respect to acquisition (including leasing, trading, sharing), consumption, and disposition of goods, services, activities, experiences, people, and ideas".[8]

"Consumer behavior is a complex, dynamic, multidimensional process, and all marketing decisions are based on assumptions about consumer behavior. Consumer behavior can be defined as the decision-making process and physical activity involved in acquiring, evaluating, using and disposing of goods and services."[9]

In a world in which crediting decision is founded on material reasoning, the consumer, as in a credit requester position is assuming the active participant condition in the economical environment. The development of the crediting decision is a crucial moment which influences both the quality of life and the individualized character of the professional frame, the motive why the consumer must assure that the decision that he will take is a optimum one and it can be supported by its own activity.

By this paper, we tried to expose the influences over the consumer, both trough an economic approach and by the description of initiative generating factors which, on a evolutionary scale, mark the birth of determined crediting decisions.

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ON ORTHODOX/HETERODOX AND AUTISTIC/POST AUTISTIC ECONOMICS – A VIEW FROM THE ROMANIAN ACADEMIC LANDSCAPE

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Abstract
The way economics is perceived nowadays seems to be going back to the old label of `dismal science`, because it has not achieved to offer consistent and valid solutions to real problems in critical moments. In a constructive defense of our profession, we need to acknowledge the existence of some oversimplified hypothesis that do not conform to the actual human behavior, and thus to turn to different branches of the discipline (from behavioral to feminist, green economics and econo-physics, just to give some examples) that try to reintegrate economic thinking in the real landscape, through different approaches. The post autistic economics represents a powerful example within this attempt of offering economics a new spirit and new insights of how it should be taught and applied.
The aim of this paper is to discuss on the multiple perspectives, orthodox and heterodox, autistic and post-autistic, and on the manner they appear to be understood, accepted and implemented in the Romanian economic higher education. We question the neoclassical paradigm in search for new insights that could lead to a possible internal reform of the field, opening it more to the opinions of the surrounding social sciences.

Keywords: *orthodox and heterodox economics, post autistic economics, Romanian economic higher education*

JEL codes: A11, A12, B50

Introduction

Labeling mainstream economics as autistic it was definitely a bold move of the French students who coined the term in 2001. „Abnormal subjectivity, acceptance of fantasy rather than reality"(PAE Newsletter), this was their more precise view on the economic science, regarding the status of teaching and relevance for practical applications and public policies.

Discovering the existence of this kind of radical perspective, as freshly young economists, is was not least of a challenge and it has lead us to extensive readings of the recent approaches on the issue and critical thinking of our own, in terms of what to believe and what paradigm to embrace.

We consider that having a broad understanding over the new theories that populate economics nowadays is essential especially for economics students and young researcher, because as Colander says „individuals are not born as economists; they are molded through formal and informal training. This training shapes the way they approach problems, process information and carry out research, which in turn influences the policies they favor and the role they play in society." (Colander 2005:175).

Under these auspices, the aim of this paper is to offer some theoretical markers about the many directions in which economics is split nowadays, with a specific focus on the latest trends, namely post autistic economics. To this framework, we have added some personal, subjective considerations on the particular situation from the Romanian economic academia.

The importance of such a topic is highlighted by the effervescence of the many relevant studies in these area (Thaler, 2000; Kirchgässner, 2005; Rubinstein, 2006), discussing the nature of

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economics, compared to other sciences, and the harmony (or disharmony) between its declared scopes and the practical results.

Even if the paper does not have the ambition to be a comprehensive material in terms of modern economic doctrines, we have found necessary to start our inquiry with a chapter discussing the two distinctive schools of orthodox and, more extensively, heterodox economics, but also clarifying terms like mainstream economics or neoclassical economics. The literature review is continued through the presentation of the arguments raised by the post autistic economics, and then naturally followed by a chapter containing a conceptual analysis on how these currents were integrated in the Romanian economic academic environment, but also reflected in some public measures. We end our short demarche with a concluding section, pointing out our future research plans.

Orthodoxy and Heterodoxy in Economics

„Economics is the only field in which two people can receive a Nobel Prize for saying exactly the opposite thing". This only one of the many jokes you will find about the differences in opinion of the economists. For somebody coming from outside the field, the first impression can be that we are dealing with a very flexible and open science, thus the great number of opinions and the possibility to have such divergent views. At a closer look, the reality shows us somewhat the contrary: even if there are many interdisciplinary tendencies of questioning the problems, economics as a traditional science has some internal rules and mechanisms of high rigidity

For an accurate image, we will proceed to properly define the terms of neoclassical, mainstream, orthodox and heterodox economics, using as a starting point the excellent review of Dequech (2007).

Even if it may look simple, drawing some boundaries for neoclassical economics is quite difficult, because the concept, or the use of the label, has consistently changed over time. An important observation to be made here is that the general acceptance of what neoclassical economics means is different from the one of Adam Smith, David Ricardo, Hayek or even Keynes.

In the opinion of Dequech (2007), the three main characteristics of neoclassical economics are the emphasis on rationality, along with utility maximization as the most import criterion, the emphasis on equilibrium and the neglect of strong kinds of uncertainty. In different words, but in the same spirit, Arnsperger and Varoufakis (2005) also discuss three axioms of neoclassicism – „neoclassical meta-axioms" (p.7): methodological individualism, methodological instrumentalism and methodological equilibration. They claim that these axioms are hidden to the public eye and thus it can be explained the capacity to obtain funding and institutional prominence of the neoclassical adepts. The institutional reference leads us to our next concept, which is mainstream economics: „what is taught in the most prestigious universities and colleges, gets published in the most prestigious journals, receives funds from the most important research foundations, and wins the most prestigious awards." (Dequech 2007:281). The definition is quite precise but what needs to be added for our purpose is the intricate dynamic of what it is or not included in the mainstream. Nowadays, even if the general impression is that mainstream economics is still dominated by neoclassical approaches, it is absolutely clear that in fact mainstream is represented by a complex mixture of ideas, including heterodox ones. Just to give an example, behavioral economics has started to gain more and more power, the ultimate proof being the Nobel prize (2002) gained by Daniel Kahneman, a psychologist, for his work (in collaboration with Amos Tversky) on prospect theory. He shared the prize with Vernon Smith, a pioneer in another emergent field – experimental economics, a branch that generates distinctly non-neoclassical results.

Returning to the main intentions of this chapter, orthodoxy is next in line to be clarified. Following an analogue definition of mainstream economics, orthodox economics is represented by the dominant school of thought. In Estey words, „orthodox economics is the analysis of economic behavior under existing institutions" (Estey 1936:791). Surprisingly, or not, recent references to

orthodoxy in economics are confuse, many authors using instead, as equivalents, both neoclassical and mainstream economics. We think this is due partly to the general connotations of the term, an orthodox being a person who lives strictly by the teaching of its religion. Therefore, an orthodox economist would be an economist who analyzes and researches strictly according to the traditional dogmas, and, we imply, who rejects the new approaches. Naturally, this is a perspective to be criticized in any science and Hodgson, for example, is one of the authors that see in the non-recognition of the necessity of a large number of theoretical frameworks of understanding human behavior, a profound flaw in the methodology of the economic science (Hodgson, 1992). And this is how we have reached the last stop of this doctrinaire short journey, revealing also the nature of heterodox economics.

According to Lawson (2005), „heterodoxy serves (...) as an umbrella term to cover the coming together of, sometimes long-standing, separate heterodox projects or traditions"(Lawson, 2005:2). On a more precise basis, heterodox economics rejects the very incisive form of methodological reductionism that only accepts formal mathematical methods. The main difficulty when mapping this field consists in its heterogeneity. We are agreeing with the position that treats heterodox economics as a collection of theories (Garnett, 2005). The attention gave to methodology and to the history of economic thought point out to them as being the hallmarks of a heterodox approach. In the same time, for example, behavioral economics is principally embracing the principle that human actors are social and less than perfectly rational, driven by habits, routines, culture and tradition. Another case is for Keynesian and institutional analysis which particularly fond to the idea that while theories of the individual are useful, so are theories of aggregate or collective outcomes. Further, neither the individual nor the aggregate can be understood in isolation from the other.

Autistic and Post-Autistic Economics (PAE)

This section will follow a retrograde method of presentation, starting with the PAE movement and in relation to it, with what is understood through the attribute autistic in this case.

For a proper understanding of the issue, we need a short historical background. The intellectual revolution we are talking about was started by a group of French students, in June 2000, and it was raised against the „narrow, mathematical, nonpluralistic economic lectures they were forced, to sit through" (Lee, 2004). They demanded science than scientism, pluralism than neoclassical monotheism, empirical realism than deductive abstracts and they requested from their teachers to save economics from its irresponsible state. Also, they have claimed the need to adopt richer models of human agency and institutional change which seriously consider such factors as culture and history as significant active ingredients in any explanatory framework.

Naturally, they have attracted a lot of attention, equally supporters and critics. The metaphor of autism has especially disturbed many people, raising a natural wave of protests against the use of such a serious medical term – „a developmental disorder that is characterized by impaired development in communication, social interaction, and behavior" (Medical dictionary). Robert Solow and Olivier Blanchard, famous economists and professors at MIT, were the neoclassical voices who replied to the attack of the discipline. However, they have only marked the beginning of controversies and the debates have multiplied, and also transformed into more public and open discussions on the current state in economics, involving more and more participants and gaining more awareness.

Fulbrook (2005) argues that pluralism remains the most important element advanced by the PAE movement, and it is also the element that makes possible the existence of a body of heterogenic sub disciplines: „Out of all the approaches to economic questions that exist, generally only one is presented to us. This approach is supposed to explain everything by means of a purely axiomatic process, as if this were THE economic truth. We do not accept this dogmatism. We want a pluralism of approaches adapted to the complexity of the objects and to the uncertainty surrounding most of the

big questions in economics (unemployment, inequalities, the place of financial markets, the advantages and disadvantages of free-trade, globalization, economic development, etc.)".

From a global perspective, „the underlying critique is not new, nor unique to economic science" (Mohn, 2008:1992) and the heterodox beliefs presented in the previous section are solid proofs in this sense. The accusation of autism in economics is grounded on the reformulation of past heterodox arguments that are strikingly similar to the traits of the disease. Firstly, the missing interdisciplinary approaches are interpreted as a sign of non-sociability in terms of awareness. Stiligtz (2000) adds here the socially insensitive applications and policy. Secondly, the missing realism in many assumptions is understood as a poor communication (Thaler, 2000) with all the other stakeholders and the society. Not last, the simplified methodology is nothing else than a non-recognition of the complexity of human behavior. Thus, even if we believe that autistic is a hard label to digest, and quite inappropriate due to its primary use, we do admit the general tendencies towards it, reflected in the artificial creation of stylized facts for describe a phenomenon, for tracking it mathematically and for finding an (unique) equilibrium to the problem.

Doctrinaire Approaches within the Contemporary Romanian Economic Higher Education

To speak honestly on the contemporary state of economics in university it is necessary to asses some facts from the past, thus from the period before the 1989 revolution. One common popular memory of the old system, regarding education, was the clear focus on memorization and almost an interdiction of critical thinking outside the communist system norms (Druica, Cornescu & Ianole, 2009). Even if in reality the assertion is only partial true, the public perception has defeated the contextual and historical realities, taking it and promoting it until today, transforming it to the rank of, we dare to say, a psychological conditioning. What we mean by this is the fact that many reforms were lead in the name of this terrible threat, but almost none has solved it. At the contrary, they have just indulged this idea more deeply in the popular subconscious.

At the higher education level, in the first 10 years after the revolution, the number of universities was more than double and afterwards it has slightly diminished. In economic terms, at the beginning of the transition period we could witness an explosion on the supply side materialized through the apparition of the private universities. The market mechanism started to function and after reaching its peak it found its equilibrium at a lower number of higher education institutions.

In this context, economics was one of the sciences that started to know a widespread popularity. As statistics proves it (table 1), there were radical changes in the development of different fields of study, moving the emphasis from science and engineering towards social sciences, especially economics, commerce and business, and law.

Table 1.

Group of specializations Year	Technical sciences*	Medicine and pharmacy	Economics	Law Science	General sciences**	Artistic
1990/1991	120541	20128	20003	3975	26270	1893
1991/1992	123736	21796	24801	7543	34367	2983
1992/1993	118097	23656	35279	10865	44298	3474
1993/1994	111145	25738	39867	14854	54297	4186
1994/1995	100837	26316	47712	15424	59947	4926
1995/1996	94289	32237	83996	43143	76729	5747
1996/1997	95792	32714	87472	48268	83430	6812
1997/1998	98864	31862	86861	53445	82370	7188
1998/1999	112720	32130	101896	57294	96071	7609

1999/2000	**125357**	**32227**	**105727**	**63055**	**118371**	**7884**
2000/2001	**138324**	**32999**	**132332**	**68870**	**152132**	**8495**
2001/2002	**149521**	**32823**	**146110**	**69124**	**175684**	**8959**
2002/2003	**152547**	**32495**	**158185**	**63456**	**180603**	**9011**
2003/2004	**158014**	**33072**	**172409**	**60613**	**187141**	**9536**
2004/2005	**161850**	**35039**	**188505**	**59621**	**195190**	**10130**
2005/2006	**164736**	**36422**	**221619**	**63586**	**218860**	**11241**
2006/2007	**170921**	**40028**	**242330**	**82696**	**238711**	**10820**
2007/2008	**178258**	**41398**	**294417**	**116538**	**265624**	**11118**
2008/2009	**188660**	**47758**	**281421**	**127399**	**235923**	**9937**

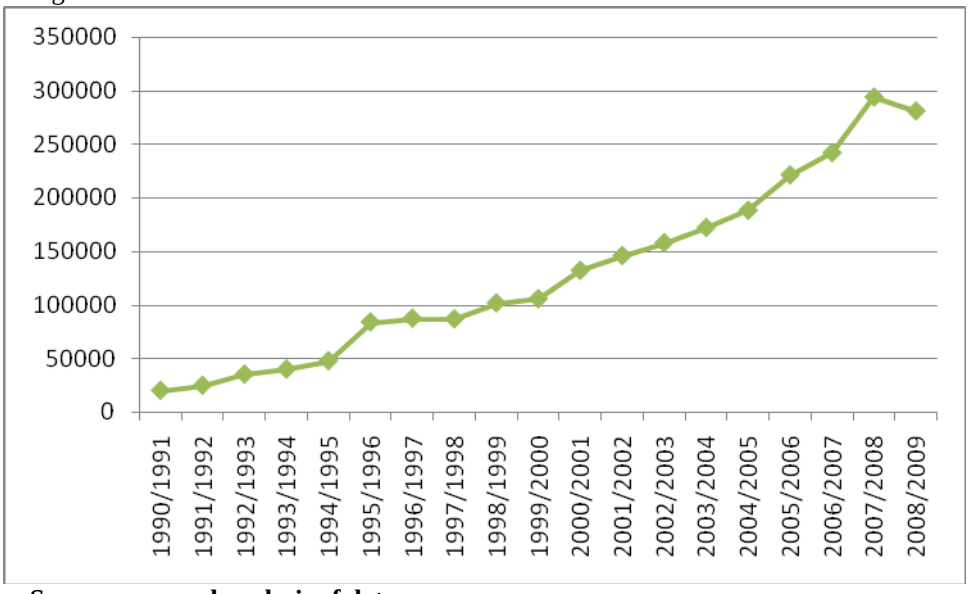
Source: Statistical Yearbook, 2009

(*Technical sciences include: Industry, Mining, Petroleum-Geology, Electric power and electrotechnics, Metallurgy and engineering, Chemical technology, Wood and building materials industry, Light industry, Food industry, Engineering, Transport and telecommunications, Architecture and construction, Agriculture, Veterinary medicine, Forestry)

****General sciences include: Philology, History-Philosophy, Geography, Biology, Chemistry, Mathematics-Physics, Pedagogy, Physical Education, Political and Administrative Sciences)**

Figure 1 illustrates separately the evolution of the number of enrolled students in Economics between 1990 and 2009.

Figure 1.



Source: personal analysis of data

This un-natural growth, along with the rigid old representation on teaching and learning outcomes, has creating a new label to be applied on the economic studies and economic students, only at a national level: an easy option, a superficial faculty and a future commercial profession. Even if these are only exterior attributes, some of their features have transferred to the interior one, making Romanian economics a peculiar mix of doctrines.

On the one hand you will say it is mostly orthodox, reined by the neoclassical hypothesis. In this sense you cannot neglect the old influences of the political economy taught during the communist regime, which still reflects some inabilities to question the problems raised by the contemporary society. On the other hand, it seems to be a low interest to adhere to one specific current or to have a coherent perspective. Tiberiu Brailean is a remarkable Romanian author who subscribes to the fact the economics has become a Babel tower because of the high degree of fragmentation and specializations. Everybody is speaking a different language which is almost impossible to understand by an economist working in different area (Brailean, 2001).

With reference to the PAE claims, we will briefly discuss how we think they are perceived in our Academia.

We will start with the students, because they were the promoters of the PAE movement. Even if there any many complaints regarding the problem of excessive theory without practice (especially with the popularization of the Bologna Process) – point 1 on the PAE original petition list – Romanian economic students are lacking a coherent body of representatives to put the problem in more scientific terms, including here research and critical economical analysis skills, and not only operational competences. One possible and reasonable explanation is due to the dynamic of the labor market, dominated by multinational organizations that need graduates with very specific sets of skills. The lack of think thanks, representative research centers and institutes or other important bodies of decision is orienting students only in some very pragmatic and business related directions, and they are not to blame for this. Therefore, either the true reason behind it, students are not offered alternative approaches developed by Post-Keynesians, institutionalists, Austrians, evolutionists or behavioral economists. The even saddest part is that the problem seems to be the same elsewhere: 95 per cent of the economics taught in higher education institutions is mainstream (Mearman, 2007).

And of course, the other side of the equation is represented by the professors. Our empirical observations suggest that we face also a lack of interest for the new branches of economics, some of it due to the lack of research infrastructure. It is almost impossible to be involved in neuroeconomics if you do not have the financial resources to equip ate a laboratory with the necessary brain scan technologies. The same with experimental economics, where you need specific conditions to run an experiment. The first reaction to this is that everybody is looking for funds and grants but we actually face a vicious circle: how to firstly be interested in these emergent fields without have no local representation of what they mean.

Conclusions and further research

„The issue of interpreting economic theory is…the most serious problem now facing economic theorists…Economic theory lacks a consensus as to its purpose and interpretation. Again and again, we find ourselves asking the question ‘where does it lead? (Rubinstein, 1995:12)

Even if it may have a philosophical tent, we consider the question above to be of crucial importance and positioned at the core of the training program for students, for professors, and why not, for practitioners also. A more comprehensive and flexible understanding on economics is definitely a long and delicate process, but if we are engaged in some way with this science, it is actually an intrinsic duty to call for a greater awareness on the issue. The research initiatives in this area carry the same „stigma” of diversity, a stigma in the sense that it is almost impossible to offer a spot solution. The validity of the articulated assumptions is only arbitrated by time, maintaining still a shadow of contextual subjectivity.

With respect to the case of Romanian economics, they are many limitations, especially on a psychological level, in accepting to even explore many of the ideas discussed through the article, and still some unresolved complexes of the past paradigm. Nevertheless, we plan to elaborate on our observations and to continue the present theoretical overview through a future empirical investigation.

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ECONOMETRIC ANALYSIS ON VOTE-POPULARITY FUNCTION FOR ROMANIA

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Abstract
The regional analysis in Romania confirms the hypothesis of a significant correlation between the status of the economy and political behaviour of the electors. The level and the dynamic of the unemployment at regional level have an influence on vote behaviour, as stated by the partisan political business cycle theory: in the areas with a higher unemployment rate there is a voting preference (tendency) towards the political left wing. This conclusion is interesting for a political perspective. If the unemployment electors carry their votes toward left, the left wing government in office between 1992-1996 and 2000-2004 promotes an economic policy that outcomes in a diminishing the electoral support for this party: during these periods, the global unemployment rate decreased from 8.2% to 6.6% in first period (1992-1996) and from 12.3% to 6.3% in the second. Moreover, the partisan electoral behaviour hypothesis affirms that the private entrepreneurs and the self-employed vote toward right-wing parties. That means that electoral support for left party in office during the mentioned periods was also reduced by another result of the reform, namely the strong increase in the number of registered companies (large numbers of them are limited liability companies). A political analogous situation was recorded during the 1996-2000 legislatures. The global unemployment rate increased and the business environment became unfavourable, leading to a decrease of the electoral support for the right-wing governmental coalition in office.
In Romania, regarding the elections from 2008-2009, a new electoral law was introduced. The main changes concerned the election of chairpersons of county councils by uninominal voting, separating general and presidential elections and the introduction uninominal voting system for parliamentary elections, with a correction of the total number of seats with the total number of votes obtained by each party on national level.

Keywords: *Political Business Cycles, Vote Popularity Function, Partisan Behaviour, Regional Unemployment*

Introduction

In Romania, the democratic experience computes a small number of electoral moments. Therefore, it is not possible yet to build an electoral behaviour econometric model using the political time series. In these circumstances, in the following section, by the examination of the political and economic dynamics during the 1990-2008, we try only to identify some significant signals concerning the economic impact of the electoral timing. We use an econometric model to analysis the political behaviour using a regional economic and political data. The analysis is divided in two different approaches: the elections before 2008 and the elections from 2008 (when a new electoral law was introduced – mainly the impact of uninominal voting and the change in electoral preferences of the voters from local elections to parliamentary elections).

The importance of such a study is underlined also by rich international literature focused on the impact of the political behaviour on economic conditions. It is important to analyse if political factors do influence the economy not for the common wealth, but for increasing their chances of re-election.

The answer to this subject is reflected by the results presented in this study. The economic and econometric evidences are presented to support the results. There is a large specialized international

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literature on political business cycles and we tested some methods and models to find out if the results for Romania are in accordance with the results obtained for other western democracies.

Political – Economic Regional Model for Romania[1]

From Romania, the democratic experience recorded a small number of electoral events. Therefore, it is not possible yet to build an electoral behaviour econometric model able to analyse the effects of population and incumbents' electoral behaviour based on the dynamics of macroeconomic and political time series. For this reason different hypotheses regarding the relationship between economic and political system were tested using the data recorded at regional level, for the electoral years 1992, 1996, 2000, 2004 and 2008.

First of all we was tested the so-called *responsive hypothesis* according to which the *electorate considers that the government is responsible for the state of the economy* and consequently, when the unemployment (and the inflation) record high values, the electoral chances of the governmental party (coalition) diminishes, and vice versa: a relatively well economic status leads to the increase of electoral chances of the party in office. From statistical point of view, the hypothesis mentioned above assumes that:

1. There is a negative correlation between the unemployment rate and the votes given to the ruling party, and
2. There is a positive correlation between the unemployment rate and the votes given to those parties (coalition) from opposition, which are considered to be an alternative at government in the electoral year.

However, the distribution of regional votes for the incumbents (parties or coalitions) in the electoral years 1992, 1996, 2000 and 2004 don't confirm hypothesis of a significant negative correlation between the unemployment rate and the electoral support. Analogously, a significant positive correlation between regional unemployment rate and electoral support of the parties situated in opposition (the challenger) cannot be observed (see Table 1). The only correct signs (in accordance with the above hypothesis) from the coefficients of correlation were recorded in 2000; as we'll show further, the values taken by the coefficient of correlation can be explained by taking into consideration of a *partisan political business cycle model*.

But these figures don't show trends according to the responsive hypothesis.

[1] In this section we use the following symbols for the Romanian political parties, political formations or their coalitions:

APR – Alliance for Romania
CDR – Democratic Convention from Romania
D.A. – Justice and Truth Alliance (National Liberal Party and Democratic Party)
FDSN – National Salvation Democratic Front
FSN – National Salvation Front
PD – Democratic Party
PD-L - Democratic-Liberal Party
PDAR – Agrarian Democratic Party of Romania
PDSR – Social Democracy Party of Romania
PNL – National Liberal Party
PNTCD – National Peasant Christian Democratic Party
PRM – Great Romania Party
PSDR – Social Democratic Party of Romania
PSD – Social Democratic Party
PSM – Labour Socialist Party
PUNR – Romanian National Unity Party
PUR – Humanist Party of Romania (which subsequently became the Conservative Party)
UDMR – Democratic Union of Hungarians in Romania
USD – Democratic Social Union

Table 1: The coefficients of correlation between the regional unemployment rates and the votes (%) carried for the Romanian political parties, political formations or their coalitions

Electoral years	Political parties, political formations or their coalitions witch form the Government	Political parties, political formations or their coalitions situated in opposition
1992	0.31 (FDSN+FSN)	-0.26 (CDR)
1996	0.33 (PDSR)	-0.17 (CDR+USD)
2000	-0.32 (PNL+PD+UDMR)	0.34 (PDSR+PRM)
2004	0.28 (PSD)	-0.14 (D.A.)

Further on, we tested for Romanian case a hypothesis formulated by Rodrik (1995) and Fidrmuc (1996) for Central and Eastern European transition countries, hypothesis regarding the political support for the economic reform.

Rodrik (1995) formulated the hypothesis that the unemployed electors cast their vote in favour of a party that realises a fast reform because they think that the rapid economic reform has as results an outcome increase and an enhance of the economic private sector. The consequence of these evolutions consists in the increasing chances for the unemployed to find a job in private sector. According to Rodrik, in the Central and East European Countries only the right-wing parties are pro-reform political formation, while left-wing parties are anti – reform. As a result, the unemployed vote for the right-wing political parties. A version of this hypothesis is given in a paper written by Fidrmuc (1996). According to Fidrmuc, the type of behaviour described by Rodrik is specific for the unemployed only in the first part of the transition, when it is expected a fast and successful reform. As far as the reform processes are developing without major results regarding the employment and the economic status of disadvantaged social categories, the unemployed become supporters of those political parties, which promote a reduction of the reform speed and maintain a high proportion of the public sector. The same as in Rodrik's model, also in Fidrmuc's model, the left-wing parties represent anti-reform political forces and for this reason, after the first transition years the political support of the disadvantaged categories (like unemployed) is straighten towards the left-wing parties.

This caricatured political system model set up for the candidate countries, with strong partisan and ideological influences (supporting the idea that the right-wing parties are pro-reform while the left-wing parties are against, that means that the last ones are anti-European), was invalidated by the political evolutions from these countries. All the candidate countries had both right and left political systems, without recording significant steps forward or backward of the reform process. There are significant differences between countries regarding the reform stage but there are not differences within the same country under different political systems. In spite of these, we have tested the Rodrik model, the same as the Fidrmuc's version of Rodrik model. The tested hypotheses are:

1.There is a positive correlation between unemployment rate and votes carried to the right-wing parties and a negative correlation between the unemployment rate and votes carried to the left-wing parties (Rodrik's hypothesis)

and

2.There is a positive correlation between the unemployment rate and votes carried to the rights-wing parties and a negative correlation between the unemployment and votes carried to the left-wing parties at the beginning of transition process, while in later reform phases the support of the disadvantaged categories is straightened towards the left (Fidrmuc's hypothesis)

The vote's distribution for the rights and left-wing parties (or coalitions) is shown in Table 2. In the Romanian case, because the fluent political environment, it is not easy to include a party in a political wing. In these circumstances, the parties are included in the right or left wing in keeping with theirs official positions.

The Rodrik's hypothesis cannot be empirically upheld, at least starting from electoral regional data. From Table 2 must be notice that always the correlation between votes from the left-wing parties and the unemployment rate is positive, while the correlation between the unemployment rate and the electoral support for right-wing parties is negative (contrary with Rodrik's hypothesis).

Table 2: The coefficients of correlation between the regional unemployment rates and the electoral behaviour

	The coefficients of correlation between the regional unemployment rates and votes carried for:	
Electoral years	Left-wing parties	Right-wing parties
1992	0.24 (FDSN+FSN+PSM)	-0.26 (CDR)
1996	0.32 (PDSR+USD)	-0.26 (CDR)
2000	0.30 (PDSR+PD)	-0.23 (PNL)
2004	0.43 (PSD+PRM)	-0.23 (D.A.+PNTCD)

The obtained results can't be a valuable argument for the Fidrmuc's version model too. The political support for the right wing is maintained relatively constant and it is negatively correlated with unemployment rate, while the political support for left increases, at least for median interval. The last result comes out from defining left-wing side. The correlation coefficient between rate employment and political support of Democratic Party (PD) is insignificant one as results from Table 3. The insertion of this party in the left political side (in 1992 through FSN – National Salvation Front and in 1996 through USD – Democratic Social Union) has an influence on global correlation coefficient. This aspect is just more evident in the case of PSM – Labour Socialist Party, which was included in the left political side in 1992; its political support was negatively correlated with unemployment rate.

Table 3: The coefficients of correlation between the regional unemployment rates and the votes for Romanian political parties

The coefficients of correlation between the regional unemployment rates votes carried for:							
Electoral years	PDSR*	PD**	PSM	CDR***	PUNR	PRM	UDMR
1992	0.33	0.07	-0.20	-0.26	-0.06	-0.14	-0.10
1996	0.33	0.08	–	-0.26	0.02	0.28	-0.13
2000	0.30	-0.03	–	-0.23	–	0.24	-0.26
2004	0.36	–	–	-0.33	–	0.30	-0.47

* For the 1992 elections – FDSN,

** For the 1992 elections – FSN, for the 1996 elections – USD

*** For the 2000 elections – PNL, for the 2004 elections – PNTCD

The relative steadfastness of the correlation coefficients recorded by the two important political parties PDSR – Social Democracy Party of Romania and CDR – Democratic Convention from Romania cannot be an argument in the favour of the Fidrmuc's hypothesis[2].

Further, we tested the hypothesis of the *partisan political behaviour*. According to this approach, *left-wing parties are relatively more concerned on unemployment* and economic growth, and relatively less interested in inflation, while right-wing parties are more concerned on inflation and less on economic growth and unemployment. *The electors' votes are straightened towards that*

[2] Even Fidrmuc gave up to this hypothesis and in his later studies he adopted a partisan hypothesis (see, Fridmuc, 2000).

party promoting a program which seen as being closer to their own expectations. As a consequence, the unemployed votes towards left wing parties.

To assess the hypothesis regarding the partisan political support we was firstly tested two following simple econometric models:

$$LEFT_{i,t} = a_0 + a_{i,1} + a_2\ RSOM_{i,t} + e_{i,t} \quad (1)$$

$$RIGHT_{i,t} = b_0 + b_{i,1} + b_2\ RSOM_{i,t} + v_{i,t} \quad (2)$$

Expected results: $a_2 > 0$, and $b_2 < 0$.

The symbols used in the models have the following meaning:

– $LEFT_{i,t}$ and $RIGHT_{i,t}$ is the share of votes received by the respective parties in county *i* (*i = 1…40*) at the elections in the electoral year *t* (*t* = 1992, 1996, 2000, 2004),

– $RSOM_{i,t}$ represents the unemployment rate recorded in county *i* in the electoral year *t*;

– $a_{i,1}$, $b_{i,1}$, are the cross-section specific coefficients and a_0, a_2, b_0, b_2 are the common coefficients in pool estimation for the models (1) and (2), and

– e_{it} and v_{it} are the error terms – random variables that respect the conditions for using the Ordinary Least Squares Method (normally and independently distributed with zero mean and constant variance).

The Romanian regional structure enclose 41 + 1 (Bucharest) = 42 counties. We used only 40 observations / year and excluded Covasna and Harghita because a large share from Covasna and Harghita counties electors are politically faithful, based on nationalist views**.** The estimation's results for 160 records (40 counties × 4 electoral events) are shown in Table 4.

Table 4: Partisan political business cycles estimation in regional data

	LEFT	RIGHT
Constant	25.01 *(2.15)*	49.68 *(2.33)*
RSOM	0.909 *(0.25)*	-2.265 *(0.27)*
Adjusted R-squared	0.64	0.44
F-statistic	8.24	4.13
Akaike info criterion	7.151	7.305
Schwarz criterion	7.939	8.093

(standard deviations are given in brackets, with *italic* fonts).

The estimators are statistically significant, with a level of significance over 99%. The probability of rejection the models (Prob (F – statistic) is smaller than 0.0001%. The estimators of the models' coefficients have correct signs (the signs anticipated for the partisan business cycle theory):

$a_2 =$ 0.909 is positive (according to the theory) and significantly different from zero with a probability over 99.99%

$b_2 =$ –2.265 is negative (according to the theory) and significantly different from zero with a probability over 99,99%

Because a share from Covasna and Harghita counties electors are politically faithful, based on nationalist views, these counties was excluded in estimation process (the proportion of the UDMR' *captive* voters affects negatively the formation up of the other parties electors).

The most important problem of these simple models is that they are able to explain only about 44% - 64% of vote behaviour setting up (R^2). For this reason we built up, in the same spirit of the partisan political business cycle theory, other econometric models, starting from the hypothesis that there are faithful electors for every party being on political market and struggle for that.

That means that, without any major political, social or economic events, the political behaviour and options of some electors remain unchanged, while economic factors explain only the

forming behaviour of the electors without long – lasting options. More exactly, there is certain inertia in the dynamic of political options, so that electors' behaviour at the moment *t* is not absolutely independent from the options expressed in the previous elections. Starting from the fact that the formation of the electors' options at the moment *t – 1* is depending on the unemployment rate and these options have a some degree of inertia, the conclusion is that the options of non-captive electorate (those electors which don't prefer almost permanently one party or an other), are formed basing on the changes in the unemployment rates between the actual electoral period (*t*) and the previous one (*t – 1*).

The literature analysis also the phenomenon of the political image eroded during the government stay in office (Nannestad and Paldam, 1994, 1997 and 1999). This effect is referred to as the *cost of ruling*, implying the incumbent governments lose support as they alienate some supporters with decisions they make while in office. The longer they stay in office and the higher their vote shares in the preceding elections the more likely it is that such losses will occur.

We have tested, in these conditions, two econometric as following:

$$LEFT_{it} = a_1 LEFT_{i, t-1} + a_2 (RSOM_{it} - RSOM_{i, t-1}) + a_3 RUL\_LEFT + e_t \quad (3)$$

$$RIGHT_{it} = b_1 RIGHT_{i, t-1} + b_2 (RSOM_{it} - RSOM_{i, t-1}) + b_3 RUL\_RIGHT + v_t \quad (4)$$

The expected results according to the theory are:

$a_1 > 0$, $b_1 > 0$, Means that every party has a faithful electors;

$a_2 > 0$, $b_2 < 0$, Means that the increase of the unemployment favours left-wing parties and disadvantage right-wing parties.

$a_3 < 0$, $b_3 < 0$, Means that it exists a *cost of ruling*.

The symbols used have the following significances:

– $LEFT_{it}$ and $RIGHT_{it}$ represents the share of votes gained by the parties in county *i* (*i = 1…41*) at the elections from moment *t* (*t* = 1992, 1996, 2000),

– $LEFT_{i, t-1}$ and $RIGHT_{i, t-1}$ are the votes (%) gained by parties in the county *i* at the previous elections (*t-1*),

– $RSOM_{it}$ and $RSOM_{i, t-1}$ are the unemployment rates registered in county *i*, in the electoral moment *t*, and at the preceding elections (*t-1*),

– RUL_LEFT is the dummy variable that capture the *cost of ruling* for left-wing parties, which takes the value 1 for 1992, 1996 and 2004, and 0 for 2000;

– RUL_RIGHT is the dummy variable that capture the *cost of ruling* for right-wing parties, which takes the value 1 for 2000, and 0 for 1992, 1996, 2004;

– a_1, a_3, a_3, b_1, b_2, b_3 are the coefficients of the models (3), respectively (4), and

– e_{it} and v_{it} are the error terms – random variables that respect the conditions for using the Ordinary Least Squares Method (normally and independently distributed with zero mean and constant variance).

In the models (3) and (4) were not used variables for counties Covasna and Harghita because the stable fidelity of electors from those regions. The results of the estimation are shown in the Table 5.

The estimators for regression equations parameters are significant different from zero with a level of significance over 99%. The models' probability of rejecting (Prob (F-statistic) is smaller than 0.00001%. The estimators of the models' coefficients have correct signs (the signs anticipated for the partisan business cycle theory) and the models (4) and (5) are better from econometric point of view than the models (2), respectively (3). The last conclusion derives both from comparison between the coefficients of determination R^2, and from the analysis of values calculated for F-criteria.

Table 5: Partisan political business cycles autoregressive model estimation

	Left wing party	Right wing party
The share of regional voting in previous elections ($LEFT_{i,t-1}$, respectively $RIGHT_{i,t-1}$)	1.169 (*0.031*)	1.225 (*0.030*)
Changes in regional unemployment rates ($RSOM_{it}$ – $RSOM_{i,t-1}$)	1.337 (*0.230*)	-1.382 (*0.175*)
Cost of ruling (RUL_LEFT, respectively RUL_RIGHT)	-4.413 (*1.364*)	-27.478 (*2.049*)
R-squared	0.91	0.84
F-statistic	590.2	311.496

(In brackets, with *italic* there are the standard deviations).

The obtained results lead to the following conclusions:

– The level and the dynamic of the unemployment rates at regional level have an influence on vote behaviour, and this effect is in accordance with the partisan political business cycle theory: in the areas with a higher unemployment rate a voting preference (tendency) towards the political left is manifest;

– Elasticity of the electoral behaviour in dependence of economic factors (unemployment rate) is rough equal (with different signs of course), in the case of the two parties[3]. This means that in the Romanian political environment the two parties have been perceived by the population as being typical for the left and respectively for the political right.

– Everyone from the two parties has faithful electors (a_1 and b_1 are positive and are significantly different from zero). The right' electors fidelity is a little bit superior comparable to the left' electors fidelity ($b_1 > a_1$); but in spite of the fact that the Romanian's political right wing has more faithful electors, this captive electorate has a small size (relative to the whole Romanian electorate).

– The *cost of ruling*, implying the incumbent governments lose support while there are in office, was much stronger in the right than in the left parties' case.

Parliamentary elections from 2008

We have analysed here the electoral behaviour from a different approach. We have studied the impact inducted by the state and dynamics of some economic variables on the change of voting intensions from the local elections from June 2008 to parliamentary elections, same year.

The results from the electoral elections from June 2008 did not obtained econometrically significant results. The vote was mainly driven by local leaders and important regional personalities.

The data are analysed in regional structures. We used a Paldam type model. In its most simple linear version the function are:

$$\Delta P_t = \{a_1 \Delta u_t + a_2 \Delta p_t + \ldots.\} + [c_1 D^1_t + c_2 D_t^2 + \ldots] + e_t \qquad (5)$$

Here Δ is used to indicate the first difference, P is either the vote or the popularity, for the political parties (%). The *a*s and *c*s are coefficients to be estimated, and the *e* is the disturbance term. The braces contain the economic variables: the e-part of the model. Two of the variables are *u* and *p*, where *u* is the rate of unemployment and *p* the rate of price rises. The next set of variables, the *d*s, are the political variables forming the p-part of the model – it is found in the square brackets[4].

Concretely, we have analysed a model like:

$$P_{ij} = \{a_0 + a_1 \cdot cj_{ij} + a_2 \cdot prescj_{ij}\} + [a_{3,i}(rs_{nov2008} - rs_{mai2008})_j] + e_{ij}, \quad (5')$$

[3] According to the Wald' test, the hypothesis of the equality (in absolute value) of the two parameters $|a_2| = |b_2|$, are accepted with a probability over 75%.

[4] *idem*, p. 14.

where P_{ij} – represents the share of votes won by the competitor *i* in county *j*, to the total number of valid votes in that county, in the Parliamentary Elections from November 2008;

cj_{ij} – represents the share of votes won by the competitor *i* in county *j*, to the total number of valid votes in that county, in the elections for the Local Councils, June 2008;

$prescj_{ij}$ – dummy variable, $prescj_{ij} = 1$, when party *i* won the Presidency of Local County *j*, Local Elections 2008 and $prescj_{ij} = 0$, otherwise;

rs_j – unemployment rate in county *j*; nov2008 = 30 November 2008, mai2008 = 31 May 2008;

a … – parameters of the model;

e_{ij} – error of regression equation, random variable.

The used data are in regional structures and refer to the first 3 parliamentary parties (PSD+PC, PD-L şi PNL). The obtained results are:

	Chamber of Deputies			Senate		
	PSD	PD-L	PNL	PSD	PD-L	PNL
Constant	6.8377 (6.94)			6.5888 (6.684)		
CJ?	0.6400 (16.684)			0.6735 (17.553)		
PRESCJ?	5.3823 (4.539)			6.1834 (5.155)		
$RS_{nov2008}$-$RS_{mai2008}$	2.1514 (1.944)	2.4978 (2.085)	-3.0629 (-2.517)	1.8465 (1.679)	2.5053 (2.009)	-3.6142 (-2.856)
R^2	0.8397			0.8548		
R^2 adjusted	0.8330			0.8487		

(in brackets, under the estimators, there are standard deviation values; the estimators have a confidence level over 90%)

The results suggest an interpretation consistent with the theory of economic voting: in the period June to November 2008, Liberal Party was the party of government. Increase of unemployment in regional structures resulted in a penalty for PNL and an increase in intentions to vote for opposition parties (PSD and PDL). Estimators are econometrically significant.

Conclusions

For Romania, the macroeconomic data suggests that is correct a hypothesis according to which a significantly connection between the political behaviour of the politicians and economic evolution exists. The intensity of the structural changes records local minimum points in electoral years. This fact could be explained by the following phenomenon: to promote economic reforms means to adopt some measures, which usually are accompanied by unpopular effects. These types of effects are not those desired by the incumbent governments, especially in election years.

At the same time, the maximum intensity of the structural changes was recorded in post – electoral years: all the political programs proposed the speeding of the economic reforms and consequently when a party or a coalition wins the political power, it tries to promote measures to speed up some economic changes process. The regional data also confirm the hypothesis of significantly connections between the state of the economy and political behaviour of the electors. The level and the dynamics of the unemployment at regional level have an influence on vote behaviour, as stated by the partisan political business cycle theory: in the areas with a higher unemployment rate the voting preference (tendency) is skewed towards the political left side. But

each of the most important Romanian political parties of the period 1992 –2004 (PDSR, CDR-D.A.) have faithful electors. The right fidelity proved to be superior to the fidelity of the left's electors: the right captive electorate has a big fidelity, but a small size (relative to total Romanian electorate)

The results obtained must be understood under the limits inner to the research method used. For example, it is likely that the bias towards left–side political spectrum observed in areas with high unemployment rates is actually explained by the behavioural specificity of the population from poor zones. Given the unavailability of credible socio-economic information regarding poverty in Romanian geographical areas over the entire 1990 – 2004 period, the above-mentioned hypothesis is not directly tested in this paper. The underlying reasoning is that the poor zones have usually high unemployment rates, and the econometric models presented here could offer, after all, arguments for two important hypotheses: (1) the electors from the poor regions vote preponderantly for left-wing political parties, and (2) the unemployment rate could be used as a *proxy* variable for poverty in the regional political behaviour models.

Regarding the economic voting for the Parliamentary elections from November 2008, the increase of unemployment in regional structures resulted in a penalty for PNL (as the party in office) and an increase in intentions to vote for opposition parties (PSD and PDL).

Further analyses would include more electoral moments, meaning that the econometric level of confidence will increase and the results should be more econometrically reliable.

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CHALLENGES OF THE EUROPEAN UNION BUDGET REFORM

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Abstract
At the European Union are presented some concerns regarding the need to review its policies starting with the recommendations for the budget reform and the change of the EU basic policies. Therefore, it was discussed some scenarios that involve the enlargement of the EU. However, the economic context imposes some constraint regarding this process to accept Croatia and Turkey as EU members. The aim of this paper is to present these scenarios. Taking into consideration that the empirical investigation of these scenarios are difficult to achieve based on short time series data, we propose a new set of analyze based on important macroeconomic indicators.

Keywords: *European Union; budget; reform; enlargement.*

1. Introduction

Community budget issue is far from fully clarified, neither in terms of income source or destination in terms of expenditure in line with the aims of the European construction, which is why we consider highly motivated to approach this issue based on the accuracy and impartiality of the researcher.

Since late 2005, according to the Interinstitutional Agreement, the EU launched sustained move in the sense of a fundamental review of the Community budget. European Commission and European Parliament have launched numerous invitations to researchers, academia in general, and even politicians, to bend on the issue of the EU budget reform process. We believe that the realization of such projects could lead to significant results, so as to come up with a proposal that can be reasoned and scientifically tested. Therefore, this approach is part of our work.

The methodology used in developing this research paper is: i) theoretical and logical analysis of European budget process; ii) conceptual analysis and evaluation is paramount, as compared with the methodological, instrumental or empirical analysis and evaluation; iii) is a critical research relating to the status quo of the subject matter of research

There are increasing debates who stresses the importance and usefulness of the existence of an extensive research to bring not only conceptual and methodological proposals for reforming the European budget process, as well as instrumental proposals (for example, how to identify the European tax base, respectively, how to build an European tax practice).

Taking into consideration that the empirical investigation of these scenarios are difficult to achieve based on short time series data, we propose a new set of analyze based on important macroeconomic indicators.

The paper is organized as follows: section 2 is dedicated to analyze some aspects of the EU budget reform based on the scenario that involve new EU members such as Croatia and Turkey. Section 3 presents the empirical investigation of these scenarios based on a new set of important macroeconomic indicators analyze. Section 4 is dedicated to the conclusions.

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2. Scenario for the European Union budget reform[1]

Along with the decision to adopt a multiannual financial framework for 2007-2013 timeframe, the leaders of governments of the European Union members decided, during the European Council meeting in December 2005, to review the EU policies and funding costs starting with the recommendations for the budget reform and the change of the EU basic policies. Decisions adopted at that time affected the financial prospects set for 2007-2013. The changes proposed in the summit in 2005 were translated in scenarios.

One scenario involves radical reform of the EU budget, but blocks most of the actions set by the Treaty of Lisbon (needs posed by global changes made, that Member States should meet the needs arising from the EU diversity and enlargement to include new members). This process would involve the allocation of adequate resources for each instrument. Even if the CAP (Common Agricultural Policy) is limited, the current budget is inadequate compared to the needs, and review should be completed with a decision to increase the level of funds collected from the EU budget. At present there is, however, sufficient determination of the Member States to lead the discussion in this direction.

Based on the above premises in regard with the EU policies and challenges, one option would be the gradual reconsideration and reconstruction of the policies and instruments that are based on European funds so that the resources are adapted to the new needs. In this context, the Member States must deal with these given the budget constraint imposed by the size of the allocated resources, by the reluctance on its growth potential, and the position taken by the net contributor Member. The adoption of such decisions would not be possible without changing the fundamental EU policies, the acquis communautaire, and the program of the budget expenditure and revenue. This is the scenario of a progressive increase (phasing-in) of the budget so that the new activities can be financed. It may be a realistic scenario with the condition to achieve a balance between the new activities and spending.

Considering that the decision adopted at the summit in December 2005 was due to the current needs of the debate then the radical changes in the EU financing policies is not the main goal. In this situation, the most likely scenario would preserve the status quo of European budget.

The challenges of the EU budget reform focus on the reorientation of the EU expenditure program, considered a legacy of the past with significant impact on increasing the competitiveness of the EU. Making fundamental changes may prove to be difficult and, therefore, the main direction of change should aim to reduce spending for certain policies, while keeping the current level (or a very small increase) funding of existing policies. This shift in expenditure would result primarily from lower costs to agriculture and cohesion policy. Such a change would penalize new acceding countries, but would benefit taxpayers net. It would be a scenario of a progressive decrease (phasing-out) through the change in the budget for increasing the share allocated to new activities.

In terms of political it might be reconsidered the British rebate. Suspension of the exemption would lead to significant contributions to Great Britain to the European budget.

These scenarios were developed only as working hypotheses to outline the potential challenges posed by the EU enlargement. It is well known that any EU enlargement involves costs and benefits for the old states and acceding states. However, taking into account the current economic environment, the financial crisis has deepened the problems already faced by the EU Member States since the boom times, it is unlikely that the founding states of the European Union to be willing to bear the new costs of the EU enlargement. In addition, any State which becomes a member of the EU brings its own imbalances that come into contact with other economic instability of the Member States. Here's that lead to an increase of the problems already faced by the EU and

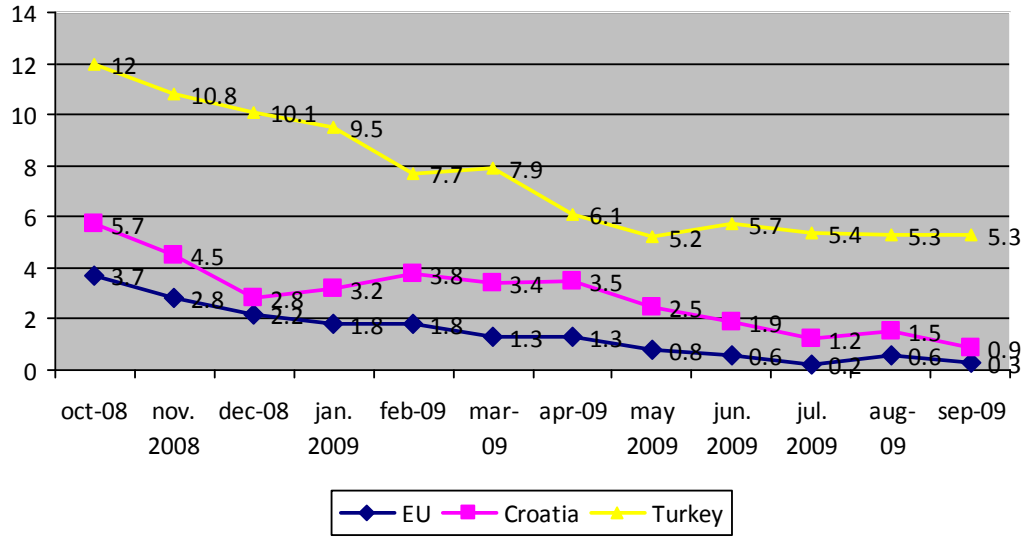
[1] This section is based on the Pietras, Jarosław, *The future of the EU budget. In search of coherence of objectives, policies and finances of the Union*, 2008, p. 60-61.

which will worsen as a result of the crisis, the failure of fiscal consolidation, and aging population effects.

3. Empirical investigation

Given the descriptive nature of these strategies it is difficult to empirically estimate the effects of EU enlargement due to insufficient statistical data. In addition, they may be a number of political and economic factors that cannot be estimated and inserted in these investigations in order to legally validate the statistical results. Considering the reasons stated above, it will try to alert the induced effects of EU enlargement in the current conditions using the key macroeconomic indicators such as inflation, unemployment, GDP per capita, budget balance, and public debt.

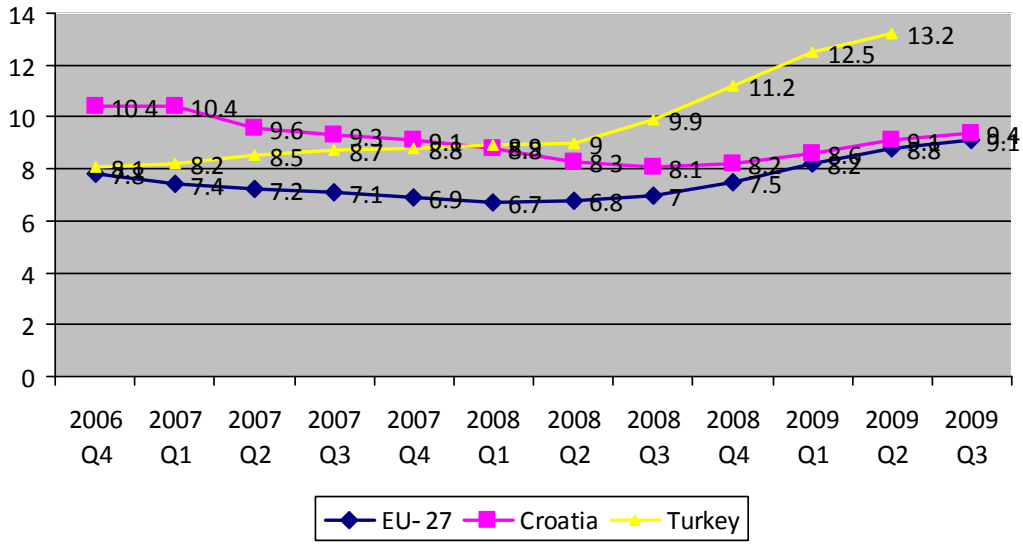
Figure 1. Inflation rate (%)



Source: own determination based on data from Eurostat yearbook 2010.

Analyzing the evolution of inflation in the EU and new EU accession countries can be observed a downward trend in Croatia and Turkey as a result of the mix of monetary and fiscal policy. However, inflation in Croatia and Turkey are above the EU average. Therefore, the inclusion of these countries under present conditions is likely to emphasize the vulnerability of the entire EU.

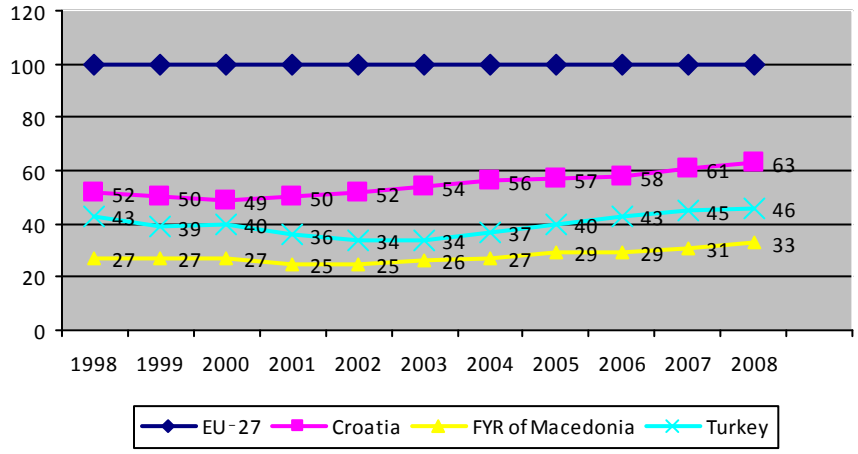
Figure 2. Unemployment rate (%)



Source: own determination based on data from Eurostat yearbook 2010.

The analyze of the unemployment rate shows that the situation is similar to that described above, in the sense that this particular indicator ahead of the EU for Turkey where there is a lag of almost 4 percentage points compared with the EU.

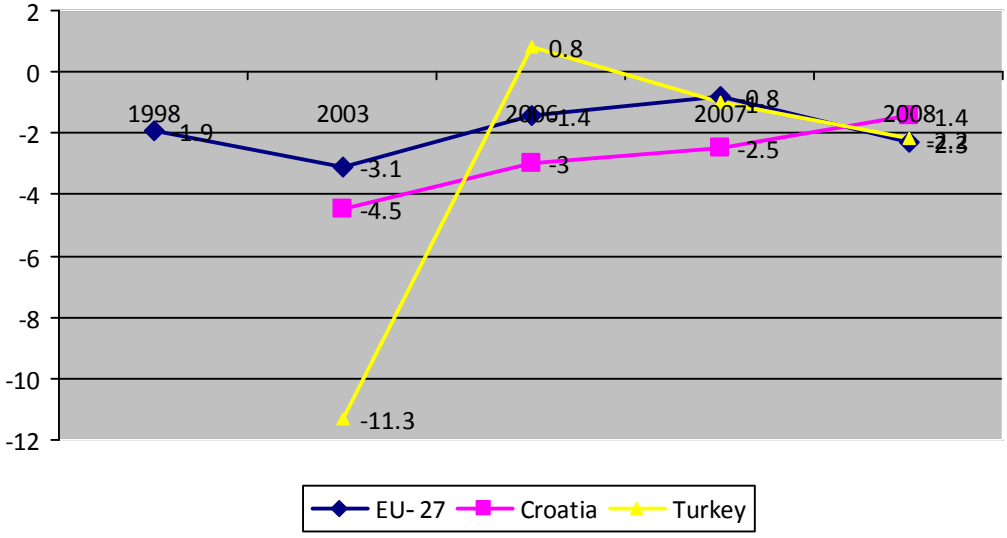
Figure 3. GDP per capita (% of GDP per capita at EU)



Source: own determination based on data from Eurostat yearbook 2010.

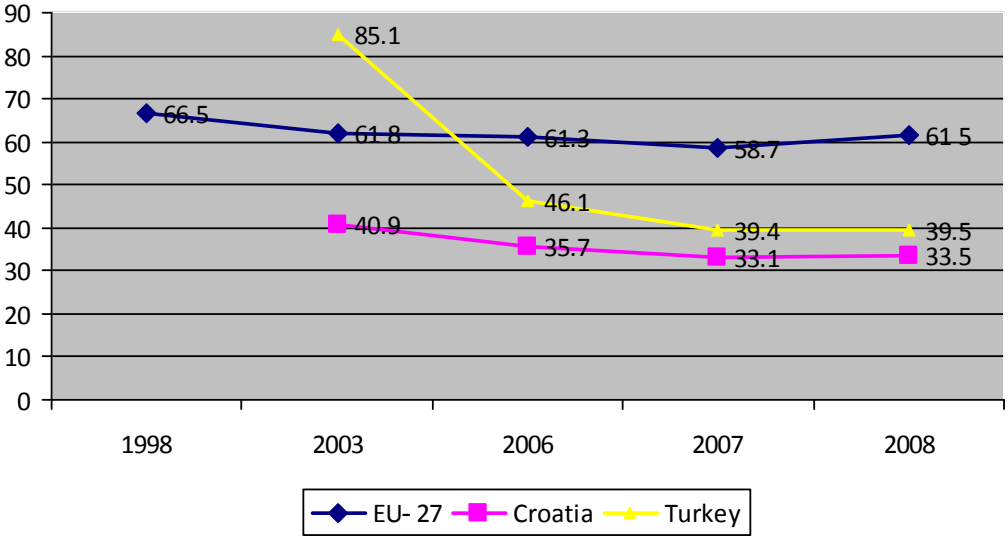
Based on GDP per capita it is identified a significant gap between its level for Croatia, Turkey and Macedonia in comparison with the EU. For example, per capita GDP of these countries to the EU average is 27.8%, in Macedonia, 39.7%, in Turkey, and 54.7%, in Croatia.

Figure 4. Budget balance (% of GDP)



Source: own determination based on data from Eurostat yearbook 2010.

Figure 5. Public debt (% of GDP)



Source: own determination based on data from Eurostat yearbook 2010.

Figures 4 and 5 indicate the evolution of fiscal indicators Croatia, Turkey in comparison with the EU. Following the graphical representation of the budget balance can be seen that these countries have the vast majority of time, lower budget deficits than the limit imposed by the Maastricht treaty. Turkey, however, had faced significant budget deficit in 1998 of 11.3% of GDP, but in 2003 the budget surplus reach 0.8% of GDP. In the same period, Turkey's public debt has been a significant

reduction of 39 percentage points of GDP as a result of massive fiscal adjustment that took place during this period. In any case, the indebtedness of Turkey and Croatia has not exceeded 60% of GDP in 1998-2008, excluding 1998 when Turkey had a debt of 85.1% of GDP.

As much as a whole is composed of more heterogeneous components it will be more difficult to manage problems that arise in all parts. Starting from this consideration it can be a generalization of this assertion and extension of it at the EU level. Above were presented the evolution of some of the macroeconomic indicators in order to highlight the important differences between the new acceding countries.

4. Conclusions

The work done in this paper is determined not only by the general case, for improvement of any tool, the EU budget having a role in the implementation of common policy objectives, but also internal and external developments, which put Union before the new challenges: geographic expansion and broadening of the subject areas of integration, the globalization and, more recently, financial and economic crisis. The intention of a deeper evaluation of the Community budget was designed not only with the involvement of EU institutions, but also with the support of wide public consultation, which shows real interest in sustainable results, acceptable, necessary to fund improvements to the design and operation of the EU budget.

It is worthwhile, given the timing generous approach coupled with the possible embed new ideas to reform the budget in future the EU's multiannual financial framework, 2013 - 2020, demonstrating the strategic vision of this reform approach.

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EUROPE'S FINANCIAL AND ECONOMIC CRISIS – VALID METHODS TO PUTTING AN END TO IT

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Abstract
Specialists believe that Europe is mired in a deep debt trap as a result of the costly measures taken to deal with the financial and economic crisis and they describe the situation as being serious, but not without hope.
The majority of the specialists believe that without the euro, Europe would be in a much worse position.
In the fallowing paper, our intention is: first to stress the key factors that have led Europe to the current crisis, second to present some possible scenarios that the crisis may generate in the near future and third to give some viable solutions that might improve Europe's nowadays economical situation and help it get out of the crisis.

Keywords: *financial crisis, economic crisis, euro crisis, valid methods, deficit, competitiveness*

Introduction

Specialists believe that Europe is mired in a deep debt trap as a result of the costly measures taken to deal with the financial and economic crisis and they describe the situation as being serious, but not without hope. The majority of the specialists also believe that without the euro, Europe would be in a much worse position.

In the fallowing paper, our intention is: first to stress the key factors that have led Europe to the current crisis, second to present some possible scenarios that the crisis may generate in the near future and third to give some viable solutions that might improve Europe's nowadays economical situation and help it get out of the crisis.

That is why our paper covers the matters that implicate the economic crisis in general, which, of course, also depend upon the financial crisis elements. The theme of the paper is extremely important nowadays, especially due to the latest events that took place not only in Europe, but all over the world.

In addition to all these important ideas, the research starts with the main factors that have led Europe to the current crisis, and that is because many specialists in the economic and financial field said, at the beginning, that the current situation was caused by the euro and the euro crisis. Other specialists have stated that it wasn't the euro and it wasn't a euro crisis that caused the current situation, bringing the arguments that the euro has worked extremely well for twelve years, and more over the last two years, when the huge crisis took place, it even has actually helped protect Europe. This last category of specialists believes that the problem was the financial policy of the countries that have it, because during the crisis most countries responded in a proper and reasonable manner, in cooperation with the European Central Bank and also in an international context, a crisis that did not start in Europe but instead had its origins in America and then came over and engulfed Europe.

After that, the research continues with the presentation of some possible scenarios that the crisis may generate in the near future, and that is because our believe is that a proper system for controlling deficits is definitely needed and that should be the lesson that we have to learn from this major economic and financial crisis.

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In the end, as a conclusion to all the important ideas presented and debate in our paper, we try to give some viable solutions that might improve Europe's nowadays economical situation and help it get out of the crisis. Firstly, we believe that was done wrongly five, six or seven years ago needs to be rectified, at any rate, which, of course, means that we need tighter supervision of budgetary policy. Secondly, we need greater oversight by the EU Commission, which was lacking, for example, in the case of Greece. Thirdly, a country that does not abide by the rules should have its voting rights within the European Union withdrawn, particularly in the euro zone, and that is why what would be even more effective is for a country that does not abide by the rules, and fails to stick to the joint recommendations as well as its own stability program, to be denied subsidies from the European fund.

All in all, our study was also based on what is the relation between the theme chosen and the already existent specialized literature, and that is the reason why our research will include different views that specialists have expressed in time in the matter of the economic crisis. In the current environment in particular, making that sort of forecast would be especially difficult as the euro exchange rate no longer takes its cue from fundamental data alone, and of course people are worried about the future, and they ask themselves what's the safest currency to be in. We strongly believe that nowadays environment makes it difficult to arrive at a forecast, not even for us but also even for analysts and economics specialists, but what should be remember as a concrete and clear fact on long term is the fact that fundamental data will play an important role and that as a result the European currency will be in a good position only provided the Europeans stick to all the promises they've made.

1. Key factors that have led Europe to the current crisis – a short presentation

Our research starts with the main factors that have led Europe to the current crisis, and that is because many specialists in the economic and financial field said, at the beginning, that the current situation was caused by the euro and the euro crisis. Other specialists have stated that it wasn't the euro and it wasn't a euro crisis that caused the current situation, bringing the arguments that the euro has worked extremely well for twelve years, and more over the last two years, when the huge crisis took place, it even has actually helped protect Europe. This last category of specialists believes that the problem was the financial policy of the countries that have it, because during the crisis most countries responded in a proper and reasonable manner, in cooperation with the European Central Bank and also in an international context, a crisis that did not start in Europe but instead had its origins in America and then came over and engulfed Europe.

Due to all these reasons, the majority of the specialists believe that it wasn't the euro and it wasn't a euro crisis that caused the current situation, and that is because the euro has worked extremely well for twelve years, and over the last two years, as this huge crisis took place, it has actually helped protect Europe. We strongly believe that without the euro, Europe would have been a scene of currency - policy devastation, and it would look today totally fragmented, and exposed to the influence of the dollar and other currencies. So, the main conclusion is that the problem isn't the currency.

Specialists have not only once stated that the problem was in fact the financial policy of the countries that have it. Therefore, during the crisis most countries responded in a proper and reasonable manner, in cooperation with the European Central Bank and also in an international context. It is also very important to stress the fact that this particular crisis did not start in Europe but instead had its origins in America and then came over and engulfed Europe. All in all, confronted with such a terrible situation, politicians on the whole acted in the right way. Our belief is that it did take a lot of money in order to avoid the catastrophe. Like in any other critical situation, negotiations during the crisis took place within a framework consisting of the European Stabilization Fund and undertakings to reduce deficits. And at this particular point comes a very important question, which

refers to the need of a proper system for controlling deficits, its main importance and how should it be properly maintained in time.

2. Possible scenarios that the crisis might generate in the near future

After presenting the main factors that have led to the appearance of the economic and financial crisis, the research continues with the presentation of some possible scenarios that the crisis may generate in the near future, and that is because our believe is that a proper system for controlling deficits is definitely needed and that should be the lesson that we have to learn from this major economic and financial crisis.

In addition to all the points stated in the previous section, we would also like to stress that what was done wrongly five, six or seven years ago needs to be rectified, at any rate, which means, of course, that we need firstly tighter supervision of budgetary policy; secondly, we need greater oversight by the EU Commission, which, for example, was lacking in the case of Greece. If you look at Greece now, oversight by the International Monetary Fund, Commission and European Central Bank is suddenly working well and thirdly, a country that does not abide by the rules should have its voting rights within the European Union withdrawn, mainly in the euro zone. Moreover, specialists have more than once emphasized that it would be even more effective for a country that does not abide by the rules, and fails to stick to the joint recommendations as well as its own stability program, to be denied subsidies from the European fund. As a consequence to all these interventions, nowadays Greece, oversight by the International Monetary Fund, Commission and European Central Bank is suddenly working well.

We can take the example of Greece at any time, in order to make a statement regarding all that we have presented earlier. Even if budgetary consolidation plans are going according to schedule, the question is what happens when the European protective shield expires. That is why, to our mind comes the questions whether will debt increase again as a percentage of economic output or will the country be able to refinance itself on the market or has the shield simply allowed us to buy time.

In order to see which of these scenarios will be viable in time, for now it's a good thing to have bought ourselves some time and thereby restored calm, not only on currency markets but also in the countries concerned, so that they can tackle their structural problems. Our believe is that if countries are able to be successfully over the next two or three years, we will then be able to take an objective look at whether they continue to need help, or will be able to solve their problems without outside assistance. That is why, what's important now is to maintain the pressure on countries to ensure that they do not let up on the measures under any circumstances. Of course, if in two or three years' time things will evolve in an upper trend, it will be politically feasible to extend the life of this protective shield if necessary.

In the end, the idea is that if it turns out that the financial ratios for countries for which this has been done have improved decisively, that governments and people have made a huge effort and a lot of sacrifices have been made and there will also be a willingness not to let these countries down. All in all, the great success of the European Union has always lain in exporting stability, rather than importing instability. In the end, as a conclusion to all the important ideas presented and debate in our paper, we try to give some viable solutions that might improve Europe’s nowadays economical situation and help it get out of the crisis. Firstly, we believe that was done wrongly five, six or seven years ago needs to be rectified, at any rate, which, of course, means that we need tighter supervision of budgetary policy. Secondly, we need greater oversight by the EU Commission, which was lacking, for example, in the case of Greece. Thirdly, a country that does not abide by the rules should have its voting rights within the European Union withdrawn, particularly in the euro zone, and that is why what would be even more effective is for a country that does not abide by the rules, and fails to stick to the joint recommendations as well as its own stability program, to be denied subsidies from

the European fund. It is also a fact that a country is not responsible for the debts of others, and that is due to the European shield.

3. Viable solutions that might improve Europe's nowadays economical situation

After presenting the main factors that have led to the appearance of the economic and financial crisis and after emphasizing some possible scenarios that the crisis may generate in the near future, the research continues with some viable solutions that might improve Europe's nowadays economical situation and help it get out of the crisis.

Firstly, in this matter, at the begging of this part a new question is raised in regard to where specialists should expect the euro exchange rate to go in the short to medium term. It is also a fact that in the current environment in particular, making that sort of forecast would be especially difficult as the euro exchange rate no longer takes its cue from fundamental data alone. So, if people were to look at the fundamental data only, the euro zone wouldn't be in such a bad position, it would certainly be doing better than the UK, US or Japan, where debt levels have reached even greater proportions. Nowadays, in a crisis such as the one we've just experienced, the safe-haven issue also plays an important role and although economic data in America is worsening, the dollar will not necessarily weaken in such a situation. Of course, due to all the changes that occur unexpectedly today, people are worried about the future, and they want to know what the safest currency to be in is. In this matter, specialists have stated that it is still the global currency of the dollar and that makes it difficult to arrive at a forecast – even for analysts and economics specialists. Long term, we do believe fundamental data will play an important role and that as a result the European currency will be in a good position – provided the Europeans stick to all the promises they've now made. So, as a possible solution, it would be more than wise to consider as a point of reference of medium and long term the dollar as an etalon currency.

Secondly, in this matter, another question is raised in regard to where specialists should expect in the near future, and that is how likely the chances of the Americans trying in a very systematic way to inflate their way out of their debt situation can be rated. As the world's biggest debtor, they would certainly have the opportunity to do so. That is why, going back in history, one can realize that America did indeed to some extent inflate its way out of debt after the Second World War. By contrast, under Bill Clinton the US had an incredibly positive performance. Clinton had inherited a huge debt mountain from the Reagan administration. Eight years later, however, he handed over a surplus to his successor. The Clinton government was also able to achieve a superb economic performance – in which 20 to 30 million new jobs were created – through budgetary consolidation, coupled with relatively low interest rates, a flexible labor market, and a highly productive financial market. But if the Americans were now to go down a different route – in other words, inflation combined with low interest rates – this would only be possible with the cooperation of the Federal Reserve, which is nevertheless a big temptation. The US is still the world's biggest debtor. So, as a possible solution, it would be more than wise to consider as a point of reference America and the position that it takes on the market place in the near future.

Thirdly, in this matter, another question is raised in regard to where specialists should expect in the near future, and that is the one concerning USA who is heavily indebted to the Chinese, which raises the suspicion to the Americans that this dependence can be an existential threat to their country. Of course, there is indeed a dependency between America and China, but the Chinese have so far used their own currency reserves responsibly and only slowly begun to move toward allowing the renminbi to rise – and first and foremost they don't want to do that under pressure. A very important fact that must be taken into account when analyzing this delicate situation is that if the dollar were to suddenly weaken even more, America's position as a world power would also be weakened. On the surface it would perhaps bring them a bit of relief on financial policy, but on the other hand there is a risk of other countries also restructuring their currency reserves. In turn, this would be associated with a major risk to the political and economic power of the US. Even in the

most difficult of times, American presidents and finance ministers have always emphasized their wish to retain a strong currency. A weak currency is not a good advert for a world power. So, as a possible solution, it would be more than wise to consider as a point of reference the fact that America is conscious of the possible dependency and of being in a vulnerable position for the moment.

Fourthly, in this matter, another question is raised in regard to where specialists should expect in the near future, and that is the one concerning how great is the temptation for Europe to inflate. Specialists believe that the European Central Bank will not go down that road, because it is an organism committed to stability, and due to this fact its committees, presidents, vice-presidents and chief economists have demonstrated that convincingly over the last twelve years. Europe's experience in the 1960s and 70s showed that inflation is not the way to solve the existing problems. The European Central Bank is obliged by international treaty to target stability alone and that is different than in the case of the Federal Reserve, which is also required to keep a watchful eye on business activity and the economy. So, as a possible solution, it would be more than wise to consider as a point of reference the fact that Europe has a strict system of checks and balances that has proven itself, and the Europeans and European Central Bank will not depart from that.

Conclusions

In the first part of our conclusions we would like to summarize the main outcomes of our study concerning Europe's financial and economic crisis and the existing valid methods to putting an end to it.

First, the key factors that have led Europe to the current crisis are not the euro and the euro crisis, but in fact consist of the public debt that is still a big concern for Europe. While fiscal tightening can have a dampening effect on growth in some countries, it is unlikely to derail the broader European economic recovery. The example that we have shown in our study is the one of Greece. Prior to the global financial crisis, risk premia on Greek bonds versus safer European sovereign borrowers such as Germany, were very low and their yields similar. Greek government bonds were almost considered as a substitute to German bonds and that is why the implicit assumption seems to have been that if Greece or another weaker European economy is not able to pay back their debts, there will be a transfer of money from the stronger countries to the weaker ones. The European treaties do however contain a "no bail-out clause," meaning that member states are not liable for the debt of any other countries in the currency union. In this particular example, after Greece drastically revised its public deficit estimate to almost thirteen percent of gross domestic growth (GDP) last year, there were increased fears that Greece might not be able to pay back its debt and might not get support if needed, which implicated that over the past months this put pressure on other southern European sovereign issuers, as well as the euro.

Second, the possible scenarios that the crisis might generate in the near future are strongly related to the US dollar and to the USA position on the market place. On May 10, the euro zone countries and the IMF agreed to provide up to roughly 720 billion euro to countries facing financing difficulties. In technical terms there will be a special investment vehicle (SPV), which obtains funding of up to 440 billion euro through direct injection from the member states or by issuing bonds. To ensure lower financing costs, the bonds will be guaranteed by the European countries. This vehicle will then support countries in need by buying their debt and thus ensure refinancing. The IMF would provide an additional 220 billion euro and an additional 60 billion euro are available from the European Commission. The European Central Bank (ECB) is helping as well. In an unprecedented move, it announced that it will purchase government debt in order to support the functioning of markets. However, it has made it very clear that the intention of the purchases is to restore an orderly functioning of markets. The amounts purchased have initially been fairly small and the ECB is committed to absorb the created liquidity to avoid inflationary effects.

Third, as viable solutions that might improve Europe's nowadays economical situation we have mentioned: that it would be more than wise to consider as a point of reference of medium and long term the dollar as an etalon currency; it must be taken into account as a point of reference America and the position that it takes on the market place in the near future; it has to be stated that America is conscious of the possible dependency and of being in a vulnerable position for the moment; it is also good to be remarked the fact that Europe has a strict system of checks and balances that has proven itself, and the Europeans and European Central Bank will not depart from that.

Of course, we would like to mention that the implications of such outcomes must be taken into account in the near future, which also proves to be unsecure and strongly related to the position that will be played by the dollar currency and by USA. We would also have in mind as a suggestion for future researches to present in a closely manner the relation that exists between euro and the dollar and the implications of the two currencies in the world development process.

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GREECE, PORTUGAL AND SPAIN - A TEST CASE FOR EUROPE IN 2011

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Abstract
Recent statistics clearly show that Greece, Portugal, Spain and other euro zone members have massive public deficits and that is why this entire means that euro's future is extremely delicate.
Until now, politicians have not come up with a concrete plan to solve the situation. In this matter, politicians in France, Germany and elsewhere have signaled that they'll provide some kind of back-up support, but only when Greece has really taken tough measures – possibly more than they have done already – to get the deficit down. Although that may be unsettling to some investors in the very short term, it's clearly good news for the euro in the longer term.
In our paper, the intention is to present the reasons why Greece, Portugal, Spain and other euro zone members have massive public deficits and what should other countries do in order to help them in the nearby future. For us, a great concern is also the reaction of the European Central Bank and what could this institution do in the benefit of European countries in general.

Keywords: *public deficit, economic crisis, euro zone, European Central Bank, institution, competitiveness*

Introduction

The study "Greece, Portugal and Spain - A Test Case for Europe in 2011" covers complex matters such as: the data provided by recent statistics about Greece, Portugal, Spain and other euro zone members that have massive public deficits and which means that the entire euro's future is extremely delicate; aspects regarding politicians that have not come up with a concrete plan to solve the situation, and in this matter, politicians in France, Germany and elsewhere have signaled that they'll provide some kind of back-up support, but only when Greece has really taken tough measures – possibly more than they have done already – to get the deficit down; problems that may be unsettling to some investors in the very short term, but could turn out to be favorable for the euro in the longer term.

That are the main reasons why, in our paper, the intention is to present the reasons why Greece, Portugal, Spain and other euro zone members have massive public deficits and what should other countries do in order to help them in the nearby future. For us, a great concern is also the reaction of the European Central Bank and what could this institution do in the benefit of European countries in general.

We strongly believe that all the ideas that we are going to present in our paper are extremely important because they present nowadays reality and try to bring along with the specialists' ideas new ideas that might bring improvement to the situation that has been created due to the economic crisis.

In order to provide an answer to the main matters of our paper, we have analyzed the situation that exists in France, Germany and the other big countries which have to provide help to other countries in need, such as Greece, Portugal and Spain. Furthermore, we have presented the position

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taken by the European Central Bank and the reasons that had lead to that position. We have considered also as being extremely important the position taken by politicians and the concrete plan that they took in order to solve the situation today. Of course, our main target was to find ways in which situations similar to the existing one can be avoided in the future. We have also mentioned which is the relation between the theme of our paper and the already existent specialized literature.

1. Greece, Portugal, Spain and other euro zone members and the massive public deficits

The first part of our study entitled "Greece, Portugal, Spain and other euro zone members and the massive public deficits" stresses the position that Greece, Portugal, Spain and other euro zone members that have great deficit problems are seen threw the yeas of other countries in the European Union or in the world. This part also highlights the main consequences of having a big financial deficit as a country that is part of the European Union and tries to emphasize the most frequent questions that the specialists have posed in regard to all these matters.

Nowadays, France, Germany and the other big countries need to provide help to other European countries that have a big public deficit. In this particular matter, France, Germany and the other big countries are going to require Greece, and any other country needing support, to put their own economy in order before receiving support from the others. It is generally known that the European Central Bank, which is technically subject to the EU treaties, is not allowed to bail out Greece, and that is the reason why the help would have to come from the other countries on a bilateral basis.

Firstly, we would like to present the situation of Greece. Of course, the problem that exists in Greece, for example, which has made investors nervous, has resulted in a safe haven flow out of Euros and into dollars. Politicians have not come up with a concrete plan to solve the situation, but they have signaled that they'll provide some kind of back-up support, but only when Greece has really taken tough measures, maybe even more than they have done already, to get the deficit down. Although that may be unsettling to some investors in the very short term, it's clearly good news for the euro in the longer term. Taking into account the situation that exists in Greece there is also a question about how high is the risk of payment default going to be. In this particular matter, specialists believe that the risk of payment default is going to be very small, though one can never say zero, because the financial markets are in continuous motion. Some analysts say that Greece is a test case for the European Union.

Secondly, our target is to present the situation of Spain. As Greece, Spain has also been facing a severe recession and major structural challenges, and that is the main reason why specialists believe that a recovery looks likely to be muted. For many years, the Spanish economy has outperformed its Euro area peers in terms of growth performance. Over the past decade, the growth of the Spain's gross domestic product (GDP) averaged 2.8 per cent compared to only 1.5 per cent in the Euro area as a whole. Even during the recent crisis, Spanish GDP has contracted somewhat less than in other Euro area countries, e.g. Italy or Germany. However, the relatively mild decline in GDP clearly masks the severity of the downturn. Domestic demand was down 12 per cent in the third quarter, compared to the third quarter in 2008. And the unemployment rate has surged from 8 per cent in 2007 to more than 19 per cent. While some of the larger Euro area economies exited recession already in the second quarter of 2009, the Spanish economy continued to contract in the third quarter. Of course, there are several reasons why the Spanish economy has been so severely affected. In this matter, specialists have stated that similar to the USA and the UK, Spain has experienced a housing boom and at the peak, 14 houses per 1000 inhabitants were built in Spain, compared to only 7 in the USA and 3 in the UK. This construction boom was financed to a significant extent by foreign borrowing. In 2007, the current account deficit to GDP ratio reached a peak of 11 per cent, which is very high by international standards and even far exceeded the US deficit. In particular, Spanish non-financial corporations' took up significant amounts of credit. And that is why, during 2007, their net borrowing (gross savings minus gross investment) reached minus 11 per cent of GDP. The debt of

households also increased markedly. The ratio of household liabilities to disposable income in Spain has become the highest among the large Euro area countries in recent years. Nowadays, Spanish households have increased their savings markedly and the savings rate has risen from around 10 per cent of disposable income at the beginning of 2008 to 18 per cent in the third quarter. Non-financial corporations have also lowered their dependency on external finance somewhat. As a result, the current account deficit has narrowed dramatically to around minus 3.5 per cent in the third quarter of 2009. At the same time, employment has been cut very sharply (minus 7.2 per cent in the third quarter of 2009, compared to the third quarter in 2008). Well known specialists believe that the extreme deterioration reflects two factors: the first one is Spain has the highest share of temporary workers in the European Union, and these can be dismissed easily and that is why the share of temporary employment has fallen from around 34 per cent in 2006 to only 26 per cent in 2009; the second one is that the downturn in the housing market has had a pronounced effect on construction employment and that is why construction employment has been falling for two years now, and accounts for around half the drop in total employment (emagazine.credit-suisse.com).

2. Possible scenarios for controlling the massive public deficits

The second part of our presentation entitled "Possible scenarios for controlling the massive public deficits" stresses the possible scenarios that one country should take into account in order to insure a better future and to avoid damage in the financial sector.

According to specialists, the current events surrounding Greece are leading to the creation of a kind of model, which will provide a broad framework in the situation in which other countries in the euro zone get into trouble. Portugal, Spain and Ireland may be affected, as well as Italy to a lesser extent, but the Greek case is very important, because it gives the possibility of creating a system offering some kind of residual support for weaker countries. In order to continue future studies, specialists must take into account that the euro encompasses strong economies like Germany and France on the one hand, and weak economies like Greece on the other and must try to balance the European Union economy. Of course, France, Germany and the stronger countries are prepared to help other countries in a deflation situation, but not inflation.

Firstly, in Greece or Spain's situation, there exist many opportunities which are both local and global: for example, locally, some investors are now looking at Greek or Spain bonds (the prices of which have fallen very sharply during the crisis) and wonder if they are now starting to offer value; for example, globally the equity prices have fallen generally during the crisis as well as the weaker euro. Of course, the worst of the crisis is now over and things will begin to stabilize, but there will be a risk of recurring bouts of instability from time to time, when some of the markets which have sold off can recover.

Secondly, taking into account Spain's situation in particular, recent figures show that unemployment is now stabilizing at a very elevated level, and we think it could start falling in coming months, business surveys have improved, but the improvement was clearly less pronounced than in other European countries, and as the process of debt reduction has further to run, we expect the road to recovery to be bumpy. The planned VAT hike from 16 per cent to 18 per cent next July and the abolition of the annual tax rebate of 400 Euro (per household) to reduce the budget deficit are the beginning of necessary fiscal restraints, which are likely to weigh on growth in coming years. Medium-term prospects do not look particularly encouraging either. A surge in the labor force driven by immigration was the major reason for the growth outperformance in recent years. From 2001 to 2008, the share of foreign workers increased from 3.6 per cent to 10.8 per cent. At the same time, productivity growth has fallen behind other large Euro area countries. Spanish competitiveness has deteriorated in recent years as unit labor costs have risen more strongly than elsewhere. A devaluation of the currency is not possible in a currency union, so competitiveness has to be regained through an increase in productivity or lower relative prices. Deflationary tendencies are becoming increasingly visible: In the producer price index, prices for consumer goods were down 0.5 per cent

in December (compared to December 2008). The prospects for Spain's housing market are also expected to be poor in the next few years. A recovery is nowhere in sight due to the challenging economic outlook, tighter credit, weak housing demand and the significant supply overhang in residential markets. The decline of housing demand in Spain started in 2007 and has intensified since then. For instance, the number of new and existing home sales is currently about 50 per cent to 70 per cent lower than their peak level. A pick-up in housing demand is unlikely in the short term given the high unemployment rate and credit constraints. During the past boom, banks have been willing and able to generate lending, which has fuelled housing demand. But the number of new mortgages on houses has dramatically fallen and hovers now around 50,000 mortgage properties per month compared to about 100,000 pre-crisis. A revitalization of mortgage credit is essential for a sustained recovery. There are some positive signs such as the pace of decline in mortgage lending abating and interest rates are at record low levels. However, for the time being, we think that mortgage credit growth is likely to remain sluggish. For example, the housing market is still highly oversupplied and the residential construction has played a major role in Spain's economic boom over the last decade, constituting around 8 per cent of output at the peak. The annual number of houses built more than trebled between 1997 and 2007 and, in 2006; Spanish housing starts were higher than in the UK and France combined. Since the beginning of the crisis in 2008, housing starts have dropped by about 70 per cent. Yet, according to estimates from R.R. de Acuña & Associados – a Spanish real estate broker – the housing supply by the end of 2008 was about 1,600,000 units. This number includes new and existing unsold houses and supply under construction. At the current sales numbers of about 400,000 units per year, it would take four years to absorb all the stock. Most of these units are located in coastal regions and satellite towns close to large cities where construction has been the most active during the housing boom. Moreover, there are some risks that this oversupply situation could worsen as Spanish saving banks have recently started selling off their property portfolios due to regulatory changes. Banks and savings banks became large real estate owners in Spain by taking over thousands of homes used as collateral on defaulted loans. Bank of Spain decided last October to increase provision requirements on real estate assets held by financial institutions for more than a year from 10 per cent to 20 per cent, which is likely to lead to the sale of some of the bank's real estate holdings. However, detailed data on the bank's real estate holdings are scarce and it is difficult to assess the importance of this effect (emagazine.credit-suisse.com).

In regard to the data that we have hereby presented, we are still optimistic regarding the economic crisis that exists today in the world, because each crisis has brought new and improved techniques to ensure a better and prosperous development to the countries.

Conclusions

All in all, specialists expect an increase in the supply/demand imbalance and further house price declines. That is why, for example, in Spain's situation, the house price index has declined by only 9.5 per cent since its peak in the first quarter of 2008, and more over, according to some indicators, such as house price to disposable income, residential properties in Spain are still substantially overvalued. In the years previous to the economic crisis, specialists will have to learn how to balance the growth in Europe and not only there, but worldwide. The consumers should make also substantial contributions to growth, as well as the corporate sector and when the economy will stabilize there will be also regions in the global economy growing far faster than Europe, so it should be able to export to these markets.

As a first conclusion, countries must find places where the demand for European exports comes from. Asia is the fastest-growing region of the global economy, and becoming a large European trading partner. Central and Eastern Europe and the US are other important trading partners.

As a second conclusion, the European countries that can outperform must be helped in the nearby future. Among these countries there is also Germany who is growing the most quickly and who has one of the most volatile economies within the euro area, and had one of the most severe recessions. The German economy is very much driven by corporate spending and exports. It is likely to grow by 3% in 2010, while France is expected to grow 2% and Italy 1%. Countries such as Spain, Ireland and Greece will probably find things much more difficult and post much lower growth rates.

As a third conclusion, this acceleration in growth mean that the European Central Bank (ECB) will start to raise its benchmark interest rate during the course of 2011, due to the already existing data on the year 2010. That is why it is possible the ECB will raise its benchmark rate to 2% by the end of 2011 from 1% today.

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ON THE GASTALDI – D'URSO FUZZY LINEAR REGRESSION

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Abstract
In the crisp regression models, the differences between observed values and calculates ones are suspected to be caused by random distributed errors, although these are due to observation errors and an unappropriate model structure.
So, the fuzzy character of model prevails.
The Fuzzy linear regression models (FLRM) are, roughly speaking, of two kinds:
Fuzzy linear programming (FLP) based methods and Fuzzy least squares (FLS) methods.
The FLP methods have been initiated by H.Tanaka (1982) and developed by H. Ishibuchi et al. The classical FLR model,

$$\mathbf{Y} = \mathbf{A}_0 + \mathbf{A}_1\mathbf{X}_1 + ... + \mathbf{A}_\mathbf{k}\mathbf{X}_\mathbf{k}$$

has a explained Fuzzy triangular variable, Y, Fuzzy triangular coefficients {Aj} and crisp explanatory variables {Xj}: the parameters {Aj} of the model are estimated by minimizing the total indetermination of the model, so each data point lies within the limits of the response variable.

In a large number of situations the prediction interval of the FLR model were much less than the interval obtained applying classical the Multiple linear regression model (see V.M. Kandala – 2002, 2003).

However, this approach is somehow heuristic; on the other side, the LP model complexity overmuch increases as the number of data points increases.

The FLS approach (P. Diamond; Miin-Shen Yang, Hsien-Hsiung Liu – 1988 et al) is an extension of the classical OLS method, using various metrics defined on the space of the fuzzy numbers.

A significant number of recent works (McCauley- Bell (1999), J. deA. Sanchez and A. T. Gomez (2003) who used FLS to estimate the term structure of interest rates) deals with models with a fuzzy output, fuzzy coefficients and a crisp input vector.

All the fuzzy components are symmetric triangular fuzzy numbers: the main idea of the method is to minimize the total support of the fuzzy coeficients. Sometimes, different restrictions occur.
In our paper, we intend to build some examples for the P. d'Urso and T. Gastaldi models, that allow a comparative study on various options.
(Pierpaolo d'Urso & Tommaso Gastaldi in: A least square approach to fuzzy linear regression, Comp. Stat. & Data Analysis 2000)

Keywords: *fuzzy linear regression; fuzzy metrics; Gastaldi - d'Urso equations; fuzzification; doubly linear adaptative fuzzy regression model.*

Introduction

The basic notion in the fuzzy theory is the fuzzy set or fuzzy number: in everyday mathematics, the corresponding notion is that of a set (or: crisp set). For a crisp set A, every element of the universe belongs or not to A, while for a fuzzy set A, every element of the subsequent universe has a degree of appurtenance to A, say, a number in the unit interval [0;1].

In this context, if an element **x** has the degree of appurtenance equal to 0, it "don't" belongs to A; if the degree of appurtenance equals to 1, then "sure" that **x** is an element of A; for the intermediate degrees of appurtenance e, say $\mu(x) = 0{,}7$ the appurtenance is 70% possible and 30% not possible (for this reason, the fuzzy theory interferes with the so – known "possibility" theory).

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For a crisp set A, belonging to an universe X, the characteristic function $\mu_A(x): X \to \{0;1\}$ is given by

$$\mu_A(x) = \begin{cases} 1, \text{if } x \in A \\ 0, \text{if } x \notin A \end{cases}$$

In the fuzzy case, the characteristic function, dubbed as *the membership function* is simply every function $\mu_A(x): X \to [0;1]$.

However, a series of special functions are routinely used, as in the following:

• **the triangular fuzzy numbers (Zimmermann)**: he's considering two continuous, decreasing shape functions, $\lambda, \rho: R^+ \to [0,1]$ with $\lambda(1)=0; \lambda(0)=1; \rho(1)=0; \rho(0)=1$; then, a triangular fuzzy number, denoted by $(m,a,b)_{\lambda\rho}$ has the membership function A(x) given by

$$A(x) = \begin{cases} \lambda\left(\dfrac{m-x}{a}\right), \text{if } x \le m \\ \rho\left(\dfrac{x-m}{b}\right), \text{if } x > m \end{cases}$$

Here, **m** is called the center of $(m,a,b)_{\lambda\rho}$, **a** is the left spread and **b** is the right spread of $(m,a,b)_{\lambda\rho}$. If **a** = **b**, then $(m,a,b)_{\lambda\rho}$ is called a ***symmetrical triangular fuzzy number*** that will be denoted simply by $(m,a)_{\lambda\rho}$.

In most applications, the shape functions **ρ, λ** are supposed to be $\rho(x)=x; \lambda(x)=x$ and consequently, the membership function becomes

$$A(x) = \begin{cases} 1-\left(\dfrac{m-x}{a}\right), \text{if } m-a \le x \le m \\ 1-\left(\dfrac{x-m}{b}\right), \text{if } m < x \le m+b \end{cases}$$

As an alternative, for an ***exponential fuzzy number***, the membership function has the shape below:

$$A(x) = \begin{cases} \exp\left[-\left(\dfrac{m-x}{\sigma}\right)^k\right], \textit{for } x \le m \\ \exp\left[-\left(\dfrac{x-m}{\sigma}\right)^k\right], \textit{for } x > m \end{cases}$$

Here, the spread is given by the positive $\sigma > 0$.

• **the trapezoidal fuzzy number (**D. Ralescu; L. A. Zadeh; Dubois), denoted by (a,b,α,β) has the membership function **A(x) :R → [0;1]** given by

$$A(x)=\begin{cases}\dfrac{x-a+\alpha}{\alpha}, & a-\alpha \le x \le a\\ 1, & a<x<b\\ \dfrac{b+\beta-x}{\beta}, & b \le x \le b+\beta\\ 0, & \text{otherwise}\end{cases}$$

• For the symmetrical triangular fuzzy numbers (TFN), an **Euclidean distance** is available: let $A=(m_1,a_1)_{\lambda\rho}$, $B=(m_2,a_2)_{\lambda\rho}$ be TFN: then, the Euclidean distance between A, B is

$$d_{AB}=\sqrt{(m_1-m_2)^2+(a_1-a_2)^2}\,.$$

If A, B are non-symmetrical, $A=(m_1,a_1,b_1)_{\lambda\rho}$, $B=(m_2,a_2,b_2)_{\lambda\rho}$ then, for $p_1,p_2,p_3>0$ suitable defined weights, $p_1+p_2+p_3=1$, the distance d_{AB} can be compute by using the next formula:

$$d_{AB}=\sqrt{p_1\cdot(m_1-m_2)^2+p_2\cdot(a_1-a_2)^2+p_3\cdot(b_1-b_2)^2}$$

PAPER CONTENT:
Fuzzy linear regression

Let's take into account the Linear Fuzzy regression model $Y = (a_0, r_0) + (a_1, r_1)X$, with:
• X – the explanatory variable, Y – the response variable
• (a_0, r_0), (a_1, r_1) the triangular symmetric fuzzy coefficients to be estimated
• X is supposed to be a crisp variable, Y = (c, s) a TSFN variable.

Remember that a triangular symmetric fuzzy number (TSFN), denoted by x = (a , r), has the membership function A(x): R → [0;1] given by

$$A(x)=\begin{cases}\dfrac{x-(a-r)}{r}, & \text{if } a-r \le x < a\\ \dfrac{(a+r)-x}{r}, & \text{if } a \le x \le a+r\\ 0, & \text{otherwise}\end{cases}$$

The spread of x is then equal to 2a: the centre of x is a.

The Tanaka approach, referred to as possibility regression, was to minimize the fuzziness of the model, represented by the total spread of the fuzzy coefficients. So, the method becomes an extension of the classical OLS method.

To illustrate this, let's consider the data in Table 1 below:

TABLE 1:

Y_i	X_i
$y_1 : (5 ; 2) = (c_1 , s_1)$	$x_1 = 1$
$y_2 : (8 ; 3) = (c_2 , s_2)$	$x_2 = 2$
$y_3 : (10 ; 2) = (c_3 , s_3)$	$x_3 = 3$

With the linear regression model: $Y = (a_0 , r_0) + (a_1 , r_1)X$

The required approximations become

$$\begin{cases} (5;2) \approx (a_0, r_0) + (a_1, r_1) \\ (8;3) \approx (a_0, r_0) + 2 \cdot (a_1, r_1) \\ (10;2) \approx (a_0, r_0) + 3 \cdot (a_1, r_1) \end{cases}$$

From here the OLS conditions are derived

- for the centers: $\min\{(a_0 + a_1 - 5)^2 + (a_0 + 2a_1 - 8)^2 + (a_0 + 3a_1 - 10)^2\}$
- for the spreads: $\min\{(r_0 + r_1 - 2)^2 + (r_0 + 2r_1 - 3)^2 + (r_0 + 3r_1 - 2)^2\}$.

The solutions are: $\begin{cases} a_0 = 8/3 \\ a_1 = 5/2 \end{cases}; \begin{cases} r_0 = 7/3 \\ r_1 = 0 \end{cases}$, so the estimated model becomes

$$Y = (2,5;0) \cdot X + (2,67;2,33) \Leftrightarrow Y = 2,5 \cdot X + (2,67;2,33)$$

Having zero spread, the X coefficient is a crisp number.

This equation allow us to perform interpolations, for example

$$x = 2,5 \rightarrow y = \frac{5}{2} \cdot 2,5 + (8/3;7/3) = (6,25;0) + (2,67;2,33) = (8,92: 2,33).$$

For a large number of explanatory variables, the matrix approach is more suitable. To illustrate this let's consider the data in TABLE 2.

TABLE 2:

sample	Y	X_1	X_2	…	X_p	the independent term
1	y_1	x_{11}	x_{12}	…	x_{1p}	1
2	y_2	x_{21}	x_{22}	…	x_{2p}	1
…	…	…	…	…	…	…
n	y_n	x_{n1}	x_{n2}	…	x_{np}	1

with: $\mathbf{y_1 = (c_1, s_1); y_2 = (c_2, s_2); \ldots; y_n = (c_n, s_n)}$ **and** $X_1, \ldots, X_n$ be crisp variables; the linear regression function will be

$$\mathbf{Y = (a_0, r_0) + (a_1, r_1)X_1 + (a_2, r_2)X_2 + \ldots + (a_p, r_p)X_p}$$

The matrix elements of the model will be the next:

- the n x (p + 1) data matrix $\mathbf{X} = \begin{pmatrix} \mathbf{x_{11}} & \mathbf{x_{12}} & \mathbf{\ldots} & \mathbf{x_{1p}} & \mathbf{1} \\ \mathbf{\ldots} & \mathbf{\ldots} & \mathbf{\ldots} & \mathbf{\ldots} & \mathbf{\ldots} \\ \mathbf{x_{n1}} & \mathbf{x_{n2}} & \mathbf{\ldots} & \mathbf{x_{np}} & \mathbf{1} \end{pmatrix}$

- the components of the TSFN Y's data:

The n x 1 centers vector, $\mathbf{C} = \begin{pmatrix} \mathbf{c_1} \\ \mathbf{c_2} \\ \mathbf{\ldots} \\ \mathbf{c_n} \end{pmatrix}$ and the n x1 spreads vector $\mathbf{S} = \begin{pmatrix} \mathbf{s_1} \\ \mathbf{s_2} \\ \mathbf{\ldots} \\ \mathbf{s_n} \end{pmatrix}$

- the (p + 1) x 1 vectors of the TSFN's coefficients,

The centers , $\hat{\mathbf{a}} = \begin{pmatrix} \mathbf{a_1} \\ \mathbf{\ldots} \\ \mathbf{a_p} \\ \mathbf{a_0} \end{pmatrix}$ and the spreads $\hat{r} = \begin{pmatrix} r_1 \\ \ldots \\ r_p \\ r_0 \end{pmatrix}$

The OLS method gives

$$\hat{\mathbf{a}} = (\mathbf{X'} \cdot \mathbf{X})^{-1} \cdot \mathbf{X'} \cdot \mathbf{C} \; ; \hat{\mathbf{r}} = (\mathbf{X'} \cdot \mathbf{X})^{-1} \cdot \mathbf{X'} \cdot \mathbf{S}$$

Let, for example, be the data in TABLE 3 below:

TABLE 3:

the sample	Y	X_1	X_2
1	(3;2)	2	1
2	(5;1)	1	3
3	(7;3)	3	2

We'll apply the regression model : $\mathbf{Y = (a_0 , r_0) + (a_1 , r_1)X_1 + (a_2 , r_2)X_2}$
According to the previous notations and formula,

$$\mathbf{X}=\begin{pmatrix}2 & 1 & 1\\ 1 & 3 & 1\\ 3 & 2 & 1\end{pmatrix};\mathbf{C}=\begin{pmatrix}3\\ 5\\ 7\end{pmatrix};\mathbf{S}=\begin{pmatrix}2\\ 1\\ 3\end{pmatrix}\Rightarrow\hat{\mathbf{a}}=\begin{pmatrix}2\\ 2\\ -3\end{pmatrix};\hat{\mathbf{r}}=\begin{pmatrix}1\\ 0\\ 0\end{pmatrix}$$

so, the estimated model will be : $\hat{\mathbf{Y}} = \mathbf{(-3 , 0) + (2 , 1)X_1 + (2 , 0)X_2}$ **or**

$\hat{\mathbf{Y}} = \mathbf{-3 + (2 , 1)X_1 + 2X_2}$.

Here, the number of parameters being equal to the number of conditions, the estimated values $\hat{\mathbf{Y}}$ are equal to the observed ones,

$$\mathbf{x_1 = 2 ; x_2 = 1} \rightarrow \hat{y}_1 = (-3;0)+(4;2)+(2;0)=(3;2)\Leftrightarrow \hat{y}_1 = y_1$$
$$\mathbf{x_1 = 1 ; x_2 = 3} \rightarrow \hat{y}_2 = (-3;0)+(2;1)+(6;0)=(5;1)\Leftrightarrow \hat{y}_2 = y_2$$
$$\mathbf{x_1 = 3 ; x_2 = 2} \rightarrow \hat{y}_3 = (-3;0)+(6;3)+(4;0)=(7;3)\Leftrightarrow \hat{y}_3 = y_3 .$$

If there are more data than model parameters, a non-zero error can occur, as shown in the example below:
Let's consider the data in TABLE 4, subject to the model

$\mathbf{Y = (a_0 , r_0) + (a_1 , r_1)X_1 + (a_2 , r_2)X_2}$

TABLE 4:

the sample	Y	X_1	X_2
1	(4;3)	2	1
2	(7;2)	3	2
3	(9;5)	2	3
4	(8;2)	4	2

The corresponding matrix elements will be

$$\mathbf{X}=\begin{pmatrix}2&1&1\\3&2&1\\2&3&1\\4&2&1\end{pmatrix};\mathbf{C}=\begin{pmatrix}4\\7\\9\\8\end{pmatrix};\mathbf{S}=\begin{pmatrix}3\\2\\5\\2\end{pmatrix}\Rightarrow$$

$$\Rightarrow\hat{\mathbf{a}}=(\mathbf{X}'\cdot\mathbf{X})^{-1}\cdot\mathbf{X}'\cdot\mathbf{C}=\begin{pmatrix}0{,}727\\2{,}5\\0\end{pmatrix};\hat{\mathbf{r}}=(\mathbf{X}'\cdot\mathbf{X})^{-1}\cdot\mathbf{X}'\cdot\mathbf{S}=\begin{pmatrix}-1{,}09\\1\\4\end{pmatrix}$$

The estimated regression function becomes $\hat{\mathbf{Y}}$ = **(0 ; 4) + (0,727 ; -1,09)X_1 + (2,5 ; 1)X_2.**

Comparing the observed values with the estimated values, we obtain

$x_1 = 2 ; x_2 = 1 \rightarrow \hat{y}_1 = (3{,}954; 2{,}82) \Leftrightarrow \hat{y}_1 \approx y_1$

$x_1 = 3 ; x_2 = 2 \rightarrow \hat{y}_2 = (7{,}181; 2{,}73) \Leftrightarrow \hat{y}_2 \approx y_2$

$x_1 = 2 ; x_2 = 3 \rightarrow \hat{y}_3 = (8{,}954; 4{,}82) \Leftrightarrow \hat{y}_3 = y_3$

$x_1 = 4 ; x_2 = 2 \rightarrow \hat{y}_4 = (7{,}91; 1{,}69) \Leftrightarrow \hat{y}_4 = y_4$

A better approach is that of Tanaka's symmetrical Doubly Linear Adaptive Fuzzy Regression Model, whose central idea is that the calculated spreads depend linearly to the calculated centers.

In this respect, for

$$\mathbf{a}=\begin{pmatrix}a_1\\\dots\\a_p\\a_0\end{pmatrix};\mathbf{C}=\begin{pmatrix}c_1\\c_2\\\dots\\c_n\end{pmatrix};\mathbf{S}=\begin{pmatrix}s_1\\s_2\\\dots\\s_n\end{pmatrix},\tilde{\mathbf{1}}=\begin{pmatrix}1\\1\\\dots\\1\end{pmatrix}$$ - "n" dimensional vector

We put

- the calculated centers: $\hat{\mathbf{C}}=\mathbf{X}\cdot\mathbf{a}$
- and, accordingly, the calculated spreads: $\hat{\mathbf{S}}=\hat{\mathbf{C}}\cdot\mathbf{b}+\tilde{\mathbf{1}}\cdot\mathbf{d}$

The optimum condition will be: **(minim)** $\left\|\mathbf{C}-\hat{\mathbf{C}}\right\|^2+\left\|\mathbf{S}-\hat{\mathbf{S}}\right\|^2$.

The next two ways to perform this:

• the "Doubly Linear" method, in which the vector **a** is estimated first using OLS method, so $\hat{\mathbf{a}} = (\mathbf{X}'\cdot\mathbf{X})^{-1}\cdot\mathbf{X}'\cdot\mathbf{C}$, the parameters of the Minimum model being the scalars b, d;

• the d'Urso and Gastaldi version, in which the unknown parameters are **a, b, d.**

As an example of applying the Doubly Linear model, let's consider the data in TABLE 5 below:

TABLE 5:

the sample	Y	X
1	(8 ; 3)	1
2	(5 ; 2)	2
3	(9 ; 4)	3

the corresponding model being the next

$\mathbf{(c_i ; s_i) = (a_0 ; r_0) + (a_1 ; r_1)x_i;\ i = 1,2,3}$

For

$$\mathbf{C}=\begin{pmatrix}8\\5\\9\end{pmatrix};\mathbf{S}=\begin{pmatrix}3\\2\\4\end{pmatrix};\mathbf{X}=\begin{pmatrix}1&1\\2&1\\3&1\end{pmatrix};\mathbf{a}=\begin{pmatrix}a_1\\a_0\end{pmatrix},$$

There arrive that

$$\hat{\mathbf{C}}=\begin{pmatrix}a_1+a_0\\2\cdot a_1+a_0\\3\cdot a_1+a_0\end{pmatrix};\hat{\mathbf{C}}-\mathbf{C}=\begin{pmatrix}a_1+a_0-8\\2\cdot a_1+a_0-5\\3\cdot a_1+a_0-9\end{pmatrix};$$

$$\hat{\mathbf{S}}=\begin{pmatrix}b\cdot(a_1+a_0)+d\\b\cdot(2\cdot a_1+a_0)+d\\b\cdot(3\cdot a_1+a_0)+d\end{pmatrix};\hat{\mathbf{S}}-\mathbf{S}=\begin{pmatrix}b\cdot(a_1+a_0)+d-3\\b\cdot(2\cdot a_1+a_0)+d-2\\b\cdot(3\cdot a_1+a_0)+d-4\end{pmatrix}$$

Putting $\hat{\mathbf{a}}=(\mathbf{X}'\cdot\mathbf{X})^{-1}\cdot\mathbf{X}'\cdot\mathbf{C}=\begin{pmatrix}0,5\\6,33\end{pmatrix}$ there obtains $\mathbf{a_1 = 0, 5;\ a_0 = 6, 33}$ and consequently

$$\hat{\mathbf{C}}=\begin{pmatrix}6,83\\7,33\\7,83\end{pmatrix}.$$

Finally, $\hat{\mathbf{S}}-\mathbf{S}=\begin{pmatrix}\mathbf{6,83\cdot b+d-3}\\ \mathbf{7,33\cdot b+d-2}\\ \mathbf{7,83\cdot b+d-4}\end{pmatrix}$.

From the condition: **(minim)** $\left\|\mathbf{S}-\hat{\mathbf{S}}\right\|^2$ there results **b = 1** and **d = -4,33 .**

Having $\hat{\mathbf{S}}-\mathbf{S}=\begin{pmatrix}\mathbf{-1/2}\\ \mathbf{1}\\ \mathbf{1/2}\end{pmatrix}$, then $\hat{\mathbf{S}}=\begin{pmatrix}\mathbf{2,5}\\ \mathbf{3}\\ \mathbf{3,5}\end{pmatrix}$ and so:

- $\hat{\mathbf{y}}_1=\mathbf{(6,83;2,5)}$ versus $\mathbf{y}_1$ = **(8 ; 3)**
- $\hat{\mathbf{y}}_2=\mathbf{(7,33;3)}$ versus $\mathbf{y}_2$ = **(5 ; 2)**
- $\hat{\mathbf{y}}_3=\mathbf{(7,83;3,5)}$ versus $\mathbf{y}_3$ = **(9 ; 4)**

For the Gastaldi – d'Urso variant, which not necessarily lead to better results, although the computations volume is incomparably greater, the parameters of the optimization problem

(minim) $\left\|\mathbf{C}-\hat{\mathbf{C}}\right\|^2+\left\|\mathbf{S}-\hat{\mathbf{S}}\right\|^2$

Will be **a, b** and **d**.

According to the results of Gastaldi – d'Urso, the solutions to this problem are given by the equations below:

$$\hat{\mathbf{C}}=\mathbf{X}\cdot(\mathbf{X}'\cdot\mathbf{X})^{-1}\cdot\mathbf{X}'\cdot\mathbf{C}\quad;\hat{\mathbf{S}}=\mathbf{X}\cdot(\mathbf{X}'\cdot\mathbf{X})^{-1}\cdot\mathbf{X}'\cdot\mathbf{S}$$

$$\bar{\mathbf{C}}=\frac{\mathbf{1}}{\mathbf{n}}\cdot\tilde{\mathbf{1}}'\cdot\mathbf{C}\quad;\bar{\mathbf{S}}=\frac{\mathbf{1}}{\mathbf{n}}\cdot\tilde{\mathbf{1}}'\cdot\mathbf{S}$$

$$\mathbf{M}_1=\mathbf{C}'\cdot\hat{\mathbf{S}}-\mathbf{n}\cdot\bar{\mathbf{C}}\cdot\bar{\mathbf{S}}\;;\mathbf{M}_2=\|\hat{\mathbf{C}}\|^2-\|\hat{\mathbf{S}}\|^2+\mathbf{n}\cdot\bar{\mathbf{S}}^2-\mathbf{n}\cdot\bar{\mathbf{C}}^2\;;\mathbf{M}_3=\mathbf{n}\cdot\bar{\mathbf{C}}\cdot\bar{\mathbf{S}}-\mathbf{S}'\cdot\hat{\mathbf{C}}$$

The appropriate value of **b**, denoted by $\hat{b}$, is derived from the equation

$$M_1 b^2 + M_2 b + M_3 = 0$$

Therefore

$$\hat{d} = \bar{S} - \hat{b} \cdot \bar{C} \quad ; \quad \hat{a} = \frac{(X' \cdot X)^{-1} \cdot X' \cdot (C + S \cdot \hat{b} - \tilde{1} \cdot \hat{b} \cdot \hat{d})}{1 + \hat{b}^2}$$

For an already presented example, namely

TABLE 6:

sample	Y	X_1	X_2	X_3
1	(3; 1)	1	2	1
2	(6; 2)	3	1	2
3	(8; 2)	2	2	3
4	(7; 4)	1	4	3
5	(10; 3)	3	2	4

From the equation: $M_1 b^2 + M_2 b + M_3 = 0$, we derive that $\hat{b}_1 = 0{,}309$, $\hat{b}_2 = -3{,}236$ and finally:

$$\hat{b}_1 = 0{,}309 \Rightarrow \hat{d}_1 = 0{,}3 \; ; \; \hat{a}_1 = \begin{pmatrix} 0{,}423 \\ 0{,}106 \\ 2{,}051 \\ 0{,}387 \end{pmatrix};$$

$$\hat{b}_2 = -3{,}236 \Rightarrow \hat{d}_2 = 224{,}4 \; ; \; \hat{a}_2 = \begin{pmatrix} -0{,}423 \\ -0{,}541 \\ 0{,}297 \\ 8{,}063 \end{pmatrix}$$

By applying the relations:

$C = X \cdot \hat{a}$; $S = \hat{C} \cdot \hat{b} + \tilde{1} \cdot \hat{d}$, we'll get

$$\mathbf{C}_1 = \begin{pmatrix} 389,7 \\ 392,5 \\ 394,2 \\ 394 \\ 396,66 \end{pmatrix} \; ; \; \mathbf{S}_1 = \begin{pmatrix} 120,71 \\ 121,58 \\ 122,11 \\ 122,05 \\ 122,88 \end{pmatrix}$$ - Obviously not convenient

$$\mathbf{C}_2 = \begin{pmatrix} 6,855 \\ 6,897 \\ 7,026 \\ 6,367 \\ 6,9 \end{pmatrix} \; ; \; \mathbf{S}_1 = \begin{pmatrix} 2,22 \\ 2,24 \\ 1,66 \\ 3,8 \\ 2,07 \end{pmatrix}$$ - This one being the feasible solution.

In the comparative TABLE 7 below, the next are presented:

- $\{\mathbf{y}_i^{\#}\}$ the values calculated using Gastaldi – d'Urso method
- $\{\hat{\mathbf{y}}_i\}$ the values calculated using the Doubly Linear method;
- $\{\tilde{\mathbf{y}}_i\}$ the values calculated using the OLS method:

TABLE 7:

$\mathbf{y}_i$	$\hat{\mathbf{y}}_i$	$\tilde{\mathbf{y}}_i$	$\mathbf{y}_i^{\#}$
(3; 1)	**(3,14 ; 1,06)**	**(3,14 ; 9,07)**	**(6,9 ; 2,2)**
(6; 2)	**(5,92 ; 1,95)**	**(5,92 ; 10,61)**	**(6,8 ; 2,24)**
(8; 2)	**(7,83 ; 1,9)**	**(7,83 ; 11,22)**	**(7,03 ; 1,66)**
(7; 4)	**(6,96 ; 3,96)**	**(6,96 ; 13,29)**	**(6,37 ; 3,8)**
(10; 3)	**(10,18 ; 3,07)**	**(10,18 ; 13,05)**	**(6,9 ; 2,07)**

Of course, not always the effectiveness of this methods is that in the Table 7: this effectiveness heavily depends on input data.

According to our information, there is no theorem stating the adequacy of each method.

Conclusion:

The basic idea of the paper is to analyze the influence of the spreads on the accuracy study.

In computing fuzzy regression – as well as other categories – there observe an automatically growing spreads with increasing number of fuzzy parameters.

Responsible for this shortcoming are the very definitions of the fuzzy operations itself. Major complications are arising when d'Urso - Gastaldi attempts to keep under control the spreads, by correlating these last with the other characteristics.

In our view, another approach consists in modifying the basic definitions as follow:

- the addition : $(a;\alpha)+(b;\beta)=(a+b;\max\{\alpha;\beta\})$
- the multiplication : $(a;\alpha)\cdot(b;\beta)=(a\cdot b;\max\{\alpha;\beta\})$

By adopting this viewpoints, we'll have the distribution,

$$(a;\alpha)\cdot[(b;\beta)+(c;\nu)]=(a;\alpha)\cdot(b;\beta)+(a;\alpha)\cdot(c;\nu)$$

thus this concept is a natural one.

On the other hand, is true that analytical optimization methods are difficult to carry out.

Our team is still trying to find solutions to these problems in occasion of studying some major economic applications.

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FROM EXTERNAL DEBT TO ECONOMIC GROWTH … AND BACK

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Abstract

This paper is meant to trace the relationship existing between external debt and economic growth for 109 countries spread all over the world. We have resorted for this study to cross-sectional data, the economic modelling being simultaneously made for a three-year period. After having constructed four models and after having estimated them by econometric techniques, we have selected the most appropriate of them, which is in fact the version to be build upon within future personal studies. The results indicated as optimum the model including GDP in logarithm as endogenous variable and total external debt in logarithm and development level dummy as exogenous variables. The analysis revealed a positive relationship between external debt and economic growth, indicating that the threshold above which the indebting influence on the economic performance should become negative has not been reached yet. The coefficients obtained within the estimations performed, construed as elasticities, show that, while GDP is inelastic in relation with debt, the latter has a supra-unitary elasticity, therefore its modification being ampler than the GDP one.

Keywords: *economic growth, external debt, impact factors, estimates, economic modelling*

1. Introduction

This study, based on an analysis made on 109 countries, for a three year period, that is 2006, 2007 and 2008, with annual data, is meant to reveal several important issues on the economic growth phenomenon and to analyse some of its main influencing factors.

According to the economic theory, economic growth represents the increase of the real GDP from a period to another one and reflects the living standard and well being of a society. This is the reason why it is highly important to identify the key elements with major impact on economic growth and to determine the type of relationships established with each and every single such item, so as to provide accurate arguments for a ground development of a nation. The said factors cover a large range, comprising, among others, without limitation, investments, unemployment rate, budgetary deficit, exports, imports, governmental expenses, external debt or population increase. Given their significant number, we have decided to take them separately and to further render our analysis increasingly complex in subsequent studies.

Therefore, we have started, by resorting to only one item, save for GDP, meaning external debt, taken consecutively as exogenous and endogenous variable. Subsequently, we have separately added two dummies, one relating to the geographical layout and the other one to the level of development of the analysed countries. After having taken into account various facets of the issue, as seen hereinafter, the following equations have been subject to econometric estimations:

$$\log_{gdp} = \alpha + \beta * \log_{dat} + \varepsilon$$
$$\log_{dat} = \alpha + \beta * \log_{gdp} + \varepsilon$$
$$\log_{gdp} = \gamma + \delta * \log_{dat} + \theta * d_1 + \varepsilon$$
$$\log_{gdp} = \gamma + \delta * \log_{dat} + \theta * d_2 + \varepsilon$$

The relationship between the economic growth and the external debt of a country is, basically, negative, considering the opportunity cost relating to the money exit out of the country due to the debt service, this rendering non-achieved potential investments. Yet, there is an inflexion point in this

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relationship graphic, an optimum level up to which the external debt has a positive influence on economic growth by the increase of the investments funds acquired as result of the external credit contracting. In this case, it is important to see whether the investment yield is sufficient to cover the long-run debt service rate, so that the leverage should not reverse once the reimbursements begins. In order to achieve a positive impact of the external debt on growth, an efficient and comprehensive debt strategy is absolutely necessary.

In view of rendering this paper as clear as possible, we have decided to structure it into six sections, as follows: Introduction in section 1 (the current section), a brief Literature Review which appears in section 2, followed by the description of Data in section 3, the presentation of the Methodology and Empirical Results in section 4, Conclusions in section 5 and, finally, Suggestions for Further Research in section 6.

2. Literature review

The external debt – economic growth relationship has been lately focused on by many economists interested in discovering the type of correlation existing between such variables. Savvides (1992) resorted to a TSLDV method, applied on cross-sectional time series for 43 less developed countries, over a six year-period (1980-1986), in order to render the negative connection between these two variables. In his opinion, the obligation of a country to pay its foreign debt seriously affects its economic performance, as a large part of its output increase should be directed towards its debt service and creditors, the debt overhang acting as a marginal tax rate on that country and lowering its investment returns, while negatively impacting on its domestic capital formation.

A negative influence of foreign debt on growth is also rendered by Elbadawi et al.(1996) whose analysis is based on cross-section regressions for 99 developing countries spanning SSA, Latin America, Asia and Middle East. They underline the indirect effect of external debt on a country's economic performance, via the impact of the former on the public sector expenditures. While the financial standing becomes increasingly precarious, governments assist to the diminishing of their resources and, subsuquently, to the cutoff of their public expenditures, thus leading to a desrease in GDP.

Clements et al. (2003) made appeal to both fixed effects and system GMM, based on data for 55 low-income countries classified as eligible for the IMF's Poverty Reduction and Growth Facilitiy, for the period 1970–1999. Their study is directed towards the analysis of the channels via which external debt affects growth in those countries. The authors indicate that a significant decrease of the external debt of heavily indebted poor countries would directly increase per capita income growth with about 1% per year and indirectly contribute to economic growth by their effects on public investments.

Patillo et al. (2002, 2004) examined the relationship between the total external debt and the GDP growth rate for 61 developing countries, for the period 1969-1998. They found out a backward bending growth curve with a debt-growth positive relationship at low levels of national debt and negative relationship at high levels. This shows us that the effects of debt-overhang are likely to occur only after a certain threshold has been reached.

Schclarek (2004) used panel data for 59 developing countries and 24 industrial countries, with data averaged over each of the seven 5-year periods between 1970 and 2002 (1970-74; 1975-80; etc.), applying the GMM dynamic panel econometric method. The study revealed a negative and significant relationship between total external debt and economic growth for developing countries. After having divided the total external debt into public and private external debt, a negative relationship has resulted between public external debt and growth, and no significant relationship as for private external debt.

Hameed et al. (2008) studied the long-run and short-run relationships between external debt and economic growth for Pakistan, by resorting to annual data for the period 1970-2003. They

identified that the debt service ratio tends to adversely affect GDP and therefore the economic growth rate in the long-run, which, in turn, diminishes the country's capacity to service its debt. Also, the estimated error correction term indicated a significant long-run causal relationship among the said variables. As a whole, the results evidenced both a short-run and long-run causal relationship running from debt service to GDP.

An impressive analysis is made by Reinhart and Rogoff (2010) who selected 44 countries over around 200 years, collecting about 3,700 yearly observations. They found out that the relationship between government debt and real GDP growth is weak for debt-GDP ratios below a threshold of 90% of GDP, while, above 90%, median growth rates fall by 1%, and average growth falls considerably more. As regards the emerging markets, there are lower thresholds for public and private external debt: when external debt reaches 60% of GDP, annual growth decreases by about 2%; for higher levels, growth rates are roughly cut in half.

3. Data

In order to study the above mentioned phenomenon, we have selected the data described below:

- The economic performance (log_{gdp}) - expressed by GDP at PPP in USD, annual series taken over from UNO database.
- The indebting (log_{dat}) - represented by the credits contracted by the authorities and economic agents from the banks reporting to IRB, corrected by the implicit index for passing to PPP standard, for comparability. These data have been annualised (given that the external debt series is quarterly) and they have been taken from UNO and IMF databases.
- For the third model, a dummy variable (d1) has been defined, as follows:

  d1 = 2, if the country is located in Europe

  d1 = 1, if the country is located in North America or Asia

  d1 = 0, if the country is located on another continent
- For the forth model, a dummy variable (d2) has been defined, as follows:

  d2=0, if the country is less developed

  d2=2, if the country is developed.

Such classification has been made according to the data collected from the World Bank official site.

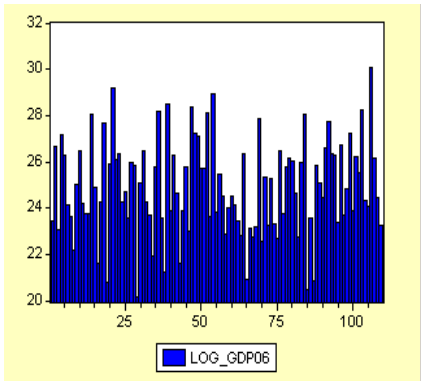
The data correspond to the years 2006, 2007 and 2008 and refer to the economic standing of 109 countries. Within the estimations performed, the series have been used in logarithm, so as to attenuate the size-related differences between the values of the variables for the selected countries.

4. Methodology and Empirical Results

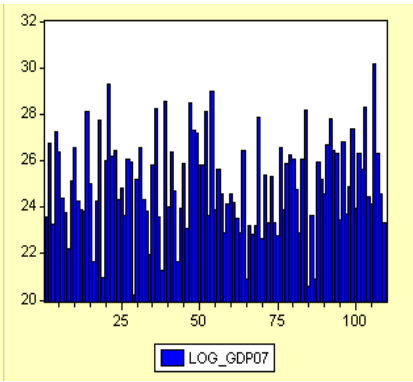
4.1. Data Descriptive Analysis

The graphic representation of the gross domestic product and of the external debt reveals the major differences between the analysed countries, even if these have been partly compensated by the logarithmic transformation performed. As for GDP, the differences indicate the distance separating the well developed countries from the poor ones.

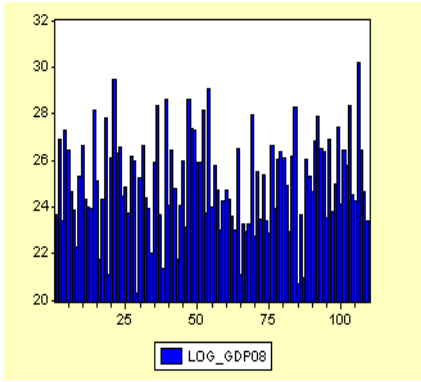
2006



2007

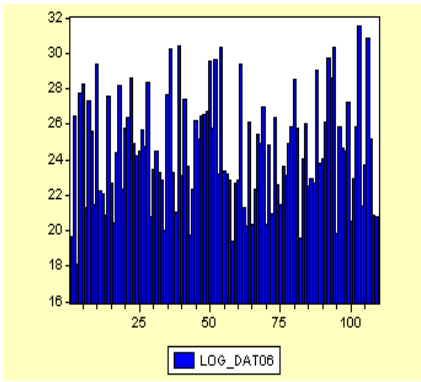


2008

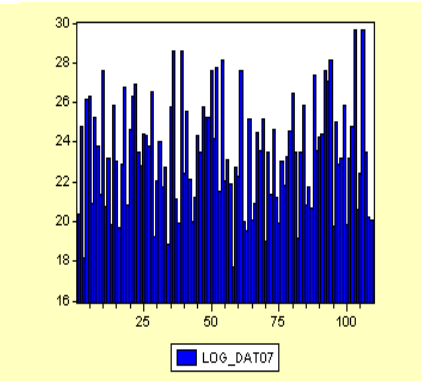


Such significant differences are also obvious in the case of the external debt series and look like remaining quite unchanged for the whole analysed period. We specify that this series is adjusted with the implicit index for passing to PPP standard and it comprises both external public debt and external private debt.

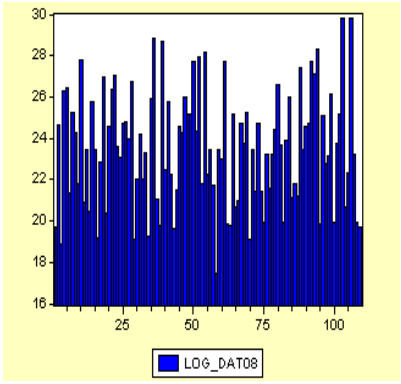
2006



2007

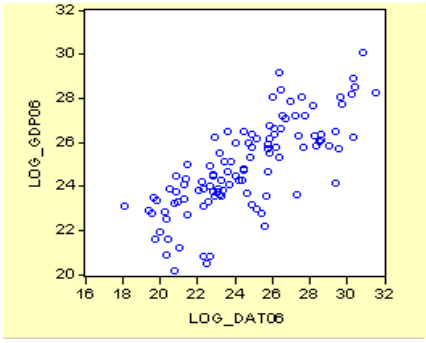


2008

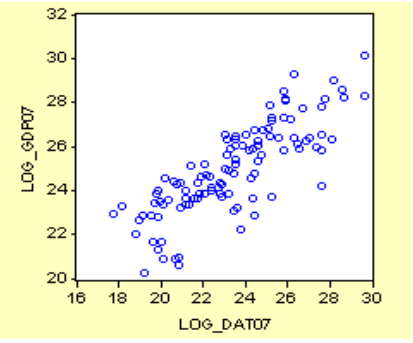


The dot plot graphic indicates a quite significant dispersing of values, but it also reveals a certain trend, a positive, stochastic relationship between the two data series to be tested by OLS method.

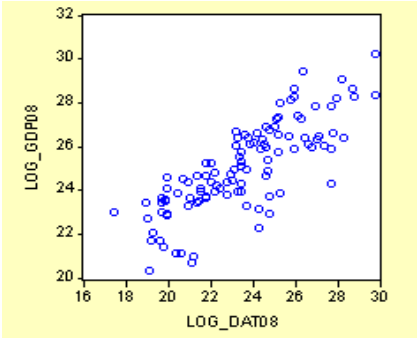
2006



2007



2008



The descriptive analysis of the two variables is separately rendered, for each of them, in Table 1.1 below:

Table 1.1 Statistic data

DEBT	2006	2007	2008	GDP	2006	2007	2008
Mean	24.55952	23.40943	23.54578	**Mean**	24.88958	24.96721	25.05848
Median	24.43337	23.46045	23.45824	**Median**	24.66615	24.75479	24.87544
Max	31.55636	29.63298	29.79000	**Max**	30.09061	30.14872	30.21124
Min	18.07819	17.72692	17.49275	**Min**	20.16988	20.23551	20.30623
Std.dev	3.097767	2.753593	2.773542	**Std.dev**	2.051020	2.051408	2.046549
Skewness	0.223488	0.172115	0.131958	**Skewness**	0.046065	0.034324	0.030269
Kurtosis	2.264114	2.289877	2.287765	**Kurtosis**	2.675430	2.680631	2.678163
Jarque-Bera	3.366811	2.828412	2.620225	**Jarque-Bera**	0.516995	0.484637	0.487066
Probability	0.185740	0.243119	0.269790	**Probability**	0.772211	0.784806	0.783854

By analysing the results obtained for the external debt, we can see that the mean increases over the three-year period, but the values remain sensitively equal. Also, the difference between the series minimum and maximum strengthens the previous statements as for the rather divergent levels between the debts of the countries considered in this study.

An interesting issue is that, in 2006, the standard deviation suddenly decreases from about 2.7 to 1.7, thus indicating a tendency of the sizes of observations to come closer to one another. The values of the skewness and kurtosis indicators have values close to the ones specific to the normal distribution.

Considering that the probability of Jarque-Bera test exceeds 5%, the null hypothesis cannot be rejected, therefore the external debt following a normal distribution. As skewness is more than zero, a slightly right deviation distribution is revealed, but its value decreases each year, thus dissipating such deviation.

As for GDP, the same increase of the mean and a significant distance between the series minimum and maximum is noticed. The standard deviation is lesser than in the previous case and it maintains all over the analysed period.

A compared to the external debt, GDP presents a positive value skewness much closer to zero, indicating an imperceptible deviation to right of the distribution graphic. The Jarque-Bera test confirms in this case too the normal distribution of the analysed series and the kurtosis values directs each year towards the normal value of 3.

4.2. Parameter Estimation

As mentioned in Introduction, we have started our study by analysing the relationship between GDP and external debt, taken successively as endogenous and exogenous variables. We have subsequently added two separate dummies, thus constructing four models to be estimated. The estimation results are rendered in brief in the tables below.

Table 1.2

$\log_{gdp} = \alpha + \beta * \log_{dat} + \varepsilon$ $\log_{dat} = \alpha + \beta * \log_{gdp} + \varepsilon$

Modelul 1	**2006**	**2007**	**2008**	**Modelul 2**	**2006**	**2007**	**2008**
Coeficient β	**0.504418***	**0.601439***	**0.588830***	**Coeficient β**	**1.150663***	**1.083645***	**1.081471***
Coeficient α	**12.50132**	**10.88788**	**11.19402**	**Coeficient α**	**-4.080010**	**-3.646159**	**-3.554232**
R-squared	0.580415	0.651746	0.636802	**R-squared**	0.580415	0.651746	0.636802
Adj R-squared	0.576494	0.648491	0.633408	**Adj R-squared**	0.576494	0.648491	0.633408
F-statistic	148.0141	200.2467	187.6053	**F-statistic**	148.0141	200.2467	187.6053
Prob F-statistic	0.0000	0.000000	0.000000	Prob F-statistic	0.0000	0.000000	0.000000
Akaike	3.433542	3.247588	3.284860	**Akaike**	4.258231	3.836349	3.892800
Schwartz	3.482925	3.296971	3.334243	**Schwartz**	4.307613	3.885732	3.942183
Durbin-Watson	2.024481	2.035982	1.987568	**Durbin-Watson**	1.985802	2.069626	1.992531

According to Table 1.2., in models 1 and 2, the independent variables are econometrically significant, the t-test having a computed value exceeding the critical one for a significance threshold of 5% for 109-2 observations. As for model 2, the intercept is significant for a significance threshold of maximum 10% in 2006 and 2008.

F statistics renders also high values, evidencing the correct specification of the said models and an adequate selection of the considered factors.

The determination ratio R^2 shows that the variance of the dependent variable is explained in a proportion of 63% by the selected explanatory variable. By comparing the two models, the adjusted R^2 is identical, as expected, but the Akaike and Schwartz tests have a lower value for the first model, indicating it as qualitatively superior.

As regards the error autocorrelation, the DW test values are located within the interval (d_2, 4-d_2), evidencing no autocorrelation for the two analysed models.

The obtained coefficients have quite similar values across the tree-year period. Considering that the used variables are in logarithm, they shall be construed as elasticities. Therefore, we could state, by interpreting the estimation results for Model 1 that GDP is inelastic in relation with the external debt, more exactly, if the external debt increases by 1%, GDP increases by only 0.58% in 2006, for instance. Model 2 indicates the elasticity of the external debt in relation with GDP, the coefficient exceeding the 1 value for the entire analysed period. The relationship would reverse once the β coefficient reaches the maximum value (t statistics value), the leverage becoming negative.

Table 1.3

$\log_{gdp} = \gamma + \delta * \log_{dat} + \theta * d_1 + \varepsilon$ $\log_{dat} = \gamma + \delta * \log_{gdp} + \theta * d_2 + \varepsilon$

Modelul 3	**2006**	**2007**	**2008**	**Modelul 4**	**2006**	**2007**	**2008**
Coeficient δ	**0.500752***	**0.621105***	**0.619299***	**Coeficient δ**	**0.581558***	**0.692501***	**0.700211***
Coeficient θ	**0.045621**	**-0.168338**	**-0.239868**	**Coeficient θ**	**-0.404404***	**-0.437195***	**-0.515113***
Coeficient γ	**12.54991***	**10.58040***	**10.69447***	**Coeficient γ**	**11.05943**	**9.245491***	**9.148010***
R-squared	0.580756	0.656104	0.645411	**R-squared**	0.605520	0.681993	0.677046
Adj R-squared	0.572846	0.649616	0.638720	**Adj R-squared**	0.598077	0.675993	0.670953
F-statistic	73.41808	101.1165	96.46866	**F-statistic**	81.35402	113.6630	111.1103
Prob F-statistic	0.0000	0.000000	0.000000	Prob F-statistic	0.0000	0.000000	0.000000
Akaike	3.451078	3.253342	3.279222	**Akaike**	3.390194	3.175077	3.185770
Schwartz	3.525152	3.327416	3.353295	**Schwartz**	3.464268	3.249150	3.259844
Durbin-Watson	2.018820	2.046178	2.003555	**Durbin-Watson**	2.026908	2.099867	2.075932

Concerning models 3 and 4 from Table 1.3., we have tried to identify the influence of the geographical layout of the analysed countries on their economic performance (for model 3) and the influence of their development level on their future economic growth (for model 4).

The dummy variable proved to be insignificant in model 3, for a significance threshold of maximum 10%; therefore we could draw the conclusion that the geographical layout does not clearly determine the economic growth of the countries in the analysed period.

In model 4, the dummy variable is significant for a significance level of at most 5% for the entire period. The sign of this coefficient is negative and sub-unitary, signalling a reverse relationship between GDP and the level of development of the countries.

By comparing this model to model 1, the first one looks like more adequate, this affirmation being strengthened by the value of the adjusted R^2 and by the Akaike and Schwartz tests.

F-test validates the model and DW test shows the absence of error autocorrelation, therefore our previous statement being reinforced. The debt coefficient remains close to the values registered for model 1, meaning positive and sub-unitary, suggesting a highly similar relationship between the two variables.

5. Conclusions

The positive relationship between external debt and GDP revealed by this study may have one of the following two explanations:

- Considering the major differences between the values of the analysed series, the negative leverage effect obtained for some of them has been compensated the positive effect of the other ones, so that, as a whole, a positive relationship emerged for the two variables of interest;
- At the world level, in average, the threshold above which the indebting influence on the economic performance should become negative has not been reached yet.

By comparing our results to those obtained by the authors of the articles considered as basic bibliographic sources, we could state that this study has revealed the same trend as that reached by Patillo et al. (2002, 2004), with the mention that the latter found a debt coefficient much closer to the inflexion value above which the leverage on GDP becomes negative.

The d1 dummy variable, dividing the countries depending on their geographical layout, proved to be insignificant, the same result being also obtained by Alfaro (2003) in his study on the influence of investments on economic growth.

Our analysis indicated that the d2 dummy variable has a strong influence on the economic growth, it being in compliance with the economic theory, according to which, as a country develops, its economic growth lowers, because the economic increase function is concave, therefore evidencing decreasing returns. On the other hand, a country in progress will develop more rapidly, as it has not reached yet the flattening level of the economic growth curve, according to Solow-Swan model.

The coefficients obtained within the estimations may be interpreted as elasticities and indicate that, while GDP is inelastic in relation with debt, the latter has a supra-unitary elasticity, so that the conclusion may be drawn that its modification is ampler than the GDP one.

Such result could be explained by stating that, if an increase of the debt determined a quicker increase of GDP, then many countries would indebt themselves until the maximum limit so as to obtain economic growth, and the debt service would be always covered by it.

The debt elasticity in relation with GDP is supra-unitary and it is confirmed for the developing and emerging countries, with significant economic growths, but highly indebted in order to reach a superior development standard, especially considering that their governments are involved in expensive development projects.

6. Suggestions for further research

In order to continue the economic growth analysis, we propose to render the model more complex, by adding, as explanatory variables, series relating to foreign direct investments, exports and imports. Such estimation results will be rendered in a future study. Also, a panel data approach could offer a larger perspective on this issue. As concerns methodology, a fixed versus random effects generalised method of moment would be an interesting alternative to the already used econometric estimation techniques.

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DATA AND PROCESSING IN DEVELOPING ECCONOMIC APPLICATIONS

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DANA-FLORENTA SIMION[***]

Abstract
Economic Informatics originates in the industry economy and the electronic processing of information. A clear distinction is made between IT and economic informatics, and further between general and particular economic informatics (the particular economic informatics meaning administration, industrial informatics etc). Economic informatics is deemed to be an applicative science relating to the conception, working modality and representation of IT and communication systems, oriented towards companies which are using electronic computers.
This paper pursues to integrate applications allowing the information systems to interconnect at informational level, by information sharing, and at service level, considering the control of the related processes in real time.

Keywords*: information systems, economic applications, integration, XML, CRM (Customer Relationship Management)*

Introduction

The paper approaches a current theme that takes into account data and information processing which may lead to economic applications development using a series of latest technologies.

Technologies such as XML, HTML, CRM allow the achievement of integrated systems, giving efficiency in user's activity. The revealed text analyses a series of specialized papers, emphasizing and comparing the advantages and disadvantages of the shown systems.

The modern management of the activity of a trading company is unthinkable without being grounded on sufficient information. Obtaining timely and top quality information implies using the **e-computing technology** on a wide scale. The quality of the decisions made to ensure the proper course of the economic activity ultimately depends on the quality of the information that the upper management operates with, and on their ability to analyze it.

Paper content

We could state that, in terms of management, information is the bearer of news about the economic phenomena and processes taking place inside or outside a company, but relating to it, such information being used in business analysis and decision making.

Information is the output of an entire range of primary data processing occurring as result of the carrying out of a trading company's activity.

The processing activity turns data into a useful form, endowing them with additional knowledge. In terms of the processing cycle, **information** represents the outcome of data processing, designed to be used in the management and decision flows.

Seen as a means of knowledge, information represents a news-story, a signal reflecting the state of a system or of the environment within which it operates, and bringing added value.

As information results from data processing, we could say that it means nothing else than the final product of such process.

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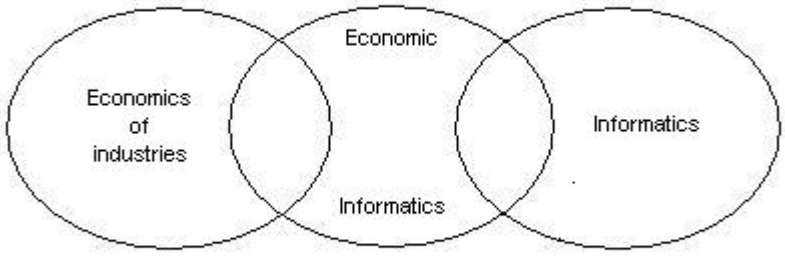


Picture 1 Fields of Economic Informatics

Programming languages, techniques and methods have known a tremendous boost since the appearance of computers until nowadays, due to the need to respond to the continuing increase in number and complexity of miscellaneous issues to be settled and therefore, implicitly, of the related programs. Thus, programming has evolved from the initial stage of introducing notions directly in binary code, and continued with the advent of assembling languages allowing the symbolic representation of instructions for computer.

The main issues arising in data integration process are generated by:

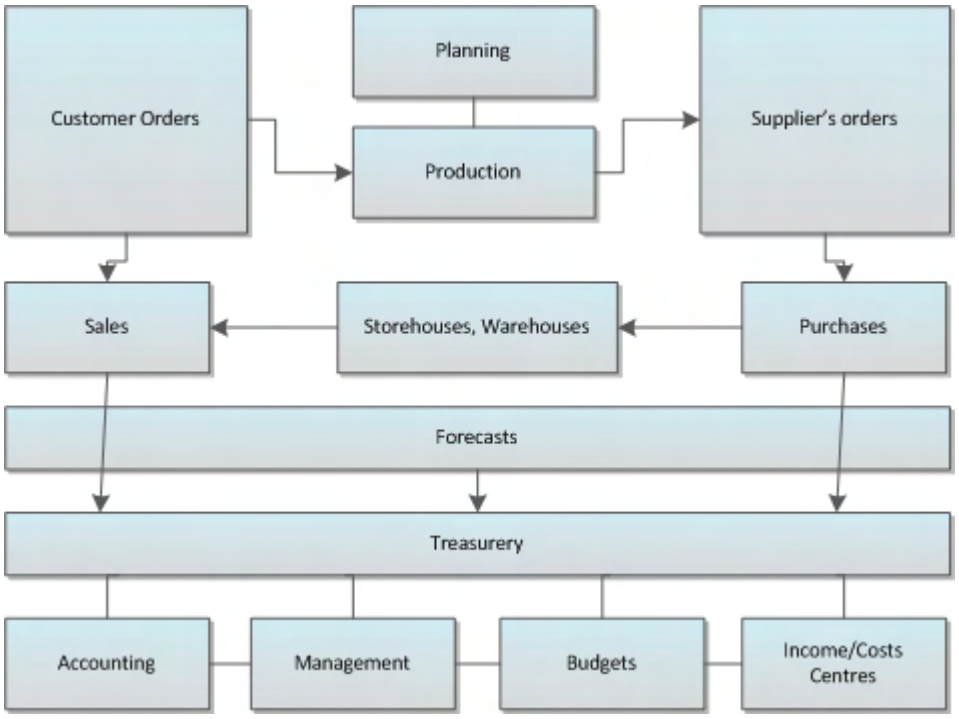
- The use of multiple data sources resorting to different versions of data representation,
- The necessity to synchronize in time the data taken over from different sources
- The use of non-conventional data,
- The ad-hoc connections to be made between different types of data or between different software applications.

Unconventional data are not standardized, semi-structured and newly defined within applications data, data with a dynamic structure or changeable in time. Given the specific characteristics of unconventional data, it is extremely difficult, and sometimes even impossible, to define general rules, universally accepted, for handling and using such types of data in software applications.

The distributed application is that application running on multiple computers simultaneously so as to improve the application performance and scalability.

The use of distributed architectures for the development of economic applications offers several advantages, namely:

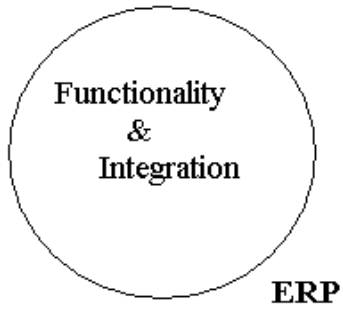
- The provision of the application with automatic scalability, by adding other computers to the system,
- The possibility to integrate applications running in different environments, on different platforms or operating systems,
- The possibility to synchronize and to allow real-time communication between multiple clients,
- The possibility to support poor computer systems in terms of technical characteristics to ensure the hardware resources required to run the related applications.



Picture 2 Flow of data exchange between a company's departments

The accelerated changes in the business environment and the increase in complexity of the activities carried out by companies impose a permanent adjustment of the effort and analysis capabilities of the human being.

Able to process a large volume of data and aggregated information in order to optimize processes and to render them more efficient, the ERP systems have been created as a solution to such challenges. The main idea relating to the development of software applications for enterprise systems consists in their evolutionary nature[1].



Picture 3 Fundamental Properties of ERP

[1] Lungu, Ion *Integrarea sistemelor informatice,(IT Systems Integration),* A.S.E. Publishing House, Bucharest, 2007.

Integration ensures the connectivity between the flows of functional economic processes. It may be construed as a communication technique. Here are some common ways in which communication takes place through and for integration: source code, extensive local networks of computers, Internet, e-mail, workflow, automated configuration tools, protocols and databases. We could state that integration is achieved through communication, and communication is achieved through integration.

The functional part of an ERP system ensures the flows of economic processes within each function. Therefore, in an ERP sequence we can find from several to tens of functional modules (general accounting, debtors, payroll, inventory, supply, production planning, logistics and sales orders).

Data integration combines the basic elements of data management systems, content management systems, data warehouses and other enterprise applications, bringing them altogether into a common platform.

Development of XML-based applications

XML is a relatively new technology. Still, this does not prevent it to impose itself almost in all branches of information technology. Obviously, since XML has become a usable component of computerization, business might also be useful.

Less than a year after its release, XML has impressed many developers and users. Currently, XML is becoming increasingly popular and irreplaceable. In 1998 the international organization W3C has strengthened the XML specification as "Extensible Markup Language (XML) 1.0. This meant green light for the development and implementation of XML.

It is clear that HTML and XML documents are based on the same structure using tags. But the functions of these two languages are quite different.

HTML	XML
Used to **display data**	Used to **carry on data**
Used to **visually define data**	Used to **describe data**
Used to show **how data are displayed**	Used to show **how data are used**

Table 1 HTML – XML Differences

The above table reveals that XML is working with data definition and transportation. An eloquent example would be the one described below, where we determine information relating to a physical entity. If we described the given information in a relational database, it would look like below:

Name	James
Surname	John
Date of Birth	07.23.1985
Height	179

The weakness of the above-described information is that it can be processed only by database management systems, which, most often, are incompatible.

From HTML to XML

The two languages have been created for different purposes:

- XML was designed to describe data and to focus on their structure;
- HTML was designed to display data and to focus on their design.

The XML Objectives are reflected by the following characteristics:

- Simple to use on Internet;
- Able to support a wide variety of applications;
- Compatible with SGML (Standard Generalized Markup Language);
- Fit for easy writing of programs processing XML documents;
- Designable quickly, formally and concisely.

The XML data can be used in HTML language and allow a rapid identification of documents via the search engines. By means of codes such as javascript, php etc., the XML files can be embedded in web pages, the most notable example being the RSS system that uses an XML file to carry on information from one web page to several web pages.

Advantages of XML:

- Extensibility (new indicators can be defined, if necessary)
- Validity (the data structural accuracy can be assessed)
- Facility for users to represent their data independently of applications
- Simple and accessible (they are text files created to structure, store and transport information)
- Easy to edit and modify (it only requires a simple text editor such as Notepad, WordPad, etc.).

XML language provides a method of inter-human communication, not of data interchangeability between machines, therefore creating relationships between the designers and the beneficiaries of their documents. XML inherits the neutrality of the platform and speech, and the liberty of the data present in SGML.

All these remarks indicate us that XML provides users with an information markup open standard, without limits in terms of annotation techniques (provided extensibility), easy to use (able to support knowledge databases) and easy to implement.

The future of XML will impact not only the IT employees, but also the political and economic world. The combination of XML with XSL could replace all current formats of text processing and publishing:

- A unique format for Web posting and printing;
- A common format for storing data in various software products;
- A single format for all languages.

The success of XML can be foreseen both as regards Web, where is allows the creation of extensible multimedia applications, and as regards the information processing in general.

Application development using the concept of CRM (Customer Relationship Management)

The CRM application is a dedicated solution for customer relationship management which offers: direct support for developing business strategies and the ability to connect front-office and back-office roles into a complete customer oriented business solution. Also, the ability to collect and analyze information, to be able to anticipate customer needs and build a profitable and long-term relationship is another important feature of this type of software solution.

The sharply increasing transition of "traditional" business towards electronic media has brought along important mutations in the crucial field of relationship administration between companies and their customers. The Customer Relationship Management (CRM) is now one of the

fashionable concepts in the new digital economy, but it is hardly an innovation of recent years. Historically, the relationship between the customer and those who provided a particular product or service has arisen since the first customer. This relationship has been managed over time in the most different ways, yet using the "traditional" methods, which implied direct contact between a company's sales representatives and its customers. As until recently a letter, a catalog sent by mail, a phone call, or an elegant restaurant were "tools" more than sufficient to maintain a close relationship of loyalty with the customer, things have changed with the appearance of the Internet. What the digital revolution brought along was an unprecedented widening of a company's customer base, and thus, almost an exponential growth of the problems involved in dealing with them.

The CRM has become a priority for the companies that have sought to have an advantage in today's stormy economy. Worse now, even if they invest hundreds and thousands, if not millions of dollars in CRM, most companies are not closer then before than when the system appeared.

The Customer Relationship Management can be defined in the following ways:

- Strategy for selecting and maintaining the customers so that their value to the firm is optimal; it involves a business philosophy that puts the customer at the center, through all the processes; the success is possible if and only if the leading team, the strategy and the organizational appropriate culture act simultaneously;

- A process of implementing a business strategy that places the customer at the center, which, in a "chain reaction" determines to redefine all the functional activities - this implies new work processes, possible only by using information technology;
- "Super-class" of business models, processes, methodologies, interactive technologies, to achieve a high retention rate of clients belonging to identifiable groups of customers with great value for business and growth potential;
- Extension of the concept of selling as an ongoing process, considered both art and science, to collect and use customer information in order to "educate" their loyalty - which is impossible without the use of appropriate technology;
- A concept of development and implementation of business strategies and related technology support, to eliminate the difference between the actual and the possible acquisition level, the development and maintenance of customer relationship - which improves the efficiency of assets;
- A timely process for enlarging and applying the knowledge (and not necessarily of data storage) on a client, leading to the individualization of acquired strategies and business to meet the personalized needs of each client;
- Specific management approach that places the customer at the center of the business processes and practices, the purpose of this approach being the increase in the profit and productivity;
- The management of all interactions with the customers, with the purpose of expanding its customer base by bringing in new customers and meeting the needs of the existing ones;
- A term specific to the information domain on potential methodologies, to the software packages offered and to the Internet, to help a company conduct customer relationships in an organized manner;
- The “overall” approach that integrates the processes of receipt of orders, sales and service, which unifies and coordinates all the channels through which the customers interact with the company, that "something" which has most to do with customer satisfaction and, in fact, has nothing in common with technology and for which technology is only a means and not an end in itself;
- A process to guide the entire company towards its outside, towards the clients, which involves understanding the customer needs and process management within the company to develop and maintain customer relations.

The information about the customers is the essence of CRM. Although the development and maintenance are important, clear and well structured data about the customers are vital. Unfortunately, many businesses do not pay enough attention to the importance of consistent and quality data. In fact a study by PriceWaterhouseCoopers showed how widespread are the data on quality problems in companies around the world.

Based on a survey of 600 mid-level companies in the U.S., Europe and Australia, the following conclusions were drawn:

- 70% of companies have recognized that insufficient data have a negative financial effect on the business. 50% added extra costs to reconcile the data.
- 30% have been forced to postpone investments in new systems because of data issues.
- A company stated that data problems have caused a loss of $ 8 million only in one fiscal year.

Many leaders have considered the subject of data management companies as boring, until they realized how much is at stake. When a critical project can not come alive because of data problems or clarity, or when they realized how much it will cost to clean the institutionalized data, the negative effect of data neglecting became clear, and the responsible persons were notified.

More than money, poor quality data means low analysis and performance indicators which makes the management take appropriate decisions to get out of this impasse. When it comes to customer information, poor data quality can lead to problems that are no less critical. Each has a story about incorrect data related to customers. But the quality of customer data is no joke, they are absolutely necessary to develop and maintain operational CRM enterprise and analytical systems. Thus consistent and quality data are critical components of the CRM system.

Customers require easy and convenient access through the channels that they choose. Creating multiple points of contact with the customer is served is a prerequisite. Unfortunately, creating multiple points of contact increases the risk of appearing inconsistent interactions. In companies where we can not reconcile information about the same customer at various points of contact, dissatisfaction shows up.

The creation of a single universal database is, unfortunately, not feasible for most large companies because of differences in portfolio applications and associated databases. However, an integrated view, and a multi-channel on the customer is feasible and represents one of the main advantages of the CRM applications. To achieve this, these applications must be integrated pragmatically, using intermediate components with intermediate applications, each dealing with a portion of data collection.

A well organized target reduces the development effort necessary to document and code the interfaces between systems, reducing duplication in technology integration, and shortening the time required to change existing applications.

Definition of customer transactions can vary widely between business-to-business (B2B) and business-to-consumer (B2C). In B2B customers are the companies and their customers, and B2C client is usually an individual, but can be a family.

The next step is to inventory the available sources of data, determining where to collect data from internal sources or whether they will be obtained from external sources. To create an analytical view, the data must be extracted from various sources, converted into consistent and usable information, and then loaded into the analytical data structures. Tools for extracting, transforming and loading (ETL) can be used for this. They are driven by data sets and have a strong support for meta-data. In addition to collecting the data from internal sources, methods to fill in the external uncovered gaps should be available.

CRM Implementation

Alone, the CRM is not a technology, but a process of collection and retention of customer information and their interactions with the company. CRM implementation tends to be a complicated and expensive test. It is estimated that during the next two years, 2,000 companies will have to spend

$ 250 million each on CRM solutions. While money is exhausted, many companies have not been able to determine what kind of return on investment they obtain in their system, beyond the obvious data.

A recent study by Andersen Consulting is seeking direct correlation between CRM and the business income. Typically a billion $ turnover could add $ 40 million profit would increase the CRM capacity by 10 percent. Besides this, the CRM increases performance and the business income.

Significantly, companies that have successfully implemented CRM solutions do not see CRM as an IT project driven away from a specific department - that is, they see CRM as a broad initiative. Most CRM implementations have been fragmented, put into operation in a department without an over viewing perspective. Similarly, the CRM software needed to be transferred to all levels throughout their organization. Marketing will be able to formulate responses and to provide the results of specific promotions or campaigns across the customer segments. The employee dealing with customer relations will be able to provide superior customer support and satisfaction services.

When talking about the technologies used to achieve the implementation of CRM system, we must first refer to the server level of the CRM. Thus the operating system on which the CRM system developed is Microsoft Windows 2000 Server and the IIS Web server is used. The application is developed in MS Visual Studio.NET Framework and the Server software is MS Framework 1.1 SDK. CRM customers that will benefit from this application should have as 2k/NT Windows operating system and IE5.

The dynamic information accessed in/through the CRM interface information will be considered as "functional" (interface elements such as labels, Message box sites, input fields sites) and "business" information (data about customers, products).

The support for the "functional" data consists in a MS SQL Server database. These data allow direct access from the interface through a ADO.net. connection. The business information is accessed through predefined Web services.

Advantages of CRM

The impact on the cost and quality data

Using data integration solutions (CDI) can produce a significant return on investment (ROI). Benefits of the CDI are:

- Better cross-selling and up-selling "(facilitated by an improvement in the modeling and better targeting of the customers)
- Improving customer retention (achieved by avoiding worn out customers)
- Improving attracting new customers

Competitive advantage through CRM

The CRM is defined as a strategy to manage customer relationship and interaction with them in the most profitable way possible for both. There are several providers of operational CRM solutions that enable traditional CRM implementation strategies. These typical strategies are supported by solutions focused on how the services, sales and marketing of more effective departments should be made, this increasing the profitability of such organizations and of their customers.

Conclusions

Web services and applications are emerging as a key technology for conducting automated interactions between distributed and heterogeneous applications and for connecting various business processes.

At software and hardware level, *technology integration* is the main phrase for the current IT products. Thus, the various existing technologies allow an interaction with outstanding results between databases and web services.

ICT infrastructures containing databases, large volumes of data, OLAP, Java turn into web platforms, therefore hardware decreasing in relevance.

A series of advantages of IT integration and interaction are outlined below:

- Diminishing of implementation, exploitation, conversion and other hidden costs;
- Increasing of data security due to the submission to common restrictions;
- Diminishing of the complexity of different technologies;
- Avoidance of scalability-related problems;
- Avoidance of issues relating to the implementation and management of different software products by using a single product;
- Obvious evolution of end users.

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A VIEW ON THE NATIONAL CAPACITY OF SCIENTIFIC KNOWLEDGE ABSORPTION

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Abstract
The concept of the Absorptive Capacity has been approached in numerous theoretical and empirical studies during the last 20 years, covering multiple facets of the relationships between various external sources of knowledge and the capability of a firm, sectors or national economy to identify, assimilate and apply external knowledge in order to increase its economic performance.
Absorptive capacity (AC) has been extensively analyzed at the firm level, but significantly less consideration has been given to the AC at the national level. National capacity of absorption is definitely much more than the simple aggregation of the individual companies' capabilities or of the sectoral capacities, due to many systemic complex factors that may add to, or detract from the national AC: the multiplication and propagation effects, access facilities the stock of national and international knowledge, various synergetic mechanisms, knowledge spillovers etc.
Based on the literature available, the authors attempted to design a system of indicators to quantify the relative scientific knowledge absorption capacity of different European countries compared with the EU average and the EU leader. Further on, these indicators will be aggregated, providing a fundament for comparative weighted estimations of the national absorptive capacities for scientific knowledge across EU.

Keywords: *national absorptive capacity, R&D activity, National System of Innovation, system of indicators*

Introduction

The concept of "absorptive capacity" becomes more and more significant, in theory and practice, in the context of increasing innovation performance within a knowledge-based economy. Based on a detailed analysis of 285 studies on absorptive capacity, a very interesting paper published in 2006 (Lane et al, 2006) states that "absorptive capacity is one of the most important constructs to emerge in organizational research in recent decades". According to another more recent empirical assessment, the number of research papers on the "absorption capacity, published, between 2005-2009 in the top ten journals in business management, has more than doubled compared with 1990-2005" (Jimenez et al, 2010). Along the 2010 year, the literature has also been enriched with many other works on this issue.

If Cohen and Levinthal, the pioneers of "absorptive capacity" construct, defined it as "the ability of a firm to recognize the value of new, external information, assimilate it, and apply it to commercial ends" (Cohen and Levinthal, 1990), further developments of the concept extended the notional sphere, adding new dimensions, determinant factors, and applying it to other levels of aggregation as well (from firm level, to industry or national level).

Most of the work on the issue of AC is focused at the firm level, where learning processes and technological changes effectively take place and, "little research has been done to examine the determinants of a country's absorptive capacity and its relationship with national R&D activities, and the general characteristics of the international technological environment"(Criscuolo and Narula, 2002).

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It is important to understand that, while learning and absorption take place at the firm level, the success or failure of individual firms occurred in orchestration with an entire system (Narula, 2004) of interconnections and interdependences between the firms from the same sectors or from different sectors, or between firms and other non -firm institution that could facilitate or hinder knowledge absorption. On the other hand, firms are connected to the international stock of knowledge that could be assimilated only if a country has an adequate national absorptive capacity.

Based on the literature available, we designed a system of indicators for quantifying the relative national absorption capacity of different European countries compared with the EU average and the EU leader. Further on, these indicators will be aggregated, providing a fundament for comparative weighted estimations of the national absorptive capacities across EU.

1. Literature review: from micro to macro level approaches of absorption capacity

In our attempt to construct a system of indicators for assessing the relative level of the national AC of EU countries, we tried to find the valuable ideas in the literature of AC at firm level that can be extrapolated and applied at national level.

Thus, the theoretical background for our work is derived from the main thesis of some of the most visible papers on the issue of AC, regarding the conceptual evolution and its main determinants. Based on ideas from some significant works about AC at the firm level and following the model of one of few works that approached the absorption capacity topic at macro level (Narula, 2004) we tried to extrapolate the main theoretical determinants from micro to macro level

It is worthy to note, from the most cited works of Cohen and Levinthal (Cohen and Levinthal, 1990, 1994), the multidimensionality of the concept that springs out from its processual nature: the knowledge, in order to be effectively absorbed, should be firstly *acknowledged*, than *assimilated* and, at last, *converted* to commercial gain. Moreover, there is indirectly suggested a conditional correlation between the company's prior accumulated knowledge and the absorptive capacity. In other words, AC is cumulative and past dependent, and its current accruement allows for future higher increasing rates.

Cohen and Levinthal (1990) also differentiate between the absorptive capacity at individual and organizational level, stating that the last one cannot be a mere sum of the members' absorptive capacities. According to the authors, gaining absorptive capacity infers knowledge transfer processes, from the external environment to organization, as well as within the inner environment of the company. Therefore, high significance is given to the company's specific mechanisms for the stimulation of communication and interaction between its employees.

By extrapolation, we can say **that the national absorption capacity** is certainly not a simple sum of AC of national firms or industries. At macroeconomic level, there are multiple specific factors with determinant impact on the magnitude and dynamics of the AC: multiplicative effects, R&D spillovers, national potential of high educated people, development of national RD system, institutional intermediate for knowledge transfer that support interactions between the companies, as well as between the different components of the national RDI system, the effectiveness and coverage of various public supportive mechanism etc. There are "synergic effects, inter-firm and inter-industries influences, due to systemic and institutional elements that facilitate absorption" (Crisculo, Narula, 2002).

In most of the authors papers is mentioned the cumulative feature of the learning process and that the learning performance is greatest when the object of learning is related to what is already known. Diversity of knowledge plays an important role at the firm level. A diverse background provides a more robust basis for learning. **At the national level**, the assimilation of external knowledge is more difficult because the quantity, quality and diversity of knowledge are higher than at the firm level. On the other hand, the accumulation of knowledge is depending also on the stage of technological development and the distance to technological frontier. The ability of a country to assimilate knowledge spillover will be changed with his level of development and is. For a given

level of AC, the farther from the frontier a country is, the easier it would be to assimilate foreign knowledge.

A firm's ability to exploit external knowledge is often generated as a by-product of its own R&D. Through its R&D activities, a firm develops organizational knowledge about certain areas of science and technology. The extent to which it invests in absorptive capacity for a given area is a function of the relevance of that area of science or technology to the firm's strategy. **At the national level**, because external knowledge is more and more high tech, more diverse, and more scientific, the assimilation of knowledge from abroad needs an increasing financial and human R&D effort, both for creation of knowledge and for acquisition and efficient integration of external knowledge into the national production.

Criscuolo and Narula (2002) pointed out the significance of human capital, as a core determinant of absorptive capacity both, at the firms and also at the national level. But, more than at micro level, at macro level a large stock of qualified workers is not a sufficient condition for assimilate external knowledge. The institutions, the incentive mechanisms, R&D market regulations, intensity of relationship and degree of cooperation between firms and external producers of knowledge (universities, public research lab, capacity of networking) could facilitate or hinder the development of the potential absorption capacity.

An important aspect that we are having in view is the distinction between potential and realized absorption capacity made by Zahra and George (2002). The potential absorptive capacity represents the ability to identify and obtain important knowledge that is critical to its main activity field. The organizational routines and processes that allow for analyzing, processing, interpreting and understanding the acquired information smooth knowledge assimilation. The *effective* absorptive capacity refers to the transformation and effective use of the new knowledge through its integration and capitalization towards organizational objectives.

Both aspects are very important in grasping the level of a company's absorptive capacity, even if they are related to different organizational characteristics and different transmission channels. The potential AC depends on the availability of relevant knowledge sources and the type of partners the company has access to, while the realized AC is dependent on the ability to appropriate new relevant technology.

Trying to review and re-conceptualize the AC, the authors emphasized the dynamic nature of the absorptive capacity, which follows the processes and the routine of the company but also triggers change and organizational development. Therefore, the absorptive capacity is defined as a "set of organizational routines and processes whereby a company acquire, assimilate, transforms and uses knowledge in order to create a dynamic organizational capacity". The absorptive capacity represents, hence, the capacity to assimilate and manage the technological and scientific knowledge in order to improve the innovative performance and competitive advantage**.** The three processual components of the AC mentioned by Cohen and Levinthal, the authors bring in a new element, that is *knowledge transformation*. This may be considered **at the national level** as integrant to the *capitalization* stage of the process, and implies the capacity to develop and enhance the match between the prior knowledge and the newly adopted and assimilated one.

Lane, Koka and Pathak (2006, p. 856) added new aspects for a more detailed definition, such as: "absorption capacity is a firm's ability to utilize externally held knowledge through three sequential processes: (1) recognizing and understanding potentially valuable new knowledge outside the firm through **exploratory learning**, (2) assimilating valuable new knowledge through **transformative learning**, and (3) using the assimilated knowledge to create new knowledge and commercial outputs through **exploitative learning**". Each phase of this process is determined by internal and external factors. **At the national level**, the learning process is more complex, including formal education and skills formation but also many informal sources of learning.

The complexity of the absorptive capacity infers serious difficulties in defining a direct measurement system. Moreover, the few approaches to quantifying the AC and the determining factors are heterogeneous in methodology and results.

The estimation model designed and used by Tobias Schmidt (2005, 2010) provides an empirical analysis of the intensity and of the mechanisms of the impact of the most significant national AC determinants.

The author refers to three types of absorptive capacity, according to the different types of knowledge to be absorbed:

- Absorptive capacity for intra-industrial knowledge
- Absorptive capacity for inter-sectoral knowledge
- Absorptive capacity for scientific knowledge.

Therefore, AC for intra-industry knowledge is necessary for obtaining relevant knowledge from companies inside the industry; AC for inter-industries supports the absorption of knowledge generated within other activity fields; while AC for scientific knowledge attracts knowledge that becomes available to the business sector through cooperation with universities and public / private research institutions.

The results of the study indicate high correlation between the absorptive capacity of an organization and the personnel involved in intramural R&D, which seems to have an even greater impact on AC than the expenditures for research and innovation. We keep out this idea because at macro level the learning processes are more important but, also more complex and dynamic. An interesting assertion that could be extrapolated at **national level** is referring to the fact that organizational ability to assimilate and use external knowledge depends not only on the R&D expenditure level, but, also, on the stock of knowledge priory acquired and incorporated in the human capital and individual capacities. The organizational structure and managerial practices and also the type and intensity of the interactions and cooperation with external partners (other companies, universities, research institutes, etc) are often more important. A most important assertion that inspired us for this topic is the distinction between the three-mentioned types of absorption capacities. Our paper is focused on the third type, namely absorptive capacity for scientific knowledge.

All the determining factors for the level of absorptive capacity are interdependent, intercorrelated and, even, complementary: the intramural R&D activity depends on the educational level of the employees, and organizational knowledge is very tightly connected to the management strategies and methods.

2. The absorption of scientific stock of knowledge from universities and research institutes

The universities have an increasingly important mission to create and transfer knowledge through various mechanisms, through patents, licenses, and spinout or by collaborative research with industrial sector organizations. Public research institutes and universities generate scientific knowledge that is very seldom directed towards specific users. Therefore its effective value will be dependent on the capacity of the potential receptors to assess, assimilate and exploit it (Abreu et al, 2010).

Whatever the external knowledge source, the absorption and assimilation of new knowledge is contingent on the organization's effort, expertise and pro-active attitudes of the researchers from within. Thus, the absorptive capacity becomes even more important for an effective knowledge transfer from the public research sector to industry.

On the other hand, the linkages between research and industry are an important determinant of AC. Some empirical studies proved that more companies develop sustained relationships with research institutes; the more increase their absorptive capacity (Schmidt, 2005). The more intensive the connections between companies and scientists, university researchers and research institutes

personnel, the more capable will the company be to take advantage of the research results in its innovative activity. At the same time, as in a virtuous circle, high absorptive capacity improves the company's ability to exploit and turn to value new scientific *fundamental* knowledge.

The capacity to absorb research results provided by universities and research institutes is particularly dependent on the factors that are specific, intrinsic to the potential receptor. That is why, **at the national level**, the rate of tertiary education personnel, the share of employees which play the interface between the scientific knowledge source and the organization, the level of sustained involvement in own R&D activities and the stock of similar knowledge already acquired are some of the most important elements that would make the available knowledge appropriable.

It is worth mentioning that, in order to build a common platform between internal and external research, necessary for an effective knowledge transfer, the company should encourage its employees to acquire a common scientific language with knowledge providers, that would improve the ability to acknowledge, absorb and exploit the scientific research result. Higher intensity of research performed within the company is a good lever for a more effective and timely turn to profit, through innovation, of the scientific research results obtained in universities and research institutes.

In order to capitalize on scientific knowledge, the level of absorptive capacity should be higher than in case of other types of knowledge. A higher absorptive capacity is closely related to the organization's ability to use fundamental scientific knowledge provided by its external environment.

A very important element of the cooperation between the public research sector and industry, at national level is represented by the mediators, support institutions whose mission is to smooth and facilitate the connection between the knowledge creators and receptors, to encourage the business sector receptivity and absorptive efforts. This is an explanation for the numerous references in the literature on this field, on the significance of clusters, technological platforms, scientific knowledge transfer networks, partnerships between universities, public research units and potential users in the business sector (Abreu et al, 2010).

3. An attempt to design a system of indicators for evaluating the relative absorption capacity of EU countries.

Our starting point in designing the system of indicators for relative absorption capacity evaluations is the valuable ideas we have fund in literature about determinants and influencing factors of AC.

Making a deep analysis of the literature previous 2002 year, Tobias Schmidt

(2010) identified the following determinants of absorption capacity mentioned in the most of the studies:

a.**Research and development activity**, expressed by the indicators as R&D intensity, continuous R&D activity and existence of an laboratory inside a firm.

b.**Prior related knowledge.** Schmidt remarks that "the cumulative nature of absorptive capacity has not taken into account by a lot of empirical studies, despite it is extensively discussed in the literature on knowledge and spillover. In his opinion, the level of education and training of the firm emplowees express the cumulative nature of AC.

c. Organizational structure and human resources management practices

In accordance with Cohen and Levinthal, the author refers to ability of an organization as a whole, to stimulate and organize the transfer of knowledge across departments, function and individual, its tools and incentives to stimulate knowledge exchange and learning. The results of Tobias Schmidt empirical estimations prove that employees with higher education, continuous R&D activity and informal contacts have a positive influence on absorptive capacity but R&D intensity but not contributes to the building of AC but helps to develop skills and knowledge stock that contribute significantly to exploitive capacity. Broad dissemination by papers, seminars and workshops influences positively scientific knowledge absorption: "the more knowledge is translated the higher

is probability to integrate into the existing knowledge base utilized in innovation process" (T.Schmidt, 2005, p.20).

A recent paper (Murovec, Prodan, 2009) proposes a direct measure of absorptive capacity and a wide range of variables in a cross-nationally tested structural model. The results of estimations show that there exist two kinds of absorptive capacity: demand-pull and science-push. Their most important determinants proved to be internal R&D, training of personnel, innovation co-operation and attitude toward change. Both kinds of absorptive capacity are positively related to product and process innovation output.

One of few but the most relevant work focused on national absorptive capacity is that already cited, of Rajneesh Narula (2004).In his construct the national absorption capacity is more than a simple aggregation capacity of its firms or its industries, other additional multiplicative effects, which, although insignificant at the firm level, became very significant at the national level.

The national absorption capacity concept refers to "the ability to search and select the most appropriate technology to be assimilated from existing ones available, as well as the activities associated with creating new knowledge. Absorption capacity also reflects the ability of a country to integrate the existing and exploitable resources-technological opportunities-into the production chain, and the foresight to anticipate potential and relevant technological trajectories. The international technological environment therefore affects this ability (Narula, 2004).

The main sources of knowledge has to be absorbed at national level are: foreign knowledge coming from foreign suppliers and customers, foreign non- firms organizations, as universities, public research institutes, stock of knowledge in the domestic firm sector and in the MNE subsidiaries, stock of knowledge in the domestic non-firm sector. Industrial policy regime, including competition policy, governmental funding organizations, government funding for education, intellectual property regime are environmental factors that influence the transforming of potential AC into a realized, effective AC.

National absorptive capacity is taken to be a function of the distance from the technological frontier, which is defined as the difference in knowledge stock at the country level and at the frontier.

As the author conclude, his construct should be seen as a tentative that provide a basis for more accurately estimating national absorption capacity, remaining considerable lacunae which deserve further theoretical and empirical analysis.

As an answer to this provocation, we attempt to add a modest contribution to the statistical estimation of the variation among the EU member states, regarding the absorptive capacity for scientific knowledge in the business environment.

We, hereafter, propose a methodology for a statistical estimation of the variation among the EU member states, regarding the absorptive capacity for scientific knowledge in the business environment. This follows the construction and calculation of a composite indicator that would integrate and express the impact of the different categories of determinants of the absorptive capacity at the national level.

Thus, the inconvenience of using a single indicator for the absorptive capacity of R&D results would be avoided, as multicriterial synthetic indicators can express different quantitative and qualitative aspects of the analyzed issue (Mitrut et al, 2010).

The resulting index will represent only an assessment of the relative position of the level of AC of each statistical unit among the EU member states, without providing an absolute quantitative value of their absorptive capacities. Yet, it may render valuable information, as it allows for multicriterial ranking of the statistical units, as well as for quantifying the gaps among them.

The smoothness, effectiveness and intensity of the scientific knowledge absorptive process depends, largely, on the quality, time and relevance of the knowledge generated by knowledge producers (which are, mainly, the RDI institutes, university centers and, seldom, even the business sector); on the ability of potential knowledge users to understand available knowledge, to assess its economic potential, to absorb it, to transform it and turn it to commercial value; on the intensity and

functionality of the cooperation/communication network established within the National Innovation System between various actors; and, on the performance of the public support for RDI, for knowledge creation and knowledge transfer.

Choosing appropriate indicators for each factor-group (see figure 1) has proved a difficult task, as serious difficulties and limitations are imposed by data availability. As far as data source is concerned, we have drawn mainly on the Eurostat database and the Innovation Union's performance scoreboard for Research and Innovation (Innovation Union Scoreboard 2010)

The capacity of generating scientific knowledge may be expressed through input indicators – variables referring to national human and financial resources employed in R&D, such as the total R&D personnel (in full-time equivalents) as a % of total employment, total expenditures on R&D (GERD), and, through output indicators, e.g. scientific publications among the top 10% most cited publications worldwide, international scientific co-publications per million population, number of patent applications.

The effective capacity of the business sector to absorb and assimilate scientific knowledge is determined by the available and employed human and financial resources. We have chosen: business R&D expenditures as % of GDP, R&D personnel employed in the business sector (% of total employed), highly educated human resources available and effectively employed in science and technology, persons with tertiary education attainment, PhD students and graduates.

The openness of the business sector towards cooperation with knowledge providers, be they in the same or in different industries, in the universities or R&D institutes, is the main factor that stimulates and ensures good, productive linkages between scientific knowledge producers and users. The chosen indicators estimate the innovative enterprises cooperating with other actors, among which we are interested especially on cooperation with public research institutes and universities, business expenditures allotted to R&D performed in public research labs and institutes, private-public cooperation in publishing.

The public support for AC at national level, that means the legislative and financial support proves very important in ensuring a favorable environment for high-quality and relevant new scientific knowledge, for high capacity of absorption and for good cooperation relationship between knowledge creators and users. We chose to express it through various variables, such as the public expenditure assigned to R&D (GBOARD), the share of R&D performed in the private sector with public funds in total private R&D activities, % of enterprises that received any public funding, total public expenditure for tertiary education, as % of GDP.

Therefore, the level of the National AC may be expressed through a function of four groups of factors: (a) scientific knowledge creation capacity, (b) employed and available resources for scientific knowledge absorption at the company level, (c) the linkages between scientific knowledge providers and users and (d) the public support for knowledge growth.

The final composite index will aggregate the four synthetic indicators calculated for each block of indicators. At their turn, each sub-group synthetic indicator, if analyzed, may bring forth specific information on the strengths and weaknesses that may amplify or hinder the development of an economy's absorptive capacity.

Using and aggregating 22 different indicators raise the heterogeneity issue, which may be handled through normalization (min-max method). The variation range is standardized, limited to interval (0,1) no matter the nature or initial variation of the given indicators. Bringing them to a common scale may compare data on different scales.

After normalization, the readjusted values for each indicator are:

$$I_i^j = \frac{X_i^j - X_{\min}^j}{X_{\max}^j - X_{\min}^j}$$, if there is a positive correlation between the factor expressed through indicator X_i and the level of AC, and

$I_i^j = \frac{X_{\max}^j - X_i^j}{X_{\max}^j - X_{\min}^j}$, for indicators which are in inverse ratio to the absorptive capacity level,

where X_i^j is the absolute value of „j" indicator for the EU state „i", $X_{\min}^j$ and $X_{\max}^j$ represents the minimum and the maximum values of „j" indicator.

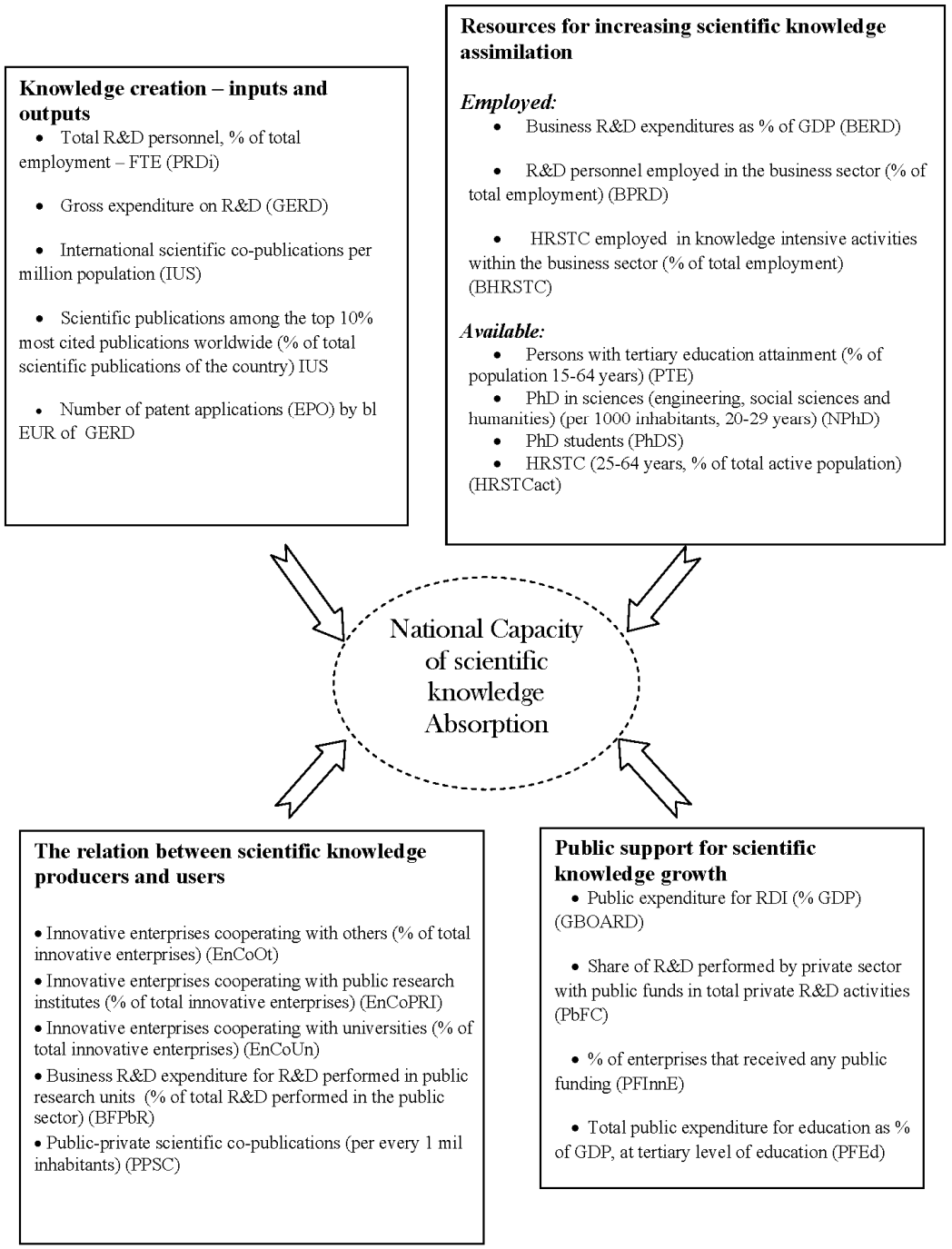
Further on, for each statistical unit „i" (EU member state) and for each indicator group („g"), a synthetic group index $\boldsymbol{I_g^i}$ will be determined as a weighted arithmetic average of the component indicators: $\overline{I_g^i} = \frac{\sum_{j=1}^{m} I_j^g \cdot p_j^g}{100}, \quad i = \overline{1,n},$ where p_j^g represents the weight of indicator „j" belonging to the factor group „g" The specific weights granted to each indicator in a sub-group shall sum up to 1.

In calculating the final composite indicator for each statistical unit „i", each group of indicators will also be given a specific weight, as their impact on the level of NAC is relative . The statistical weights sum shall equal 1, as well. ($\sum_{g=1}^{5} \boldsymbol{p_g} = 100\%$)

Therefore, the Absorptive Capacity relative composite index for the EU state „i", will eventually be calculated as $\overline{\boldsymbol{I}}_{\boldsymbol{i}} = \frac{\sum_{g=1}^{m} \boldsymbol{I_g^i} \cdot \boldsymbol{p_g}}{100}, \quad \boldsymbol{i} = \overline{\boldsymbol{1,n}}$.

The value of the composite index can be of, maximum, 1 – if the same unit scores the highest regarding all indicators and of minimum 0, if the same unit ranks the lowest for all indicators.

Figure 1. Indicators for evaluating a relative level of national AC within the EU



4. Conclusions

Indicators suggested in the figure nr.1 allow for international comparisons between the different relative national absorption capacities of scientific knowledge of the EU member states. This would provide supplementary effective tools for better assessment of national performances in innovation and competitiveness, of the gaps between countries and of the factors that may stimulate or hinder the capacity of an economy to absorb new available knowledge, to assimilate it and effectively use it towards higher competitiveness and productivity.

Our proposal of a methodology for a statistical estimation of the variation among the EU member states, regarding the absorptive capacity for scientific knowledge in the business environment is a modest contribution to the macro level literature on the absorptive capacity that has been scarcely and somehow inconsistently approached, with limited empirical, econometric applicability.

This follows the construction and calculation of a composite indicator that would integrate and express the impact of the different categories of determinants of the absorptive capacity at the national level.

Thus, the inconvenience of using a single indicator for the absorptive capacity of R&D results would be avoided, as multicriterial synthetic indicators can express different quantitative and qualitative aspects of the analyzed issue.

The papers contribute to the clear up of specific aspects of absorption capacity of scientific knowledge, constructing a system of AC components composed of four groups of indicators expressing: the capacity of generating scientific knowledge; **t**he effective capacity of the business sector to absorb and assimilate scientific knowledge; the openness of the business sector towards cooperation with knowledge providers and the public support for AC at national level.

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RECENT APPROACHES IN THE OPTIMUM CURRENCY AREAS THEORY

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Abstract
This study is dealing with the endogenous characteristic of the OCA criteria, starting from the idea that a higher conformity of the business cycles will result in a better timing of the economic cycles and, thus, in getting closer to the quality of an optimum currency area. Thus, if the classical theory is focused on a static approach of the problem, the new theories assert that these conditions are dynamic, and they cannot be positively affected even by the establishment of the Economic and Monetary Union. The consequences are overwhelming, as the endogenous approach shows that a monetary union can be achieved even if all the conditions mentioned in Mundell's optimum currency areas theory are not met, showing that some of them may also be met subsequent to the unification. Thus, a country joining a monetary union, althogh it does not meet the criteria for an optimum currency area, will ex post lead to the increase of the integration and business cycle correlation degree.

Keywords*: optimum currency area theory, endogeneity theory, OCA characteristics*

Introduction

Although the problem of the monetary unions is more actual than ever, both for the developed countries, which have already joined the Eurozone, and also for the less developed states, which are preparing to meet the criteria for being accepted, this topic has been put forward for a long time in the economic literature. Thus, the classical theory of the optimum currency areas has come out since 1961 in an article presented by Robert Mundell (who is considered to be the „father" of the optimum currency areas theory). The objective of this theory was to make a monetary union possible, by providing answers for the measures which should be taken for improving the situation.

The optimum currency areas theory *(OCA.)* is based on Robert Mundell's contribution (1961) which is mentioned above, although the problem has been reviewed and added by many other economists, such as Robert McKinnon (1963), Peter Kenen (1969) etc. *The theory shows that countries can obtain net benefits as a result of having a unique currency, thus being able to avoid the possible adjustment problems, as long as the member countries meet certain conditions (OCA characteristics)*

The latest researches referring to the optimum currency areas theory require the so-called theory of OCA endogeneity criteria in the economic literature. Thus, from a theoretical point of view, some authors assert that two of the optimum currency areas criteria are especially important.

Frankel and Wei (1998) propose two of the characteristics of the optimum currency areas as being fundamental in assessing the net benefits of a monetary union: *an economy's opening degree (from a commercial point of view) and the correlation degree of the business cycles* (*economic symmetry degree).* In case the classical theory is focused on a static approach of the problem, the new theories assert that these conditions are dynamic, and they can be positively affected even by the establishment of the Economic and Monetary Union. This approach represents one of the paradigms related to the optimum currency areas theory and it has overwhelming consequences. According to this approach, a higher economy opening degree will determine a convergence of the business cycles, and this will provide favorable conditions for political integration and for the creation of a currency

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area. In such a case, the mutual commerce is stimulated, and the business cycles will get synchronized, the final effect being the regularity of the currency and the exchange arrangements.

The consequences are overwhelming due to the fact that the endogenous approach shows that a monetary union can be created *even though all the conditions* mentioned in Mundell's optimum currency areas theory *are not met*, showing that some of them may also be met subsequent to the unification. Thus, a country joining a monetary union, althogh it does not meet the criteria for an optimum currency area, will e*x post* lead to the increase of the integration and business cycle correlation degree. Actually, this fact outlines that the main objective for which a monetary union is created is to make profits on the benefits, even though they can be identified from the beginning (the ex ante variant), or if they occur after a certain period of time (the ex post variant).

The endogeneity of the optimum currency areas was defined by Jeffrey Frankel and Andrew Rose in 1998, and, subsequently, in 2007, Gayer made an important addition. The endogeneity in a currency area shows that a country's joining to a currency area results in the increase of the synchronization degree of the economic cycles, due to the increase of the commercial integration.

The Endogeneity of the Optimum Currency Area Criteria

The trade-off between *the economy's opening degree* and the correlation degree of the business cycles is described by the OCA line, in figure 1. It represents the set of combinations between symmetry and economic integration for which the costs and the benefits of joining a monetary union are equal. The OCA line has a negative slope due to the fact that the implementation of a unique currency is in a positive relation with the economy's opening degree, and also with the correlation degree between the countries' economic cycles. On the right side of the OCA line, we encounter the situation in which the benefits exceed the costs for losing the monetary independence. On the left side of the OCA line, it is more favorable for countries to keep their monetary independence and to join a monetary union (for example, a monetary union between EU, USA and China is not efficient).

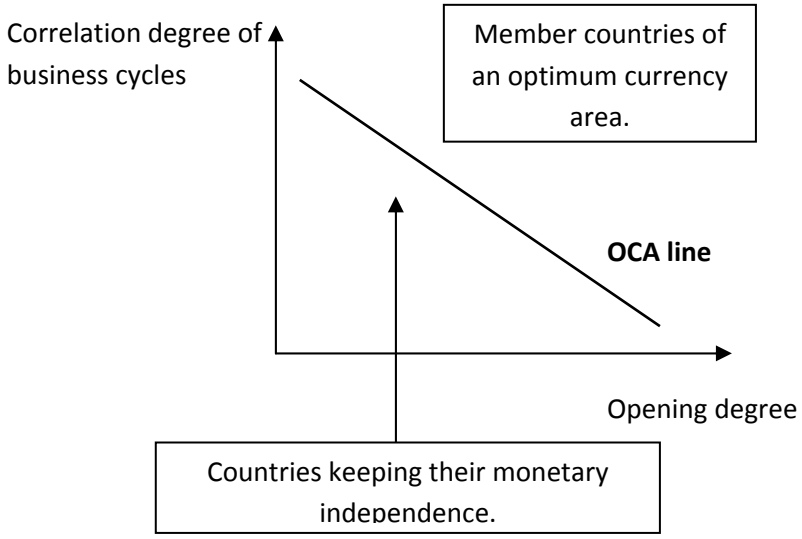

Figure 1.**The line of the optimum currency area**

Many authors agree that the development of a mutual commerce and an economy's opening degree as high as possible are benefic for each national economy. Thus, the transaction costs get

decreased, the rate of exchange is stable and the net benefits of a monetary union get increased. The empirical studies demonstrated that, after the creation of the Unique Market, the commercial relations between the European Union's members recorded a 60 percents increase (Frankel and Wei, 1998).

Rose and Frankel explained that the monetary integration may lead to a significant dependence on the mutual commerce. From this point of view, the Eurozone can be changed into an optimum currency area after initiating the monetary integration process, and this means that the countries joining the Eurozone, irrespective of their motivation, could ex-post meet the criteria required by an OCA ZMO, even though they were not able to do it ex-ante. As a consequence, the borders of a new currency area would be too large, due to the standby according to which the commerce integration and the revenues correlation will get increased when the union is created.

The effect of endogeneity of an optimum currency area is based on two main perspectives. The first perspective outlines the fact that the opening degree of the economies being taken into consideration (the mutual commerce between the members of the currency area) is expected to get increased. This perspective is generally accepted, even though there are contradictory points of view regarding the largeness of the opening, and the second perspective supposes a positive relation between the commerce integration and the revenues correlation. As a monetary union is established, even in an automatic manner, the market mechanisms begin operating, and this facilitates the various criteria proposed for testing the area's efficiency.

The differences between countries exist, but the problem is to what extent they are relevant, so that their presence could prevent the creation of a monetary union. To what extend do the *asymmetric shocks* mentioned by Mundell exist and act Î? From this point of view, there are two perspectives: an optimistic perspective and a pessimistic one.

From the optimistic point of view, the commerce within the countries which are member to the European Union is, to a large extent, an intra-industrial commerce; this commerce is based on the existence of the economies of scale. Thus, most of the demand shocks affect the countries from this economic space in the same manner. Under the terms of creating a unique market, most of the demand shocks will tend to have a symmetric effect. According to this perspective (figure 2), the increase of the integration degree will lead, to a larger extent, to making the economic structures compatible and, to a smaller extent, to the occurrence of asymmetric shocks.

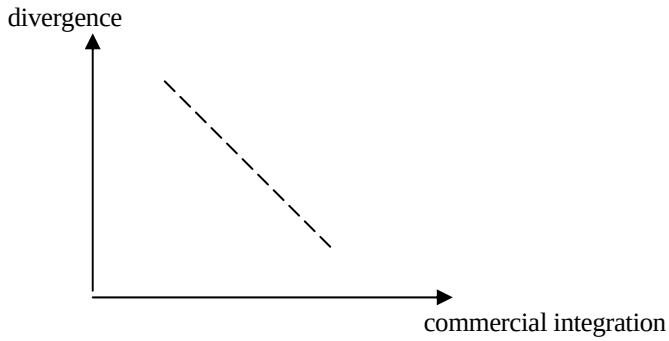

Figure 2. **The optimistic perspective**

From the optimistic point of view (figure 3), the assumption of the asymmetric shocks is not eliminated, though. According to this perspective, the economies of scale may result in the occurrence of agglomeration effects; the commerce integration which is achieved due to the economies of scale existing in the EU space leads to a regional focus of the industrial activities. Thus, the output focus effect will result in losing the advantages provided by the economies of scale. According to this approach, the commercial integration leads to the occurrence of asymmetric

shocks. The asymmetric shocks would be favored by the high focusing degree of certain industries in a country. In such a case, the countries encountering such shocks would rather use the rate of exchange for balancing economy.

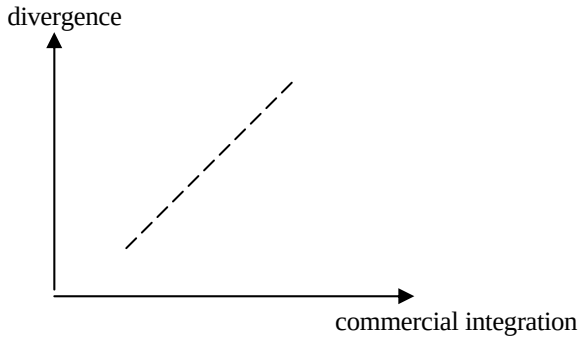

Figure 3. **The pessimistic perspective**

The intersection point of costs and benefits related to joining a monetary union (point A) determines the critical level of an economy's opening which makes a country worthy joining a monetary union together with its commercial partners. In this pattern, the form and the position of the costs curve depends, to a great extent, on the perspective considered in terms of efficiency of the exchange rate tool in adjusting the effects generated by the different evolutions of demand and costs in the countries which are involved in a monetary union. De Grauwe (2003) presents two variants of the costs-benefits correlation: *the monetarist perspective* – also accepted by the European Commission for assessing the net benefits of the Economic and Monetary Union – in which the right side of the costs is closer to the origin – and *the Keynesian perspective* which supposes a less optimistic approach of the problem (figure 4).

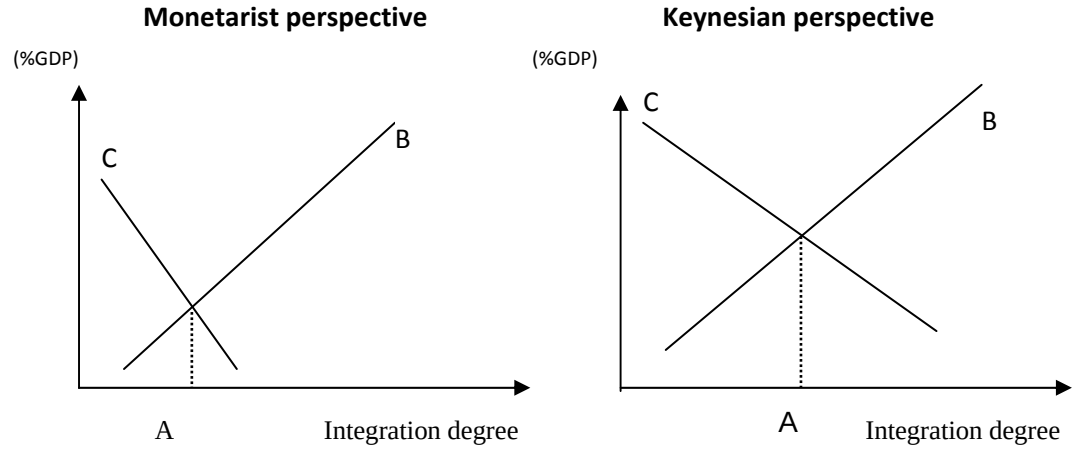

Figure 4. M**onetarist perspective versus Keynesian perspective**

In the case of the Keynesian perspective – illustrated by Mundell's model – the costs curve is placed much farther from the origin of the axes system, so that only a few countries would be favored by joining a monetary union. The national economies are characterized by structural rigidities; the rate of exchange is an essential tool for eliminating unbalances, and the curve of the costs for giving up their own currency is farther, if compared to the origin. In such a perspective, a few countries will be interested in joining a monetary union.

In the case of the monetarist perspective, the modification of the exchange rate is not efficient in adjusting the development differences between countries; thus, the curve of the costs for giving up their own currency is closer to the origin. Even in the case when the rate of exchange were an efficient tool, its use would typically generate worse results for the countries using it. Thus, the costs curve is placed very close to the origin of the axes system. The point which makes a country worthy joining a monetary union (the critical point) is close to the origin. As a consequence, several countries in the world would benefit from giving up their own currencies and from joining a monetary union. In case a decrease is recorded in the prices and wages rigidity, and the labor mobility gets increased, then the curve of the costs for giving up the national currency would move to the left, and the monetary union would become more attractive. Practically, the net benefits depend on the inclination degree of the two lines, as well as on their position in relation to the origin.

Which of the two perspectives is closer to reality? The empirical evidences of Frankel and Rose (1996) support the optimistic variant. Frankel and Rose asserted the *endogenous* characteristic of the OCA criteria, starting from the idea that the countries with the closest economic relations have the tendency to provide a higher conformity of business cycles and they asserted that the emphasis of integration due to the monetary unification will lead to a better synchronization of the economic cycles and to coming closer to the quality of an optimum currency area. The lower the correlation of the shocks, the higher the costs for a monetary union, in the absence of the economy's short-term adjustment possibilities by means of the exchange rate. The costs for a lower symmetry can be balanced by the benefits from a higher economic integration degree, and this will allow a better expenditure of resources in economy.

Frankel and Rose gave the following example. Let us consider a group of countries, which is initially placed in point 1 in figure 5, on the left of the OCA line (where it is more favorable to keep their monetary independence). If these countries create a "union" – for example, the European Union – then the correlations between the business cycles of these countries will get increased, as well as the economic integration degree. According to the endogeneity assumption, if these countries create a common market, they will gradually move towards point 2. If the group decides to also create a monetary union, then the integration degree and the correlation of the business cycles between these countries will get more increased; soon, they will move in point 3, which is placed on the right side of the OCA line, where it is more favorable for all the countries which are members to the group to adopt a common currency. Joining the monetary union will result in the increase of the economic integration degree, thus outlining the benefits of such a union.

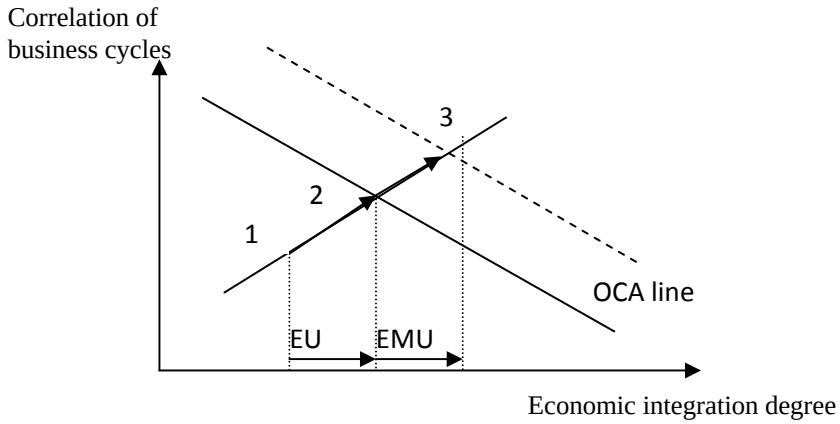

Figure 5. The Endogeneity of the Optimum Currency Area Criteria

This approach represents one of the paradigms related to the optimum currency areas theory and it has overwhelming consequences. According to this approach, a higher economic opening degree will determine a convergence of the business cycles, and this will provide favorable conditions for political integration and for the creation of a currency area. In such a case, the mutual commerce is stimulated and the business cycles will get synchronized, the final effect being the disciplining of the monetary and the exchange arrangements.

Thus, if the classical theory is focused on a static approach of the problem, the new theories assert that these conditions are dynamic, and they can be positively affected even by the creation of the Economic and Monetary Union. The consequences are overwhelming, as the endogenous approach shows that a monetary union can be created *even though all the conditions* mentioned in Mundell's optimum currency areas theory *are not met*, explaining that some of them can also be met subsequent to unification. Thus, a country's joining a monetary union, even though it does not meet the criteria of an optimum currency area, will *ex post* lead to the increase of the integration degree and to the increase of the business cycles correlation degree. Actually, the main objective for which a monetary union is created is to make profit from the benefits, even though they can be identified from the beginning (the ex ante variant), or if they occur after a period of time (the ex post variant).

Consequences of the OCA endogeneousness theory upon the economic and financial integration

The economic cycles synchronization is an extremely important element for adopting the Euro currency without costs as a result of giving up the independent monetary and exchange rate policy. On the one hand, the commercial/economic integration is one of the main economic cycles correlation mechanisms. The economic **integration is a complex and dynamic process aiming at the unification of economic areas which h**ave previously been distinct and it may become real by emphasizing the relations between them, namely by intensifying the commercial trades, the flow of goods, of persons, of capital and ideas, and also by establishing increasing interdependences between these economic areas in order to create an open system which includes various economic, politic and social fields etc.

Andrew Rose and Jeffrey Frankel were those who discovered the fact that the membership to a monetary union results in the increase of the commercial trades. The effects of the monetary integration upon commerce are also known as the "Rose effects".

Box 1. The "Rose effect" behind the economic integration endogeneity

The dilemma constituting the basis of the "Rose effect" → *Can the simple creation of a monetary union lead to intensifying commercial trades, besides the positive impact generated by the elimination of nominal exchange rate volatility?*

The researches on this topic assert contrary opinions. Thus, some of them assert that there is no significant relation between the two of them, at most a very low negative effect upon commerce may occur regarding the volatility. Other researches reflect the fact that they discovered some significant and negative effects of the exchange rate uncertainty upon commerce: on a long term, the impact could be high enough, even 10 percents. The decrease of the exchange rate may result in the increase of the commercial trades' volume in two ways: firstly, by encouraging the increase of a company's exported quantity, and secondly by increasing the number of companies which are involved in export. In order to give an exact definition for the "Rose effect", Baldwin, Skudelny and Taglioni started by noticing that Europe has several companies which do not make exports or which make very low exports. One of the factors which determine them not to make exports is the uncertainty related to commerce, thus, a decrease of uncertainty may stimulate more the companies to make exports, thus increasing the commerce volumes. While these things are important for the negative relation existing between commerce and volatility – see the broken line in the below figure – the "Rose effect" is not totally applicable, being generally perceived as the impact of a monetary union's control upon the linear commercial relations.

For a better understanding, we should explain the reason why the relation between volatility and commerce is convex. We may assume that the assertion according to which the relation between the two of them is convex is real, as the continuous curve in the chart shows.

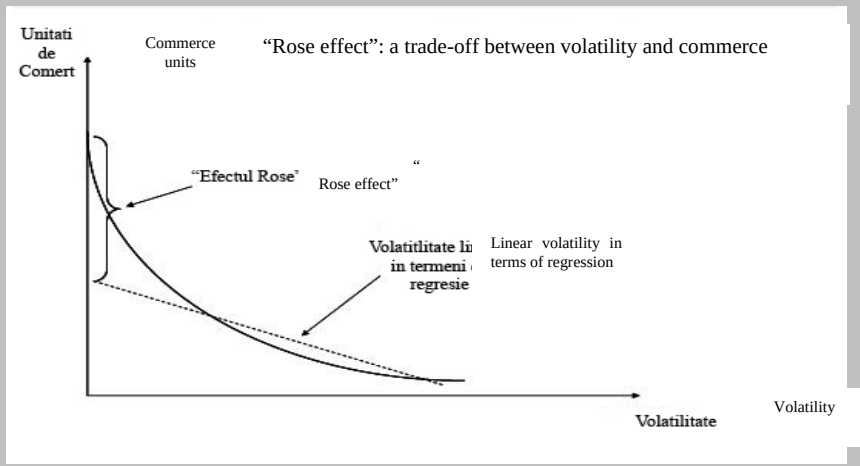

Figure 7

Baldwin assumes the existence of two sources for this convexity, as it follows:

- firstly, the volatility of the exchange rate accordingly affects small companies to a greater extent than the big ones. When the initial set of exporting companies includes more small companies, the marginal impact of a lower volatility could be higher; and
- secondly, the distribution of the European companies is very oblique in the case of the smaller companies. Thus, each decrease of distribution brings a higher and higher number of new exporters, as it is shown by the vault made by the "Rose effect" in the above figure.

As a consequence, the theory and the various economic researches have shown that the economic integration related to a monetary union may create commerce effects. The researches made for the OCA endogeneity suggest the capacity to increase the European integration subsequent to the monetary unification; along with this, the commerce is expected to increase faster. The financial European integration is a developing process, especially with reference to some market segments, namely the capital market and the retail segment of the banking market. Until now, the highest integration degree has been reached by the monetary market and the bond market. The Euro currency represents the bond which has resulted in the increase of the real unique market and which plays an important role in the well operation of the financial European market.

The financial markets integration is one of the essential factors of the optimum currency areas theory, because it results in the improvement of transmission of the unique monetary policy, it improves the assignment of resources by directing resources towards the areas with investment potential. As a consequence, the financial markets integration stimulates the economic growth and it may help in adjusting the idiosyncratic shocks. The financial markets integration is measured by means of the integration of monetary, capital and banking systems markets and by the way in which, from an institutional point of view, the conditions to equally deal with the market members are provided. Integration is institutionally provided in the new member states by adopting the community acquis. The free movement of the capital is provided by liberalizing the capital account, as a previous condition for joining the European Union.

The financial markets in the European Union's member states which are not member to the Eurozone record the highest delays in the integration process. Once these countries adopt the Euro currency and harmonize their internal financial structures with those of the Eurozone, the integration process will encounter an obvious acceleration. The experts assert that the financial integration is completely achieved when all the potential market members have the same relevant characteristics: if they face a unique set of regulations, when deciding to invest in various financial tools and/or services; if they have equal access to the above mentioned set of financial tools and/or services s; and if they are equally treated when being active on this market.

The financial integration generates a series of advantages, such as: the improvement of the capitals assignment, their efficiency increase and the increase of economic growth.

Besides all these, the financial markets can provide a significant security source against the asymmetric shocks. From a graphical point of view, the financial integration, in the presence of endogeneousness, has the effect of moving downwards the OCA line, namely the increase of net benefits for the Eurozone.

Conclusions

Even though the empirical evidences seem to validate the endogeneity theory in the case of the Eurozone, its enlargement, under the present terms of financial instability, is not efficient and it may have an unhappy end for the Euro currency, the pessimistic people assuming that it can even decompose. The uncertainty related to the future optimality of the European monetary union comes to a standstill, due to the major differences existing between the economies of the member states. Moreover, there is another assumption in the economic literature (Krugman, 1993) which is based on

the commerce theory and on the increase economies of scale, according to which the commercial and financial integration is accompanied by the member countries' specialization within an OCA, and this generates very less diversified economic structure, which is inclined to be affected by the offer shocks.

The result is that their business cycles will become less correlated. As the economy's opening degree gets increased, each country will get specialized in producing the goods and services for which they have a comparative advantage. Thus, the second paradigm of the optimum currency areas theory is supported by Paul Krugman and it attempts to demonstrate exactly the contrary (if compared to the endogeneity theory), asserting that the commercial integration may result in specialization and in a lower correlation of the economic cycles.

The empirical evidences have shown that, although with reference to industry, economic centers may occur in certain areas, it is less probable that this phenomenon brings the emphasis of asymmetries. On the one hand due to the fact that the increase of the integration degree is accompanied by the possibility of occurrence of centers in the cross-boundary areas, and on the other hand, the probability that these centers occur in the sector of services is lower. As this sector represents 60-70% of the EU member states' GDP, it will be taken into account in the costs-benefits equation maybe more than the industrial sector.

Acknowledgement

This article represents the dissemination of research financed by Social European Fund, contract no POSDRU/89/1.5/S/59184 *Postdoctoral research performance and excellence in economic sciences in Romania*, Academy of Economic Studies, Bucharest.

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SOME SOCIO-ECONOMIC EFFECTS OF LABOR FORCE MIGRATION IN AN ENLARGED EUROPE

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Abstract
The enlargement of the European Union and the liberalization of labor force movement to Europe increase greatly migration to developed countries. This phenomenon affects the economic growth both on short and long term. The ascendant trend of migration began by the mid-nineties and continued after 2000. The data between 2002 and 2009 indicate a quasi-slow down tendency. This paper intends to estimate some effects of migration flows over both origin and host countries in an enlarged Europe. Capital, financial and labor flows are the main mechanisms of European integration that should be borne in mind with respect to south-eastern enlargement, implicitly the migration from Romania which represents a sensitive subjects added to the aforementioned. The migration and emigration from and to Romania will have effects on the Romanian economy on short and long term.

Keywords*: work force mobility, free movement of labor force, economic impact, brains exodus*
JEL *F02, J6, J21, J60, J61*

Introduction

In 1849, Victor Hugo said, "*A day will come when all nations of this continent, without losing their distinctive features and their glorious individuality, will merge and form the European brotherhood. A day will come when there will be no more battlefields, others then the spiritual ones. A day will come when bullets and bombs will be replaced with votes.*" It took over a century for this utopist predictions to become reality.

The enlargement of the European Union, to 25 members - the historic step of May 1st 2004 - made a final reconciliation between history and geography, as suggested by a politician from a member state. Between 2007-2015, the EU should undergo a new enlargement: first were Romania and Bulgaria, countries accessing the European Union on January 1st 2007, and both shall be followed by Turkey and Croatia, after the latter countries will meet some of the criteria.

The enlarged EU belongs to a world in constant and quick-change process, reason for which a new stability is required. Europe is affected by the events form other continents, no matter whether it is the religious extremism of the Islamic world, the diseases form Africa, the totalitarian tendencies of Latin America, the increase of population in Asia or the global tendencies of industrial and professional reorientation. In these circumstances, Europe must focus not only on self-development, but also should/must be a part of the globalization process. Although some remarkable outcomes were obtained in commercial politics, EU has a long road ahead before it may be said that Europe has "only one voice" or that it is a powerful actor in world politics.

EU enlargement and, at the same time, free movement of labor force lead to substantial increases of migration flows. This phenomenon has effect on economic growth on long and short term.

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After the fall of communist regimes it was easy to notice a fast growth of work flows from Central and Eastern Europe to the West, especially for economic reasons. The new conditions allowed for workforce mobility to areas with high wages and low unemployment.

By the Amsterdam Treaty (1999) a political solution was found for continuing the progress towards the free movement area, including here The Schengen Agreement to the EU Treaty.

In "On a Community Immigration Policy" published by the European Commission in November 2000, the pressures were clearly identified about the changes which imposed the revision of immigration policies.

In this context, the specialized literature (Bauer and Zimmerman (1999), Borjas (1999b), Boeri and Brucker (2000), Fidrmuc (2002), Fidrmuc and Huber (2002), Drinkwater (2002), Kallai (2003), Hazans (2003), Huber (2003)), posed a set of questions:

- How is the mobility in the countries that joined EU15 and what kinds of geographic expansion can have mobility based on economic interest? ;
- What groups of population had the most increased mobility in the past?;
- How high can be the flows from East to West after joining the EU; which is the composition of this migration flows from the professional viewpoint?;
- What will be the effects of the post-joining migration on the labor market in the EU countries? After the new countries joined EU15, did the danger of unemployment in EU15 increase? The danger of "brains export" will increase or a labor crisis will appear in the new joined countries?

By over a decade ago, Layard and others (1992) predicted that a minimum of 3% of the Central and Eastern European countries' population will emigrate in the next 15 years after the enlargement. In 1999 Bauer and Zimmerman said that on long term, the migration rate would be 2-3% of the population of new joined countries. The expectations formed by Boeri and Brucker, in 2000, over the dimension of post-enlargement migration flows showed a number of 335000 people per year in the first stages of enlargement, dropping at 150000 in 2010. This will lead to an increase in the number of residents from Central and Eastern countries in EU15, from 850000 in 1998 to 2.9 mil around the year 2010, to 3.7 mil around 2020 and 3.9 in approximately 30 years as of the introduction of free movement. These values show that on long term, approximately 3% of Central and Eastern countries population will migrate. Each of these scenarios shows that migration can have a major impact on labor force markets in the newly joined countries but also for the EU15.

The evolution of migration flows in Central and Eastern Europe

The fall of communist regimes generated a growth of migration flows from the Central and Eastern countries to western countries, for economic reasons.

An important characteristic of Central and Eastern countries migration is the repatriation of ethnic minorities. The most important ethnic move was that of Germans from Poland, Hungary and of those from former Soviet areas to Germany.

The ethnic conflicts from various regions continue to be the source of migration for today and the near future. At the moment, most of Central and Eastern countries are regarded as stable and therefore asylum requests from this countries were rejected, a fact which meant a decrease of people migrating towards Western Europe, but which determined an increase of temporary migrations.

The Central and Eastern countries modified their national codes in order to allow to former citizens to return in their native country. The research shows that this type of migration takes place at regional level. The migration flows from Hungary, Kazakhstan, and Siberia to Poland; from the Baltic States to Russia; from Russia and Estonia to Finland, and all of them can be described as "ethnic return".

For the progressive development of an EU policy in the economic migration area, collaboration was initiated between EU organizations, member states, candidates' countries, and the civil society in order to ensure finding optimal solutions to manage migration flows taking place at EU level. As result of debates and based on the conclusions of the European Council from June

2003, the European Commission adopted, in January 2005, the Green Book regarding the administration of economic migration to EU. With this document a first step was made towards a unique legal framework at EU level in this area, starting from two new European constructions:

i) The union will develop a common immigration policy, having in mind the purpose of an efficient management of migration flows at every level;

ii) Defining a common immigration policy doesn't have to affect the right of the countries to determine the volume of entries on the workforce market of citizens from a third country.

In a first stage were identified the causes that impose a quicker approval, respectively a change, of policies promoted in this field of activity, among which:

a) The impact of demographic decline and ageing across the economy;

b) The significant demand of labor force in the EU (satisfying the national economy needs) and the impact of immigration on the entrepreneurs;

c) The creation of a legal framework for this phenomenon;

d) The necessity of a legal base for all rights and obligations for all the people working abroad;

e) Ensuring best practices for managing economic migration;

f) The realization of the necessary framework to implement the Lisbon strategy.

The next stage was substantiating the main principle about managing economic migration, in relationship with:

a) Drawing up legislation that settles some common definitions, criteria and procedures, by leaving up to the member states to answer the specific needs of their markets against setting up a quick set of common rules to allow migrants with some jobs and skills, in order to avoid competition between the member states in connection to recruiting some working categories;

b) The employment of workers from third party countries based upon the evidence that the vacant job was not taken by any worker from the internal workforce market against the employment based on quick procedure (the green card) in the case of workers with high levels of qualifications from a certain area or field were there is already a lack of workforce;

c) Choosing the national labor force market against EU labor force market;

d) Systems of admission based on existing vacant workplaces against flexible systems (green card) which allow to fill the demand on the national market on medium and long term – economic demands, the existence of a specific job – and also of a unique selection system at EU level (organizing some work fairs based on EURES services);

e) Procedures of hiring on its own, promoting some sectors of activity or establishing some accessing conditions;

f) Solving the request for work and living permit with one nation wide application which allows for combining the residency and work permits against the possibility of hand in one requests for work permits and residency in accordance with national rules;

g) Clarifying the legal situation of every migrating worker, ensuring the equality of treatment between them and the EU citizens right before obtaining the right to live and work against the clear difference of right in connection with the time duration of live and work;

h) Administrating the migration phenomenon on the integration segment or the return to the origin country by cooperation between the departure and destination country of migrating workers and also the cooperation with third party countries in order to ease the legal migration.

Regarding the free movement of workforce, EU requested all candidate countries, including Romania, a transition period of 2-7 years, after entering the Union, offering in exchange: *the member states will continue to apply the national measure for a 2 year period after joining regarding the right to work of citizens from the new member state.* This period of time can be extended with another 3 years – depending on previous evaluation – and yet with another 2 years in case of severe deviations on local market of the new member.

The EU political-social agenda bears in mind more favorable conditions for migrating workers, the European Commission talking about modifying the actual *transition periods* settled by the UE15 for the new members.

May 1st 2004, the moment when 10 new members from Central and Eastern Europe accessed EU, generated fears among the EU15, who saw a threat in a workforce exodus from these new countries. As a result, the member states announced restrictions on workforce migration from the new member states.

Since the EU enlargement, a rise was registered in connection with the numbers of *workers* from new countries into EU 15 member states. Nevertheless, despite the rise, the relative impact is quite limited if measured by the number of work permits issued in comparison with the population able to work from host countries. In the first quarter of 2005, the average population able to work from the New Member States in EU15 was low, only 0.1% in France and Netherlands, 1.4% in Austria and 2% in Ireland.

For Austria, Germany, Netherlands, Italy, and France the statistics show the fact that a significant percentage of work permits is given for short periods of time (6 month – 1 year).

The restrictive measures lead to reactions from the New Member States, which see one of their fundamental rights affected, one that came by joining the union. The New Member States aimed for complete and immediate opening of movement for workforce into EU, but a step by step mechanism was established. The member states attempted to establish bilateral relations in order to obtain advantages over this mechanism.

Romania is interested in continuing the bilateral agreements regarding the movement of workforce. Imposing a transition period to the New Member States could be an extra barrier for EU investors who desire to come to Romania. The EU enlargement will probably lead, at least in the first years after the accession, to an increase of active population looking for a workplace in more developed countries. It should be expected that the status of EU member will generate a migration flow from undeveloped countries to our country and not only. The experience of all the countries that accessed the EU in 2004 and 2007, showed that there were high values of migrating workers from Eastern Europe.

Socio-political impact of migration

Mobility/ people movement and especially of workforce movement can influence in different ways the quality of the human capital of the origin country/region, but also of the destination country.

Measuring the socio-political impact of migration in the country of origin and in the host country is a complex process which implies knowing both the costs and benefits at individual, local, national and international level for migration and to analyze the world conjuncture in which this process takes place.

For the origin country, "*the negative effect of migration/movement phenomenon"* has different dimensions and structures according to age, sex, and professional level:

i) loss of investments made in education and training for migration and emigration;

ii) losing state contributions by taxes that these categories must pay;

iii) a decrease of highly trained personnel and as result the increase of medium and low trained personal, which is not conducive to creating a strong base for a country's growth.

Regarding the *"positive effects*" of migration over the origin country, these could be:

a) reducing the unemployment rate and decreasing the pressure on work force market and social spending from the budget;

b) money transfers of migrations. These became an external source for financing the budget - it's a known fact that money or goods transfers of migrants shipped through various ways into origin countries can have various implications on the evolution of the host country. Many studies show that money transfers are used in the origin country for households' spending, for new houses

constructions and consumption. These transfers have an impact both at the micro level - households – and the macroeconomic one, affecting the macroeconomic management, workforce involvement, education and health, income distribution etc.

c) creating connections between Diasporas and the origin country. Communities outside the origin country can represent an important source and facilitating factor for research and innovation, for technology transfer and growth. To involve the diasporas in the economic growth of origin countries can be achieved by some agreements in order to allow for technology, new knowledge and know-how transfer between firms owned or managed by the diasporas in host countries and firms from the origin countries, by direct investments, the creation of scientific or professional exchanges to disseminate new research results from host countries to the origin countries, mainly through a definitive return of workers in the origin countries, etc.

The movement between the new member states and EU15 can have positive effects on the workforce market by replacement with workforce from other areas. Hence, new workplaces can be created, for instance, in constructions, in the cleaning services' sector, in catering, which otherwise could be left vacant. Highly trained workers form the New Member States can contribute to generate business and economic growth on long term, through the accumulation of human capital.

For Member States statistical and significant information is available for the main indicator - employment rate. This indicator shows the fact that citizens' form New Member States tend to have the same employment rate as the citizens of the respective country. Sometimes, these are higher than those of the respective country's citizens (in Ireland, the citizens from EU10 have a higher employment rate then the locals). So, we can say that the citizens of New Member States have an important contribution in each Member State at improving the performance on the workforce market, at the sustained economic growth and the structure of public finances.

After the EU enlargement, the employment rate of the New Member States in the EU15 grew, in certain cases, even substantially, a fact explained by:

- the EU enlargement contributed to bringing to surface a part of the black economy, made by undeclared work by workers from new members. This means, also, intensifying the movement of workforce **within the EU**, because EU enlargement can be, in reality, smaller than the data shows;
- after EU enlargement a real improvement took place for the citizens of new member countries, due to employers and their attitudes, to more opportunities for private business, a better information system and settlement.

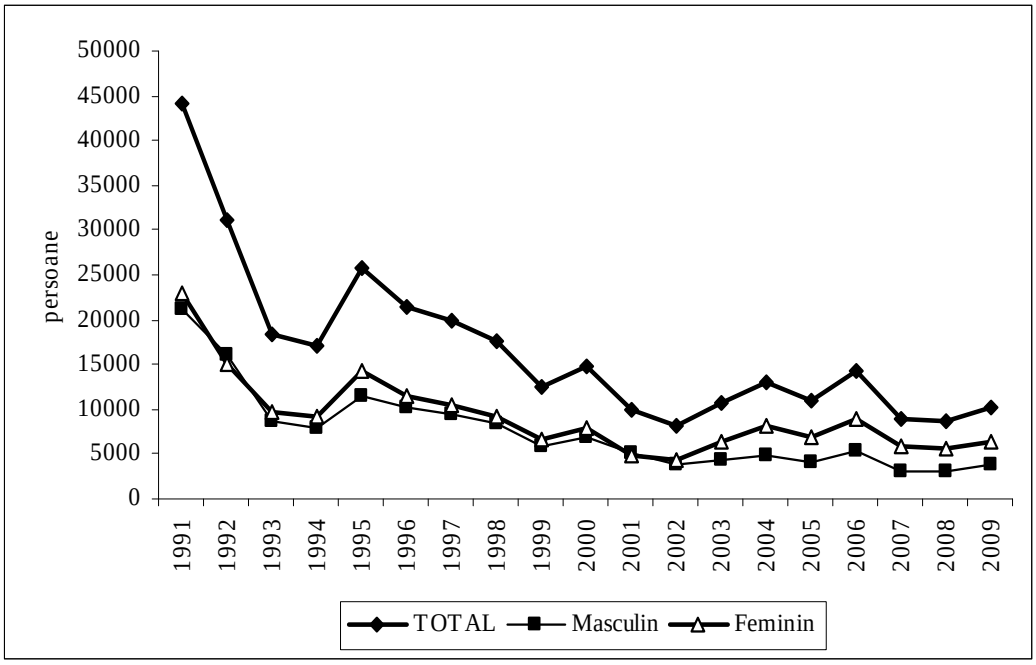
For **Romania**, the evolution of employment in different activities was conflicting, because a lot of work resources were directed to sectors with little efficiency – agriculture and industry. The most important issues regarding the workforce structure in Romania compared to EU15 or EU25 are: i) the high yet slightly decreasing employment of the population in agriculture starting with the year 2000; ii) the high but nevertheless slightly decreasing employment of the population in services, including here for agriculture (approximately half of the ones employed in this sector at EU level); iii) the decrease of population employed in industry, but still above the EU average 18.1% iv) weak movement of workforce form agriculture and industry towards the services' sector.

In Romania, the "low workforce cost" influences the position of intensive activities in their use of this production factor. The low level of high-tech within the Romanian economy leads to low work productivity for all new members, which affects some of the advantages of low wages.

The analysis of statistical data regarding the population migration from Romania shows a difficult situation. If at the beginning of 1990 the Romanian population was of 23 mil people, in the last 20 years the number dropped dramatically. The most recent statistical data shows that the number of Romanians has decreased to 21.47 millions by July 1st 2009. Between the years 2002-2009, according to NIS (Statistical Yearbook of Romanian 2010), the Romanian population dropped by approximately 211015 persons.

After the migration flow boom from 1990 the number of emigrants dropped bit by bit until it became insignificant (14197 persons in 2006 – 3 time less then 1991 – then the trend became descendant again, in 2007, 8830 persons, and ascendant until 2009- 10211 persons (figure 1)).

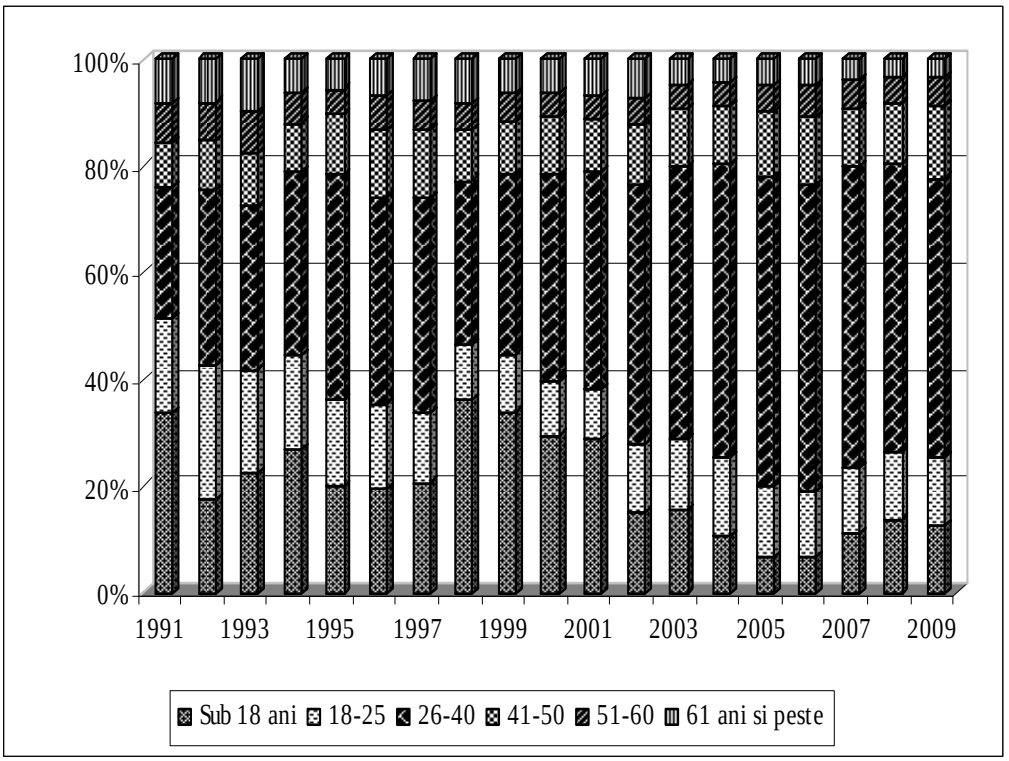
Figure 1 *The evolution of emigrants' number according to sex*



Data source: *Romanian Statistical Yearbook*, 1997-2010, (NIS)

Most of the persons that emigrated are from the able to work category, mostly young and young families, and migrations in this period had and continue to have economic motivation (figure 2).

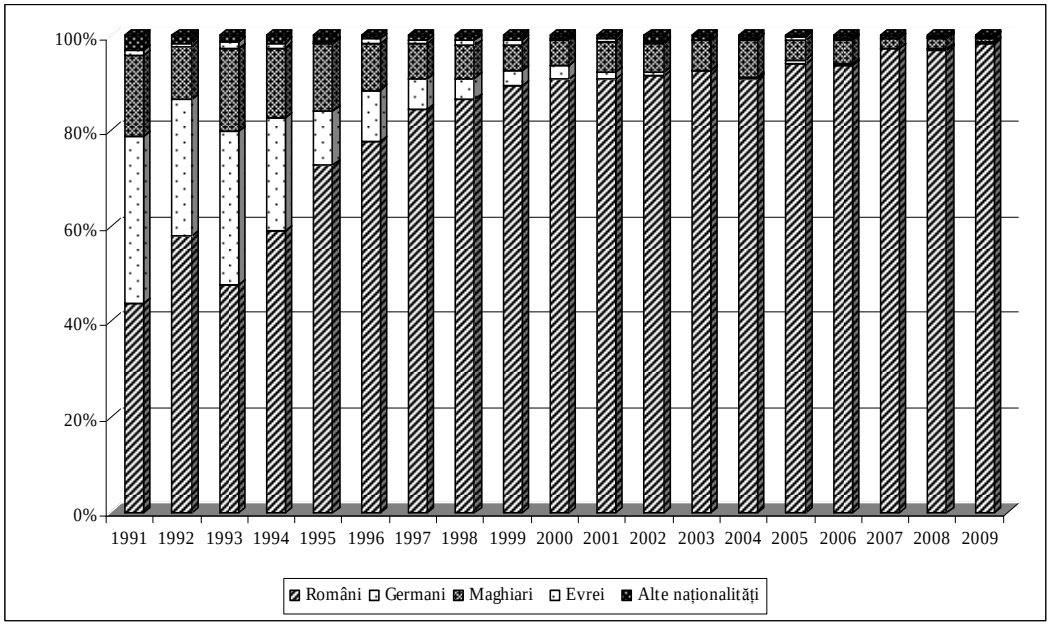
Figure 2 *The evolution of emigrants' number according to age*



Data source: *Romanian Statistical Yearbook*, 1997-20099, (NIS)

Also the numbers of ethnic minorities who left the county are significant for this period (Germans 13.5%, of which 0.015% in 2009 and Hungarians 9.8% of which 1.0% in 2009), figure 3.

Figure 3 *The evolution of emigrants' number according to nationality*



Data source: *Romanian Statistical Yearbook*, 1997-20099, (NIS)

According to WIO, a characteristic of Romanians is the fact that they have, on short term, a high tendency to travel in order to find a work place. Also the Romanians have the highest tendency to migrate for medium and long periods of time (a few years) compared to the other countries from Central and Eastern Europe. But this fact has repercussions for some national economy sectors, in which the lack of workforce is felt. For instance, in constructions, one of the most affected sectors because of work migration, the lack of trained personal, like carpenters, reinforced steel-concrete workers is worrisome; the data from NIS show that the value of constructions increases year by year, and an important part is held by new constructions. These figures prove the construction rate but also the demand for a specific workforce. Around 200,000 Romanian construction workers found a comfortable workplace in Spain and Italy, paid with 800-1000 euro, several times more than in Romania. For instance, in 2006 the number of persons working abroad, with legal forms, was above 2 mil, or more than half of workforce still in Romania – around 4.5 mil persons. This number is bigger if you add the workers without legal forms, in numbers of over 1 mil. Out of these 30% are working in constructions and forestry and 40% in textiles and confections.

Joining the EU implied for Romania the elimination of most commercial barriers, but also direct foreign investments and other forms of capital movement. Because free movement of workers is one of the four fundamental freedoms (movement of goods, services, capital and work force) stipulated in legal EU documents, joining the EU has as outcome a fundamental change of the migration regime for Romanian citizens to EU Members States (freedom of work, right of residence, equal treatment).

The analysis of *migration flows' effects from Romanian in the context of EU enlargement* means acquiring all economic dimensions of an EU member and that should be done by gaining the general equilibrium which contains the freedom of commercial, workforce, and capital flows.

In the context of enlargement the migration from Romania represents a sensitive subject, as it is, next to commercial and capital flows one of the most important mechanisms of European integration.

Migration/emigration from Romania will have effects on the national economy on short, medium and long term:

► on *short and medium term*, the emigration will affect:

i) the availability of workforce and thus will influence the wedges/wages? and employment;

ii) the workforce market through the modification of distribution at regional and sector level of workforce and the relativity of production distribution,

iii) money transfers of Romanian migrants in the country will influence the emigration regions,

iv) the decrease of financial contributions because of the decreasing number of persons from the respective community and the existence of some effects at public transfer level,

v) possible modification in the population structure and the alteration of the exchange terms because of workforce availability in Romania.

► on *long term* the emigration effects on the Romanian economy are hard to anticipate: from the neo-classic point of view, the migration can be considered just as an instrument which contributes to the convergence of integrated economies. On the other hand, migration can be regarded as a phenomenon which leads to an increase in development and growth between countries, in the way that the less developed location will lose numerous production factors.

If EU countries will continue to attract human capital from Romania, then their economy will evolve faster than the Romanian economy and the latter will be left behind. As a conclusion, on long term, the EU and Romania's economic growth will have different configuration.

The economic growth of Romania in the post-integration stage and the title of "EU member" will be influenced by migration flows through exits of human capital because the highly trained are the ones leaving (*brain migration*), and the backwards financial flows associated with migration, that is the amounts sent in Romania by the emigrants.

Regarding the *brain migration*, the analysis, conducted on the basis of data from the European Inquiry on Labor Force and Eurostat, indicates the existence of this phenomenon, but at a small level – less then 0.6%. Under the conditions of Romania's accession to the EU and of free movement, it is possible that the dimension of migration flows shall increase. Taking into account the paper of Robert E. Luca (1998), where education is considered as a determinant factor of economic growth on long run, the emigration of highly skilled persons – brain migration – has a negative impact on the origin country.

In the post-accession period it should be expected that the number of people working abroad will increase, provided that EU states shall promote an openness policy. Most member countries have promoted or would promote, probably, a selective policy, favorable to two categories of labor force: specialists/experts, with high qualifications and workers who would accept uncomely jobs, already refused by the local labor force.

Under the conditions of brain migration, it is not excluded that the professional level of the local labor force shall become inferior to the expected ones. This situation might trigger the diminishment of the creative and productive potential at national level. Thus, the Romanian capacity to overcome productivity, competitiveness and income lags against EU countries is subjected to negative influences. The external labor migration has a positive effect on the destination country, both directly (through the contribution of foreign workers) and indirectly (through the income taxes paid to host country). Also, this is one of the underlying reasons that determine a decrease of national production in the origin country. In the paper of Van der Putten (2002) it is shown that, in the context of Romania's accession to the European structures, the production decrease might by higher than 3%.

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ABSORPTION OF EUROPEAN FUNDS, PRIORITY OBJECTIVE FOR LOCAL COMMUNITIES DEVELOPMENT

CONSTANTIN BRĂGARU*

Abstract
This paper analyzes the absorption capacity of structural funds in Romania in the programming period 2007-2013 and its impact on the development of local communities from the administrative point of view.
The paper also focuses on the need to invest in institutional capacity and efficiency of public administrations using the Operational Programme for Administrative Capacity Development 2007-2013 which is a part of ESF funds that have as general objective to contribute to the creation of a more efficient and effective public administration for the socio-economic benefit of local communities.
Finally, the study reveals the problems and challenges related to local administration and its limited capacity to absorb european funds wich is a sensitive issue, especially because 2011 represents the fifth year of EU assistance for Romania to reach the stage of development of other member states.

***Keywords**: Structural funds, absorption capacity, central and local authorities, local communities, local development.*

Introduction

The present paper begins with a few conceptual definitions of the notions of absorption capacity, absorption rate, administrative absorption capacity, financial absorption capacity. The next section presents the absorption capacity of Romanian central and local authorities and the main obstacles that affect the absorption processes and the local development. Chapter three focuses on the most important financial tool of EU dedicated to a major national priority "Building Effective Administrative Capacity" namely The Operational Programme for Administrative Capacity Development 2007-2013. Chapter four presents the conclusions on the actual stage of local administration capacity to implement integrated projects regarding the development of local communities and the next priority objectives that must be achieved in the next 3 years of EU financial assistance.

1. Conceptual definitions

At the beginning it is necessary to give a few conceptual definitions.

Absorption capacity expresses the degree to which a country is able to spend effectively and efficiently, the financial resources allocated through the Structural Funds. Achieving this objective depends on the one hand, on the ability of the institutional system established by that State to administer the funds in question, and on the other hand, on the beneficiaries potential to whom they are addressed, to create projects and to co-finance[1].

The ***absorption rate*** illustrates the absorption capacity and is defined as "the level of spending as a percentage of the total amount of Structural Funds available". Achieving an absorption rate of 100% or close to this level means that all funds that have been allocated to a country have been fully spent[2].

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[2] Gherghinescu, O. PhD Lecturer, University of Craiova, Rinderu, P. PhD Professor, University of Craiova

Administrative absorption capacity refers to the ability of central and local authorities to prepare plans, projects and programs in a timely manner, to organize an effective partnership, to meet the administrative obligations, to finance and supervise the implementation process, avoiding irregularities[3].

Financial absorption capacity expresses the ability of central and local authorities to co-finance EU supported programs and projects, to plan and guarantee these national contributions in multi annual budgets, and to collect these contributions from several partners, interested in a program or project[4].

2. The absorption capacity of Romanian central and local authorities

As we said before, the administrative capacity defines the ability and qualifications of central and local authorities to prepare programs and projects, to ensure coordination of partners involved, to monitory the implementation of programs and projects in order to avoid irregularities.

Seeing the last statistics regarding the stage of absorption of structural funds, we may conclude that the absorption rate is low . So, according to statistics from february 2011, Romania succeded in achieving the 9,87% from the total allocation of structural funds for 2007-2013 period.

That brings us to the conclusion that for the next 3 years of EU assistance, our public authorities ,central and local ones, must act as a responsible adminstration in order to receive the proper financial support for its actions regarding the development of local comunities .

Taking into account the importance of the above mentioned terms and the purpose of the paper which is, among other things, to analyze the main problems that affect the absorption capacity of central and local public authorities, we have to present the main obstacles affecting the absorption processes in the local communities, such as:

- lack of experience and qualifications for central and local authorities ;
- limited local budgets for public co-financing available;
- lack of funds for the initiation and completion of feasibility studies in order to access projects;
- lack of banking products for covering the private co-financing necessary for the projects budgets;
- lack of partnerships at different levels formed for financial support (public-private partnership)

It is important to note that the problems of absorption capacity depend heavily on institutional factors mostly on the administrative capacity. So, for the next period of time, in order to create an effective and efficient public administration, capable to prepare and implement good projects that can achieve the great objective, "*local development*", the central and local authorities must use one of the most important financing tool of the European Union: The Operational Programme for Administrative Capacity Development 2007-2013.

3. The Operational Programme for Administrative Capacity Development 2007-2013[5]

The initial problem analysis for the OP ACD was based on the next assessments:

- the level of public trust in public administration; the level of public trust is low and caused by: the extent and burden of regulation on the citizen, the poor timeliness in delivery of the public services, a poor motivation of civil servants, and its underlying causes in low levels of remuneration

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Băcanu,D.N. PhD Student, Academy of Economic Studies, Bucharest - *The development potential of the Romanian economy under the structural funds framework*, 2008.

[3] Idem 2.

[4] Droj,L. University of Oradea , Faculty of Economics - *The analysis of absorption capacity of European funding in the north western region of Romania*, 2010.

[5] *Operational Programme* ***Administrative Capacity Development*** **2007-2013,** Ministry of Interior and Administrative Reform, September 2007.

and an unreformed civil service, the large number of laws and the need for their frequent modification;

- the problems related to reliability were grouped under three headings: political administrative, decision making, accountability and organizational effectiveness. These problems are common to both central and local levels of administration;

- the poor responsiveness of public services to the needs of citizens. This issue was used to group problems that directly affect the provision of services, including resource allocation, the need for greater attention to quality, the opportunities for process change.

In this context, The Operational Programme for Administrative Capacity Development is designed to substantially contribute to the achievement of the thematic priority "Building Effective Administrative Capacity", established in the National Strategic Reference Framework (NSRF).

Public institutions can contribute to local socio-economic development programmes through the performance of the following functions:

- improving decision making processes, including the quality of major investment choices (knowledge and human resources) and project selection (information, regulation and feed-back mechanism);
- ensuring a better implementation and enforcement of legislation;
- improving the regulation mechanism especially through setting up a standardized model for quantifying the compliance costs imposed by issued regulation;
- ensuring adequate framework for economic activities (human resources, data, legal);
- improving the public decision making processes;
- ensuring quality and efficiency in public service delivery;
- increasing the number of civil servants who hold professional qualification in HRM, finance, economics and law.

The situation analysis identified three priority sectors for support - health, education and social assistance. The basic idea is that the funds spent in these priority areas will seek to ensure that Romania has a sufficient, adequately trained, well managed work force, in good health so as to be able to develop the economy on competitiveness terms.

The OP ACD recognizes four guiding principles:

1. Participation: the OP ACD seeks to reach a higher level of trust from citizens through the impact on the functioning of institutions, improved responsiveness to public needs and thus significantly positive effects on socio-economic development.

2. Rationalization of structures: the OP ACD is expected to create new structures, to modify the existing ones, to change the relationship between central and local administration, leading to a more responsive and empowered local administration to meet the needs of citizens and to generate local development.

3. Efficiency: the OP ACD seeks a real and substantial improvement in the efficient delivery of decentralized public services at local level - a fall in consumption of resources and a qualitative and quantitative increase in output without a comparative increase in resources.

4. Sustainability: the OP ACD seeks sustainable improvement in the supported fields. This is why the interventions are based on an appropriate combination of structural, process and capacity development change.

The general objective of the OP ACD is *to contribute to the creation of a more efficient and effective public administration for the socio-economic benefit of Romanian society.*

There are also two specific objectives:

1: To achieve structural and process improvements of the public policy management cycle.

2: To improve the quality and efficiency of the delivery of public services on a decentralized basis.

The OP ACD is implemented through three Priority Axes, including a Technical Assistance Priority Axis as listed below:

Priority Axis 1: Structural and process improvements of the public policy management cycle;

Priority Axis 2: Improved quality and efficiency of the delivery of public services on a decentralized basis;

Priority Axis 3: Technical Assistance.

The first two Priority Axes complement each other, but there are relevant differences between them:

The Priority Axis 1 deals mainly with conceptual, horizontal issues in the areas of decision making system, aiming at increasing the quality of decisions within public administration by developing mechanisms for substantiating policy initiatives, increasing the effectiveness of organizational structures through better planning, and strengthening the accountability framework. Activities under Priority Axis 1 concern the system for all central and local administration, including the priority sectors (Health, Education, Social assistance, Training programs for civil servants) ;

The focus of **Priority Axis 2** is on mechanisms for the implementation of policy and the delivery of public services through fiscal and administrative decentralization from central to local administration and targeted improvements in quality, timeliness and assessment of public services.

Both Priority Axes have elements of structural and process change and involve substantial investment in training for civil servants and contractual staff.

This approach of differentiating between quality of service delivery in a decentralized way and strengthening decision making system is considered as sound basis for the development of administrative capacity.

Priority Axes 1 and 2 are supported by five key areas of intervention. These are strategic responses to the problems identified. Figure 1 will show the diagram of the overall OP objective the priority axes and key areas of intervention.

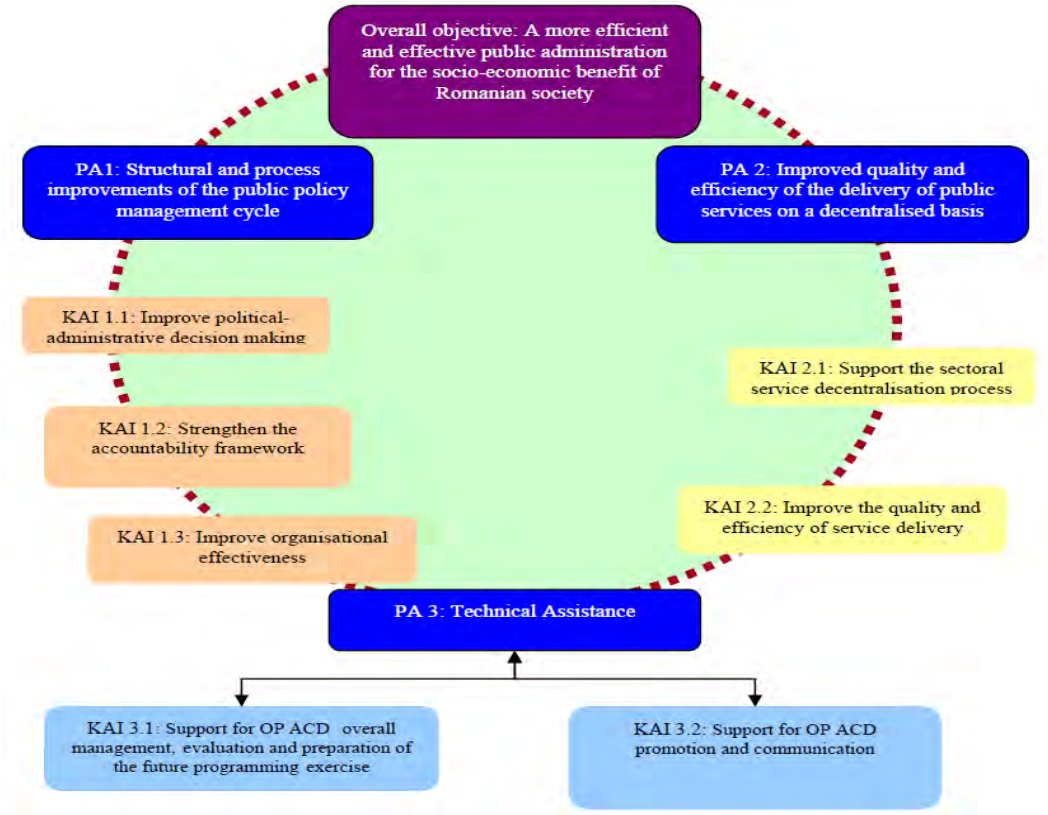

Figure 1. ***Priority Axes (PA) and Key Areas of Intervention (KAI)***

Numerous European documents, such as The Community Strategic Guidelines for Cohesion, The Lisbon Strategy , The European Commission Reports present improvement recomandations for the efficiency of local public administration and point out the need to invest in the institutional capacity of local administration in order to deal with a set of socio-economical challenges and good government, especially regarding the local development management.

Accessing OP ACD, the public administration has the opportunity to develop their capacity as good managers of their own resources and to strengthen the ability of a better representation of their communities, building strong partnerships, implementing and monitoring local policies and well based strategies for socio - economic development.

4. Conclusions

Most of the factors causing a lower absorption capacity of Romanian local and central administration, as potential beneficiaries of EU funds, can be summarized in the following lines:

- Low level of expertise and low qualifications regarding the accession and management of European funded projects;

- Low reaction regarding the process of elaboration, proposing for financing or evaluation and contracting of projects;
- Low financial and management capacity;

Since these are the main causes that threaten the successful absorption of EU funds great measures should be taken both at the level of Programme Management Authorities and at the level of the beneficiaries.

Taking into account the low absorption of EU funds, the Romanian Government had to compile a long term planning of contracting targets, terms of payments and expenditure declarations wich was presented to European Commision in order to avoid the risk of withdrawal of financial support starting with 31th of December 2011.

The action planning sent to the EC identified the same problems and obstacles as we have presented in this paper.

In order to solve these problems the Romanian Government settled semester targets regarding contracting payments and expenditure declarations for each Operation Programme.

Besides the planning mentioned before and in order to overcome the absorption problems we may also mention a few purposes to fulfil[6]:

- Regional development by creating the conditions necessary to stimulate economic growth

of less developed regions, the promotion of sustainable economic and social development. There is requirement of necessary investments in infrastructure, transport, energy, social investment (health, education), environment, tourism investments. In fulfilling of these objectives, there is ROP (Regional Operational Programme) with any destinations on the priority axes. Government must find solutions to ensure the level of public co-financing and to create conditions to attract private capital investment.

- Romania has the opportunity to decide the rate of funding per project taking into account

the balance of the all operational program in question; therefore, authorities should decide the extent of supporting projects, at 100% of Community assistance, to be taken on the sectors which have real value added in the process of economic development, or in the sectors where the potential beneficiaries have difficulty in providing their share of co financing.

- Given the difficulties of local governments to ensure necessary co-financing resources, the easiness for local governments access to financing, by taking the measure to increase the debt ceiling, would mean a concrete granted support for them, conditional on the existence of guarantees property insurance; these measure should be taken with caution, so as not to reach the situation where the government is obliged to support the effort for repayment of loans.

As a conclusion of all the aspects addressed in this paper, one may say that the financial support of EU funds is a great opportunity for central and local administration in order to develop the communities from social and economic point of view. The local public administration authorities are the main actors of local development. They are responsable for ensuring the possibility of developing the local communities in the observance of European standards.

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[6] Idem 2.

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LOCAL COMMUNITIES AND THE PROCESS OF LOCAL ECONOMIC DEVELOPMENT

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Abstract
The present paper focuses on sustainable development and the specific objectives that Romania intends to achieve in order to reach a new model of development that is capable of generating high value added, is interested in knowledge and innovation, and aims to improve the quality of life in harmony with the natural environment.
The paper also analyzes the process of local development that Romania started in 2000 with the financial support of United Nations Development Programme - "Romania within the framework of Local Agenda 21" and continued within Regional Operational Programme 2007-2013.
Finally, the study reveals the regional and local development priorities established by Romania within "The National Sustainable Development Strategy" for the next period of time – 2013-2020 -2030.

Keywords: *local communities, environment, sustainable development, European Union, Local Agenda 21, Regional Operational Programme*

Introduction

The study is structured in five chapters. The first one defines the sustainable development and presents the 2006 EU sustainable development strategy with its key objectives and guiding principles. The second chapter presents the Local Agenda 21 with its contribution to strengthening the capacity of local administrations (in the regions and localities taking part in the programme) to draft and implement concrete policies and plans aimed at promoting sustainable socio-economic development. The third chapter contains a short description of European Structural Funds for regional and local development and few detailed information on the physical and financial progress of Regional Operational Programme (ROP) implementation in our country. The fourth chapter is dedicated to regional and local development objectives for 2013, 2020, 2030 and actions to be taken in accordance with the strategic guidelines of the European Union. The paper ends with some conclusions mentioned in the fifth chapter.

1. Sustainable development. Definition. The EU Strategy for Sustainable Development (SDS)

Sustainable development has been defined in many ways, but the most frequently quoted definition is from *Our Common Future*, also known as the Brundtland Report[1]:

"Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts:

- *the concept of **needs**, in particular the essential needs of the world's poor, to which overriding priority should be given; and*
- *the idea of **limitations** imposed by the state of technology and social organization on the environment's ability to meet present and future needs."*

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[1] World Commission on Environment and Development (WCED). *Our common future.* Oxford: Oxford University Press, 1987 p. 43.

As the concept of sustainable development is defined we may analyze the European Union Strategy for Sustainable Development.

The Sustainable Development Strategy of the European Union (EU SDS), as renewed in 2006, is a framework for a long-term vision of sustainability in which economic growth, social cohesion and environmental protection go hand in hand and are mutually supporting[2].

The renewed strategy sets out a single, coherent approach on how the EU will more effectively live up to its long-standing commitment to meet the challenges of sustainable development. The overall aim of the renewed EU SDS in to achieve continuous improvement of the quality of life and well-being on earth for present and future generations, through the creation of sustainable communities able to manage and use resources efficiently and to tap the ecological and social innovation potential of the economy, ensuring prosperity, environmental protection and social cohesion[3].

The document sets out key objectives and guiding principles to be achieved in the future:

1. Key objectives:

- Environmental protection,
- Social equity and cohesion,
- Economic prosperity,
- Meeting our international responsibilities.

2. Policy guiding principles:

- Promotion and protection of fundamental rights,
- Solidarity within and between generations,
- Open and democratic society,
- Involvement of citizens,
- Involvement of business and social partners,
- Policy coherence and governance,
- Policy integration,
- Use best available knowledge,
- Precautionary principle,
- Make polluters pay.

These principles correspond to the new European model of development and of course to the new model of society based on a stronger economy, a cleaner environment, a better education and health care and social protection.

Every two years the European Sustainable Development Strategy is being put to the test. With its monitoring report, the European Statistical Office Eurostat presents EU data on the development of the sustainability indicators. So, on 24th of July 2009, the Commission of the European Communities presented the 2009 Review of the European Union Strategy for Sustainable Development regarding the policy progress on the EU's sustainable development strategy. This report provides a relative assessment of whether the EU is moving in the right direction. The approach is essentially quantitative, focusing on the EU SDIs (Sustainable Development Indicators) as of October 2008.

[2] Commission of the European Communities,- *Mainstreaming sustainable development into EU policies: 2009 Review of the European Union Strategy for Sustainable Development*, Brussels, 2009.

[3] Council of the European Union, *Review of the EU sustainable development strategy*, , document 10117/06 of 9 June 2006.

Here we have indicators [4]:

SDI Indicators	Headline indicator	EU-27 evaluation of change
Socioeconomic development	Growth of Gross domestic product (GDP) per capita	clearly favourable change/on target path
Climate change and energy	Greenhouse gas emissions*	moderately unfavourable change/far from target path
	Consumption of renewables	moderately unfavourable change/far from target path
Sustainable transport	Energy consumption of transport relative to GDP	no or moderately favourable change/close to target path
Sustainable consumption and production	Resource productivity	clearly favourable change/on target path
Natural resources	Abundance of common birds**	no or moderately favourable change/close to target path
	Conservation of fish stocks***	clearly unfavourable change/moving away from target path
Public health	Healthy life years****	no or moderately favourable change/close to target path
Social inclusion	Risk of poverty****	no or moderately favourable change/close to target path
Demographic changes	Employment rate of older workers	no or moderately favourable change/close to target path
Global partnership	Official development assistance*****	clearly unfavourable change/moving away from target path
Good governance	*[No headline indicator]*	-

LEGEND:

** EU-15; ** Based on 19 Member States; ***In North East Atlantic; **** EU-25, from 2005; ***** from 2005*

The indicators presented in this report show a rather mixed picture. Policy areas where there have been favourable developments include sustainable consumption and production, in particular as regards production patterns, and global partnership. Overall, and with the exception of the headline indicators related to 'climate change and energy', little progress seems to have been made since the 2007 Monitoring Report, confirming that more efforts are necessary in the European Union to get on the pathway to sustainable development[5].

At EU level, sustainable development is primarily promoted and monitored in the context of individual EU policies, and the EU SDS itself plays a central role in promoting the overall objective of sustainable development. The EU SDS has also been instrumental in developing sustainable development strategies at national and regional levels. Today, almost all EU Member States have their own national sustainable development strategies (NSDS) in place, in line with international recommendations of best practice[6].

Romanian SDS coordinators provide a link between the EU SDS and NSDS (National Sustainable Development Strategy Romania).

[4] European Commision , Eurostat Statistical Books - Sustainable development in the European Union, *2009 monitoring report of the EU sustainable development strategy*, 2009.

[5] Idem 5.

[6] Idem 3.

Before the presentation of Romanian NSDS and its development objectives established for 2013-2020-2030, we must analyze the progress that our country succeeded in regional and local development within Local Agenda 21.

2. Implementing Local Agenda 21 in Romanian local communities

Local Agenda 21 (LA 21) was established in 1992 at the United Nations Conference on Environment and Development, also known as the Rio Earth Summit, as the blueprint for sustainability. The nations that have pledged to take part in Agenda 21 are monitored by the International Commission on Sustainable Development and are encouraged to promote Agenda 21 at the local and regional levels within their own countries. Agenda 21 addresses the development of societies and economies by focusing on the conservation and preservation of environment and natural resources.

At the Rio Earth Summit, the United Nations agreed that the best starting point for the achievement of sustainable development was at the local level. In fact, two-thirds of the 2,500 action items of Agenda 21 relate to local councils. Each local authority has to draw up its own Local Agenda 21 (LA 21) strategy following discussions with its citizens about what they think is important for the area.

Agenda 21 focuses on:

- **social and environmental problems**, including air, water and soil pollution, deforestation, biodiversity loss, health, population trends, poverty, energy consumption, waste production, and transport issues

- **sustainable development as a community issue**, involving all sections of society, community groups, businesses, and ethnic minorities.

Since the Earth Summit in Rio, successful LA21 campaigns have taken place in Bolivia, China, Sweden, United Kingdom, Turkey and Bulgaria to name a few countries committed to this concept. Romania is also regarded as a success story in the implementation of Local Agenda 21.

In Romania LA 21 was implemented in five phases till now:

1.Pilot phase – 2000-2003
2.Second phase – 2003-2004
3.Third phase – 2004-2005
4.Forth phase – 2005-2006
5.Fifth phase – 2006- 2008

It is very important to analyze the benefits of local development achieved due to the implementation of LA 21.

The pilot phase started with 9 locations (Baia Mare, Oradea, Iasi, Targu Mures, Galati, Ploiesti, Giurgiu, Ramnicu Valcea, and Miercurea Ciuc), which completed their Local Plans for Sustainable Development. One of the main goals achieved in the pilot phase was the establishment of a methodology, according to which the Local Agendas were drafted in all of the participating cities.

In the second phase, the project expanded to 13 locations, in which the local authorities agreed to draft their Local Action Plans for Sustainable Development, namely Falticeni, Vatra Dornei, Arad, Sighisoara, Medias, Sibiu, Campina, Targu Jiu, Targoviste, Pitesti, Slatina, Bolintin Vale, and Zimnicea and the third phase continued in 3 cities and 1 county**,** covering the Municipalities of Brasov, Borsec, Bistrita, and the Mures County that also prepared their Local Plans for Sustainable Development. The main innovation in that phase was the further expansion of the project to county level through cooperation with the Mureş County Prefecture.

Furthermore, the National Centre for Sustainable Development[7] added a new dimension to the project, in 2005, through its partnership with the Canadian International Development Agency (CIDA) for the purpose of introducing the Integrated Environmental Assessment (IEA) practice in Romania. The main achievements of that initiative consisted in:

- Building NCSD's capacity to provide expert advice and evaluate the environmental impact and sustainability of government and NGO programmes as well as private sector; projects.
- The beginning of IEA training provided by NCSD to 19 local NGOs and institutions.
- Enhanced cooperation with the private sector by carrying out an IEA training course for the ROMAQUA GRUP S.A. (Mineral water Company) in Borsec and other 10 private companies.

The goal of the fourth phase was to continue strengthening the institutional capacity and raise the awareness of the authorities and the public regarding the implementation of the principles of sustainable development in the local and county development strategies and action plans in another 3 cities and 1 county, namely Constanta, Medgidia, Gura Humorului, and Brasov County**.** It is important to emphasize the support rendered by UNDP and NCSD to the local authorities for the preparation of the relevant documents for the concession of the water supply/waste water treatment system in the city of Medgidia.

For the purpose of developing the institutional capacity of the selected local authorities, LA21 offices were established in each location. The participative mechanisms at the local level was accomplished by informing the local civil society about the project and organizing public debates that made it possible to finalize the three essential documents for the implementation of the LA21: the local strategy for sustainable development, the local action plan, and the portfolio of priority projects.

Continuing the established procedures for the introduction of the principles of sustainable development in the work of local municipalities, in the fifth phase, LA21 project was expanded to other 4 cities (Alba Iulia, Tulcea, Ovidiu and Babadag.), 3 counties (Alba Iulia, Neamt and Tulcea), the 2nd District of Bucharest and 2 communes in Romania (Falciu -Vaslui county and Mihail Kogalniceanu -Constanta county). The Local Strategy for Sustainable Development, the Local Action Plan and the Portfolio of priority projects were finalized in all above communities.

During the years 2009-2010, the National Centre for Sustainable Development offered consultancy to local administrations that were engaged in the implementation Local Agenda 21. The aim was to help strat the actual realisation of the priority projects that had been identified as eligible for public-private partnerships.

Localities and topics:

- Mures County Council – construction of an airport;
- Ovidiu – rehabilitation of water supply and sewerage system;
- Falciu - construction of sewerage system; rehabilitation of educational infrastructure;
- Babadag – rehabilitation of the city park; wind energy system[8].

After Romania's accession to the EU, the projects developed under LA21 became eligible for financing from the Structural Funds.

[7] The National Centre for Sustainable Development (NCSD) was established in 1997 under the aegis of the Romanian Academy. It is an independent non-governmental organization and a leading national consultant on sustainable development issues. The mandate of the NCSD is to identify the priorities for sustainable development in Romania and to address them through specific projects at national and local levels, to promote capacity building with a particular emphasis on human resources and to facilitate meaningful debates on the principles and practice of sustainable development in line with Romania's commitments as a member state of the European Union.

[8] Idem 8.

3. European Structural Funds for regional and local development. Regional Operational Programme (ROP)

Despite heavy technical assistance delivered in the past decade, local governments still lack capacity in strategic participatory planning at the local and county government level. Since presenting well- defined projects that respond to the needs of the communities is a fundamental criteria for success, this situation directly affects the ability of local governments to access structural funds. Two possible causes for this situation are:

- Insufficient and untargeted training that would support personnel in accessing and absorbing structural funds.
- An organizational culture that is unsupportive to various post-accession challenges at local and regional government level[9].

Further on we will analyze the ROP because, unlike the other operational programmes :

- It has a clear local dimension in addressing socio-economic problems from the local point of view and capitalizes on local resources and opportunities;
- It privileges Regions relatively lagging behind and less developed areas in ensuring them the existence of a minimum set of preconditions for growth but does not have redistributive purposes per se;
- ROP key areas of intervention are complementary to those of the other OPs and expected to operate in synergy with these;
- It fosters a bottom up approach to economic development;
- It takes into consideration the underdeveloped stage of local programming in the Country by envisaging broadly common-to-all thematic priority axes at the National level, namely:

Priority axis 1: Support to sustainable development of urban growth poles
Priority axis 2: Improvement of regional and local transport infrastructure
Priority axis 3: Improvement of social infrastructure
Priority axis 4: Strengthening the regional and local business environment
Priority axis 5: Sustainable development and promotion of tourism
Priority axis 6: Technical assistance [10]

So, according to the Authority for Coordination of Structural Instruments statistics regarding the contracted projects financed under operational programmes , at the end of December 2010, the rate absorption of structural funds was low. The most accessed programme is The Regional Operation Programme with a percentage of 29,79%, followed by the Operational Programme for Human Resources Development with 27,03% and Sectoral Operational Programme Increase of Economic Competitiveness with 18,58%.

Because The Ministry of Development, Public Works and Housing didn't publish yet the 2010 Annual Implementation Report we may take a look over the 2009 report in order to see how were completed all priority axes and major fields of intervention of the ROP[11].

[9] United Nations Development Programme Romania - *Expanded Implementation of Local Agenda 21 in Romania*.

[10] Ministry of Development, Public Works and Housing - *Regional Operational Programme 2007-2013*.

[11] The Ministry of Development, Public Works and Housing, *2009 Annual Implementation Report*, 29.06.2010

1. PRIORITY AXIS 1: SUPPORT TO SUSTAINABLE DEVELOPMENT OF URBAN GROWTH POLES

Information on the physical and financial progress of the priority

Indicators		**2007**	**2008**	**2009**	**2010**	**Total**
Integrated urban development plans aproved (no)	Achieved	0	0	7	-	
	Target					30
	Baseline					
Projects ensuring sustainability for improving urban public infrastructure and urban transport (no)	Achieved	-	-	0		
	Target					60
	Baseline					
Projects promoting sustainable development in businesses area (no)	Achieved	-	-	0	-	
	Target					15
	Baseline					
Projects ensuring the rehabilitation of social infrastructure including social centers and improving social services (no)	Achieved	-	-	0	-	
	Target					25
	Baseline					
Inhabitants benefiting from the implementation of integrated urban development plans (no)	Achieved	0	0	0	-	
	Target					400.000
	Baseline					
Companies established in the "urban action zones" (no)	Achieved	0	0	0	-	
	Target					400
	Baseline					
Jobs created / saved in "urban action zones" (no)	Achieved	0	0	0	-	
	Target					1500
	Baseline					

2. PRIORITY AXIS 2: IMPROVEMENT OF REGIONAL AND LOCAL TRANSPORT INFRASTRUCTURE

Information on the physical and financial progress of the priority

Indicators		2007	2008	2009	2010	Total
Key Areas of Intervention 2.1: Rehabilitation and modernization of county roads and urban streets network - including construction/rehabilitation of ring roads						
Length of rehabilitated/ modernized county road (km)	Achieved	0	0	0	-	
	Target					877
	Baseline					
Length of rehabilitated/ modernized urban streets (km)	Achieved	0	0	10	-	
	Target					411
	Baseline					

Length of rehabilitated /constructed by-passes (km)	Achieved	0	0	7	-	
	Target					219
	Baseline					
Increase merchandise traffic (%)	Achieved	0	0	0	-	
	Target					10
	Baseline					
Increase passengers traffic (%)	Achieved	0	0	0	-	10
	Target					
	Baseline					

3. PRIORITY AXIS 3: IMPROVEMENT OF SOCIAL INFRASTRUCTURE

Information on the physical and financial progress of the priority

Indicators		**2007**	**2008**	**2009**	**2010**	**Total**
Key Areas of Intervention 3.1: Rehabilitation, modernization and equipping of health services' infrastructure						
Rehabilitated/equipped health care units (no)	Achieved	0	0	0	-	
	Target					50
	Baseline					
Persons benefits by to the rehabilitated /modern/equipped health care units (no/day)	Achieved	-	-	0	-	
	Target					30000
	Baseline					
Key Areas of Intervention 3.2: Rehabilitation, modernization, development and equipping of social services infrastructure						
Rehabilitated/equipped social services infrastructure (no)	Achieved	0	0	0	-	
	Target					270
	Baseline					
Persons benefits by to the rehabilitated /modernized/equipped social services centers (no)	Achieved	-	-	0	-	
	Target					10000
	Baseline					
Key Areas of Intervention 3.3: Improving the equipment of operational units for public safety interventions in emergency situations						
Mobile units equipped for emergency interventions (no)	Achieved	0	0	0	-	
	Target					510
	Baseline					
Average response time of mobile units in rural areas (min) – infrastructure of emergency interventions	Achieved	na	na			
	Target					Up to 12' in rural area
	Baseline					
Average response time of mobile units in urban areas (min) – infrastructure of emergency	Achieved	na	na			

interventions						
	Target					Up to 12' in urban area
	Baseline					
Key Areas of Intervention 3.4: Rehabilitation, modernisation, development and equipping of pre-university, university education and continuous vocational training infrastructure						
Rehabilitated/equipped schools in compulsory education (no)	Achieved	0	0	0	-	
	Target					130
	Baseline					
Rehabilitated/equipped pre-university campuses (no)	Achieved	0	0	0	-	
	Target					30
	Baseline					
Rehabilitated/equipped centers for continuous vocational training (CVT) (no)	Achieved	0	0	0	-	
	Target					35
	Baseline					
Rehabilitated/equipped university campuses (no)	Achieved	0	0	0	-	
	Target					15
	Baseline					
Pupils access to rehabilitated/modern/ equipped schools (no)	Achieved	0	0	0	-	
	Target					40000
	Baseline					
Children from disadvantage group (rural pupils, Rroma pupils etc.) that access compulsory education (no)	Achieved	0	0	0	-	
	Target					5000
	Baseline					
Participants in continuous vocational training in rehabilitated /modern/ equipped centre (no)	Achieved	-	-	0	-	
	Target					3000
	Baseline					
Student's number in rehabilitated/equipped university campuses (%)	Achieved	0	0	0	-	
	Target					2000
	Baseline					

4.PRIORITY AXIS 4: STRENGTHENING THE REGIONAL AND LOCAL BUSINESS ENVIRONMENT

Information on the physical and financial progress of the priority

Indicators		**2007**	**2008**	**2009**	**2010**	**Total**
Key Areas of Intervention 4.1: Development of sustainable business support structures of regional and local importance						
Business support structures assisted (no)	Achieved	0	0	3	-	
	Target					15
	Baseline					

Occupation rate in business support structures (after 2 years since the project was finalized) (%)	Achieved	0	0	0	-	
	Target					50
	Baseline					
New jobs created in the supported business structures (no/FTE)	Achieved	0	0	0	-	
	Target					3.000
	Baseline					
Key Areas of Intervention 4.2: Rehabilitation of unused polluted industrial sites and preparation for new activities						
Unused polluted industrial sites rehabilitated and prepared for new economic activities (ha)	Achieved	0	0	0	-	
	Target					500
	Baseline					
New jobs created in the supported business structures (no)	Achieved	0	0	0		
	Target					1000
	Baseline					
Key Areas of Intervention 4.3: Support the development of micro-enterprises						
Micro-enterprises supported (no)	Achieved	0	0	319	-	
	Target					1500
	Baseline					
New jobs created in the supported micro-enterprises (no)	Achieved	0	0	201	-	
	Target					3000
	Baseline					

5.PRIORITY AXIS 5: SUSTAINABLE DEVELOPMENT AND PROMOTION OF TOURISM

Information on the physical and financial progress of the priority

Indicators		**2007**	**2008**	**2009**	**2010**	**Total**
Key area of intervention 5.1 - Restoration and sustainable valorization of cultural heritage and setting up/ modernization of related infrastructure						
Projects in tourism field (no)	Achieved	0	0	16	-	
	Target					100
	Baseline					
Jobs created / saved at the end of project implementation (no)	Achieved	0	0	0		
	Target					200
	Baseline					
Key area of intervention 5.2 - Creation, development, modernization of the tourism infrastructure for sustainable valorization of natural resources and for increasing the quality of tourism services						
Project in tourism field (no)	Achieved	0	0	27	-	
	Target					300
	Baseline					
Supported SSM (no)	Achieved	0	0	21	-	
	Target					350
	Baseline					
Number of tourists arrived in	Achieved	0	0	0	-	

rehabilitated/modern/equipped infrastructure (no)						
	Target					400000
	Baseline					
Number of tourists overnights-staying in rehabilitated/modern/equipped infrastructure (no)	Achieved	0	0	0	-	
	Target					800000
	Baseline					
Jobs created / saved at the end of project implementation (no)	Achieved	0	0	0	-	
	Target					800
	Baseline					
Key Area of Intervention 5.3 - Promoting the tourism potential and setting-up the needed infrastructure in order to increase Romania's attractivity as tourism destination						
Promotional campaigns for advertising the tourism brand (no)	Achieved	0	0	7	-	
	Target					10
	Baseline					
National Tourism Information and Promotion Centres supported (no)	Achieved	0	0	0	-	
	Target					10
	Baseline					
Tourists visiting the Information and Promotion Centres (no)	Achieved	0	0	0	-	
	Target					1 mil.
	Baseline					
Web site visitors (no)	Achieved	0	0	0	-	
	Target					1.5 mil.

6. PRIORITY AXIS 6: TECHNICAL ASSISTANCE
Information on the physical and financial progress of the priority

Indicators		**2007**	**2008**	**2009**	**2010**	**Total**
Key Areas of Intervention 6.1: Support for the implementation, overall management and evaluation of the ROP						
Evaluation and other type of studies undertaken (no)	Achieved	0	0	1	-	
	Target					40
	Baseline					
Number of participants to training programs (IB/MA' beneficiaries, (no)	Achieved	0	760	2422	-	
	Target					2000
	Baseline					
Number of training days/participant	Achieved	0	2260	4245	-	
	Target					10000
	Baseline					
Key Areas of Intervention 6.2: Support for the publicity and information activities of the ROP						
Number of communication and promoting events (no)	Achieved	0	500	944	-	
	Target					900

	Baseline					
Increase awareness of population/ potential beneficiaries on ROP financing opportunities (%)	Achieved	0	30%	30%	-	
	Target					20%

After the presentation of Romania's achievements on regional and local development it is necessary to take a look over the main objectives and key priorities for the next period of time established within The National Sustainable Development Strategy - Romania 2013-2020-2030.

4. The National Sustainable Development Strategy - Romania 2013-2020-2030

Romania established the actions to be taken and the objectives for 2013, 2020 and 2030 in accordance with the Strategic guidelines of the European Union.

The key challenges[12] for aims at:

Climate change and clean energy

Overall Objective of the EU SDS: To limit climate change and its costs and negative effects to society and the environment

Horizon 2013. National Objective: To meet the short and medium-term energy demand and to create the prerequisites for national energy security in the long run, responding to the requirements of a modern market economy for safety and competitiveness; to fulfil the obligations under the Kyoto Protocol regarding the reduction by 8% of greenhouse gases emissions; to promote and implement measures for adjustment to the effects of climate change and to observe the principles of sustainable development.

The main strategic guidelines of the Romanian energy policy are:

- Energy security
- Sustainable development
- Competitiveness

Horizon 2020. National Objective: To ensure the efficient and safe operation of the national energy system; to attain the current average levels of energy intensity and energy efficiency of the EU; to fulfill Romania's obligations in accordance with the EU legislative package on climate change and renewable energy and with international targets following the adoption of a new global agreement on that subject; to promote and implement measures for adaptation to the effects of climate change and to observe the principles of sustainable development.

Horizon 2030. National Objective: To align Romania's performance with the EU average in terms of energy and climate change indicators; to meet Romania's commitments on reducing greenhouse gases emissions in accordance with existing international and EU agreements; to implement further measures for adjustment to the effects of climate change.

Sustainable transport

Overall Objective of the EU SDS: To ensure that transport systems meet society's economic, social and environmental needs whilst minimising their undesirable impacts on the economy, society and the environment.

Horizon 2013. National Objective: To promote in Romania a transport system that would facilitate the safe, fast and efficient movement of persons and goods nationally and internationally, in accordance with European Union standards.

Horizon 2020. National Objective: To attain the current EU average level of economic, social and environmental efficiency of transport and to achieve substantial progress in the development of transport infrastructure.

[12] The National Sustainable Development Strategy - Romania 2013-2020-2030.

Horizon 2030. National Objective: To get close to the average EU level of 2030 in relation to all the basic sustainability indicators for transport activities.

Sustainable consumption and production

Overall EU SDS objective: To promote sustainable consumption and production patterns.

Horizon 2013. National Objective: To achieve eco-efficient management of resource consumption and to maximize resource productivity by promoting a pattern of consumption and production that makes sustainable economic growth possible and brings Romania gradually closer to the average performance of the other EU countries.

Horizon 2020. National Objective: To decouple economic growth from environmental degradation by reversing the ratio between resource consumption and creation of value added; to move closer to the average performance levels of the EU in terms of sustainable consumption and production.

Horizon 2030. National Objective: To come close to the average level attained at that time by the other EU Member States in terms of sustainable production and consumption.

Conservation and management of natural resources

Overall Objective of the EU SDS: To improve management and avoid overexploitation of natural resources, recognizing the value of ecosystem services.

Horizon 2013. National Objective: To narrow the current disparities in relation to other EU Member States in terms of coverage and quality of environmental infrastructure by providing efficient public services in this domain, following the concept of sustainable development and respecting the «polluter pays» principle.

Horizon 2020. National Objective: To attain the present average EU level for the main indicators describing the responsible management of natural resources.

Horizon 2030. National Objective: To come significantly close to the environmental management performance of the other EU Member States at that time.

Public health

Overall Objective of the EU SDS: To promote equal access to high-quality health care and to improve protection against threats to health.

Horizon 2013. National Objective: To improve the structure of the health sector and the quality of medical assistance and care provided through medical services; to improve the state of public health and the performance of the healthcare system.

Horizon 2020. National Objective: To come closer to the current average public health standards and the quality of medical services provided in the other EU countries; to integrate healthcare and demographic factors in all Romanian public policies.

Horizon 2030. National Objective: To achieve full alignment with the average performance level of the other EU Member States, also with regard to healthcare financing.

Social inclusion, demography and migration

Overall EU-SDS Objective: To create a socially inclusive society by taking into account solidarity between and within generations and to secure and increase the quality of life of citizens as a precondition for lasting individual well-being.

Horizon 2013. National Objective: To create a modern legislative, institutional and participatory framework for reducing the risks of poverty and social exclusion, promoting social

cohesion, gender equality and cultural diversity, and also for the responsible management of migration and demographic change.

Horizon 2020. National Objective: To promote consistently, in accordance with the new legislative and institutional framework, the EU norms and standards regarding social inclusion, gender equality and active support to underprivileged groups; to proceed with the gradual implementation of the long-term national strategy on demographic change and migration. Horizon 2030. National Objective: To come significantly close to the average level of the other EU Member States in terms of social cohesion and quality of social services.

Global poverty and the challenges of sustainable development

Overall Objective of the EU SDS: To promote sustainable development globally, and to insure the coordination of the internal and foreign policies of the European Union with the principles of sustainable development and its related engagements.

Horizon 2013. National Objective: To implement the required legislative and institutional instruments pertaining to Romania's status as a donor of development aid according to its obligations as an EU Member State; to establish the priorities and means of action and to allocate for this purpose approximately 0.25% of the gross national income (GNI) by 2013 and 0.33% by 2015, with the intermediary target of 0.17% of GNI by 2010.

Horizon 2020. National Objective: To define the specific areas in which the expertise and resources available in Romania can serve the aims of development assistance, and to allocate for this purpose around 0.5% of gross national income.

Horizon 2030. National Objective: To fully align Romania with the policies of the European Union in the sphere of development cooperation also in terms of budget allocations as a percentage of gross national income.

5. Conclusions

The analysis presented in the previous chapters has emphasized Romania stage of development at regional and local level, the local governments implemented projects and the future development directions.

The sustainable development of the local communities is a present and future option of the national policy that seeks economic growth and quality of life's improvement.

Becoming a member state of the European Union, Romania must cope with new challenges and objectives. One of these objectives is the sustainable development of our local communities. This objective can be achieved by local governments because they represent powerful actors in their local economies. They must build and maintain infrastructure that is essential for economic activity. They must set standards, regulations, taxes, and fees that determine the parameters for economic development.

In essence, one can say that the use of European Union Funds is an opportunity for economic development in Romania, in the context in which their use can generate sustainable economic and social development.

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ORGANIZATIONAL CHANGE IN KNOWLEDGE-BASED FIRM

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Abstract
For sustainable competitive advantages gain, modern organizations, knowledge-based, must promote a proactive and flexible management, permanently connected to change which occur in business environment. Contextually, the paper analyses impact factors of the environment which could determine a firm to initiate a programme strategic organizational change. Likewise, the paper identifies the main organizational variables involved in a changing process and emphasizes the essential role which managers and entrepreneurs have in substantiation, elaboration and implementation of organizational change models.

Keywords: *knowledge-based firm, organizational change, impact factors, organizational variables, competitive advantage.*

1. Introduction

In the society and knowledge-based economy context, change is by itself the essence of business development. Approach of change became a key-element of competitive advantage, because only by a coordination of employees with the purpose of the fastest implementation of change, organization may react to market pressures before a context modification. [6]

Continuous change of the organizations evolutional environment is determined by a series of factors within which we remind technological evolution, knowledge boom, a fast moral depreciation of products, work conditions and mutation in labour power character. [4]

Managers and entrepreneurs in modern firms, based on knowledge, must identify, analyze, and evaluate systematically main variables of impact on the environment inside and outside the organization. To enter the sphere of operational excellence, organizations must show flexibility, substantiate and implement proactive business strategies, which include initiation processes and periodical implementation of proper organizational changes. Viable organizational system is the flexible one, which can answer favourably to any challenge of the environment. [9]

An eloquent example on what concerns the understanding of organizational change is famous company Hewlett Packard. William Redington Hewlett, one of the co-founders of the company, states: "Above anything, consider change inevitable, do not try to oppose it. Always be ready for 180˚ turn when discover a new and promising direction".

A significant number of papers, studies and articles are found in literature, which address issues of organizational change, underlining the necessity of projecting and implementing several programmes of organizational change in modern firms, as a sine qua non condition of competiveness. [1, 3, 10]

2. Conceptual delimitation

Established on strategic diagnosis-analysis, organizational change covers a sum of activities for the firm to be prepared to gain necessary competence to implement a new business strategy. An important premise of subscribe a firm on the trajectory of economic and social efficiency is represented by the existence of an organizational infrastructure, flexible and adaptable. In the context of contemporary economic dynamics, change became necessary, for medium and long term

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objectives are permanently reviewed and modified according to registered evolution in business environment.

Organizational change implies a change of mission and vision in organization, introducing new technologies, a modern system of performance evaluation, redesigning remuneration system, orientation towards new clients' target-groups, as well as applying several complex managerial methods such as management by objectives, management by projects, management by budgets, total quality management and so on. [11]

Organization change corresponds to new orientation, fundamental and radical, concerning ways which the organization follows to develop activity, having essential implication on the behaviour of all its members. Launching a process of change implies the awareness of change necessity, to manifest desire of change, accumulation of knowledge as well as formation of necessary ability for implementing change.

Peter. M. Senge [13], management professor at Massachusetts Institute of Technology, introduced the notion of "learning organization". In such organizations, it is are developed and grown new models of thinking, human resource are permanently stimulated in the learning process for gaining competences and every experience is considered as being an opportunity to learn.

Knowledge-based firm is, by, an organization which learns, and also a sustainable organization, an entity generating added value integrated in economic, social and ecologic environment, which, by a proactive management, flexible and innovative, creates constantly competition advantages reported to competitive firms.

For adjusting to business environment mutations, knowledge-based modern firms must be permanently connected to change. Over time were developed a series of models which support managers and entrepreneurs in the trial of understanding and implementing change. Organizational change models are based on gaining consensus between human resources of organization. One of the model's, such as Lewin's, helps managers to analyse change, to preview probable consequences and identify solutions to decrease resistance and difficulties of such step.

Lewin's model suggests that it should be accomplished a balance between change sources and resistant forces to change. Robbins appreciates a simple announcement of change and does not eliminate previous conditions and its success. For gaining a sustainable effect of change, it is necessary that managers to anticipate and to evaluate forces which are opposed to change and reduce intensity.

Beer and Eisenstat [2] believe that enterprises tend to oppose a greater resistance to change if this is not of paramount importance for their surviving. Other authors state that for reducing resistance to change, managers must induce to their employees the sense of urgency.

3. Forces of organizational change

First step in initiating organizational change represents identifying factor which greatly influenced the evolution of firm. Researches of specialists and professional consultants reveal the connection between these factors, mainly, to the firm environment, to the organizational and management structure. [15]

Of the environmental factors which could generate failure of and organization we remind new firms on the market, technological innovation of competitors, and dependence on a supplier or a single costumer and so on. On what concerns organizational structure, in most of small and medium enterprises, this is flexible and marks, usually, a potential source of success. Issues on inadequacy of any changes of the organizational structure may appear in some medium firms which develop diverse activities or are expanding, such as larger firms.

In small enterprises and many other small firms, management factors which generate failure are, in our opinion, the insufficient managerial training of entrepreneur, promoting an authoritarian managing style and inadequate coordination of developed activities within the organization. In medium and large enterprises, management factor which generate failure are, mainly, the excessive

analysis of information and the existence of some conflicts which can determine serious dysfunctions when they neither are nor well controlled. Groups in conflict reduce efficiency and often establish personal objective to prevail on those organizational. For such reason, conflict must be controlled thus to remain in accepted limits.

Modern organizations represent open economic systems to correspond more diverse consumers' demand. Firm's ability to adapt market manifestation demands depend on their flexibility. Henk Volberda considers that flexibility must represent a defining characteristic of organizations. Thus, from organizational perspective, flexibility could be defined as being the capacity of a firm to react to change. In a turbulent business environment, development strategies must be permanently filled and connected to programmes of planned strategic change. Actually, strategic organizational change includes continuous initiatives starting at entrepreneurs and manager. Management implementation of total quality is and example of organizational change within a firm.

Forces to determine an organizational change could be internal or external. Strategic orientation change of competitors, government regulation, new firms on the market technological innovation of competitors and product and services quality growth offer by these represent forces to determine a firm to resort to making some strategic organizational changes.

Organizational change could find its origin inside and enterprise – a new vision of entrepreneur or managerial team, introducing a new fabrication technology, developing a product or a service, intention to enter a new market. Change can produce reactively (as a response) or proactively (as an initiation). Otherwise, the firm either anticipates the necessity

Several authors appreciate that organizational change must be approached as a phenomenon which is the result of the interaction between economic, technological, social and political factors on the environment.

4. Variables involved in organizational change

Despite the firm's proactive or reactive approach on strategic organizational change, should be established main involved variables of changing process. As we see it, organizational change variables are strategic view, objective, organizational structure, technology, organizational culture and managerial techniques. Such variables are found either totally or partly, in different proportions, based on the firm's dimension. In small enterprises, main variables of organizational change are represented in the entrepreneur's view also by organizational culture which, at its turn, carries the imprint of his personality. In medium enterprises with productive profile or which develops more activities, as well as in large enterprises, in the process of organizational change are found, usually, all above mentioned variables.

Key-elements of organizational change, human resources – entrepreneurs, managers and employees – create and implement organizational change model, connecting mentioned variables and coordinating interaction between these. In many firms, strategic vision and system of objectives are not connected adequately. Entrepreneurs and managers must have the capacity to communicate employees their strategic vision and firm's mission. Unfulfilled objectives, inadequate communication between different hierarchical steps, lack of management involvement are obstacles in changing process. [7]

Implementing an organizational change programme implies operationalization of certain systems, methods and managerial techniques which to lead to reaching afferent objectives for new strategic orientation of the enterprise. Managerial practice targets the connection between human resources and organizational activities, as well as regulating and developing principles to govern labour process of the firm. If employees are not motivated to fulfil attributed tasks or do not understand the report between their objectives and the firm's objectives, we may find a "system incoherence" which is necessary to be analyzed and solved for the enterprise to be successful in the change initiative. [14] Rogers and Byham suggests that posts in a firm should be projected such that

subscribed tasks, competencies and responsibilities to be congruent with the new organizational strategy. [12]

Organizational change represents an integrating process in which are involved two interconnected subsystems: human resources – managers and employees – and organizational change variables – strategic vision, objectives, organizatorional structure, technologies, organizational culture, managerial methods and techniques.

Vectors which define connection between the two subsystems are orientation towards change, change resistance and organizational learning. Human resources are main actors of change. Managers and entrepreneurs have an important role by their strategic vision leads the effort of change, as well as the involved process in organizational change. Also, managers and entrepreneurs must know what are the employees' opinions and attitude towards change and to induce a feeling of mobilization for accomplishing a sustainable change. Communication between managers and employees is essential for understanding the essence of change and for implementing it successfully.

Strategy changes of competitors, technology mutations, law regulations, and new firms as well as the general trend to quality growth of products and services lead to certain organizational changes. A new strategic vision of managers, introducing new modern fabrication technologies, developing a new product or service and entering a new market implies profound change on organizational environment.

Taking into account pressures of the environment, modern firms, knowledge-based, must have flexible and adaptable infrastructures which to allow reaching high levels of performance. The greatest difficulties are not connected to technological change and managerial methods, though to human resources change.

5. Conclusion

Managers and entrepreneurs in modern firms, based on knowledge, must identify, analyze, and evaluate systematically main variables of impact on the environment inside and outside the organization. To enter the sphere of operational excellence, organizations must show flexibility, substantiate and implement proactive business strategies, which include initiation processes and periodical implementation of proper organizational changes. Viable organizational system is the flexible one, which can answer favourably to any challenge of the environment. Knowledge-based firm is an organization which learns and a sustainable organization, integrated in economic, social and ecologic environment which, by a proactive, flexible and innovative management creates constantly competitive advantages reported to competitors. Organizational change implies new competences, as a result to gathering information through continuous learning process.

Strategic orientation change of competitors, government regulation, new firms on the market, technological innovation of competitors as well as quality of products and services growth offered represent external forces that determine the firm take use of strategic organizational change. Internal forces of organizational change we remind the new vision of entrepreneur and managerial team, introducing a fabrication technology, development of a product or service, re-projecting organizational structure, operationalization of new management methods, intention to enter a new market and so on.

Organizational change represents an integrating process in which it are involved two interconnected subsystems: human resources – managers and employees – and organizational change variables – strategic vision, objectives, organizational structure, technologies, organizational culture, managerial methods and techniques.

Human resources are the main actors of change. Managers and entrepreneurs have a determinant role in transformation of firms they lead in flexible organizations, towards change, for they create and implement projects of planned strategic change, connecting involved organizational variables and coordinating interactions between these. In the society context and modern knowledge-

based economy it is necessary a new mentality of managers and entrepreneurs on what concerns change, which must be gradually induced to employees, in an adequate cultural model, thus to pass from acceptant of change to initiators.

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INCREASING EFFICIENCY AND EFFECTIVENESS IN LARGE COMPANIES BY COMBINING SIX SIGMA WITH BPM

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Abstract
The paper underlines the importance in combining the Six Sigma methodology with BPM technology. Companies are just discovering the benefits of combining BPM and Six Sigma. Ideal for enhancing the long-term performance of business processes, the BPM/Six Sigma union helps companies better characterize, understand, and manage entire value chains. It also helps companies improve control and predictability of corporate business processes and generate sustainable enterprise improvements in performance levels.The study starts with the concept of Six Sigma which was powered by principles governed by continuous improvement. In pure terms, Six Sigma helps manufacturing organizations reduce the number of errors or reduce the number of defective products manufactured by them. This is achieved by a regular sharpening of the process and constant monitoring on processes and how they can be improved. This approach had been truly effective in ensuring quality in a manufacturing environment and was later adopted by the services industry during the 90s. However, as the Six Sigma framework relied heavily on the collection and analysis of data of individual processes, synchronizing them between departments was ignored. This resulted in improvement benefits being limited to specific functions only, without taking into consideration the integration with other processes. Another weakness of the Six Sigma methodology is the lack of control used to sustain improvements achieved. This stems from the fact Six Sigma utilizes manual processes to do this, an approach that lacks effectiveness. In this sense, Business Process Management (BPM) initiatives address areas that Six Sigma falls short of, in line with the purpose of achieving excellence in organizations. These two methodologies complement each other to compensate for areas of weaknesses. Although BPM addresses process enhancements and monitoring from a holistic viewpoint, it fails to address the analytical requirements to solve complex issues.

Keywords*: Six Sigma, BPM, efficiency, effectiveness, managerial tool*

1. Introduction

The managerial tools and the methodological elements used in running of complex managerial initiatives, inclusively in promoting and using them represents, with no doubt, the fundamental combination of the managerial, economical and commercial success of any organization; proper knowledge and operationalization of the most adequate systems, methods and techniques of management provide a favorable answer to the question: How do we lead?

This is why ,in the following pages ,we approach two of the most representative managerial tools Six Sigma and BPM (business process management) which combined sustain the idea that the managerial methodologization is the most facile modality of amplifying the efficiency and effectiveness of any large company.

This article focuses on answering following questions. What is BPM? .What is Six Sigma? .How can BPM and Six Sigma combined increase effectiveness and efficiency?

2. What is Six Sigma?

The concept of Six Sigma was developed at Motorola in the 1980's as they worked to improve the quality of their products and services. By implementing a systematic, rigorous routine, they were able to improve their products and increase customer satisfaction, thus increasing profits.

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Six Sigma can be in many ways defined. It's a way to measure processes, a goal of near perfection, underlined by the 3, 4 defects / million occasions, an approach to change mentality. The best definition is by far this one: Six Sigma is a vast and comprehensive system to achieve and support efficiency, effectiveness in other words performance.

Any organization who wishes to implement Six Sigma methodology should bear in mind six vital points.

1. A real focus on costumer. The necessities of the customer should always come first

2. Managment based on facts and data, with efficient measurement systems witch follow up on results and systems outputs, but also processes, system inputs and other predictable factors.

3. Focusing on process, management and improving the process. Six Sigma keeps track of all processes through documentation, measurement indicators …

4. Proactive management. Sis Sigma anticipates problems and changes, using facts and data and always checks the hypothesis regarding organizational objectives.

5. Collaboration without limits between all actors involved in the organization (internal and external clients)

6. Impetus to perfection and yet failure tolerance. This approach offers employees freedom to test new approaches even when risk are attached to them. Only an organization who wants to seek new methods of improving is on the long term sustainable.

Six Sigma approaches business processes from a highly statistical standpoint. It incorporates three levels of activity:

- Metrics – statistical focus to make process outcomes 99.9997% defect free, otherwise expressed as 3.4 defects per million opportunities
- Methodology – structured approach to solving problems that uses specific tools and process mapping to achieve the metric goal
- Philosophy – the enterprise-wide embrace of defect reduction by making decisions based on hard data and customer focus

In short, Six Sigma allows an organization to reduce the variability in its products and services so that waste is reduced, efficiency is improved, and customer satisfaction is dramatically increased. Business problems are solved through rigorous application of data collection and analysis tools. The training that Six Sigma users receive is quite intensive, progressing through several increasingly sophisticated levels based on experience and accomplishment. Professional Six Sigma consultants and practitioners usually work to become certified at the various levels, increasing their ability to help guide development and implementation of Six Sigma methodology.

The methodology of Six Sigma is key to its success. An organization follows a five step progression that uses factual information and statistical analysis to address achievement of operational goals. There are some differences in the five steps depending on whether they are used to improve an existing process or design a new process. The end goal, though, is always to achieve the standard metric of 99.9997% defect free performance.

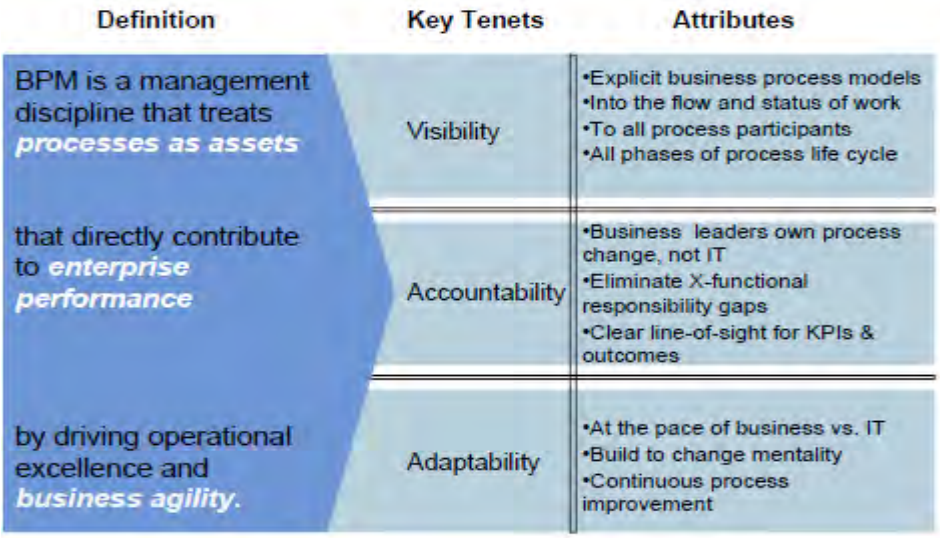
3. What is BPM?

Business Process Management (BPM) has become a top priority for companies in 2006 and 2007. A recent survey of more than 1,400 CIOs revealed that the top business priority identified by their company was business process improvement. Of course, there are many options for improving business processes – ranging from complete process re-engineering to adopting new process management methodologies, such as Six Sigma, or adding new capabilities to existing systems. An investment in BPM software, coupled with new approaches to project

implementation , enables companies to institutionalize a sustainable business process improvement program.

Business process management (BPM) is a holistic management approach focused on aligning all aspects of an organization with the wants and needs of clients. It promotes business

effectiveness , efficiency and agility while striving for innovation, flexibility, and integration with technology. BPM attempts to improve processes continuously. It can therefore be described as a "process optimization process." It is argued that BPM enables organizations to be more efficient, more effective and more capable of change than a functionally focused, traditional hierarchical management approach. Other define BP as a management discipline that treats processes as assets that directly contribute to enterprise performance by driving operational excellence and business agility.



4. How did we get to BPM?`

The managerial tools and the managerial methodological elements are in a perpetual change . From the earliest taylorist scientific management to computerized processes (JIT) to re-engineering (Six Sigma, Lean) , and currently to BPM.

- **Scientific management** was a theory of management that analyzed and synthesized workflows. Its main objective was improving economic efficiency, especially labor productivity. It was one of the earliest attempts to apply science to the engineering of processes and to management. Its development began with Frederick Winslow Taylor in the 1880s and 1890s within the manufacturing industries. Its peak of influence came in the 1910s; by the 1920s, it was still influential but had begun an era of competition and syncretism with opposing or complementary ideas. Although scientific management as a distinct theory or school of thought was obsolete by the 1930s, most of its themes are still important parts of industrial engineering and management today. These include analysis; synthesis; logic; rationality; empiricism; work ethic; efficiency and elimination of waste; standardization of best practices; disdain for tradition preserved merely for its own sake or merely to protect the social status of particular workers with particular skill sets; the transformation of craft production into mass production; and knowledge transfer between workers and from workers into tools, processes, and documentation.: While scientific management principles improved productivity and had a substantial impact on industry, they also increased the monotony of work. The core job dimensions of skill variety, task identity, task significance, autonomy, and feedback all were missing from the picture of scientific management. While in many cases the new ways of working were accepted by the workers, in some cases they were not. The use of stopwatches often was a protested issue and led to a strike at one factory where "Taylorism" was being tested. Complaints that Taylorism was dehumanizing led to an investigation by the United States Congress.

Despite its controversy, scientific management changed the way that work was done, and forms of it continue to be used today

- In the 1970s, when Japanese manufacturing companies were trying to perfect their systems, Taiichi Ohno of Toyota developed a guiding philosophy for manufacturing that minimized waste and improved quality. Called Just In Time (JIT), this philosophy advocates a lean approach to production, and uses many tools to achieve this overall goal.

When items are ready just in time, they aren't sitting idle and taking up space. This means that they aren't costing you anything to hold onto them, and they're not becoming obsolete or deteriorating. However, without the buffer of having items in stock, you must tightly control your manufacturing process so that parts are ready when you need them.

When you do (and JIT helps you do this) you can be very responsive to customer orders – after all, you have no stake in "forcing" customers to have one particular product, just because you have a warehouse full of parts that need to be used up. And you have no stake in trying to persuade customers to take an obsolete model just because it's sitting in stock.

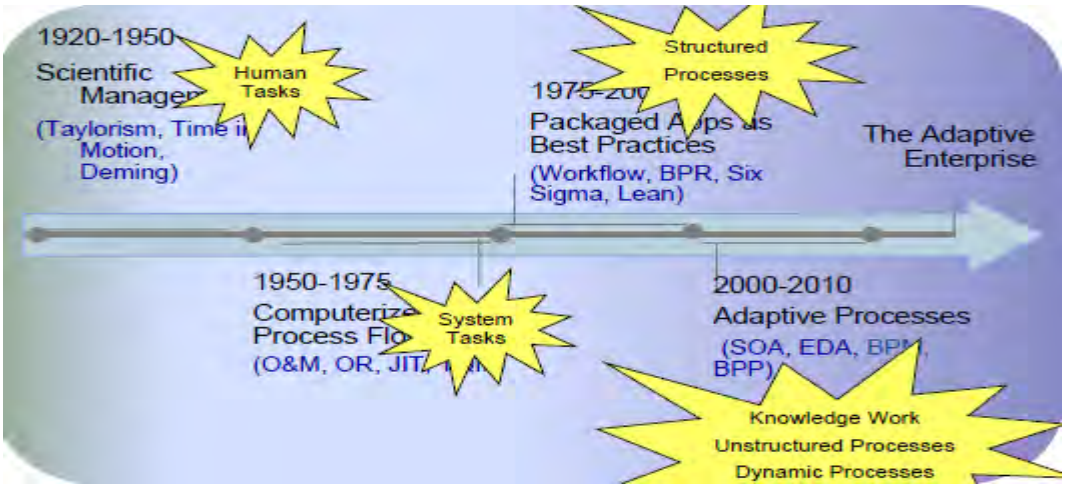
The key benefits of JIT are:

- Low inventory
- Low wastage
- High quality production
- High customer responsiveness.

A key drawback of JIT is that it only works if you can rely on your suppliers to deliver when they promise to – otherwise your whole operation may grind to a halt.

What's more, if material costs suddenly increase, then storing them at a lower rate might have been a more economic option. And JIT is also based on historical patterns of need: If orders increase sharply, adjusting to the increased need for supplies may not be easy for you or your suppliers.

- In the early 1990s strategists Hammer and Champy introduced the concept of re-engineering ,a tactic also known as business process re-engineering (BPR). The key to BPR is for firms to look at their business processes from a “clean slate” perspective and determine how they can best construct new and existing processes to improve the overall conduct of business . BPR constitutes the complete re-alignment of the firm and requires the company to be built from the bottom up . Hammer and Champy defined BPR as : “The fundamental rethinking and radical redesign of business processes to achieve dramatic improvements in critical ,contemporary measures of performance such as cost, quality ,service and speed**.** Six Sigma is probably the best method of reengineering a company . With all the positive things that people have to say about Six Sigma, there are also plenty to go around that aren't so positive. With any system that relies heavily on data and measurement like Six Sigma does, it may sometimes be difficult to gather sufficient data and this can be a big problem especially when big tactical decisions are being made based on the date collected. There are even times when a particular type of data or measurement may not even be available at all. Gathering and finding out ways to gather data when it is not available can have a very significant cost to the company in terms of time and effort. Prioritization can also become a problem when Six Sigma is being used because it so critical to the success or failure of the implementation. There are very few tools that have been developed that help make objective decisions regarding prioritization.



5. BPM basics

Let's first take a look at the basics of BPM. It uses a four step method to create better processes and improve performance. The steps are as follows:

- Map the process (whether new or existing) from start to finish, capturing each step along the way
- Execute the process by using people and automated applications, with specific assignments of responsibilities and accountabilities for each step
- Manage the process through information flow, actions and related activities Analyze process performance and metrics, using findings as the basis for continuous process improvement

BPM has a strong base in software applications to help streamline and automate processes. At the software level, BPM is commonly applied within a single department or group to improve a specific process.

From the software level, BPM expands to a suite of software applications. The suite level enables BPM to link multiple departments or groups that affect processes. It promotes information sharing and accountability through use of a work portals where multiple users can share knowledge, documentation, and process management.

At its highest level, BPM expands to an enterprise-wide system. This level combines software and IT aspects with management practices to address broad structural and systemic issues within a business or organization. Business practices and operations are examined from a holistic standpoint, paying close attention to how occurrences in any one part of the system have a ripple effect across the organization.

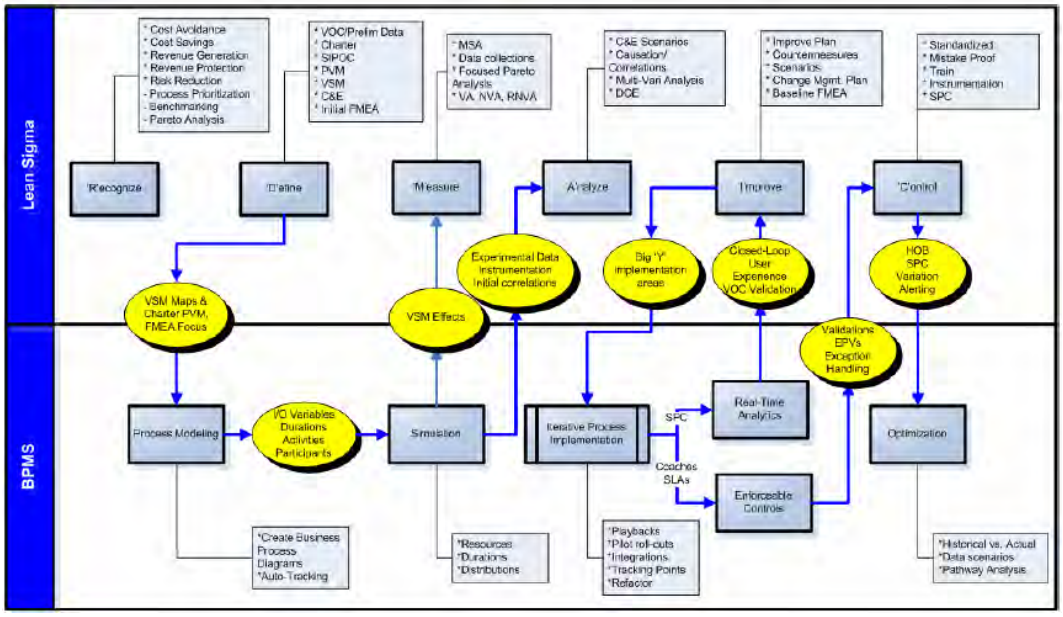
6. A Common Objective

Fortunately, both BPM and SS have a similar goal in mind – allowing companies to better manage and optimize their processes. Their approach and focus, however, is different. SS has a focus on understanding the variance in processes and how that affects the ability to achieve key objectives. One of the challenges of deploying SS across a company is that it is labor intensive to gather the data and implement the controls that are recommended by analysis. This, of course, is one of the key benefits of implementing BPM – automated controls and data gathering about the performance of the process. At the same time, many BPM teams struggle to understand which processes are the top priority for the business and which problems are the most critical to solve for any given process. SS

has much to offer BPM teams in this area – through tools like Failure Mode Effect Analysis (FMEA) and Value Stream Mapping (VSM). So, conceptually, BPM and SS should be a great fit.

Conceptually, most people will agree that connecting the data-driven focus of SS improvement with the real-time controls and automation of BPM could increase the efficiency and effectiveness of a company . The question would be, why haven't more companies succeeded at connecting the two initiatives. The problem could be the education and specific definition about points of integration. While BPM and LSS teams can tell you how their specific activities integrate and complement each other in their OWN disciplines, there is little insight into how to hand-off between the two. Lance Gibbs and Tom Shea believe there are eight basic touch points between the two initiatives. It is critical that these touch points are managed if a company is going to integrate their BPM and LSS initiatives.

7. The Eight Touch points of LSS and BPM



1. **Value Stream Maps (VSM), Charter and Failure Mode and Effects Analysis (FMEA) –**

Several of the assets created in the "Define" step of Lean Sigma are helpful to BPM teams when they start their process modeling. In particular, the VSM helps the BPM team understand the key areas of focus for their process modeling and how specific processes contribute to overall value to the company. Furthermore, FMEA provides BPM teams with insight into particular failure points that their process models must factor in and mitigate. Without these inputs from the LSS efforts, a BPM team might struggle to understand where they should truly focus their modeling efforts.

2. **I/O Variables, Durations, Activities, and Participants –** From the value stream map we can now begin to add the data that surrounds the key input and output variables. Cycle time, lead-time, and WIP as well as the human and system consumers who interact with the process – all need to be included by the BPM implementation.

3. **VSM Effects** – BPM simulation capabilities provide a strong initial baseline of data about the process. Instead of having to wait for several weeks of sampling, LSS teams can start analysis

using projected performance information provided by the BPM system. Initial multivariable studies can be run using the pathway analysis and resource thresholds generated by simulation from BPM, providing an early litmus test of the areas of opportunity for improvement.

4. **Experimental Data, Instrumentation, Initial correlations** – Simulation data generated from a BPM solution can also be leveraged to create SPC charts. This data also allows the LSS team to begin to validate process capabilities on future state. While LSS teams could gather all of this information without BPM, it would take time and effort – and they would not have key data as early. Leveraging the BPM data can remove one of the biggest bottlenecks for LSS teams.

5. **Big Y Implementation Areas** – As part of their work in the "Improve" step of an R-DMAIC approach, the LSS team will produce an Improvement Plan. This document is a great asset to the BPM team as they make the process executable – not just simulated. In the BPM world, the best practice is to implement process applications iteratively. During that implementation process, one of the biggest challenges is to keep teams focused on solving the top priority problems. Knowing the Big Y implementation areas gives the BPM team a concrete understanding of which problems to solve – without them having to go and repeatedly interview the organization to distill that information.

6. **Closed Loop User Experience** – An executing BPM solution provides control over activities and generates performance data from the process consumers that can be used for improvement base lining in LSS. Since the process that was designed is the process that runs, change is automatically enforced and failures can be identified in real-time. This automatic control and data collection greatly simplifies the workload of Black Belts and Green Belts on the LSS team who would otherwise have to enforce controls and gather data themselves.

7. **Validations, EPVs and Exception Handling** – The key exception handlers are in place for the most critical FMEA input variables that need to be closely monitored. The right information is now available to identify countermeasures as the process begins its inevitable shift from compliance to non-compliance in meeting the customer requirements. This information is fed in real-time in the right format to the LSS teams.

8. **SPC, Variation Alerting** – Today, most BPM solutions treat business event alerting in a simplistic fashion. For example, alerts are generated for late work items or when certain data conditions are met (e.g., loan application over $250,000). SPC instrumentation allows managers to understand the relevance of specific events. Variation alerting helps a process manager focus – telling them only when significant events happen. This discipline and approach must be integrated into the BPM dashboards that end users leverage to drive process performance.

8. Conclusions

BPM coupled with Six Sigma is the best investment a company can make in establishing a platform for continuous improvement and a managerial tool that can measure processes and improve them close to perfection(3.4 defect/ million occasions) .. Companies have different levels of maturity in adopting BPM and/or SS. However, those that have successfully implemented and integrated their BPM and LSS initiatives are able to answer ,"Yes," to all of the capability statements in the following list.

Capability	Yes or No?
Process Visibility from the value stream map of the business, with the processes broken down to the procedural level.	
A real-time dashboard with control charts at the procedural level, up to Executive Health of the Business gauges that can be used to monitor the whole corporation, lines of businesses, functions, or processes with full drill-down capability.	
Ability to incorporate Statistical Process Control (SPC) charts to monitor in real-time the process performance against the voice of the customer in time, quality, and delivery, and, most importantly, their "stable" processes alone.	
Simple to use Process Modeling tools for the process owners at all levels, to provide standardized process mapping and standard work documents, and simulations capability.	
Proactive: The ability to notify users immediately when out-of-control conditions occur, so process owners and process specialists can capture the root cause for corrective action or for best practices implementation.	
Relentless Voice of the Customer driven process requirements and the subsequent method to gather, prioritize, and validate compliance.	
Visibility into and accountability for process performance against voice of the customer SLAs.	
Live updating of Process Improvement Prioritization matrix, aligned with the Company Strategy, to assure that available improvement resources are assigned to the improvement activities with the most impact.	
Rapid prototyping of new products and services using process simulation (DMADV).	
An efficient workflow to implement the best "future" state process, usually yielded by Kaizen Events.	
Mining process capability against VOC for improved and new products and services.	

The challenge for many companies is justifying the BPM coupled with Six Sigma investment instead of using traditional paths for solving process problems – like buying an application or building a custom application. We feel that only BPM coupled with Six Sigma can help you're company answer "Yes" to all the above question, which automatically will increase efficiency and effectiveness .

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MARKETING TECHNOLOGICAL INNOVATIONS IN BANKING PRODUCTS AND SERVICES

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Abstract
Success depends on the ability of financial institutions to assess the opportunities of new markets, attracting customers from competitors and improve the effectiveness of marketing strategies.
Marketers have to understand that the most effective approach is based on an analysis of needs of different market segments, designing the marketing mix and implementation of marketing programs targeted to selected segments.
The allocation of financial and banking institutions of important resources for new technology to replace expensive labor, led to technical progress in the field that accelerates business processes and keep control of large databases on client operations, working in worldwide.
The emphasis of the competition fund, the European single market is a challenge both in banking and for organizations involved in harmonization of standards and legislation, which is why banking institutions adapt to new technologies is very important to customers.

Keywords*: bank marketing, banking products and services, technological innovations, trends, mutations.*

1. Introduction

Developing financial markets and tradable financial innovations have led to an extensive banking disintermediation as a result of consumer preferences for other savings instruments (eg: mutual funds, pension funds, investments in investment companies etc.), and orientations consumers - the corporate capital markets in order to obtain financial resources. Banking deregulation and the emergence of the required regulatory process, as a response to conditions created new financial and banking environment.

Along with the deregulation legislation was extended and the implementation of technological innovations in retail and corporate banking business. IT applications and new communications technologies have led to reorganization and running the operations of traditional banks, but the intensifying competition and by the emergence of new financial institutions. Have emerged as new products and banking services, as well as virtual banks and internet connections.

Everything is put in a high technological breakthroughs permanent competitive banking financial institutions.

Priority and challenge for banking financial institutions still focus on implementation and optimal use of technology for a guaranteed success, in terms of a changing society, but also to increase awareness of financial education, living standards, diversification needs and desires consumers.

2. Paper content

Ability to assess new market opportunities, attract customers and competitors helps improve the effectiveness of marketing strategies to strengthen the success of financial institutions.

Marketers have realized that the most efficient approach is based on an analysis of needs of different market segments, designing the marketing mix and implementation of marketing programs directed to selected segments.

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The allocation of the financial institutions banking of significant resources for new technology to replace expensive labor, led to technical progress in the field, which accelerates business processes and keep control of large databases on client operations, working in worldwide.

Lately, technological innovations increasingly find their place in the banking business. Electronic devices, software applications, Internet, telecommunications etc., Are increasingly used in various areas of the banking industry, with major implications on the performance of its business.

Technology will always have a particularly influential role on banking products and services, such as specialized departments within the institutions and banks will have to prepare plans and strategies to meet any changes in behavior as a result of the impact of technology. Customer needs and desires to develop according to their own business so that the banks are put in a position to install systems that ensure the required level of services and products: fast and efficient. Every banking institution has different possibilities of action, but will work closely with these issues, issues that generate factors that may influence a bank's strategy, a strategy that in turn must be compatible with the external operating environment.

The banking business has an important role environmental monitoring technology for all the changes that may affect bank strategies.

In the category of outstanding technological innovation, applicable to bank finance, we can mention:

- introduction of plastic cards, which have simplified the system settlements in the economy;
- adaptation of mobile and fixed system to perform various operations (deposits, transfers, loans);
- emergence of virtual banks, the internet, which offers banking products and services through electronic media.

Technological innovations are used in the management of banking information (customers, accounts, operations etc.) risk management in facilitating the bank customer relationship (especially in distance running operations), in carrying out banking operations (bank payments, granting credit amounts of deposit, securities issues etc.). Thus, technological innovations implemented in the banking industry and are used both to base decisions, but also in manufacturing activity.

The main factors that led to the expansion and lead the implementation of technological innovations in the banking business are:

- new discoveries in the field of technological innovation;
- development of economic relations and the number of transactions;
- restructuring and modernization of banking;
- growth and diversification of customer demand, especially due to increasing awareness;
- increasing customer demands in terms of offering banking products and services;
- increasing costs for maintenance and development of traditional banking networks;
- expansion of spending on staff;
- increasing emphasis placed on resource - time.

The main role of technological innovation applied in banking is to automate the process of obtaining background information and decisions. The degree of automation of banking activity can be measured by this online banking so that it can pass through three stages:

1. online this state, namely the existence of a site and general information about the bank;
2. type interaction with the bank off line, by e-mail, some computer applications, real-time view of information etc.
3. interactive communication with the bank in real time, by conducting online transactions, internet banking etc.

The introduction and expansion of technological innovations in banking imposed, both for banks and for account holders and rationalization measures to redesign the bank documents, which leads to improvements in operational staff work from the banking institutions (activities, guidance, coordination and counseling clients).

In the contemporary economy, characterized by globalization, both the structure of financial markets, and consumer characteristics will change as a result of using new information and communication technologies, access to free, easy and real-time information of any kind and from every corner of the world. Financial institutions will form the largest trusts in transnational activities, which will provide integrated financial products and services globally. Typology and consumer behavior will turn diminishing the importance of characteristics related to their belonging to a certain nationality. Global cultural values will spread and be adopted by consumers in all countries. This will not lead to the disappearance of personal identity to consumers, but rather it will enhance and will reconfigure the access to other cultural values will be taken to the extent that they better match their personality.

Following the globalization process all elements that make up the internal environment and external financial and banking institutions will be influenced by the rapid pace of evolving information technologies and access to information from anywhere on the globe. Under these conditions, rethinking the way down the marketing strategies of bank financial institutions is becoming a necessity. Substantiation of marketing strategies in the new economy is necessary to consider the changes and evolution of all environmental factors whose action influences activity of financial institutions.

It is visible that the role of banks becomes a more consultative, and organization. Especially for large organizations to determine a change in the objective and forms bank intermediation. The bank today is not a deposit and credit, became a bank, "*financial*" to the organizations. They require more sophisticated financial innovation and support they need for banks to achieve their installation or to find a counterparty. The process leading to reorganization of banks: new directions appear on the market; new specializations occur in banking profession. Mutations continues its course: the trader to market, financial engineering and those "*back office*" which are actually the best cells are responsible for analyzing the consequences of new product development, in relation to bank and regulatory objectives in force.

In conclusion we can say that, given the emphasis of the competition, the european single market is a challenge both in banking and for organizations involved in harmonization of standards and legislation, which is why banking institutions adapt to new technologies is a very important aspect to customers.

Concerns the European Union harmonization directives on free movement of capital and services all aim to identify and eliminate existing barriers on the banking market.

The work relies heavily banks and marketing, which plays an important role in the organization. Marketing of banking services, like banking industry, marketing is a "special" you need to sell an intangible product in a tangible way. Ultimately, products and services offered by banks are essentially the same. They can be differentiated only by how they are perceived by customers.

Customer perception can be improved through effective marketing and special interests and backed by continuous quality development and meeting the needs, requirements and expectations. The client should feel important and want to remain at the bank. It is more expensive to attract new customers than retain existing ones and therefore need special efforts to retain customers, very important issues in marketing.

Ratings agencies rank banks by their financial performance. Classification of the fastest and is used depending on the size of their assets.

In conclusion, it can be said that the EU aims to create a coherent framework, and legislative and institutional banking, applying the directives in this area and non-member states (to combat and prevent money laundering, risk management, financial etc.).

The introduction of the euro has strongly influenced the economic life of the EU member states and had consequences for the national banking systems of other countries.

Bank performance are tracked and analyzed on the basis of specific indicators of the rating agencies and national financial supervisory authorities.

The EU has specific interests in the growth competitiveness by promoting quality organizations, creating legislative and institutional framework to achieve this goal, guiding it, now, to promote an ambitious policy, aiming to make it possible to substantially increase the economic competitiveness of member states.

In terms of economic development and amplification of trade, the trend of globalization and the emphasis of the competition, some of the most dynamic changes in the last decade and a half have occurred in banking. Credit institutions are, in all countries, participants in the economic life very active, dynamic, flexible and highly adaptable to market changes, being able to create demand for products and services. Assuming that credit institutions, nature activities, operates in a regulated environment, it is believed that a healthy economy is more and more efficient with how the banking system operates on principles of prudent and appropriate management of risk related. Quality management system enables continuous improvement of product quality and services provided by banks, thus increasing customer satisfaction and for the other stakeholders and, on this basis, continuous improvement in business performance of banks.

Credit institutions in Romania will face increasingly more demands of the European Union and their competitiveness in the European single market will depend largely on how they will manage to implement an effective quality management system. The problem of quality management systems effectiveness is accentuated with more insistent lately due to increased competition and market globalization.

The last decade and a half of the banking system accounted for a period of radical transformation. They were concerned not only modernize by creating appropriate legal and institutional framework and that a wide range of banking products and services, but also assimilation's acquis communautaire and aligning policies, strategies and practices of the European Union. In this context, is an essential part of the National Bank of Romania, which authorizes the operation of banks, regulate and supervise their activities for the development in healthy conditions and high caution. In recent years, banks in Romania have started to move towards the market segment represented by individuals. However, identifying customer needs (existing and potential) individuals shall be made by banks on their own or with help of specialized firms, there is the possibility of misunderstanding or misinterpretation of the results of market research. The transformation of the requirements in banking products and services for this segment of customers is difficult, especially for unusual banks have many customers, but small.

Evolution of the international environment is influenced by the development of banking systems in different countries, which, in turn, is determined by the historical, social and cultural economies. Based on these facts, and have outlined a series of functions and a way of organizing activities in the field. To be more explicit, representing banking systems still present, existing in countries with a developed economy and some aspects of their evolution.

Peculiarities of the largest global banking system

Country	**The peculiarities of the banking systems**
SUA	- The beginning of banking regulation; - Demarcation of trade and investment activities in the banking busines; - Categories of banks: commercial (deposit) and investment (credit); - The creation of bank holding company.
Marea Britanie	- Strong and stable banking system, which dominated a long period, the entire world banking system; - Strict specialization of banking activities;
Germania	- Developed banking system; - Banking activity one of the most dynamic sectors of national economy;

	- The structure of the banking system is represented by the universal banks (public institutions, cooperatives and commercial banks) and specialized; - Initiation of insurance companies.
Japonia	- The banking system is focused on holding impressive sites, including: the production unit, commercial unit and one or more banks; - Risks are high, but also are monitored and controlled by the bank; - Banks have provided the high-tech logistics; - Specialization strong banks.

Problems facing eastern european banks at present, by their nature are very varied.

First, it is necessary to adjust the cost structure of the bank margin, since the unification of banking services in EU countries and increased the absorption and merger reduced the cost of these services.

Secondly, it highlights the problem of maintaining profitability and strategy for improving the management procedure of financial, technical, human. In order to solve these problems, the FMI analysts suggest four rules banks "*gold*":

- exactly follow the bank's development strategy. Deviating from the direction of development chosen perplexities and diminish confidence finds customers and shareholders;

- deepening specialization within each activity directions of the bank;

- ensuring an adequate level of diversification of bank activities (analysis of each participating institution's directions to the profitability of banking activity);

- establish a balance between stimulating the sales of financial services and insurance cost control.

For integration into the european banking system, banks and financial companies create their universal system for selling products and services.

Study of peculiarities of development of the European banking market is a prerequisite for the banks in Romania. Regarding the Asian financial market, it includes a large number of financial centers in Tokyo, Hong Kong, Shanghai, Singapore, whose experience, especially in investment services, portfolio management services provided by a huge network of branches and agencies is of real importance for banks in Romania. Using information technologies for the development of banking is a practice used today not only the asian banking system, but also the entire global banking system.

Of particular interest to local bankers is the experience of developed countries in the sphere of communicative policy improvement, the working relationships within the group and the "behavioral approach to management." This includes system design complexities of human relationships inside the bank, between management and staff. The objective is to exclude conflict situations should be the collective incentives for staff to obtain good results of activity. Thus, the practice shows that the effectiveness of modern market economy, including banking business, is up at a rate of one third of the technical components and materials. 2/3 are determined by the intellectual potential of both managers and the employees. Many american banks, to streamline the relationships within the bank, uses the principle of feedback. Thus, the "open door", which requires that any employee can address the leaders of all ranks, organizing individual discussions, carrying out investigations with different purposes are distancing measures to prevent major bank managers collectively. Creating a favorable environment in Western banks is based on such methods as reducing the distance between client banker working process, ethics leader, the client - the most important person, removal and prevention of conflicts.

An important aspect of communicative relationships are relationships with clients and attention with which they are treated. The idea deserves to be remembered is: "*Client does not depend on us (the bank), we depend on him. We do not do favors and serving him, but he give us the*

opportunity to serve him. Our work consists in solving the problem of the client in an advantageous way for him and for the bank".

We mention that in the bank's business customers, while ensuring high quality of service process, develop informal relationships. An example may serve Bank Koelner German bank, which organizes tourism travel information clients. Client, its requirements, wishes and meeting their milestones bank marketing.

Banks should not only make financial transactions, but also to provide quality advice to their clients to explain the possibilities of making transactions, to propose optimal choices, that is to be concerned that the financial situation to be a good customer. Western banks are given public attention and involve training in business than advertising.

Most times, the supply of products and services is the main criterion for choosing a bank by a customer as an individual. Consequently, the more banking products and services offered presents several possible variants, in which only some features vary, the more customers will have a choice. The offer is applicable to understand both the rates and fees and all other aspects of banking product or service taken into account, eg deposits due to credit and interest rate, number of days until the issuance and validity of a card formalities and completed forms to obtain a loan or issuing a card etc.

Banks' ability to obtain long-term competitive advantages as a result of innovation and differentiation of products and services is limited by two things:

- banking products and services can not patent a new product being imitated by competitors within a short time;
- banking products and services are strictly regulated and supervised by the authority in the matter.

Differentiation range of banking products and services is manifested by small variations or nuances of specific items, sometimes in the details. Because differentiation is achieved through the quality that satisfies customer requirements, can be considered as a strategy to be adopted is the quality strategy. And this even more as the distribution channels are diversifying banking products and services continuously. Era in which bank customers moved to its location to find information or to request a loan or deposit a sum of money is already outdated.

Currently, today, customers have many other opportunities to meet the demands and expectations regarding products and banking services, such as: call center, ATM, Internet banking, mobile banking, co branding (cards issued together with a distributor products and services), partnerships with distributors of products (eg: consumer products).

Series of factors that led to the expansion and lead the implementation of technological innovations in the banking industry is composed of: new discoveries in terms of technological innovation, developing economic relations and the number of transactions, restructuring of banking; growth and diversification of customer demand, especially amid the rise of education degree in banking and extend more and more resources "for" increased costs for maintenance and development of traditional banking networks.

New distribution channels could be implemented due to the development of information technology. However, their expansion is limited by the need to ensure the necessary infrastructure and security operations, and customer behavior. Modern distribution methods means an increase in banks' ability to offer products and services beyond their territorial network. Deriving significant benefits:

- there is no need to go at the bank for each customer or transaction information desired;
- automatic or electronic distribution allows the advantage of standardization of products and services, leading to a continuous and homogeneous quality;
- activity is enhanced by relieving banks of any crowded desks.

It must, however, that these alternative distribution channels to benefit from increased attention from the banks to notify potential malfunctions, establish and implement corrective and

preventive measures necessary to train staff properly and meet customer reactions in parallel monitoring the life cycle of products and services.

3. Conclusions

Banking Financial Marketing is knowing and meeting customer needs and desires, their orientation towards the needs of the institution's activity, are being found both in commercials and advertising, and financial innovation in the banking, distribution services and banking products, the actual supply, adequate supply market needs and at an affordable price for both partners.

The introduction of high technology in banking activity leads to an improvement in operational staff work in banks, focusing more and more towards the work of guidance, coordination and advice to clients. Thus, visible increase customer service quality of banking services and banking.

A new era of doing business in the Internet requires a new model of strategy and marketing practice. According to a strategist*: "In light of new technologies, especially the Internet, a corporation undergoes a radical transformation that can be compared to a new industrial revolution. To survive and thrive in this century, managers will have to assimilate a new set of rules. Corporation XXI century must adapt to web management*". Another suggests that the Internet is *"revolutionizing the way we think about relationships with suppliers and customers, how to create value for them and how to make money in this process, in other words, it represents a revolutionary marketing"*.

New Economy focuses on information. The information has the advantage of being able to be arranged, divided, personalized and sent via network at incredible speeds. Due to rapid advances in Internet and other connectivity technologies, institutions have come to comprehend the gathering of data about individual customers and business partners (suppliers, distributors, sellers). In turn, they become more flexible in the individualization of products and services, messages and media.

Bank financial institutions in our country will face more and more demands imposed by the EU and their competitiveness on the European single market will be very largely dependent on how they will manage to implement an effective quality management system. The problem of quality management systems effectiveness is accentuated with more insistent lately due to increased competition and market globalization.

In conclusion, we appreciate that, given the emphasis of the competition, the European single market is a challenge both in banking and for organizations involved in harmonization of standards and legislation, which is why banking institutions adapt to new technologies is very important in front of customers.

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CITY MARKETING AND ITS IMPACT OVER URBAN TOURISM – SIBIU EUROPEAN CAPITAL OF CULTURE 2007 - A SUCCESS STORY

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Abstract
In the past years tourism has become the fastest-growing economic sector, both in terms of turnover and the opportunity to create jobs. In this context, it begun to be one of the activities with an important potential and, in the same time, a challenge for the development of urban centers which find themselves forced to redefine their identity, due to the decrease of other types of industries under the impact of the global economic crisis and the economic reset. After analyzing the main indicators of the touristic activity in the urban area, it is noticeable that cities have an important percentage in the overall touristic circulation. The future development of this form of tourism is, however, conditioned by the assimilation in the urban management process of marketing strategies meant to allow the development of touristic functions in the main urban localities and of touristic programs designed to bring added value to the cultural attractions for large and small cities alike. Urban marketing comes, in this case, as a natural response to the requirements of the city to better answer the market's needs and to adjust to the dynamics of the tourist market. The present article aims to analyze the different urban marketing strategies used by urban centers interested in attracting important tourist flows and their impact over their future development, based on the Sibiu case after implementing the "Sibiu - European Capital of Culture" Programme in 2007.

***Keywords**: urban marketing, destination marketing, city branding, tourism, touristic attractiveness, competitiveness*

1. Introduction

The first part of the present paper analyzes the urban marketing strategies used by Sibiu municipality in 2007 when implementing "Sibiu - European Capital of Culture" Programme, in order to improve its image and to attract more tourists in the area. The second part evaluates the marketing strategies impact and the municipality ability to capitalize the advantage given by the European Programme, by examining the tourism statistics following 2007.

The importance of the study lays in drafting several marketing strategies that other cities can use outside a European Programme in order to promote their image and to attract more tourists.

The research will examine the papers submitted by Sibiu and other former European Capitals of Culture during the evaluation process, publications and online resources of European Cultural networks, documents and publications of the European Commission and local governmental documents which will describe the effectiveness of Sibiu, as European Capital of Culture in implementing and promoting its cultural programme and its impact on the long-term development of the city.

In the past years the main indicators of the touristic activity in the urban areas emphasize that cities have an important percentage in the overall touristic circulation and a recent study conducted by the European Travel Commission suggested that almost 20% of tourists who visit a European city mention culture, in the broader sense of the term, as the main reason for their visit. In these circumstances, urban tourism becomes associated naturally with cultural tourism and cities are

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increasingly using cultural events to promote their image, encourage urban development and attract visitors and investments.

That is why the "European Capital of Culture" Programme has become appealing for different cities as their only possibility to visibly transform their cultural infrastructure, to boost the local economy, to attract tourists and to improve their image. The specialized literature treats mainly the subject of culture, as a means of promoting the cities and less the aspects regarding the European Capital of Culture Programme and subsequent impact over the cities which implemented the programme.

2. European Capital of Culture

The origins of the Cultural Capital event were put forward in 1983 by Melina Mercouri, the Greek Minister for Culture at that time. The event was designed to 'help bring the peoples of the member states closer together' through the 'expression of a culture which, in its historical emergence and contemporary development, is characterized by having both common elements and a richness born of diversity' (European Commission, 1985). In view of the fact that the proposal came from Greece, Athens was appointed the first Cultural Capital in 1985. Since then, the event has rotated around the member states of the EU, with a different city being awarded the honor every year.

The European Capital of Culture Action was introduced in 1999 by a Decision of the European Parliament and the Council1, building on the European City of Culture event that had operated annually since 1985.

This Decision created a specific Action, whose overall objective was to *"highlight the richness and diversity of European cultures and the features they share, as well as to promote the greater mutual acquaintance between European citizens"*[1].

Article 3 of the Decision stated that the "nomination of each city shall include a cultural programme of European dimension, based principally on cultural co-operation". It also set out a number of objectives that each nominated city must address, which were to:

- highlight the artistic movements and styles shared by Europeans which it has inspired or to which it has made a significant contribution;
- promote events involving people active in culture from other cities in Member States and leading to lasting cultural cooperation, and to foster their movement within the European Union;
- support and develop creative work, which is an essential element in any cultural policy;
- ensure the mobilization and participation of large sections of the population and, as a consequence, the social impact of the action and its continuity beyond the year of the events;
- encourage the reception of citizens of the Union and the widest possible dissemination of the various events by employing all forms of multimedia;
- promote dialogue between European cultures and those from other parts of the world and, in that spirit;
- optimize the opening up to, and understanding of others, which are fundamental cultural values; and
- exploit the historic heritage, urban architecture and quality of life in the city.

The list of former European Capitals of Culture:

1985: Athens	1996: Copenhagen	2003: Graz
1986: Florence	1997: Thessaloniki	2004: Genoa + Lille
1987: Amsterdam	1998: Stockholm	2005: Cork
1988: West Berlin	1999: Weimar	2006: Patras
1989: Paris	2000: Reykjavík Bergen, Helsinki,	2007: Luxembourg + Sibiu

[1] Decision No 1419/1999/EC of the European Parliament and of the Council of 25 May 1999 establishing a Community action for the European Capital of Culture event for the years 2005 to 2019

1990: Glasgow 1991: Dublin 1992: Madrid 1993: Antwerp 1994: Lisbon 1995: Luxembourg	Brussels, Prague, Krakow, Santiago de Compostela , Avignon , Bologna 2001: Rotterdam + Porto 2002: Bruges + Salamanca	2008: Liverpool + Stavanger 2009: Linz + Vilnius 2010: Essen + Pécs + Istanbul 2011: Turku + Tallinn

Although its first aim was to *"highlight the cultural wealth and diversity of the cities of Europe whilst emphasizing their shared cultural heritage and the vitality of the arts"*, it became obvious that the impact of this programme went beyond this educational level. It gave the city a marketing opportunity to improve its image on a national and European level, and represented an important regeneration instrument for the areas around which the main events occurred.

However, as the event has developed, it has been used in different ways by the cities, either to support, extend or challenge the original Cultural Capital concept. Table 1[2] illustrates the development of the event from its origins as a cultural festival to an integrated cultural capital programme, at least according to the planners of the Copenhagen event.

Table no. 1- The development of the European Capital of Culture Event

Level 1: a summer festival (Athens 1985, Florence 1986, Paris 1989)	A number of artistic events, primarily based on heritage. No international marketing. Short planning period, no long-term investment and few sponsors.
Level 2: an all-year festival (Amsterdam 1987, Dublin 1991, Madrid, 1992)	Focus still on fine arts, with national performances supplemented with a few international events. Fairly good quality, but lack of penetration because of planning gaps and lack of international marketing. Little investment, financial base primarily local.
Level 3: an art city (Berlin 1988, Antwerp 1993)	Well planned and managed international artistic programme running over a whole year. Strategies to stimulate artistic production. Professional, centralized management, with finance from the city, supplemented by substantial sponsorship.
Level 4: a cultural capital year (Glasgow 1990)	A more comprehensive programme based on a broader concept of culture. Many international highlights. Social, popular and economic structures included in the concept, with a view to creating long-lasting improvement in the image of the city. Long-term planning and management with participation of local groups. Financing from a broad spectrum of private and public sources.
Level 5: a cultural capital (Copenhagen 1996)	Development of a long-term strategy for the development of a cultural capital and improvement of the image of the city. Planning horizons extend beyond the year itself. The involvement of the local population and the business community is crucial, as is the stimulation of educational initiatives and cultural networks. The cultural capital concept involves the whole metropolitan region, with a separate environmental strategy and new infrastructure. Funding from a wide range of sources.

The cultural programme was the central element of nearly all European Capital of Culture, and represented on average 63% of the operational expenditure of European Capital of Culture. The European Capital of Culture cultural programmes are unique due to their scale, duration, scope and the range of stakeholders and partners. No other large-scale cultural events are directly comparable to

[2] Greg Richards, „The European Cultural Capital Event: Strategic Weapon in the Cultural Arms Race?", *Journal of Cultural Policy* 6(2000): 159-181.

the European Capital of Culture, and hosting the event was an unprecedented experience for most cities[3].

Communication and promotion is closely related to some of the key objectives established by the European Capital of Culture Programme, such as the enhancement of city image, attracting visitors to the city, or expanding the local audience for culture[4].

The 21 European Capitals of Culture spent in total over 105 million Euros on communication and promotion, in a range from just under 1 million to 14 million Euros, which represented between 7 and 24% of the total operating expenditure of the European Capital of Culture organization. However these figures should be treated with caution, as most European Capitals of Culture benefited from significant additional promotional expenditure by tourist boards, media and travel sponsors, cultural institutions and other partners.

The number of staff directly employed on communication and promotion varied from one to forty, however most European Capitals of Culture contracted elements out to public or private organizations, with tourist boards and municipalities often assuming responsibility for tourism marketing.

The most frequently used media by the European Capitals of Culture were print and broadcasting, while new technologies (internet, SMS) were comprehensively exploited by several recent European Capitals of Culture. Almost all used special events to promote the year, and a smaller number made significant efforts using merchandise as a communication tool.

3. Sibiu - Urban Marketing Strategies

Sibiu was the first European Capital of Culture (ECOC) to be staged in one of the post-2004 EU accession Countries and even if it was a risky bet at first, due to lack of experience in managing large scale cultural projects, to insufficient funding, or the fact that Romania was just joining the European Union, in the end it proved to be a success story.

The main aims of the event were[5]:

- Raising the international profile of Sibiu;
- Long term cultural development;
- Attracting international visitors;
- Enhancing feelings of pride and self-confidence;
- Growing and expanding the local audience for culture;
- Improving social cohesion and creating an economic downstream;
- Improving cultural and non cultural infrastructure;
- Developing relationships with other European cities/regions and promoting European cultural cooperation;
- Promoting creativity and innovation.

In addition there were a number of specific aims in the area of communications and promotion:

- Raising the international profile of the city;
- Changing the image of the city;
- Increasing foreign and domestic tourism;

[3] Palmer/Rae Associates, „European Cities and Capitals of Culture", Study Prepared for the European Commission, Brussels, 2004.

[4] Palmer/Rae Associates,„European Cities and Capitals of Culture", Study Prepared for the European Commission, Brussels, 2004.

[5] Sibiu European Capital of Culture 2007 website, accessed January 29, 2010, http://www.sibiu2007 ro/ en3/strategia htm

- Broadening audiences for culture;
- Improving the availability and dissemination of information about the programme is a major task, now under the process of construction.

The key objectives for 2007 CCE Programme in terms of communications and promotion are:

- Raising the international profile of the city;
- Changing the image of the city;
- Increasing foreign and domestic tourism;
- Broadening audiences for culture;
- Improving the availability and dissemination of information about the programme is a major task, now under the process of construction.

Sibiu 2007 CCE Programme has several communications priorities:

- Promoting the profile of the city;
- Promoting the brand/image of the Capital of Culture;
- Promoting the cultural programme of the Capital of Culture.

Table no. 2 – The target audiences of the communication strategies

Audience 1 – potential visitors	• Citizens from Sibiu and Romania, a national audience estimated at 5-5.5 million persons, focusing on the mobile categories, interested in cultural events and cultural tourism; • Citizens from EU and other European countries, from USA, Canada, Israel, accentuating the traditional areas generating tourist flows for Romania. The European targeted audience was estimated around 40-45 million people, focusing on the mobile categories, interested in cultural events and cultural tourism; • Organizations of Romanians from abroad.
Audience 2 – information multipliers	• Journalists and opinion-formers from Romania and abroad; • Tourism operators; • Business communities and lobby groups; • European and international organizations (UE, Unesco, EC).

In order to better implement the programme the representatives of the local stakeholders from Sibiu decided to create an NGO which would be entrusted with the organization of Sibiu – European Capital of Culture Programme: The Association Sibiu/Hermannstadt European Capital of Culture 2007.

The Coordination Office Sibiu European Capital of Culture 2007 represented the Association's executive board and had the following responsibilities:

- General coordination for Sibiu 2007 Programme;
- Thorough look into the objectives and artistic concepts of the Cultural Programme;
- Selection of the projects in the preliminary stages;
- Coordination and consultation with the Luxembourgian partners;
- Implementation of the Cultural Programme;
- Implementation of the communication and marketing strategy;
- Administrative and financial management for the Programme.

The Association has been the main stakeholder during the Sibiu 2007 Programme managing the marketing strategy alongside with the advertising company and the partners involved in the programme. When implementing a large scale project like this it is essential to have a clear and unique message communicated and so, the Association created the Visual Identity Guidelines which described the elements to be used by the different cultural partners in order to promote the visual

identity of Sibiu 2007 Programme within the context of its own event and the rules and limitations for using these elements.

The logo was divided in **(a)** text; **(b)** logos of financing institutions and of institutional partners, **(c)** logos of official partners, **(d)** logos of media partners.

Table no. 3 – The elements of the logo

The textual specification of	Presentation of logos of financing institutions and institutional partners	Presentation of logos of official partners	Presentation of media partners
• the high patronage of the President of Romania • the organizer of Sibiu 2007 Program, namely Sibiu European Capital of Culture -Sibiu 2007 Association • the cooperation with Sibiu City Hall • the cooperation with the Ministry of Culture and Religious Affairs • the cooperation with Sibiu County Council • the support of the Prime Minister of Romania • the support of the European Commission	• the European Commission • the Ministry of Culture and Religious Affairs • Sibiu City Hall • Sibiu County Council	• Banca Comerciala Romana • Automobile Bavaria • Ambient • Scandia Sibiu • Atlassib • Zentiva	• TVR (Romanian Television) • SRR (Romanian Radio-broadcasting Company) • Realitatea Catavencu Group represented by: Realitatea TV, Cotidianul, Academia Catavencu, Money Channel, 24-Fun and Radio Guerilla) • Emi Deutschland Group (Monitorul de Sibiu, Monitorul de Iasi, Monitorul de Cluj, Monitorul de Alba, Ziarul de Iasi, Viata libera Galati, Obiectiv Vaslui, Arbo Media) • Tribuna • Zile si Nopti

The whole text was:

"Sibiu European Capital of Culture 2007 program is under the high patronage of the President of Romania. The program is developed by Sibiu European Capital of Culture 2007 Association in cooperation with Sibiu City Hall, the Ministry of Culture and Religious Affairs and Sibiu County Council, with the support of the Prime-Minister of Romania and of the European Commission."

The promotion campaign for Sibiu – European Capital of Culture 2007 was carried out with the support of GAV Scholtz & Friends, the company which won the auction. The program was promoted both at national and international level using different instruments of promotional mix: TV and Internet campaign, PR campaign, outdoor campaign, radio spots, and presentation films.

The Sibiu 2007 Programme logo was the following[6]:

[6] Visual Identity Guidelines, Coordination Office for Sibiu European Capital of Culture 2007 Program

The slogan, "City of Culture City of Cultures" was meant to underline the main characteristic of the city which is multiculturalism. The motto: "Sibiu - Young since 1191" emphasized the long cultural heritage of the city and also the modern context of its citizen's evolution, aiming at the same time to a different target for cultural tourism: young people.

The main communication vehicle used during 2007 event was the Programme website: www.sibiu2007.ro which was in Romanian, English and German so both national and international tourists could find useful information.

The outcomes of the campaign were[7]:

- Integrated communication campaign: TV (three spots, outdoor, PR campaign, radio campaign);
- International TV campaign: three international TV channels (EuroNews, Travel Channel, National Geographic), 1460 spots aired over a period of three months: 50 % to National Geographic, 30 % to EuroNews and 20 % to Travel Channel;
- more than 55 million people targeted in Great Britain, Austria, Belgium , Denmark, Finland, France, Germany, Ireland, Italy, Holland, Norway, Portugal, Spain, Switzerland, Bulgaria, Croatia;
- National TV campaign: four national TV stations (TVR 1, TVR 2, TVR Cultural, TVR Internațional), over 1600 spots aired, out of which 457 on TVR 1 and TVR 2, with an estimated target audience of 7 million people;
- Two outdoor campaigns (spring and summer-autumn) with over 3900 square meters of outdoor advertising displayed for 150 days in 48 central locations in Bucharest, Brasov, Targu Mures, Arad and Sibiu;
- Internet campaign with banners and pop-ups on three European websites for a period of 8 to 12 weeks: www.euronews net, www.travelchannel.com, www nationalgeographic.com.
- 2808 articles about Sibiu 2007 in the national press (October 2006 – December 2007), an average of 8 articles per day;
- 2386 minutes in the news on national TV stations (January – December 2007), an average of 7 minutes aired daily on national news programmes.
- 457 minutes of news on national radio stations (October 2006- December 2007);
- The general attitude of the articles toward the programme: negative – 5%, neutral – 25%, positive – 70%.

Besides the contracts financed by The Ministry of Culture and implemented through GAV Scholz & Friends, Realitatea TV station signed a partnership with Sibiu CCE 2007 Association to promote the event.

The partnership consisted in:

- Daily airing an one minute reports, in the evening news about Sibiu – European Capital of Culture, named "The number of the day in Sibiu";
- The show "EU, Romania" was dedicated, twice a month to Sibiu – European Capital of Culture;
- Another series of materials on Sibiu – European Capital of Culture were broadcasted once a week on Sunday in the afternoon news under the name "Eurocapitala" with an average duration of 8 minutes;
- Another series of materials labeled "Sibiu week at the Money Channel" were broadcasted during the daily show "Today's agenda" on The Money Channel TV Station.

The urban marketing strategy is strengthening by the touristic infrastructure developed in 2007: Sibiu has currently 15 active tourist information centers and the fact that the municipality continues to participate every year at the international tourism fairs and exhibitions around Europe.

[7] Sergiu Nistor, "Sibiu, Capitală Cultural Europeană – Raport sinteză, Bucureşti, Martie 2008

Another important aspect is that Sibiu continues to host every year cultural events with international impact: The International Theatre Festival, The International Jazz Festival.

The Development strategy of Sibiu County for 2010-2013 mentions as a priority of the tourism sector the development and communication of Sibiu Brand. The strategy aims to capitalize the positive image acquired throughout the European Capital of Culture Programme[8].

4. Tourism Development Effects

The Sibiu European Capital of Culture aimed to develop a „new tourism concept" in 2007, with the following aims:

- Promoting high-quality, ecologically sound, tourist experiences in Sibiu and the surrounding region.
- Providing satisfaction. Tourists must enjoy their stay here; they must be so satisfied with their experience that they will be willing to tell others about the city. The programme aims to integrate the tourism industry into an all-embracing concept, and connect it to a regional services network which operates at high standards.
- Intensifying the tourism marketing. In this regard, the activities will include:

- the promotion of the historical city centre;
- easy access to the sights and monuments in the region;
- the promotion and reintegration of the tourism market of the mountain resort at Paltinis (situated in the close proximity to the city);
- planning and organizing local, regional, inter-regional, national and international events;
- developing a gastronomic and hotel industry of high quality, enhanced by an attractive calendar of cultural and artistic events;
- developing new forms of tourism: religious, scientific and cultural, which can make better use of the local and regional conditions.

The results of visitor research conducted by ATLAS in 2007 indicated that the new tourism concept was largely successful, both in terms of the visitor profile and in terms of high levels of satisfaction[9].

It is rather difficult to separate the impacts of the European Capital of Culture Programme itself from the general growth in tourism supply in Sibiu, which would probably have shown some growth without the European Capital of Culture as well. However, looking at the pace of growth, it is clear that the period after 2007 has seen a substantial increase in the supply of hotels and other accommodation facilities.

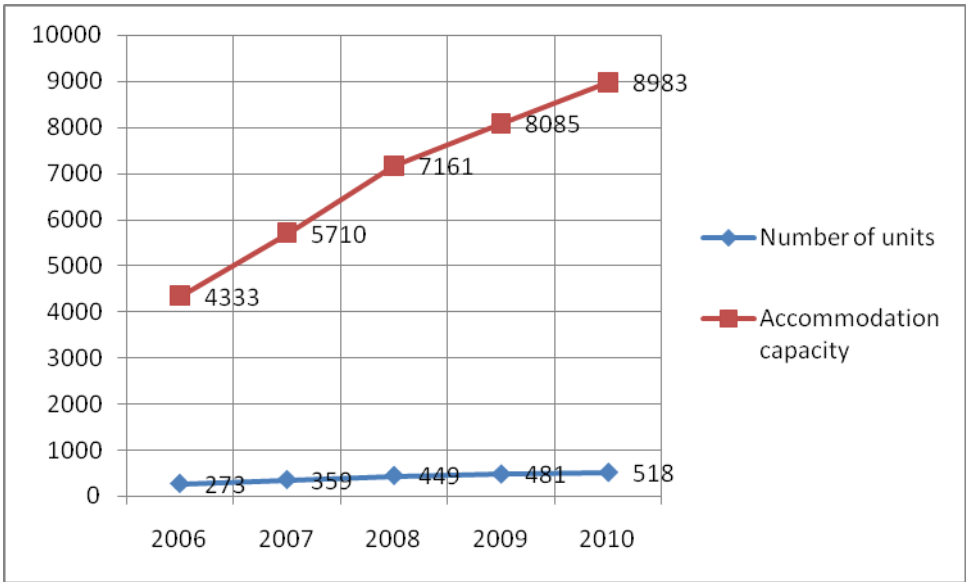
Table no. 4 - The evolution of the accommodation capacity in Sibiu County 2005– 2010

Year	Number of units	Accommodation capacity	Accommodation capacity Newly classified structures
2006	273	4333	-421
2007	359	5710	1377
2008	449	7161	1451
2009	481	8085	924
2010	518	8983	898

Source: compilation between INSSE statistical data, Masterplan for Tourism in Sibiu County, Sibiu County Tourism Association – Annual Report 2009

[8] Strategia de dezvoltare a județului Sibiu pentru perioada 2010 – 2013 și direcțiile de dezvoltare ale județului pentru perioada 2014 – 2020, Sibiu, 2010

[9] Richards, Greg nad Rotariu, Ilie, The *Impact of the 2007 European Cultural Capital in Sibiu: A long term perspective*, Sibiu, Editura Universității „ Lucian Blaga" din Sibiu, 2010.



As we can see from the table above 2007 has been an important year in the touristic development of Sibiu, from the number of touristic units and accommodation capacity, point of view. The overall result has been a doubling of total accommodation supply since 2006 and a continuous positive trend. It is also relevant that several large commercial hotels development accommodation facilities mainly in Sibiu, but also in the surrounding area.

The predicted increasing of tourists attracted many investments in hotel industry. The total amount spent for refreshing accommodation establishments was 60 million Euros[10]. Many existing hotels were renovated and some of them were reclassified to an upper category.

Ramada Hotel which is an international brand also opened a location in Sibiu. This expansion put Sibiu in top 5 Romanian destinations considering the number of hotels. An interesting aspect is the development of medium and large hotels with more than 70 rooms.

Due to the fact that many of the hotel projects related to the European Capital of Culture were not actually operational until 2007 or even in 2008, the biggest effects of hotel development were actually felt the year after the European Capital of Culture Programme. By 2009 Sibiu had an additional six four or five star hotels compared with 2006. This way, not only did tourism increase, but visitors also stayed in higher grade accommodation and therefore paid higher average room rates.

Table no. 5 - Tourist arrivals and overnights in Sibiu County 2006-2010[11]

Year	Arrivals (thousands)	Overnights (thousands)
2006	252.7	434.5
2007	327.9	530.1
2008	287.1	459.3
2009	240.1	375.9
2010*	196.1	345.6

*****statistics available until November 2010

[10] Smaranda Cosma, Adina Negrusa and Cristina Popovici, "Impact of Sibiu European Capital of Culture 2007 event on country tourism", *Proceedings of the 2nd WSEAS International Conference on CULTURAL HERITAGE and TOURISM.*

[11] www.sibiu.insse ro, National Institute of Statistics, Sibiu County Department, accessed January 29, 2010..

The tourism statistics show a clear boost both in terms of arrivals and bednights during the European Capital of Culture Programme in 2007. The fact that, starting with the following year, the number of tourists decreases is rather normal considering the global economic crisis, which had an important impact over the touristic activity. However, we need to take into consideration the fact that the decline was framed in the general national trends and that almost a third of overnight visitors stated that they stayed with friends and relatives when visiting Sibiu in 2007, so the decrease showed by the official statistics may not be entirely accurate.

Table no. 6 - Tourist arrivals and overnights in Sibiu City 2006-2009[12]

Year	Arrivals (thousands)	Overnights (thousands)
2006	150	235
2007	178.5	280.9
2008	147	204
2009	120.3	164.2

The data for 2008 and 2009 show a decline in tourist arrivals and overnights, which is also probably related in 2008 to post-ECOC decline and in 2009 to the economic crisis. It is also clear that the decline in arrivals and overnights follows national and regional trends. Compared to other cities in Transylvania, for example, the decline in arrivals in 2009 has been lower in Sibiu than in any other city except those of Mures County.

An important aspect in interpreting the statistics is the fact that almost a third of the people visiting Sibiu stated that they stay with friends and relatives, so, these are also tourists not included in the official statistics. Another issue is represented by the different accommodation units which are not registered, but still practice tourism.

Trends in the economic impact of tourism are also evident from the data on tourism tax revenues. These show clearly that 2007 marked a giant leap forward in terms of the development of the tourism economy of the city and the contribution of tourism to civic finances.

Tourism tax revenues grew by over 70% between 2006 and 2007, and have remained at these high levels in 2008 and 2009. In spite of the general downturn in tourism in Romania, tax revenues were still 70% higher in the first half of 2009 than they were in 2006. This shows that the European Capital of Culture Programme was successful in stimulating a qualitative change in the development of the tourism industry in the city[13].

5. Conclusions

In conclusion, the statistics show that Sibiu - European Capital of Culture Programme has had a strong impact on accommodation development both in terms of quantity and quality, not only in the city itself but also in the surrounding area. The marketing investments from 2007 proved to have an important impact on the overall touristic activity, but the fact that the municipality decided to capitalize the brand attributes acquired during the programme by including it as a major priority in the Development Strategy, demonstrated that Sibiu can stay on the European cultural tourism map for a long time from now on.

The fact that Sibiu continues to participate at the international tourism fairs and exhibitions around Europe, that, it hosts every year cultural events with international impact such as the

[12] Richards, Greg and Rotariu, Ilie, The *Impact of the 2007 European Cultural Capital in Sibiu: A long term perspective*, Sibiu, Editura Universității „ Lucian Blaga" din Sibiu, 2010.

[13] Richards, Greg and Rotariu, Ilie, The *Impact of the 2007 European Cultural Capital in Sibiu: A long term perspective*, Sibiu, Editura Universității „ Lucian Blaga" din Sibiu, 2010.

International Theatre Festival or the International Jazz Festival are all the more reasons for tourists to continue to be attracted to the city - Young since 1191.

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ORGANIC FOOD LABELING AND CERTIFICATION

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Abstract
In the rush to produce more and more crops to satisfy growing demand producers have had to resort to using a lethal cocktail of pesticides to control disease and insect attack. This has lead to numerous international debates about unhealthy food, the effects of it and the measures that must be taken in order to avoid the harmful effects of genetically modified food consumption demonstrated by specialists. These debates evolve around the benefits of the organic products versus the pure trade trick outlined by some. The organic food movement has earned its well deserved place in many markets around the world. Its prestige is lately being widespread to vast parts of Eastern-Europe as well. Based on data collected from specialized reports and articles on organic products, the aim of this paper is to present the importance of organic products, the regulations on organic food and different labels used around the world in order to certify the organic food products.

Keywords*: certification, food, labels, organic food, products.*

1. Introduction

Based on data collected from specialized reports and articles on organic products, the aim of this paper is to present the importance of organic products, the regulations on organic food and different labels used around the world in order to certify the organic food products.

Organic foods are made according to certain production standards. For the vast majority of human history, agriculture can be described as organic; only during the 20th century was a large supply of new synthetic chemicals introduced to the food supply. This more recent style of production is referred to as "conventional." Under organic production, the use of conventional non-organic pesticides, insecticides and herbicides is greatly restricted and saved as a last resort.

However, contrary to popular belief, certain non-organic fertilizers are still used. If livestock are involved, they must be reared without the routine use of antibiotics and without the use of growth hormones, and generally fed a healthy diet. In most countries, organic products may not be genetically modified. It has been suggested that the application of nanotechnology to food and agriculture is a further technology that needs to be excluded from certified organic food. The Soil Association (UK) has been the first organic certifier to implement a nano-exclusion.

Organic food production is a heavily regulated industry, distinct from private gardening. Currently, the European Union, the United States, Canada, Japan and many other countries require producers to obtain special certification in order to market food as "organic" within their borders. Most certifications allow some chemicals and pesticides to be used, so consumers should be aware of the standards for qualifying as "organic" in their respective locales.

2. Organic Food

Historically, organic farms have been relatively small family-run operations, which is why organic food was once only available in small stores or farmers' markets. However, since the early 1990's organic food production has had growth rates of around 20% a year, far ahead of the rest of

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the food industry, in both developed and developing nations. As of April 2008, organic food accounts for 1–2% of food sales worldwide.

Processed organic food usually contains only organic ingredients. If non-organic ingredients are present, at least a certain percentage of the food's total plant and animal ingredients must be organic and any non-organically produced ingredients are subject to various agricultural requirements. Foods claiming to be organic must be free of artificial food additives, and are often processed with fewer artificial methods, materials and conditions, such as chemical ripening, food irradiation, and genetically modified ingredients. Pesticides are allowed so long as they are not synthetic.

The following chart shows the size of organic farmlands (in ha) in different countries from Europe.

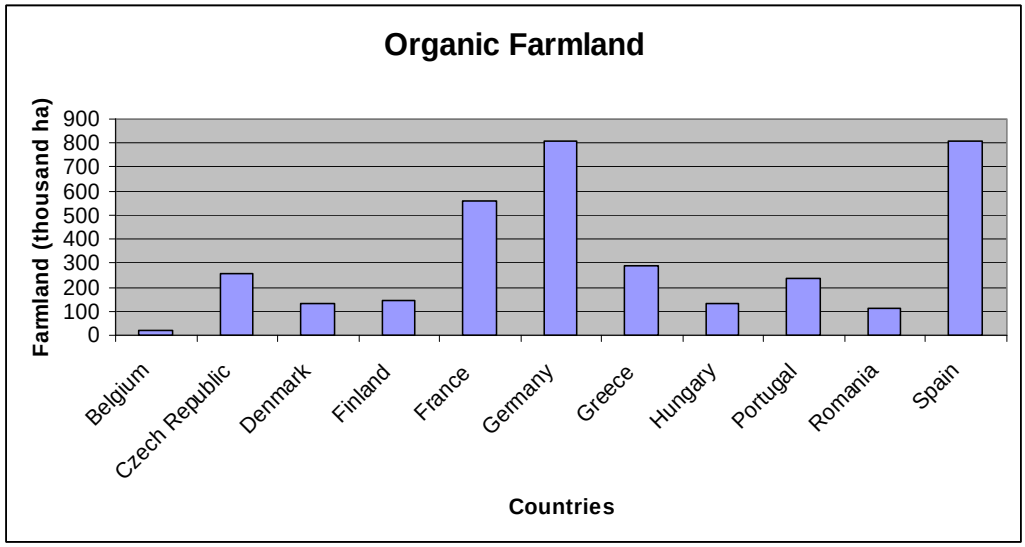

Chart 1.1: Organic Farmland in different European Countries, in thousands of hectares
Source: www.organic-europe.net

However, it must be taken into consideration the total area of these countries. It is logic that bigger countries have a larger farmland.

Early consumers interested in organic food would look for non-chemically treated, fresh or minimally processed food. They mostly had to buy directly from growers: "Know your farmer, know your food" was the motto. Small farms grew vegetables (and raised livestock) using organic farming practices, with or without certification, and the individual consumer monitored. As demand for organic foods continued to increase, high volume sales through mass outlets such as supermarkets rapidly replaced the direct farmer connection. Today there is no limit to organic farm sizes and many large corporate farms currently have an organic division. However, for supermarket consumers, food production is not easily observable, and product labeling, like "certified organic", is relied on. Government regulations and third-party inspectors are looked to for assurance. A *"certified organic"* label is usually the only way for consumers to know that a processed product is "organic".

The ecological aliments are diversified, healthy, and free of diseases and pets, deprived of noxious residuum, with a balanced content of bioactive substances and minerals.

Advantages of ecological products consumption are:

- to their production are not used herbicides, pesticides, hormones;
- they don’t contain additives or other chemical substances;

- they are not genetically modified;
- animal origin products don't contain antibiotics;
- they are healthy products, deprived of noxious residuum;
- they have a balanced content of bioactive substances and minerals;
- their impact of environment is minimal.

The disadvantages of ecological aliments are firstly represented by higher price and limited range. The higher prices are a consequence of lower productivity, because of non using additives, fertilizers and other chemical substances that have the role to increase the production.

Ecological products obtain their status only after the product unity is verified and certified. These products must have a quality certificate and the sigle of Certification Institute.

The label of an ecological product must contain: producer's name and address, the product name, the ecological production method used, the name and sigle of Institute which certify the product.

The traders of products containing 95% organic ingredients must use a EU special logo and a label indicating the product origin. Underneath will be another label indicating the organic ingredients type. This measure will permit to the consumers to easy recognize the ecological products from EU and to know exactly what they are buying. The label can be accompanied by national or private logos, depending of each member state.

The catering companies are excepted from these rules, but states can introduce national rules in that field.

Now, EU has 2 categories of labels:

- gold standard for final products containing minimum 95% of organic ingredients
- emphasized labeling for products with at least 70% organic content.

3. Organic Food in the Czech Republic

The Czech organic food market is developing rapidly. In 2005 the turnover grew by 30% and reached 350 million Czech crowns (ca. €12.5 million). The main reason for this growth is demand from Czech consumers; however, this is predominantly satisfied by increased imports from abroad.

In the retail market there is an ongoing lack of certain basic commodities of organic quality, for instance eggs, certain types of meat (above all poultry), fruit, vegetables, and milk and dairy products, especially butter and cheeses.

In general, organic food in supermarket chain stores is offered under the labels of the producer organizations. Nonetheless, the first organic labels of the retail chains are starting to appear. Super- and hypermarkets are the largest distribution networks for meat (beef from Biopark; pork from Delvita) and dairy products (Olma, Valašská Dairy, Polabské Dairies). Delvita, Tesco and Hypernova offer a limited range of fruit and vegetables (supplied by Ekofarma Deblín).

In 2005 the BIO logo of organic food in CR was transferred from private hands into the state's possession. The state support allocated to organic food producers was renewed in 1998, determining the development of this field. The support given by the state varies according to the type of food product.

The main regulation, which was changed as beginning with 2005, is Act. No. 553/2005 which amends Act. No. 242/2000, came into force as of 30.12.2005. The purpose of this amendment was to omit all the regulations from Act. No. 242/2000, which are duplicated in the European legislation. This lead to a simplification of the legislation.

4. Organic Certification

Organic certification is a certification process for producers of organic food and other organic agricultural products. In general, any business directly involved in food production can be certified, including seed suppliers, farmers, food processors, retailers and restaurants. Requirements generally

involve a set of production standards for growing, storage, processing, packaging and shipping that include:

- avoidance of most synthetic chemical inputs (e.g. fertilizer, pesticides, antibiotics, food additives, etc), genetically modified organisms, irradiation, and the use of sewage sludge;
- use of farmland that has been free from chemicals for a number of years (often, three or more);
- keeping detailed written production and sales records (audit trail);
- maintaining strict physical separation of organic products from non-certified products;
- undergoing periodic on-site inspections.

Organic certification addresses a growing worldwide demand for organic food. It is intended to assure quality and prevent fraud, and to promote commerce. For organic producers, certification identifies suppliers of products approved for use in certified operations. For consumers, "certified organic" serves as a product assurance, similar to "low fat", "100% whole wheat", or "no artificial preservatives".

Certification is essentially aimed at regulating and facilitating the sale of organic products to consumers. Individual certification bodies have their own service marks, which can act as branding to consumers; a certifier may promote the high consumer recognition value of its logo as a marketing advantage to producers.

5. Organic Food Labeling

In some countries, organic standards are formulated and overseen by the government. The United States, the European Union and Japan have comprehensive organic legislation, and the term "organic" may be used only by certified producers. Being able to put the word "organic" on a food product is a valuable marketing advantage in today's consumer market, but does not guarantee the product is legitimately organic.

In the US, federal organic legislation defines three levels of organics:

1.Labeled "100% organic" - products made entirely with certified organic ingredients and methods

2."Organic" – word can be used for products with at least 95% organic ingredients

3."Made with organic ingredients" – is a label for products containing a minimum of 70% organic ingredients.

In addition, products may also display the logo of the certification body that approved them. Products made with less than 70% organic ingredients can not advertise this information to consumers and can only mention this fact in the product's ingredient statement.

The following picture presents the logo of organic products in the United States:

Picture 1.1.: The official seal found on USDA certified organic foods
Source: www.organic-world.net

EU countries acquired comprehensive organic legislation with the implementation of the *EU-Eco-regulation 1992*. Supervision of certification bodies is handled on the national level.

In March 2002 the European Commission issued a European wide label for organic food however for most of the countries it was not able to replace existing national product labels. It was re-launched in 2009 with a design competition for a new logo to be used throughout the EU from July 2010. The new logo for European Union member states can be seen below:

Picture 1.2: The new official seal for EU organic products
Source: www.organic-world.net

In **France**, organic certification was introduced in 1985. It has established a green-white logo of "AB - agriculture biologique", seen in picture 1.3. The certification for the AB label fulfills the EU regulations for organic food.

Picture 1.3: Organic seal in France
Source: www.organic-world.net

In **Japan**, the Japanese Agricultural Standard (JAS) was fully implemented as law in April, 2001. This was revised in November 2005 and all JAS certifiers were required to be re-accredited by the Ministry of Agriculture.

The seal pf JAS can be seen on the picture below:

Picture 1.4: JAS www.organic-world.net
Source: www.organic-world.net

In **Australia**, the Australian Quarantine and Inspection Service (AQIS) is the controlling body for organic certification because there are no domestic standards for organic produce within Australia. Currently the government only becomes involved with organic certification at export, meaning AQIS is the default certification agency. The largest certifier of organic products is Australian Certified Organic (logo seen in picture 2.5), which is a subsidiary of Biological Farmers Australia, the largest organic farmers' collective in the country.

Picture 1.5: Australian organic seal
Source: www.organic-world.net

6. Organic Food in Romania

In Romania, organic food and beverages account for a mere one percent of total food sales, according to Agriculture ministry. "Romanians were fascinated by McDonalds and Coca-Cola after the 1989 Revolution, but today people think more about their health and are starting slowly to come to organic food," said Marian Cioceanu, president of NGO Bio Romania.

The fact that the organic products have an outlet in Romania is proved by imports, which are doubled each year. In 2007, the market of organic products was estimated at 2.5 million EUR, by 1 million EUR more than in 2006. The table below shows the evolution of organic food production in Romania (in tons and hl):

As in the case of land areas and livestock, productions continuously increased in the investigated period. Although the production levels are much higher than those obtained 5-6 years ago, the domestic supply cannot totally meet the demand yet, which makes it possible for the imported organic products to penetrate the Romanian market.

The organic products are found both in the large store network and in the small specialized shops. At the beginning of the year 2007, only two shop networks were registered at MAPDR: the shop "BIOCOOP" (Sibiu) and the shop Naturalia (www naturalia.ro), with units both in Bucharest and in the county Ilfov (Voluntari).

The sale on the domestic market is through the wholesale networks Metro, Selgros mainly by retail shops. The main stores that introduced organic products in their assortment of goods are: Carrefour, Cora, Gima, La Fourmi, Mega Image, Nic, Primavera, OK.

Picture 3.1: Organic products' logo
Source: www.organic-world.net

EU provides support for the promotion of organic products, through co-financing programs, with a 50% funding from the European Commission, 20% from professional organization, and 30% from the state budget, in conformity with the procedure of the Commission Regulation (EC) no. 1071/2005.

The governmental policy is elaborated and coordinated by Ministry of Agriculture, Forestry and Rural Development (MAPDR), under which the Office of the National Authority for Organic Products (ANPE) is operating, which is the authority in charge of the organic farming sector.

7. Official Control of Aliments

For assuring a consumer proper protection, by Government Order nr 1196/2002 from 12.14.2002, was approved the general Norms regarding food official control.

The Norms establish the general principles for execution the official control of aliments addressed to internal market trade or export, as well as aliments offered for free by economic agents, associations or foundations.

Official control of aliments represents the inspection made by authorities about aliments, additives, vitamins, mineral salts, as well as materials and objects who came in contact with aliments, for checking legal dispositions regarding risks prevention for public health, guarantying proper commercial transactions, protecting the consumer interests and informing them.

The control is made periodically (as a rule without warning) or any time when an illegality is suspected.

The control is done by using aim adequate ways and can target all cycle stages that include the manufacture, import, deposit, delivery and trade.

Executed control includes one or more of next operations:

a) inspection;
b) assay and examine samples, tests;
c) control of personnel hygiene;
d) documents examination;
e) examine all the checking systems established by economic agent and obtained results.

During the inspection is checked the following:

- the way of use and the status of terrain, construction and installations, offices and other spaces, neighboring, ways of transport, machines and equipment used;
- raw materials, ingredients, auxiliary technological materials and other products used for food production and preparation;
- the half-finished products;
- the finished products;
- the materials and objects that came in contact with aliments;
- the products and procedures for cleaning and maintaining;
- the procedures used for aliments manufacturing and processing;
- the aliments labeling and presentation;
- the preserving ways.

Through Phare RO 9704 – 02 Project, EU supported Romania food industry companies regarding to products standards harmonization. This project includes activities grouped in two domains: 1. consultant and managerial training for alimentary products suppliers; 2. informing the business environment from alimentary sector regarding products quality.

For aligning to EU norms in products quality domain, Romania took over all ISO 9000 standards appeared by now at world level, being RS (Romanian standard) or EN (EU standard) encoded.

EU 93/43 Directive regarding alimentary products –hygienic requirements- refers to a quality management system implementation, conform standards series ISO 9000, in those organizations that

manufacture and process aliments. Also, the Directive refers to the possibility of using HACCP (*Hazard Analysis Critical Control Points*) as part of a quality management system.

8. Conclusions

The word organic is central to the certification (and organic food marketing) process, and this is also questioned by some. Where organic laws exist, producers cannot use the term legally without certification. To bypass this legal requirement for certification, various alternative certification approaches, using currently undefined terms like "authentic" and "natural" instead of "organic", are emerging. Consumers have to be informed about real organic products and laws must always be adopted in order to certify these products and to regalement their production processes.

As seen from the information presented in this paper, various labels serve the purpose of guiding consumers. They have to pay attention and to closely analyze the available organic products.

From the tables and chart it can be deduced the increasing trend of organic food. In the same time it must be taken into consideration that the certification holds drawbacks as well. It could be seen as a barrier to entry for small producers and an unnecessary bureaucracy.

Taking into consideration all the aspects of this topic the first and most important issue is to be aware of tricks and to know as well as possible the consumer protection regulations that might come in handy if bumping into a false organic product.

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MANAGERIAL FORMATION, LIFESTYLE AND PERFORMANCE

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CRISTIAN SIMA[**]

Abstract
The definitive characteristics of companies' management and background have offered more or less convincing explanations for the fundamentals of their performances and competiveness. It was long studied the ability of managers and management teams of drawing "strategic lines" at national, regional, EU and world level. The future, instead, is at stake because of the crisis. All big companies experienced new managerial methods and models, more or less strategic, for the past two years. The present shows that those companies which resisted in front of the present realities of the market do not fit in the general strategic management. Already, often, the strategy does not excel one year. What preoccupies the specialists in human resources lately is the existent disequilibrium on the labor market and the crisis at all levels: moral crisis – spiritual crisis – financial crisis – economic crisis – social crisis, and on the needs to reduce costs with the human factor. Very few will be interested in indentifying their employees' labor aspects. They examine human personality, with the purpose of completing their employees' professional training and improvement, their performances and behavior at work, their individual results and those of the organization compared to competition… That seems to be enough, right?! But who is still interested in investigating the relation between the work results and the quality of life, the lifestyle, the personal satisfactions?

Keywords: *evaluation of management quality, lifestyle, quality, crisis.*

1. Introduction

The manifestation of the human factor in social and economic activities, involves not only the existence of a numerical quantity of it, but especially a certain level of training, of professional qualification. In simple words, the quantitative aspect is relatively easy to solve, each company draws from the labor market the respective necessary employees (calculated according to the objectives established and the interest to maximize profits). Qualitatively, the problem is more complex. The qualitative side, in the case of the labor factor, refers to the professional training, qualification, level of qualification and to the continuous formation, therefore to learning throughout life.

Until three or four years ago, when mankind was living in a time of intense expansion of technics and modern technology, the continuous improvement of workers within each company was producing significant changes in the character and content of work. This required workers with a high professional training, with a wide horizon of culture, able to master modern means of production. In real terms, on the labor market one could feel the companies' concern to improve, on one hand, the quality of labor resources, and on the other hand, the use of labor resources available in each company.

In the Romanian economy of the recent years, the relationship between the level of training and performance is impossible to separate from that of quality – quality of life, quality of work, quality of work life and why not, primarily, employees' human quality, not only their professional and managerial training.

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Even the meanings of "performance" experienced somewhat different approaches from those already established. Cases of perpetual crisis, recession, déjà vu in solving the crisis, marked the reevaluation of the turnover values, the profits, the exports, the employees that were not laid off, taking extreme measures in order to keep the organization at functional parameters.

That is performance, to prevent bankruptcy and not to lay off workers!

Sad, but terribly true.

2. Literature review

Normally, the bond between training – management training – quality / lifestyle – performance is represented by the ability to understand the content of each of the concepts mentioned especially the interdependencies between them, as well as the consequences of the individual and combined actions.

The economic publications have made available thousands of pages on managers, their training in making businesses efficient and maximize the profits by developing and generalizing performance - A. Chandler, P. Drucker, O. Gélinier, as well as Eugen Burdus, Viorel Cornescu, Gheorghita Caprarescu, Ovidiu Nicolescu, Ion Verboncu, Tiberiu Zorlentan...

Regarding the standard of living, lifestyle or the quality of life, we can say that managers have not shown sufficient concern to study the organizational context in order to identify the dependences and interdependencies with the work results. We know of research conducted over decades by Annas, Bowling, Cella, Cherin, Evans, Farquhar, Veenhoven, Sergiu Baltatescu, Ion Marginean, Lazar Vlasceanu, Catalin şi Elena Zamfir ...

3. Theoretical background

Mankind was witness over the years to an accelerated evolution of the individual, from the child in school, student in university amphitheatres, to the specialist engaged in a continuous self-improvement of his/her own professional, managerial knowledge. Perhaps the time has come to a slowdown of the process, for a deep, serious and sincere reflection about the way of understanding the complexity of present reality, of planning the personal/professional and managerial evolution, and most of all, of putting into practice in an efficient way the work of the people so formed.

Experts say that humanity is still struggling with an unprecedented crisis. The methods known and applied do not seem to help. As regards the human factor, the classical patterns of education and personality formation, they do not prove sufficient. The current financial and economic crisis, without precedent in the heyday of educational management/academic or human resources management, combined with the identity crisis of the human factor. The present shows, first of all, a human crisis: identity, physical, understanding, behavior... So, where should we look for the answers to the needs of restructuring the society [1]?

Hard to understand is that the wise men with decision power, both in the education system and in the ministries with impact on the professional development of people, are not inert, but destructive. They seem not to be aware of that fact that the work results are in direct proportion with the way in which the employed person is valued (by others, but also by his/her own standards), of the issuance of a certificate attesting a competence or more competences, of the collective or individual awareness of the personal value, of understanding the necessity of familiarize with the proactive thinking and the application examples [2]...

Study hypothesis

- Training, especially training in management, is a constant of the economic activity, just that the present situation requires changes in the approach, variation in the training programs not being enough.

• Obtaining performance is not only conditioned by the managerial training, but also by the quality of life, including the work life of all workers.

4. Possible arguments

Training is a complex and lengthy process [3]. It is materialized for each individual in its qualification for a certain profession out of the wide range of professions in a society. Qualification can be seen as acquiring all the basic scientific, technical and special knowledge, as well as all the necessary skills for carrying a profession under certain economic, technical and organizational conditions. Taking into account the opportunities, skills and aspirations of each individual, the concept of qualification becomes even wider, richer. Especially under the present conditions of technical progress, when more and more professions require a certain type of skills, the qualification of each person has to start from their identification, continuing with their development thorough professional training. Taking this into account, we consider that the professional training groups two different major processes [4], namely: the professional education (which highlights the abilities of each person and, in the same time, that person is oriented towards one of the professions appropriate for the respective abilities) and the professional formation (the process though which, effectively, the preparation of each person for the job they choose is accomplished, by using all the methods and forms existent at a certain moment for acquiring scientific, technical, general and special knowledge and working skills).

In other words, the professional formation has to be the perfect combination between the process of education and work, evolving in two directions, namely [5]:

• Ensuring for each person a volume of general and special knowledge, and particularly, superior managerial knowledge. This is achieved by means of school preparation, but also of some special forms of training within the company, by this the employee acquires more competences.

• Formation of practical working skills. Practical learning in shops and enterprises under specialized guiding. The content of the work competences acquired is formed by the existence of certain methods of action practiced through exercise, i.e. continuous repetition in executing specific operations or works. As these exercises increase, the inherent clumsiness of the beginning disappears, the individual is becoming more and more familiar with the content of the activities required, the nervous tension fades, and the effort per time unit decreases continuously. The skills' training process appears like a process of work experience accumulation, each repetition leads to better skills, work experience and enhances performance [6].

Generally accepted

The theory states a person's managerial skills, pointing out that their existence does not necessarily lead to success in the act of leading. More often they accept the idea that managers are formed through formal education, but also in practice, but this is not enough. Even today, there are very few accepting that a valuable manager is born for that particular profession. In other words, native qualities are the basis for the completion of the acquired skills.

Along with the professional skills, primarily, or with the general knowledge and qualities, the abilities, talent, experience or even gender, secondly, come together to form an efficient manager. The managerial training results in a set of ten competences [7]:

• Establish a clear direction for action;

• Achieve a system of open and intense communication with all workers, regardless of their hierarchical position in the organization;

• Train and support the others;

• Recognize objectively the subordinates' performances;

• Efficiently equilibrate control and trust (knowing that their sum is a constant in management);

- Correctly know the persons to lead the organization;
- Correctly evaluate the financial consequences of the decision process;
- React positively, openly to new ideas;
- Send clear messages and clearly communicate decisions;
- Have an ethical integrity and be an example for the others.

Most of the theorists believe that managers are those who meet two categories of requirements [8]:

- Requirements related to personality, defined by: the subject's constitution and temperament; the physical environment (or climate); social environment (land, family, education); habits, skills in everyday life...
- Requirements related to intellectual abilities: intelligence; openness to new ideas; memory; rational, clear and straightforward thinking, both in term of theorization, generalization and abstraction, but also in solving everyday problems...

However, the manager's skills always appreciated are grouped into four categories:

- Cognitive skills – serving managers in collecting and summarizing information required, as well as to expose them in an accessible manner, easily understood by others;
- Interpersonal skills – enabling managers to master human resources under their leadership by precisely awarding each team member the most appropriate role in the company;
- Communication skills – easily solve existing problems, as well as managing, formally or informally, exceptional problems that may appear;
- Motivational skills – enable managers to establish clear, deeply determined and ranked objectives.

Some also believe that the qualities, skills and competences are not the only defining elements of a manager. There have to be added some technical (tasks or works) activities, analytic, conceptual, decisional activities, in the field of human relations, communication, computers....

The fact is that regardless of the interpretation, approach, grouping or denomination, the managerial training results in a series of characteristics, competences, abilities, aptitudes, talents, vocations... subordinated to a single purpose: to lead people in order to lead processes.

The managerial training completes the special formation, is continued with managerial training, various other trainings, formations and any other ways by which managers can broaden their knowledge and skills [9]. The managers' professionalism is subject to the quality of the management training, determined, on its turn, by the complexity of the training, its pragmatism, the measure in which the knowledge and skills are updated, as well as by the measure in which new attitudes and behaviors are shaped in accordance with the recent trends. Specifically we are talking about:

- **Special training (basic formation).** The importance of the basic formation (engineer, economist, lawyer etc.) within the managerial training decreases proportionally with the position occupied by the manager on the career ladder within the company. For the average levels and especially the low leading positions, which are closer to the places where work is being carried out, the importance of the basic formation is clear, because managers have to face directly with problems regarding the respective activities, therefore it is compulsory that he/she be familiar with all the aspects of those problems. At the company's management level, especially in big companies, the basic formation of the managers significantly loses importance, since the nature of the problems faced by managers at this level and, therefore, the managerial approach, is of a superior persuasion, which requires creativity, strategic vision, foreknowledge and the ability to coordinate different activities etc., which have far less to do with the basic formation. Thus, achieving performance depends on:
  - specialized training profile;
  - its congruency with the management activity;
  - its relevance in relation to the manager's hierarchic level.

• **MA formation.** Application at European level of the Declaration of Bologna, has given increased importance to the MA (considered a superior form of training which leads to a more concise answer to the real qualification needs on the labor market). The added knowledge and specialized skills achieved through MA training is reflected on the managerial performance according to:

- MA training profile;
- Its congruency with the management activity;
- A plus of knowledge and skills which the now manager acquired in the MA training.

• **Ph.D. formation.** The higher form of high scientific qualification, after finishing the university studies, PhD involves the materialization in a scientific paper of an idea, a project, a deep approach of a certain specialized problem. PhD holds a paramount importance for the scientific careers (in fundamental and applied research) and university careers. For management positions, PhDs in technical sciences are significantly less relevant than those in social sciences related to the management or connected areas (marketing, forecasting, finance, operational research, organizational psycho-sociology etc.), because the latter, through considerable efforts of documentation and experimentation, considerably broadens the horizon of knowledge and the consolidation of certain skills directly related to the management practices.

• **Management training through university classes** (specialization – Management). This basic training is of vital importance for creating a professional manager. During the year of study with specialization Management, the graduate acquires a considerable amount of knowledge, a wide range of skills specific to that of a manager, basic rules essential for a quality management (attitudes and behaviors), in accordance with the latest elements and trends in the managerial science and practice. The effectiveness of managerial knowledge and know how within university classes is conditioned by their applicative, pragmatic character, as well as by the intensity with which they are used in interactive, participatory methods, focused on developing the base understanding of problems and on creativity. The intense presence in the university curricula of participatory methods (panel, incident, sensitivity training, solving correspondence, case study, entrepreneurial game, or in the Romanian variant, the economic project) in the past decades, is a convincing confirmation of their effectiveness in the training process, in the sense that they ensure the acquisition of conceptual, decisional and action skills that will allow the future managers to successfully face the real problems. Among graduates with specialization Management, only some will come to hold managerial positions, others will sure their knowledge and skills as specialists in activities related to the managerial practice (strategic planning, operational research, organizational development, project management, staff training etc.). The performance of a company where such graduate is working, depends on:

- the quality of the university classes completed, assessed by the reputation of the high education institution attended;
- graduation degree;
- contingent exceptional achievements of the manager during his university training (specialization in famous universities abroad, excellence awards etc.).

• **Post-university managerial training.** The requirement of continuous training is greatest for those who hold managerial positions. The answer to this requirement implies, for managers, the regular participation, usually at every 2-3 years, in management training programs, which provide an update for knowledge. To this end, training programs must cover a wide range of topics on innovations in methods, techniques and management tools, in primary and secondary legislations, in government policies, global trends in the economic and managerial fields. Subsequently, the level of performance at work is influenced by:

- the quality of the post-university classes completed, assessed by the reputation of the institution organizing them;

- the connection between the theme of the graduation paper and the problems the manager is to face;
- contingent exceptional achievements of the manager during his post-university training (an excellent graduation paper, widely applicable in the respective field, winning excellence awards etc.).

• **Further training.** The training manager have in other fields closely connected to management or which provide knowledge that can be used within the managerial activity, should also be taken into account when assessing the general training for managers. Among these classes and programs are those whose object, for example, is energy efficiency, environmental protection, investment in human capital, protection of intellectual property, sustainable development, labor market, capital flows, banking system, exchange mechanisms, trade policy, energy infrastructure, transportation and telecommunications, liberalization of industrial public services, regional development and inter-regional disparities, EU institutional context, EU policies, alignment of the Romanian legislation to the EU acquis, the benefits and costs of full integration in the EU, globalization, etc. Again, the level of performance in an organization depends on several aspects:

- number of company managers who have participated in specialized classes and programs;
- how often managers participate at such classes and programs;
- the visible effects on manager's actions, after participating at such classes and programs.

• **Specializations in the country.** This form of improving the training involves conducting training courses of varying duration, from 2-3 weeks to several months in important companies in the field, in research institutes and centers of scientific and technological development, universities and specialized government bodies (agencies, offices etc.), in consultancy companies etc.. This form of training enables new and different approach to problems of interest to the beneficiary of the specialization, provides the acquisition of knowledge and new practices, as well as the capacity to adapt to new conditions and functions, and normally requires playing an active role in the respective unit. Performance achieved in the employing company is a variable dependent on:

- profile and level of specialization;
- period of specialization;
- the form in which it is completed;
- the degree of connection with the managerial field.

• **Specializations abroad.** It, obviously, presents the same characteristics as those made in the country. However, the selection of beneficiaries of specialization abroad is significantly more demanding and rigorous than the one made in the country; specialization is made in prestigious foreign institutions, which provides the premise of a very consistent transfer of knowledge and practices. The level of performance is influenced by:

- specialization profile;
- specialization period;
- the degree of correspondence with the managerial field and with the problems the respective manager has to face.

Accepted, but with pro and con commentaries

As many specialists put it, managerial performance is what mostly defines the manager's quality, its capacity to convert, with a certain degree of efficiency, knowledge, experience and skills into decisions and actions that ensure the achievement of such performance. It is enough to mention the neoclassical school of management (which includes famous names such as A. Chandler, P. Drucker, O. Gélinier), which considers profit the most direct expression of a company's capacity and implicitly, its management, to adapt, maintain and develop, by proposing a system of precise indicators to measure profit [10].

Appraising the managerial performances, and hence the quality of managers, only through the profit achieved or, on a larger scare, in terms of economic and financial performances of the company, is to embrace an exclusive and simplistic vision, which does not take into account the many internal and external elements defining the company's management. We must not forget that the company's profit, more accurately, its rate, is determined, most of the time, by factors beyond the management practice quality, such as special situations, consistent governmental support, significant changes to regulations directly related to the company's activity etc.

Consequently, management performances have to be considered in a broader dimension that includes, in addition to the financial and economic performance, other relevant aspects. Unfortunately, today's employees put the equal mark between the level of performance and the rewards. Although not the only, nor the most important motivator, reward is one of the oldest, most visible, direct and fastest tool to gather all efforts in achieving performance [11].

Recognized as having instrumental value even at the dawn of civilization, as being the foundation of various cultures and religions, reward always had the gift to influence mentalities, behaviors and attitudes at individual and society level. In organizations, the reward evolution was linked of that of the human resources. If the reward was initially positive (money and praise) and negative (punishment and blame), and the maximum valorization was material and financial, reward became only positive, widening its scope with moral and spiritual elements which are becoming increasingly popular, especially since they became, in fact, inexhaustible, as shape, volume and means of expression.

The term reward is relatively new in the management practice in Romania. Before 1990 the concept of retribution was used as a reward for the work. Taken from the Anglo-Saxon literature – "compensation" – the term can be translated into organizational context through compensation, payment, reward, indemnity, salary [12]. If the common meaning of the compensation concept is to complete, to replace something insufficient with something else, to correct something wrong by means of something good [13], the payment concept leads to the meaning of transaction, while reward as premium for a certain recognized effort is considered by most authors as the most appropriate and comprehensive.

From the organizational point of view, rewards include all existent or future nominal earnings, facilities and advantages by which the professional status, value and contribution of an employee to the company's success is recognized. Rewards are influenced and influence on their turn, directly or indirectly, all the activities that from the Human Resources Management. Therefore, they should be seen as an open system, which interacts with the company's environment, but also with its external environment. *The reward system is composed of components, policies, strategies and processes by which the organization evaluates and rewards its human resources according to skills, competences and results, as well as to their value on the labor market.* The reward system is designed and operates as a part of the company's global strategy, reflecting the philosophy of management, which can be found, explicitly and implicitly, in the assumed mission of the organization.

In the present context, there is no pleasure in presenting the reward structure neither in the public institutions nor in the private companies. Often, it is no longer the incentive to creativity, productivity or performance. However, perhaps those who have decision power will take into account the theoretical element of the system and will no longer object in putting in into practice:

❖ **INPUTS**

1. Company's human resources in the number and structure presented in the organization chart, in the operational recruitment and selection plans;

2. Awards, classified on their nature:

A. Direct financial rewards:

a) salary – the basic element of the reward system;

b) minimum bonuses, granted under the Collective Labor Agreement (of which they are already talking at the past tense, wanting to transform it in a memory): *special working conditions, hard, dangerous or embarrassing; harmful working conditions; extra hours and hours worked on national holidays and legal holidays; seniority.*

c) awards;

d) incentives, especially in public institutions to increase motivation at work – in term of theory, the reality is quite different;

e) allowance – fixed sums paid for outstanding performance, depending on individual, group or organization results;

f) commission – a special form of reward given, with preference, to employees as a percentage of the sales or as a percentage of the total value of the sales;

g) participation to profit – share of profit distributed to employees, up to 10% for commercial companies and 5% for autonomous.

B. Indirect financial rewards: the amounts received for the employee quality, both for during employment as well as after it, including: paid vacation, sick pay, maternity leave pay, insurance premiums: medical, life, accident, work incapacity, unemployment, pensions, dividends.

C. Facilities – refer to facilities granted to employees during the period of employment with the respective company. This category includes: housing, company car, financial support for house construction or purchase of durable goods, discounts on purchase of company products, company phone, vouchers, providing legal and financial advice, use of rest houses and sports facilities, receiving paid holidays and business trips.

D. Benefits refer to the direct and indirect, immediate and future interests that the company provides for each employee; training courses for career development, team-building and friendship opportunities, career opportunities, skills developments, quality of working life, reserved parking, and special facilities at work.

3. Information in labor legislation, the levels and types of remuneration, the evolution of supply and demand of work force for the respective market, nationally as well as on European level, the level of individual and group performances at company level, individual aspirations and motivations.

❖ **REWARDING PROCESSES**

Inputs on the reward system, their level and way of combination in a special compensation policy of the respective company regard primarily the motivational processes and only afterwards the level of performance. Analyzed in conjunction with the types of motivation it was proven that, while direct financial rewards are extrinsic motivation factors, the indirect rewards, facilities and benefits are intrinsic motivation factors. Combining inputs through motivational process must take into account:

- *The utility the employee seeks* – regarding intrinsic motivation, satisfaction and interest towards the work content, the sense of professional accomplishment, merit and contributions recognition, personal development and self-esteem;
- *The cost the company seeks* – found in the extrinsic motivation, related to the official recognition of the activity and the employee's contribution.

The rewarding processes within a company are influenced by:

a) internal environmental factors:

➢ *Management vision on human resources.* The mentality of the senior manager on human resources is directly reflected on the size and structure of rewards. Thus:

- *the classic vision of* ***„labor" or of „work force"*** implies a strict judgment on the economic level: the emphasis falls on direct rewards, namely, the basic salary and certain allowances provided by law, and their value is, as much as possible, minimized in favor of profit growth; often, important components of direct rewards (bonuses provided by law) are ignored; awards are granted on a preferential system, depending on mood, sympathy, existing even the possibility of intentionally

omitting persons or situations employees are facing. Facilities exist only for certain people in the top management, the benefits for regular workers are consider extravagant spending. The formula „I am everything, you are merely a few pieces on the chessboard which can anytime by replaced" expresses the infatuation as fundament for the whole management philosophy. Contempt for people is express in the most obvious ways: from the form of addressing them to attitudes that leave no room for interpretation regarding the person/s holding the power, to the working hours that infringe on the legal legislation, as well as the lack of attention for days such as 1st or 8th of March, 1st of June etc. – or different occasions in employee's personal life. The staff's state of satisfaction or dissatisfaction is of no interest, only the obligation and responsibilities at work are. Only the present is important, usually strategies are inexistent, and the rewarding policies include restrictions, sanctions, threats. This vision is very common in the twenty-first century Romania, especially in private companies led by gerontocrats, the newly rich in the transition period, people whose entrepreneurial spirit is synonymous with the ability to circumvent the law, where performance is not a must.

- *The globalizing vision of "**personnel**"* - is characterized by a tendency of leveling rewards and strictly aligning to the legal provisions. There is no differences and contribution, effort and individual aspirations do not count. It is characteristic for the public organizations and public institutions with obvious signs of bureaucracy and too little performance.
- *"**Human resources**" vision* allows intellectual capital and human capital to be appreciated and valued, treated differently depending on skills, performance and attitudes. As a result, the rewards are fulfilling their role as motivational factors and the way the reward system is designed and applied is based on human capital appreciation through investment in organizational learning. Relations to employees are addressed in a unitary manner (employees and employers have common interests) not pluralist manner (employee's and employer's interests are different and contradictory).

➢ *Reward policy and strategy.* The reward policy can work informally, by rules, group norms, traditions and habits, reflecting the management vision. Reward strategy, since it is designed as a component of human resources strategy must reflect and support the objectives and the strategic options of the global strategy. Thus, a development strategy with options to enter new markets and product innovation will determine not only a policy of recruitment from sales and research and design, but also a strategy to reward performance in those areas.

➢ *Work conditions.* This factor is included in two factor theory of Herzberg, in the category hygiene factors, whose presence does not necessarily lead to satisfaction, while their absence causes dissatisfaction.

Here is where the quality of working life, the quality of life and that of the lifestyle appears.

The standard of living is based on aspirations and initiatives (subjective component) and living conditions (objective component) [14]. They depend on the natural economic, social, cultural, personal resources... manifested in the natural, socio-cultural, collective and individual frame. If we consider all biological, social, economic, educational, cultural activities and evaluate the level of health, leisure and free time we define the standard of living [15]. It is obvious the relationship between the amount of reward and the quality in the way of life. A high income brings access to a well-placed individual status in the social hierarchy, greater satisfaction of needs [16]. And by good health, a sustained interest of raising the education level, the individual consolidates their rise on the career ladder in parallel with raising the standard of living. In terms of efficiency, this translates into performance, both in life and in the organization in which they operate.

Managers have to pay special attention to the quality of life of their subordinates if they are not indifferent to the business they lead. The individual and the organization as well depend of the health level and quality of life of the employee. Even if, in the manager's opinion, individuals have no value except through what they achieve within the organization, there must still be concern to improve the work and life conditions of employees [17].

In order to make the business efficient, each manager should consider that the individual at work is a complex object of study, especially those who still reject the idea of taking into account the

psychological and sociological concepts within the organization. There is – not enough though – concern for employees' collective behavior. In the case of well thought leaderships, there is interest in achieving performance, but only by fully motivating their employees.

The Romanians' incomes are generally below their needs and hence employees cannot only be motivated through this material aspect. In this situation, workers choose their own work as a motivational retreat, by its content and dimensions. Surprisingly, they also become productive.

People are different, they react differently in similar situations, and therefore, observing and analyzing them and use their lucrative potential, does not have to follow rules applicable to everyone. The value of a manager is given by the way in which he/she knows and is able to recognize each personality in his/her vicinity, and through managerial levers to achieve the most efficient combination of interests at organizational level: orienting the individuals' activities towards achieving common objectives and meeting performance and, as it is possible, to meet the employees' needs. The manager's role is even more important if he knows how to use everything that is visible for everyone, but unreadable for the eyes of many.

b) external environmental factors. In this category:

- *Demographic factors.* Their evolution influences the demand for employment. Thus, a negative population, even though it is immediately charged as pozitive effect (by decreasing payment or maternity and child-rearing) has efects for the future (aging population), and the number of indirect awards (pensions, sick leaves) increases.
- *Nationwide labor market evolution.* The evolution of demand and supply on certain segments of the labor market can produce substantial reward variations. The example of the recent years Romania is clear: certain occupations – computer scientists, financial analysts, auditors, accountants – for which demand is greater than supply, caused not only an increase in direct and indirect rewards but, most of all, the occurence of certain facilities and benefits practically unknown before 1995-1997.
- *Labor price at international level.* This factor appeared as a result of the human resources' mobility, the globalization. Salaries are subject to inevitable comparizons in the case of labor force migration. It is the case of workers in construction, agriculture, IT and doctors whose salaries in the other EU countries are compared to those earned in Romania. Lower rewards determine the massive exodus of these categories, so, in order to stabilize this situations, those remaining in the country should be offered comparable rewards.

❖ **OUTPUTS**

The most obvious outputs in the rewards system are:

- *Professional performances.* Performance-reward relation remains one of the central issues of management. Although it is discussed since the time of the classics of management (F. W. Taylor shows in his works the importance of this relation, primarily, for the employer's benefit) we cannot say that there is a perfect solution in practice, or that it is an exhausted subject in theory. Beyond measuring results and comparing them with the standards, the professional performance is subject to a numerous physiological aspects, often ignored. Therefore, so that the relation professional performance – rewards be better understood, a series of conditions, mentioned in the specialized literature [18] should be taken into account.

Table no.1 : Premises of determining the correct relation between performance and reward

No.	Premise	Effects on manager's behavior	Effect on employee's behavior
1.	Employees' trust in managers	The manager who is respected by the employees may decide to grant rewards depending on performances; the contested	Employees accept the differences in rewards without clamoring against the manager whose authority they recognize; in the case of the incompetent manager

		manager will level all rewards.	the differences will be contested as being subjective and unprofessional.
2.	Performance freedom	The manager has to stimulate performance in all employees	Employees must know that there are no restrictions in achieving performance and that, once achieved, they will be properly rewarded.
3.	Competent managers	The competent manager can correctly evaluate employees' performances	Employees are convinced of the usefulness and correctness of coordination in achieving performance.
4.	The correctness of the evaluation system	The manager shall periodically review the level of performance and will periodically adapt and communicate it to employees	An incorrect assessment will generate inequity, frustration and lack of motivation.
5.	Real financial potential	The manager shall not make promises of rewards that cannot be granted	The lack of financial resources, the reduction or even elimination of certain rewards will decrease the employees' confidence and level of motivation.
6.	Way of expressing performance	The performance level has to be clearly expressed for each job	Knowing and understanding performances can enable action to achieve it.
7.	Clarity and awareness of the reward structure	The components of the rewards system and the conditions for obtaining them have to be presented to employees from employment and announced of any modification thereto	Direct motivation for employees will be increased if they can act on those aspects of work to bring them higher rewards.

- *Professional competence*. A reward system properly designed which operates efficiently, stimulates performance and recognizes professional skills, employees' efforts in professional training and development.
- *Organizational behavior*. It is found in the attitude towards the organization, the management and, last but not least, towards work, and by default performance.
- *Employee's health.* Directly affects productivity, performance and job satisfaction.

The way in which it is designed, implemented, monitored, the reward system based on the socio-economic realities of the organization and the respective area, in accordance with the specific objectives and principles, is crucial for achieving business performance, but also for the human capital's satisfaction, career and appreciation.

5. Conclusions

As times passes by, everyone can become wiser due to accumulation of information and life experience. Or so it should be. Assuming that there are no serious reasons to deny evolution in human life, at adulthood individuals can appreciate the value acquired through study, practice and put it forward through performance... For those with a deep sense of knowledge, but particularly of self-discovery, analysis is made with a high degree of objectivity and is based not only on the absorption capacity and ownership of everything that appears as new for the topics in discussions. An important factor in the analysis report is given by the relation moral motivation/material motivation; remains negligible the amount of money received by the individual for his/her work, as well as the standard of living.

The job may provide an individual with a source of revenue for a given standard of living; physical and intellectual efforts orientation towards a certain type of job; the social and material

status, implicitly recognition from others; integration in a competitive circle, where working for the benefit of others is a purpose in life and a considerable motivation to permanently overcome personal limits. However, it is not a necessary and sufficient condition for the transformation of the human factor in human capital, in discovering all human resources' abilities, talents, and vocations and transforming them into competences recognized on the labor market.

We live troubled, confusing times, almost empty of remarkable content, precisely because perennial values are denied, and non-values are promoted [19]. Slowly but surely, imposture becomes a virtue. All kind of sand castles are build and they collapse with the first wave. The principles on which our ancestors have built our society are now denied. We suffocate it – more or less consciously – not only by polluting the environment, but also by awarding incompetence with diplomas, certificates and licenses. The original fault is that there are always leaders (whatever the level) that do not know how to direct their subordinates towards progress.

Some are well intentioned, but easy to manipulate and do not realize that they are only puppets in the hands of some other more experienced puppets. Some even know their limits of competence, but mark their spiritual poverty with sick domination ambitions based on split – *divide et impera*. Those of good faith, devoted to creative, noble ideals, who know that they definitively compromise in a world of appearance, of forms without substance, of superficiality, keep fighting with the windmills until they get tired and abandon the "elitist" platoon.

Spirituality is out of place in the kingdom of materialism. Development of human personality is not desired in a world dominated by money (either by their presence, or the willing to have them) and power (through politics, family relations or economic interests).

Democracy waved in front of credulous people proves to be the symbol of uniformity. Why advocating for the individual, for the belief in one's self, who can continuously accumulate knowledge and dedicate to others?! Why should it be interesting to invest in the human being, as a specimen capable of evolution, when it is infinitely more efficient to dominate it?! When the wealth poles change, when the power spheres are reestablished, when the interest areas are reconfigured, who is interested in the number and quality of the human resources?!

Natural selection is valid also on the labor market, not only in the environment. In times of crisis only those who have days to live survive. When we will appreciate the banality of everyday life as a wonderful gift and we will stop wishing for material things or socio-professional development just because others did so, then maybe there is still hope for salvation. Reality shows that the unhealthy times we are living contain less and less moments of reflection on our own destinies: the everyday automaticity hinders us from seeing the essential in life. In fact, planning a career or professional development is, for each individual, an issue for many persons. The present economic context requires, all the more, alternatives for the permanent education and continuous formation, most of the times on our own, outside any formal structures.

There are numerous young people who are not satisfied with a slow and less significant development in the active life. All the more decided are those who already understood the difference between a satisfying job to ensure the daily income and the job which provides the individual with a wide range of challenges and multiple satisfactions. With relatively little money, for certain categories of individuals, a costly training, conducted either by the employer or another certified trainer may be replaced. If it were to encourage the acquisition of competences horizontally and transversally, by self-education or by non-formal or informal education/formation, people would be more interested in develop their hidden and undeveloped skills. It is true that such training cannot be handy to everyone, because there are not too many those who know themselves and objectively self-evaluate themselves, who are able to overcome the so considered normal or average dimension in this point of human development, and implicitly society development.

In the spirit of human resources management science, human's inexhaustible potential must be known and developed. In other words, the individual construction is subject to social construction.

Those who build explore do not fight, they create and not fight, they leave something for their descendents they do not fight. Therefore, do not kill and destroy!

The study has exceeded its original area of interest. During the research many more directions of investigation have been indentified than what it was expected. The concept of quality of life and that of quality of work life bring to focus other evolution variants of the human factor quality, namely the quality in human resources management. Upgrading human capital, with the help of managers, even in the context of such a crisis which seem not to end, contributes to the continuous development of the performance level, regardless of its manifestation.

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CLASSICAL STRATEGIES OF TRANSNATIONAL COMPANIES FROM EMERGING COUNTRIES

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Abstract
The analysis of strategies adopted in the last 10-15 years by companies in emerging countries that have managed to reach the status of global companies, enables us to appreciate that, in a first stage, emerging companies have followed the "normal" principles of corporate strategies that have lead Western companies to a multinational or a transnational status. But more important is what happened in the second stage, namely that many emerging companies were able to overcome the classical principles and strategies and to develop new business models, such as the integration of "functions" resulted from the global value chain restructuring, based on the new "functional" specialization in manufacturing and services, the building up of global networks of suppliers or the reverse outsourcing. However, the range of strategies implemented by emerging companies in their efforts to become global players comprise also "classical" strategies such as the global brand development, the global development and supply of niche products, the non-organic growth or the strategy of geographical adjustment of business flows on South-South and South-North directions.

Keywords: *emerging countries, emerging companies, classical strategies, modern strategies*

1. Introduction

One cannot talk about globalization without taking into account the economic momentum of emerging countries, their development in rates two times higher than in developed countries and projections that indicate that the cumulative Gross Domestic Product will be at a higher level within 25-30 years. The BRIC countries (Brazil, Russia, India and China) will surpass the G7 countries from this point of view, and the first 15 emergent countries will surpass the G7 after 2030.

Table 1
The rise of emerging countries
- Trillion $ –

	G7	Developed countries	BRIC	The next 11 emerging countries	All emerging countries
2005	27,3	32,4	4,2	2,9	8,9
2015	33,0	39,6	10,2	5,6	19,0
2030	43,0	51,6	28,2	12,5	46,8
2050	64,2	77,0	90,0	35,5	138,0

Source Table 1: Antoine van Agtmael, in "The Emerging Markets Century", Free Press, New York, 2007, based on Goldman Sachs estimates for BRIC and another 11 emerging countries and JPMorgan for another countries.

Before, however, the years will validate or not this scenario, we can see the nowadays realities in the world. A study undertaken by Boston Consulting Group (BCG) has recorded impressive economic concentrations that exist in emerging countries. In 2006, a total of 100

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companies in these countries have assets of 520 billion USD, this means more than the top 20 global automobile manufacturers.

UNCTAD inventoried until 2004 a total of five companies from emerging Asia, which were among the top 100 transnational companies regarding the size and another 10 external assets, which could be included among the first 200 companies.

In 2006, FDI from the emerging economies (including mergers and acquisitions) reached the level of 174 billion in the USA, 14% of world total, up from 5% in 1990. Their share in world FDI stock was 13%, representing $ 1600 billion in US (compared to 8% in 1990).

Investment flows take place increasingly SN and SS relations as emerging economies invest both in developed and in the less developed countries.

2. Tipology of strategies implemented by emerging companies

According to Antoine van Agtmael, one can see three historical steps (the author calls them „waves") that define the commercial relationships between industrial and Third World countries during the last century:

- First wave defined by FDI in production facilities overseas;
- Second wave dedined by outsourcing and offshoring;
- The third wave defined by competition between transnational companies from developed countries and strong global companies in emerging countries;

Today, we stand in the early stage of the third „wave".

Rise of a growing number of companies from emerging countries to the status of global companies is obvious. From the methodological point of view, we accept the criteria the author proposes to trace the entrance of a company in the selected category of global companies, as following:

1.to be the world leader in the industry;

2.to have a global presence in exports and even production;

3.to have one of the top three market share position as a sufficient number of countries in order to be considered a global player;

4.to be globally competitive, not only in Chapter price, but also in quality, technology and design;

5.To refer to the biggest and the best companies in the world.

The ways of achieving these performances, the strategy adopted, there has never been a single abstract step, but a succession of steps. These attempts have however one common denominator: the courage of strategic management decisions, allowing faster browsing of those steps, getting out of the classic pattern of organic development that the Western occidental companies have run across.

Analysis of strategies adopted in the last 10-15 years by companies in emerging countries that have managed to reach the status of global companies, enables us to appreciate that, in a first stage, emerging companies have followed the principles of "normal" corporate strategies that lead Western companies to multinational or transnational status, as following:

- Focus on activities or core competencies and outsource other;
- Accession to the status of market leader in key markets around the world;
- Keeping costs at a low level and quality high level;
- Impeccable customer service;
- R & D investment;
- Hiring the best specialists and their corresponding reasons;
- Building a strong brand;
- Motivating employees through options and other incentives.

But more important is what happened in the second stage, namely that many emerging companies were able to overcome the conceptual principles and strategies to develop classical and new business models.

Currently, we cross a time when we try, by specialists and researchers, to "unveil the mystery" of how many emerging companies were able to achieve this unexpected success. For example, Boston Consulting Group concludes that there are five types of strategy determinants, namely:

1.Growth of local brands globally (eg.: Hisense in China for consumer electronics, Bajaj Auto in India for two or three wheeled vehicles, Tata Motors of India for cars);

2.Transforming engineering excellence in innovation globally (eg.: Embraer of Brazil for the production of regional jets);

3.Acceding to the status of a global leader in a niche product (eg.: BYD in China which produces batteries, Johnson Electric in Hong Kong that produces electric motors and video cameras for cars);

4.Widening ownership advantage of natural resources by implementing new ways of marketing and distribution (eg.: Sadie and Brazilian companies in international distribution Perdigao cereal, chicken and pork, Brazilian Vale Company in world exports of iron ore);

5.Implementing new models for business performance or new types of market penetration (eg.: Mexican company Cemex in cement and construction materials).

Certainly, the list of examples of each type of strategy presented above can be extended enough to validate these trends.

In the following, we want to systematize in our own way the range of the main strategies implemented by emerging companies until now, facing their efforts to become global players in an increasingly globalized world.

We believe that the most remarkable and ongoing process developed in the last 10-15 years, and its effects will increase in the following decades, in a manner which cannot be said to have been predicted the "functional" specialization of companies affects the strategies of emerging companies. We call them "modern strategies."

They join to a category of strategies that have direct link with the new division (national and international) of labor specialization based on "functions". We name them classical strategies, and based on these we refer to those who have provided the greatest success in recent years as emerging companies in their globalization plans.

We believe that the following structure of strategies practiced by emerging companies to accede to the status of global companies can be enlightening for today:

- **Classical strategies,** which:
- The strategy of global brand development;
- The strategy of development and global supply of niche products;
- The strategy of non-organic growth;
- The strategy of geographical adjustment of business flows on South-South and South-North directions;
- **Modern strategies,** which:

• The strategy of integration of "functions" resulted from the global value chain restructuring, based on the new "functional" specialization in manufacturing and services, completed by the strategy of “steps getting on” on the overall chain of the "product" value;

• Strategy based on organizing global networks of suppliers;

• Reverse outsourcing strategy on South-North direction;

3. Classical strategies implemented by emerging companies

3.1. Global brand development strategy

The building of single product brands and, more than that, of a company brand, is a desirable strategy for any company. Logistic and financial effort to achieve this goal is huge, but further benefits are essential to the company. As a result, this strategy was adopted by a number of

corporations from emerging countries, and the overcoming of this challenge finally led to their success and competitivity on the global stage. A number of companies took the road of systematic construction, like Samsung, BenQ, Grupo Modelo, while others tried to make their effort easier through acquisitions and mergers, like Lenovo and Haier.

Samsung Case

Samsung General Stores Company was founded in 1938 as a Korean company exporting fish, vegetables and fruits to China. In the 1990s, Samsung Group had become the most influential Korean conglomerate with activities in various fields, from consumer electronics to insurance, petro chemistry and shipbuilding.

If we consider only consumer electronics industry, Samsung has managed to blow away the competition of Japanese firms, so that, according to the Interbrand's classification of brand value, Samsung has been ranked as one of the fastest-driven companies on the list, surpassing even Sony (see Table 2).

Table 2

Samsung's Competition in 2005

	market capitalization ($billion)	sales volume ($ billion)
Samsung	107,0	56,7
Intel	147,7	38,8
Nokia	76,3	42,5
Philips	15,2	9,8
Sony	46,4	66,0
Motorola	56,5	36,8
Matsushita	49,2	78,6
LG Electronics	12,6	43,4

Source: Antoine van Agtmael – "The Emerging Markets Century" Free Press, 2007.

Among the factors that led to the success of Samsung in the global marketplace we have to mention the specific organizational culture, access to the best technology and highly skilled workforce, the early government support, the restless search for excellence in all areas. Of particular importance was the focus on exports, on research-development as well as on brand building and promotion.

The marketing campaign sustained in a totally unconventional way has achieved the main four important goals, namely:

- led the company's brand to international recognition,
- succeded in a subtle and original use of the design of brand, in the shape of the shell, in a world where imitation exceeds inspiration
- showed incredible growth of the company's global power
- has reiterated that, according to a study conducted by Interbrand-Business Week on top global brands, Samsung steped on the 20th place, for the first time surpassing Sony, ranked 28th on a list of competitivity driven by the value of the company's brand.

Interbrand's ranking was a confirmation that Samsung is not only the first brand of emerging markets, increasing in recent years it's value faster than any other brand in the world, but succeeded in the fight for brand value, to outperform a series of symbols of the global market, such as Pepsi, Nike, Budweiser, The Gap, Ikea, Starbucks and Harley-Davidson.

All this significant evolution took place after the monetary and financial crisis of 1997-1998, when Samsung, on the verge of huge losses, was forced to prove a large market discipline and apply a real shock treatment. It took into account a total transformation of the activity by removing the low-

value consumer electronics and memory chips (DRAM) and embedded approach to high value products such as multifunction mobile phones, flat panel displays for electronic equipment, multimedia equipment, specialized chips for digital cameras, iPods, etc.. In this way, Samsung has managed not only to capture a large share of the consumer electronics market, but has become the most profitable multifunctional mobile phone maker in the world.

The company consolidated its corporate brand by significant amounts invested in promotional activities (more than $ 10 billion, which represents the maximum amount for this purpose dedicated in emerging markets) and sponsorships awarded at the Sydney, Seoul and Beijing Olympic Games.

Finally, we can estimate that the success of Samsung's efforts in establishing a brand of worldwide reputation was due not only to global marketing and advertising campaign, but also to the huge success won by the distinctive shell-shaped style of its mobile multifunctional phones. Thus, in 2005, Samsung was ranked 3rd on the production of mobile phones (over 100 million pieces), approaching Nokia and Motorola. The high value design of Samsung's products has transformed the company from a second hand maker of electronics, into a world-renowned brand, which had also the inspiration to:

- set strategic steps that seemed completely out of scale at that time
- keep their obsession for quality in execution
- combine technology, global distribution and design
- invest large sums in research and development.

Concha Y Toro Case

Concha y Toro was founded as a winery producing wines since 1875, becoming a globally active Chilean company until the economic policy of this country in the 80es forced it to change its owners. Since 2004, however, the company sells wine in 110 countries, and in 1994 became the first wine producing company listed on the New York Stock Exchange, considered the largest vineyard in Chile and Argentina. With a turnover exceeding $ 300 million, Concha y Toro is the undisputed leader of wine producers in South America, is among the top 20 companies in this category in the world and ranks 2nd in U.S. imports.

When traditional wine producers such as France, Italy, Spain lost ground latelly infront of the new production methods in the U.S., the global wine industry has moved the center of interest from northern areas to those in the south, Australia, Chile and South Africa becoming the main suppliers. Chilean exports grew from $ 10 million in 1985 to $ 835 million (60% of production) in 2004, Chile reaching the 5th place in the top of world wine exporters.

Tables 3

Concha y Toro's Competition in 2005

	market capitalization ($billion)	sales volume ($ billion)
Concha y Toro	1,1	0,4
Constellation	0,5	0,5
Robert Mondavi	0,6	0,5

Source: Antoine van Agtmael – "The Emerging Markets Century" Free Press, 2007.

Concha y Toro has built a successful business based on exports, the modernization of wine producing processes, an aggressive distribution and a global brand promotion. The company tries to find a balance between affordable wine production, competing with other global brands of wine and delivering very high value (eg. Don Melchor) to customers with a very good knowledge of wines.

In this regard, the company turned to a successful brand strategy, whereby a major brand launches a subbrand, targeted at customers with a very good knowledge of wines, so that the master-brand could be raised in association with the subbrand. Therefore, the company produces large

amounts of wine with very attractive prices, along with some elite brands that can be appreciated only by knowledgeable specialists in the field.

As a global exporter, the company has always tried to tailor the wines to the tastes and trends of various markets. Thus, for example, most popular on the Chilean market are the oldest and sweet wines, the American consumers want especially fruity and fresh wines, the British prefer wines with more complex flavors.

Since 1980, Concha y Toro has doubled its vineyard area, employing in the same time, one expert for each of them, in order to achieve a severe quality control, and since 1990 it has invested heavyly in vineyards in Argentina, becaming a big exporter of this country too.

It achievedbalso a special location for the production of special wines for the UK and in cooperation with Philippe de Rothschild Bordeaux vineyard, focused on achieving the first "Grand Cru Classe" in Latin America.

Factors that have contributed to the international success of the company were:

- understanding the need to achieve substantial exports of wines
- a focus on quality
- addressing marketing techniques and strong distribution
- focusing obtaining important positions in the rankings made by prestigious publications in this field.

3.2. The strategy of development and global supply of niche products

The strategy of development and supply of niche products for which demand is uncovered globally, can be considered one of the main successful ways that a company can follow, showing thus such innovative qualities, which involve a well-organized business and marketing strategy, and also a special attention given to the research and development department.

Risks assumed by companies in this case are quite high, the market should be well prepared to absorb as quickly as possible the products offered, but finally the obtained advantages by implanting on such market segments are rewarding. As examples, in this case, companies like Concha y Toro and Haier could be mentioned.

Haier case

In 1984, Haier began its major restructuring through which, in one year it managed to become profitable, in 1991 started exports, in 1993 was listed on Shanghai Stock Exchange and in 2004 had a turnover of about $ 2 billion.

Haier is considered the undisputed leader in the Chinese market of household appliances, with a market share of 34%. Its products can be obtained not only through Wal-Mart network, but also through a number of other chain stores in many countries. Haier has achieved significant growth in exports, having production facilities in 22 countries, starting with Italy and the U.S. and going to the Philippines and Iran, 18 international design institutes and 30,000 employees worldwide.

It currently produces more than 6 million refrigerators, as well as air conditioners, TVsets, washing machines, microwave ovens, mobile phones, etc.. Its main competitors in the field of home appliances are Whirlpool, Electrolux and Bosch-Siemens, Haier being on the fourth place (third in refrigerators), with a global market share of 3%.

Table 4

Haier's Competition in 2005

	market capitalization ($billion)	sales volume ($ billion)
Haier	0,5	0,6
Whirlpool	5,7	14,3
Electrolux	11,0	16,4

Source: Antoine van Agtmael – "The Emerging Markets Century" Free Press, 2007.

Company's management realized early that only by improving product quality (although this was a major requirement) a world-class status can be reached. "The making of a global brand can be achieved only by testing the company's competitiveness on the global market and this is the only way Haier can demonstrate that it has become an international class company " said one of the managers of Haier.

Thus, in 1999, Haier has launched a campaign of expansion, opening its first U.S. production capacity, worth $ 30 million, aware that, by direct production in the U.S.it can get rid of the cheap label of the image of "Made in China". On this occasion, Haier has identified a niche hitherto unexplored by any company producing household appliances, namely: minifriges for college rooms and hotel mini-bars. In this way, taking over 30% of this growing niche, Wal-Mart began to sell Haier branded refrigerators in different sizes, while Haier began to build a solid reputation in the production of mini-electric refrigeration cellars, washing machines, dishwashing machines, etc..

Through the strategy approached by Haier, it has gained a competitive advantage over its competitors, not only by increasing quality and reducing production costs, but also by identifying market niches and innovation of original products, this being the safest way to build a brand and enter new foreign markets.

3.3. The strategy of non-organic growth

The non-organic growth of multinational companies involved carrying out mergers and acquisitions of companies, this strategy being increasingly important especially in emerging markets which in past years have seen fast economic growth, particularly in Eastern Europe and Asia (China, India, Russia, etc..).

Examples of that kind are companies such as China National Petroleum Corporation which has acquired PetroKazakhstan in 2005, Mittal Steel which has acquired Arcelor Group in 2006 (considered the largest transaction that year - $ 32 billion), Tata Group which has acquired British - Dutch company Corus Group, etc..

We can also mention CEMEX (global Mexican company producing cement), and Tenaris (producing steel pipes for petroleum industry, created by the merger made by Argentine company producing stainless steel pipes for oil and gas industry SIDERCA with Techint's subsidiaries in Mexico, Brazil, Europe and Japan).

CEMEX Case

Company was founded in Mexico in 1906 under the name Cementos Hidalgo, with an accelerated growth rate during the 1960s by building new factories and acquisitions across the country. In 1976, CEMEX acquired Cementos Guadalajara, the main local competitor, thus becoming the largest cement producer in Mexico.

In 1989, it consolidated its position in the Mexican market through the acquisition of the second largest producer, Cementos Tolteca, and since 1990, it began to jump on a global producer status due to international acquisitions that followed . Thus, in 1992, CEMEX has bought two cement manufacturing companies in Spain, a market which until that time was dominated by an European group of companies active in this field.

Anti-dumping measures taken by the U.S. meanwhile, by charging 58% on cement imports, have forced the company to continue its global procurement strategy in Latin America, Asia, USA and Europe, maintaining its dominance status on the cement market in Mexico. His latest acquisition, the RMC company, almost doubled its turnover, has dramatically expanded its product line and drove CEMEX at number one on the U.S. market and number two in the UK.

Currently, as a strategy, CEMEX is recognized internationally for its strong centralized management, development and focus on IT activities and highly integrated teams built after the acquisitions made. Company's declared mission is to transform cement from a commodity, into a branded product.

The factors that determined the company's international success, were:

- the dominance of the Mexican market, from which the company began the global development
- global competitiveness
- the permanent strategy of foreign acquisitions
- effective integration of post - acquisition integration
- the assumed position of industry leader in using IT.

Table 5

CEMEX's Competition in 2005

	market capitalization ($billion)	sales volume ($ billion)
CEMEX	21,0	14,9
Lafarge	15,7	19,8
Holcim	15,6	14,8
Siam Cement	7,1	5,4

Source: Antoine van Agtmael – "The Emerging Markets Century" Free Press, 2007.

3.4. The strategy of geographical adjustment of business flows on South-South and South-North directions

The increase of the competitiveness of companies from emerging countries has made it possible to adapt the strategy of their geographical expansion from the South-South direction to the South-North direction. We are refering not to the conquest of market segments by increasing sales volume, but to the implantation of "functions" of the value chain in the field of production of goods or business services.

Examples of such companies can be:

- Indian generic drug maker, Ranbaxy, which, by virtue of a high concentration in terms of global development, strengthened its manufacturing facilities in seven countries, selling its products in 100 countries. In 2005, three quarters of the sales volume were realized internationally, 36% in the U.S., and with a major presence also in emerging markets.
- Brazilian company Embraer, manufacturer of regional aircrafts with a capacity of 50-110 seats, for buyers like US Air, Let Blue, Cross Air and even Chinese Southern Airlines.
- Hyundai Heavy Industries (HHI) of Korea, the largest sea-going vessels producer in the world, which is building tankers, bulk cargo ships and container ships, chemical hi-tech carriers, etc.., as well as marine Diesel engines and construction equipment (excavators, loaders, etc..), electrical equipment, etc.., performs deliveries in both developing countries (South-South flows) and the highly industrialized states (South-North flows).
- CEMEX SA, the Mexican cement company , which has acquired two Spanish companies in 1992 and subsequently continued this strategy by acquiring companies in U.S., Latin America and Europe, becoming one of the leading cement producers globally.
- Chinese firm Haier which became one of the most renowned global manufacturer of electronics manufactured in production facilities in 22 countries (Italy, USA, Philippines, Iran, etc..) and which has 18 international design centers and 30,000 employees worldwide.

It had become noticeable latelly also the growing number of jobs created by multinational companies from emerging countries, which have invested directly in industrialized economies, such as Samsung, Hyundai, CEMEX, Tenaris, etc..

Thus, Samsung, Hyundai, Sasol, TSMC, Haier and other companies are major employers in the U.S., with more than 30,000 employees. It is considered that, in 2003 in the U.S. there were a total of 160,000 employment made by emerging multinationals ("Survey of Annual Business", August, 2005, Bureau of Economic Analysis, USDepartment of Commerce), which further quickly

increased. In addition to these we must taken into consideration all other connections created, activities such as design, marketing, supply of equipment and materials, dealers, etc.., which also involve indirect hired personnel.

4. Conclusions

The analysis of strategies adopted in the last 10-15 years by companies in emerging countries that have managed to reach the status of global companies, shows that, as a first step, they followed the principles of "normal" corporate strategies that have led Western companies to the multinational or transnational status.

In the second stage, however, many emerging companies have managed to overcome the classical principles and strategies and to develop new business models. Some of these new business models are directly related to the development of the "functional" specialization of companies.

They come together, however, with a class of strategies that do not have direct link with the new division of labor based on the "functional" specialization. We named them classical strategies and we made reference to those who have largely ensured recently the success of the emerging companies in their efforts to accede to the status of global companies, namely: the strategy of global brand development, the strategy of development and global supply of niche products, the strategy of non-organic growth and the strategy of geographical adjustment of business flows on South-South and South-North directions.

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TEAM CONSOLIDATION BY DEVELOPING WELFARE AT WORK

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Abstract
The development of welfare at work should contribute not only to strengthen the company's position on the market. Maybe before measuring the economical results we should first analyze the social consequences of a microeconomic policy supportive of all the elements of good practice conducive to employees. Environmental aspects (inside or outside the company), which affect the workers' current behavior, should be interpreted. It is the case of the actual conditions on the world market, as well as the state of things among employees' needs: job security, new aspirations for wage and personal development; professional entourage: complexity, uncertainty, lack of flexibility, fluctuation…The most pressing element of the employees' welfare is the research of: the work psychopathology; the psychoactive substances at work; the stress causes and manifestations, exhaustion, sleep disorders, but also behavioral; strikes, conflicts, crises, bullying and violence, harassment and sexism…To opt for a leadership where understanding and helping employees is a must also means having an interest in generalizing the state of health among employees, and this is reflected in their high quality of life.

Keywords: *welfare at work, employees' behavior in team*

1. Introduction

The Romanian economy in recent years faces many situations where specialists leave their jobs, either because of low wages or for better working and life conditions. If their movement would be made towards companies that recognize their skills and performance, it would not be a loss for the economy. Unfortunately, they migrate. They cannot be blamed, because everyone has a life and is bound to live it in the best way possible for themselves. But, for the society, the investment made in educating and training them is not recovered. This phenomenon is not peculiar to our country, but the Romanians who live and work within our national borders should be concerned of this fact for many reasons, with short, medium and most of all long term consequences.

In the recent years, international migration flows have increased significantly worldwide due to globalization. A significant percentage of the total number of migrants is composed of highly skilled workers. Although the studies for this type of migration date from the 1970s, the concept of "highly skilled migrant" remains hazy, difficult to define. The 2005 Report of the Global Commission on International Migration concluded that even the traditional distinctions between skilled and unskilled workers is, in some respects, of no utility, proposing the term "essential workers" [1]. At international level, skill levels can be defined either by the level of education or through the occupational level. The main classification systems used are the International Standard Classification of Education (ISCED) adopted by the United Nations Educational, Scientific and Cultural Organization [2], respectively the International Standard Classification of Occupation (ISCO), adopted by the International Labour Organization [3].

To assess the level of qualification, at the European Union the recommendations in the Canberra Manual are applied, a manual developed by the Organization for Economic Cooperation and Development (OECD) in 1995, which combines the education and the occupational skills. The

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term used to describe highly skilled persons is that of "human resources in science and technology", agreed also by Eurostat, which uses it in comparative analysis [4]. This category includes people who have completed education at tertiary level for a particular specialization which leads to obtaining a university/post-university degree or equivalent, and even though they do not hold the above mentioned qualifications, they have a job that normally requires them. The concept of science and technology is broad and includes, in addition to the natural sciences, engineering and technology also medical, social and human sciences. Migration of highly skilled labor is inextricably linked to the level of technological and economic development policies.

Macroeconomic concerns are more or less saving. What happens in Romania is not conducive to retention of workers, on the contrary. If guidance from the highest ranking officials was to be followed, people should leave the local labor market as soon as possible. However, there are entrepreneurs who are keen not to close down businesses. Certainly many were bankrupt, some reoriented, bankrupting their own businesses and committing themselves to other employees. Regarding the public system, let us not remember the iniquities "implemented."

The analysis of the study focuses on an economy with logic functionality, regardless of difficulties, but in any case, within the normal and natural rules of common sense, based on knowledge, competence of the decision factor, accordance with the international or community laws etc. In the system of competitive economy, any valuable manager, aiming at high performance levels, is forming a well qualified team, being constantly concerned to motivate, retain, train not only in the actual activity, but also in the decision making – on different hierarchies. Perhaps most important, is to really know it, understand it, support it and to contribute to its development, not only of the business. Therefore, the human being is seen as a complex entity, bio-psycho-physiological being, involved in collective work, where it communicates, gets stressed, enters into conflicts, has a standard of living and working, with needs and aspirations... Quantify them, as restrictions on the results, strengthen the team, orienting it towards performance.

2. Literature review

The collocation "brain drain" defines the "loss of intellectual and technical labour force through the movement of such labour force to different and more favorable geographical, economic and professional environments" [5]. In Anglo-Saxon terminology the collocation means "the migration of educated people or specialists from a country, economic sector or fields to another, for better remuneration or living conditions" [6].

The word "brain" represents in general, any qualification, competence or superior intellectual quality, while "drain" suggests that the output rate is higher than desired. In the special literature also other types of migration flows are described, implying the highly skilled labour force, which differs from the "brain drain" phenomenon, respectively "brain over flow", "brain export" and "brain exchange." The "brain over flow" may be determined by the over production of highly skilled labour force, the low employment rate of those who make up this category of labour, lack of adequate jobs etc. On this background, highly qualified persons migrate, being absorbed by the external labour market.

The operation of an educational system uncorrelated with the labour market, where the necessary qualified labour force is not adequately planned, results in a surplus of skilled labour that cannot be absorbed. High percentages of unemployment among people with higher education are recorded in many countries: Columbia, China, South Korea, Philippines, India, Iran, Nigeria, Pakistan [7].

The "brain export" refers to those situations where the countries of origin invest in those segments of highly qualified labour force by the export of which the gains can outweigh the costs. The market price of high-skilled labour generally covers the private costs of education, but not the social ones. Usually, the "brain export" is mutually beneficial for the country of origin and that of

destination. Some states, that cannot absorb their own human capital (such as Barbados or the Philippines), deliberately prepare highly qualified labour force for export.

The "brain exchange" is a form of "brain drain" in which are made mutual transfers of researchers, students or other types of highly skilled persons, in order to achieve mutual benefits in terms of knowledge, expertise, training. In this case, migrations are a temporary phenomenon, and "brain loss" is offset by "brain gain." [8]. Connected to the concept of "brain drain" is that of "brain waste", used to describe highly skilled labour force wasted in case these migrate to countries of destination where their qualifications and previous experience cannot be used. [9]

Recent studies have introduced specialized language term "brain circulation", which describes the cycle of movements abroad for studies, occupying a job position in the same country where they graduated and return to their country of origin, at least with the same social status to be waived at [10]. "Brain circulation" is a positive form of migration of highly qualified people, as it promotes the spread of knowledge.

The concept of "brain return" refers to those situations in which highly qualified people studying/working in another country, return in the country of origin after longer or shorter periods of time.

In what concerns the opposite process, of attracting and retaining the human element in the organization, as a capital, possibly intelligent capital [11], the special literature has developed welfare to work [12], favorable to stimulating the individual to over exceed himself in creative actions [13]. Sociologists have long before economists agreed that the standard of living leaves its mark on employment outcomes and quality of life is conditioned and conditions on its turn, individual's state of health and its ability to work to its full potential – Baltatescu, S., Marginean, I., Vlasceanu, L., Zamfir, C., and E.

3. Theoretical background

3.1. Brain migration

a. Preliminary considerations

Migration is considered one of the defining global issues of the beginning of the millennium, due to the fact that today the phenomenon affect more people than at any other time in human history. Migration is an inevitable component of vital importance to economic and social life of each state. Complex social phenomenon, international migration affects every country in the world, in their quality of state of origin, transition and/or destination.

Among the contemporary global trends with impact on migration are: demographic evolutions; economic disparities between developing and developed countries; trade liberalization, which requires a more flexible labour force; communications networks, linking all regions of the planet; the economic downturn (temporary recession).

The dimensions of the phenomenon of migration are impressive and growing. According to data from the International Organization for Migration, at word level there are 192 million people living outside their country of origin, representing 3% of world population. Basically, one of 35 persons is a migrant [14]. If they live in one place, migrants would be the fifth country in the world taking into account the total population.

While between 1965 and 1990 the number of migrants increased by 45 million (annual growth rate of 2.1%), annual growth rate today is 2.9%. Analysis of the phenomenon is hampered by the fact that migration statistics are not regulated internationally. At EU level, for example, it is governed by a series of voluntary agreements between Eurostat and specialized institutes of the member states. In the summer of 2007, the European Parliament and the Council adopted Regulation 862, as a step toward achieving accurate and harmonized data on migration. In terms of net migration in EU – 27, it ranged from 2002 to 2007 between 1.64 and 2.03 million annually. Expressed as a

percentage of the total population in 2007, immigration has provided 0.39% of the total population of the member states [15].

According to a study conducted in 2000, of a total of 59 million migrants in OECD member states, 20 million were highly skilled. Demographic analysis showed that between 1990 and 2000 the growth rate of the level of skilled migrants in the countries concerned, has been uneven, skilled immigrants were 2.3 times more numerous than those unskilled. One of the few studies analyzing the evolution of long-term international migration between 1975 and 1995, showed that highly skilled emigrants from 223 nations had as countries of destinations Canada, USA, UK, Germany and France. Basically, almost 85% of skilled immigrants live now in the six countries mentioned above. If in 1990 the total number of immigrants with tertiary education registered in developed countries was of approximately 9.4 million (representing 41% of the total immigrants) in 2000 there were 14.7 million immigrants in this category (representing 44% of total). The most significant increase of highly skilled migrants were registered in states located in some of the poorest regions of the worlds: Latin America and the Caribbean (97%), Asia (84%), Oceania (69%) and Africa (113%) [16].

The term "brain drain" was first used in a Report of the Royal Society in London, made in 1963. The researchers of the renowned scientific fellowship surveyed more than 500 heads of higher education departments concerned about the emigration from Britain of a significant number of scientists in a period of only five years (1959-1963), including nine members of the Royal Society. The responses showed the permanent migration of approximately 60 scholars a year, a significantly high percentage being registered in the case of Ph.D. in the five years period (140 per year, representing 12% of the those acquiring this title) [17]

The emigration of intellectuals, especially from Europe to the United States of America, was thereafter the subject of several investigations that will lead to the establishment of "brain drain" in academic language. In what concerns the reverse phenomenon, namely immigration, in the United Kingdom this shall be done also though a report of the same scientific fellowship entitled "Migration of scientists to and from Great Britain", published in 1987 [18]. Study, conducted both in universities and research institutions and industry on a 10-year interval, identified an annual average of 74 emigrants in the university sector, while the number of immigrants was of 556 academic, during the same analysis, of which 140 were British. At that time it was concluded that the "brain drain" phenomenon, although it had low proportions, was continuing to pose a concern. A third study, conducted in 1993 by the Royal Society, entitled "Migration of scientists and engineers in 1984-1992", confirmed, to a larger extent, the conclusions of the previous study. [19]

More recent studies conducted in Great Britain revealed that between 1995-2006 immigrant flows predominantly academic have exceeded those of migrants, registering a 1.4 input to one output, with a fall in the trend in the last part of the period. In recent decades, in the special literature the subject was analyzed in terms of the negative impact on the countries of origin of the highly skilled migrants.

Statistics for the years 1960s-1970s showed a consistent flow of highly skilled migrants from developing countries to the developed ones, due to rising demand for migrants in this category, coupled with the decreasing availability of those on the labour market. Migration trends have been considered a serious treat to the economic development of poor countries, bodies such as the United Nations Conference on Trade and Development (UNCTAD).

Economic and political changes of the 1990s have induced significant effects in terms of migration flows of highly skilled people. On this background, there will be a considerable increase in highly skilled labour migration from Eastern Europe to the United States of America, Canada and countries in the Western Europe.

Although incomplete, the statistics give a relevant image of the phenomenon. Only in 1990, approximately 40,000 people with higher education emigrated from Yugoslavia (nearly 10% of all migrants). In 1991 at least a million polish people, especially youngsters with higher education have migrated to Western Europe (with favorite destinations UK and Ireland). The same countries of

destination were chosen by highly qualified emigrants from Lithuania, after joining the European Union.

The biggest losses caused by the "brain drain" were recorded by Albania, estimating that 40% of the intellectuals of the country before 1990 opted for emigration.

There were also situations of control of the phenomenon, the best policies of preservation and significant return of intellectuals being applied by Croatia, by strengthening the university system and granting consistent scholarships. After joining the European Union, Serbia invested considerable resources in restructuring the higher education, significantly reducing migration of highly skilled labour force.

b. Causes and determinants

One of the most common explanatory theoretical models of migration is the push-pull theory of Lee Everett (1940), according to which migration is determined by the action of certain economic, social, political, cultural, environmental etc. factors, which carries on the migrant rejection (push factors, pertaining to the country of origin) and attraction (pull factors pertaining to the country of destination). In the first category are: insufficient jobs, lack of opportunities, "primitive" living conditions, political/religious constraints, diseases, natural disasters, threat of death, slavery, pollution, lack of housing conditions, unable to find a life partner. The second category can include: job opportunities, better living conditions, political/religious freedom, education opportunities, better medical conditions, personal security, family ties, increased chances of finding a life partner.

Push-pull approach can be used to analyze factors that determine the phenomenon of "brain drain." This, the rejecting category includes underemployment, economic underdevelopment, low incomes, political instability, overproduction, little utilization of highly skilled persons, low opportunities for scientific research, discrimination in professional promotion, unfavorable working conditions, the desire for superior qualification and its recognition, high expectations in terms of career. Pull factor include: better economic prospects, higher income, increased living conditions, facilities for research, efficient education system, prestige conferred by training made abroad, better working conditions, increased employment opportunities, incentives etc.

b. 1. Economic factors

In general, in the special literature two economic factors involved in the decision to emigrate are described. The first is the remuneration gap, in real terms, between the country of origin and that of destination. The existence of such significant differences in labour remuneration for comparable activities in terms of job content and training is regarded as one of the key drivers of migration motivation. The second factor is the degree of probability of finding a job in the country of destination, within a reasonable time horizon.

The majority of those with high qualification opt for practicing abroad because that will bring significantly higher revenue compared to what they would receive in their country of origin. Generally, between the level of education and that of incomes there is a substantial correlation. Although there are individuals with a high level of education with low earnings, as well as persons with a lower education level with higher incomes, the overall level of education and income are highly connected.

The difference between the wages in the country of origin and destination correlates usually with the real GDP per capita, indicator considered a determinant variable of international migration in Europe, especially for highly skilled labour force [20]. In the case of the "brain drain" from the underdeveloped countries to developed ones, an important role is held by the uneven development patterns and the disequilibrium between demand and supply of labour force. In the developed countries the population growth rate is low, education is more expensive and the technological development requires a highly skilled workforce, for which demand is often greater than what is available.

Even if it has a special importance in the decision of migration, economic factors do not cover all possible reasons of the phenomenon.

b. 2. Socio-professional factors

Some authors have stressed the fact that dynamics of highly skilled migration varies by occupation. Pull factors and rejections causing migration are different depending on the migrant's occupation: manager, engineer, technician, scientist, entrepreneur or student. Thus, while a scientist may wish to migrate to fulfill its scientific curiosities or to receive the financing required by the respective research, an engineer may be motivated primarily by wage conditions on the labour market [21].

Similar research has shown that in the case of scientists and researchers, the decision to migrate is determined by factors such as overall structure of national systems of innovation, the quality of the research infrastructure, financial support for academic research, the prestige of universities and research institutes, employment opportunities in innovative sectors, the perspective to have a successful scientific career, access to advanced scientific equipment [22].

b. 3. Political factors

Educational policies of the countries of origin have an influence on the brain drain. Subsidization by state of tertiary education is leading either to a considerable increase in the number of graduates, over the capacity of the labour market, or to a decrease in the education quality, where the financial resources allocated by the government are insufficient. Both situations encourage the best graduates of higher education to migrate abroad in order to benefit from training opportunities qualitatively superior or from jobs according to their formation. The experience of being a student abroad increases the likelihood of later becoming a skilled migrant.

Migration of highly qualified individuals is influenced to a high extent also by the migration policies of the countries of destination. In countries like USA, UK or Canada, the absorption of highly skilled labour force through migration is an integral part of the effort aimed at maintaining the economies' global competitiveness.

Since 2002, the British government initiated a set of measures designed to determine the highly qualified people to immigrate to this country, the Highly Skilled Migrant Programme, one of the most accessible immigration programs in Europe. From 30 June 2008 it was replaced by Tier 1 visa program (General), which allows highly skilled individuals who meet a minimum score (75 points) given for a set of specific criteria to immigrate to the UK without any sponsorship from an employer. This category includes physicians, scientists, engineers and other university graduates. The criteria considered are: qualification)degree 30 points Masters – 35 points PhD – 50 points), previous income (score may vary from 5 points to annual incomes between 25,000 and 29,999 pounds to 75 points for income over 150,000 pounds), age (under 30 years – 20 points, 30 to 34 years – 10 points, 35 to 39 years – five points, over 40 – 0 points), experience in the destination country (obtaining income or previous qualification in the UK – 5 points), use of English skills (proof of a standard level of knowledge required – 10 points), the capacity of upkeeping (keeping a minimum amount in a bank account a period of three months before application, to prove ability to support the applicant/any people dependent on it, respectively 800 pounds for applicants from inside the UK and 2800 pounds for those outside the UK territory – 10 points) [23].

In Canada operates a similar system, Canada Skilled Worker Immigration. The minimum score of 75 points was reduced to 67 points from September 18th, 2003, in order to increase the applicants' chances of being accepted as immigrants. Visa criteria are: education (university studies – between 15 and 25 points, certificates/non-university diplomas – between 5 and 22 points); ability to use French and English (maximum 24 points possible, depending on the performance of speaking/listening/reading/writing, of which 18 for the first official language and 8 for the second); work experience (maximum 21 points possible – 15 points are granted for one year of experience in a

skilled profession and 2 points for each additional year); age (maximum possible 10 points awarded for category 21-49 years); adaptability (maximum 10 points). As with Great Britain, to the mentioned criteria an additional requirement is needed, that of a minimum amount for upkeeping, which varies from $ 10,168 for a single person to $ 26,910 for a family of seven people [24].

As for the United States of America, they represent the main pole of attraction for highly skilled labour. Approximately 40% of the adult population born abroad has a tertiary education level. Since 1952 U.S. authorities granted temporary visas for highly qualified people. The 1990 Immigration Act defined the categories of highly qualified people and set several distinct categories of visas that may be granted to them. Since the early 1990s, over 900,000 highly qualified people, mostly IT professionals from India, China, Russia and some OECD countries (including Canada, Britain and Germany) have migrated to this country under H-1B visa program, aimed at researchers, specialists in information technology, social, natural and exact sciences. Number of visas in this category has increased gradually, with now 195,000 annually [25].

c. Romania's situation

Although there are no official statistics to reflect the exact number of Romanians working abroad, the approximate number (2 million) leads sociologists to speak of a national phenomenon by size, implications and the geography of the flow origin. The first estimations of the emigration of Romanians have been made in the early 2000s.

The problem of immigration ("euro-commuters") is complex. Since 1989 over one third of households (two million and a half) had at least one member abroad. 10% of the Romanians aged between 18 and 59 years old have worked abroad during the transition [26]. In the first stage (1990-1995) the main countries of destination for Romanians were Israel, Turkey, Italy, Hungary and Germany. In the second stage (1996-2001) Canada, Spain and the USA were added. After 2002, with free circulation within the Schengen area, the Romanians concentrated on Italy (50% of all immigrants) and Spain (25%).

In 2008, one of six Italian immigrants came from Romania (1 million). In Spain, in 2008, the Romanian immigrants ranked first as number out of the total of 5.2 million, they were 730,000, a quarter of which in the Madrid region.

Studies on "brain migration" in our country are extremely rare. Data provided by specialized publications issued by the National Institute of Statistics provides information on the structure of migrants by level of education, correlated with other socio-demographic indicators, allowing some conclusions about the migrations of highly qualified people.

In the net migration between the two censuses (1992, 2002), the balance was inclined toward the people having the most fertile age, between 20 and 40 years old (62%) and people already formed, with a working potential and innovation higher than that of other age groups.

Higher education graduates, considered "brain drain", represent between 10 and 12% of the total migrants. Their decision to migrate is determined by the difficulties on the labour market in finding an adequately paid job, as well as the increased mobility of this category, whose elements see in emigration an option to succeed [27].

Between 1990 and 2000, from Romania emigrated a total of 36,117 highly educated people, of which 19,012 women and 17,015 men.

Regarding the distribution of migrants with higher education by age, in the same period, 57.4% were aged between 26 and 40 years, 17.5% between 41 and 50 years, 11.6% from 51 and 60 years, and 16.6% for people over 60 years.

Destinations of Romanian immigrants with higher education between 1990 and 2000 were Canada (54.4%), USA (15.95%), Germany (5.3%), Hungary (4.7%), Italy (3%), France (2.6%), Israel (2.3%).

Distribution of occupational categories of migrants between 1990 and 2000 is as follows: engineers and architects - 19.122, physicians, doctors and pharmacists - 4466, economists - 4937, other professions - 7592.

Among the few groups of occupations for which statistics are available, the most noticeable increases were recorded between 1995 and 2004 among engineers and architects (from approx. 8-9% to 12-14%), teachers and economists (3-5% at the end of the period), technicians, doctors and pharmacists (3-4%) [28].

The latest figures from the National Institute of Statistics on temporary external migration in 2008 indicate a total of 8739 migrants, slightly down from the previous year (8830). In terms of education, 33.2% had higher education and 41.2% secondary and post-secondary studies.

Most immigrants with higher education chose as countries of destination, in 2008, Germany, Canada, USA and Italy.

Age distribution of migrants with higher education is as follows: 914, between 30 and 34 years, 618 between 35 and 39 years, 471 between 25 and 29 years, 380 between 40 and 44 years, 189 between 45 and 49 years.

Among male migrants with higher education, the majority were aged between 30 and 34 years (332) and 35-39 years (242). A similar distribution was recorded in terms of female migrants (582 in the first age group and 376 in the second) [29].

Migration on age structure shows considerably more pronounced tendency to leave of the working-age people, who enjoy increased opportunities for professional development.

The highly skilled labour force involved in the migration movement includes, therefore, mainly, persons aged between 25 and 40 years old, with skills in science and technology and to a lesser extent in education and health [30].

Without minimizing the role played by the economic motivations in the decision to migrate, ultimately it depends on each individual's system of value, ideas, preferences, expectations and available resources, i.e. its financial, educational, professional and cultural capital.

Apparently, the following question emerges: And what does brain migration has to do with welfare at work, which strengthens the team? The short answer is causality – if the collective welfare in an organization is not reached through internal efforts or national regulations for all organizations, people emigrate.

3.2. Welfare at work

For every employee, welfare translates in [31]:

- An environment of functionality, a harmonious relationship within the organizational structure (both horizontally and vertically), more autonomy in carrying out the working activities, a moderate level of pressure and stress, and interesting and challenging work content;
- A constant desire to better balance the personal life and the professional one, by reducing the working time in favor of the free time, in order to rebalance the lifestyle;
- An efficient use of the skills, which allows prospects of a career, material and moral recognition of efforts and work effects.

In general, welfare at work is conditioned by the education and training level of the individual, but also by the remunerations he/she receives. We do not intent to show here the anomalies in the Romanian organizations – private, but most of all public ones. However, work duration leaves a mark on the fexicurity degree of the employee (it is again necessary to remind the need to present things as they are normal, and not as they are in our country).

The concept of welfare is closely related to the quality of life. The standard of living [32] is based on the living conditions, but also on personal aspirations. If the manager understands where the team members are positioned and knows how to provide for them natural, human, social, cultural and educational environments, but also the proper resources, then he/she will be able to mobilize the team

towards efficient activities, which, at individual level to materialize in a better life style. Specifically, we speak about the subjective and objective methods of assessment of the living standard. The individual, subjectively, is concerned about a rise in one's career, which will ensure a growth of income, working time, prestige, quality of life through access to other type of services, of a higher level. And the society, objectively, requires education, training, wishes to meet, namely mobilization to create.

Welfare at work is protected [33] by the legislation regarding the occupational safety and health. Personal hygiene, leisure, dining first aid and others no longer represent union claims. Group welfare protection services usually are in the form of access to the canteen, sports clubs or social clubs, as well as the organization of activities such as rituals and traditions.

There are also benefits offered, voluntarily, under the specific activity of the organization, but in order to maintain the employees' wellbeing – providing periodical free dental checks, medical check-ups beyond what the occupational medicine services offer, cosmetics, manicure, hairdresser.... Regarding the employees' safely, health and welfare within the organization, most elementary rules are laid down in legal regulations, at a minimal level; managers can extend these facilities, as seen before, if they take into consideration the employees' psychological comfort.

But most visibly, for the workers, is welfare through the pay system or contractual provisions for exceptional cases of family or job problems, illness or death.

Is it much? Is it little? It is enough, if it meets the people's needs. Money invested in their welfare is multiplied within the work results.

4. Managing discomfort at the workplace.

Basically, discomfort is not determined so much by crisis and conflicts, as it is by stress. Without discussing in more detail the elements which define and generate discomfort in the team, we should try to establish a change in the ways to overcome such situations.

What it is done in the management of discomfort? In practice, very little.

Crises and conflicts are apparently solved, because regardless of the communication and negotiation skills, words and deeds already done cannot be simply deleted. The play on words between "forget" and "forgive" is a trick – I forget, but I don't forgive or I forgive, but I don't forget. In reality, it is neither forgiven, nor forgotten. And stress, once installed it permanently changes the neurological structure of the person in question.

- **What to do, then?**

It is for the manager to carefully monitor the interdisciplinary relations among team members, providing them permanently with the right assessment tools, trainings, leaderships profiles, job rotation, transfer between countries for certain level managers...

- **What else could be done?**

Essentially, fighting discomfort at the workplace [34] is the preservation of health. "Health is a fully favorable condition physically, mentally and socially and not merely the absence of diseases or infirmities" (OMS, 1945). Subsequently it was added "the capacity of having a social and economic productive life."

In a holistic approach, reducing discomfort is adopting a healthy lifestyle, maintaining a balance between work and life conditions though:

1.1 **education** (strengthening self-esteem, positive thinking...). Family education is completed in any of the formal, in school, informal and non-formal environments.

1.2 **energetic recovery** (healthy diet, exposure to natural lights and fresh air; outdoor exercise; self-impose and respect a rest through sleep program...)in fact, almost everyone has heard or learned once, but fail to remember:

a) A work-appropriate nutrition is provided by:

- Substances necessary to daily consumption (50-55%), protein (15-20%), unsaturated fats, fibers, vitamins, minerals and plenty of water (2l/day) – precisely because of its properties and features [35] ("water is life," part of the body; structural role and water balance; lubricant and emollient; thermo regulator, washing agent, tempering, transport; role in digestion; prophylactic and curative factor through hydrotherapy);
- Vegetables, fruits and cereals (60% of the daily menu);
- As much fresh food as possible, without additives and preservatives.

b) Exposure to natural light and fresh air [36]:

b. 1. **Light** has been defined over time though photons, a wave-like flow, a complex of electromagnetic radiations, UV radiation (A – long, B – middle, C –short), visible (40% of those reach the earth's surface) and infrared (calorific value), cosmic rays, Y rays, X rays etc. Light effects are multiple: photochemical and photosensitive (sunburn, hives...); bactericides; antirachitic; physiological and psychological characteristics of colors; biochemical and metabolic; on blood components, circulatory, biochemical and metabolic apparatus; on the endocrine glands and nervous system as well as on the skin.

b. 2. **Clean air** is invisible, necessary to life; it presents negative ions recommended in aerotherapy and so necessary in case of pollution.

c) Outdoor exercise through: walking daily and jogging as much as possible; giving up the comfort of the elevator, the car (in exchange for the bicycle, for example), the conveyor...; walk in lunch breaks or between activities; rediscovering sports in parks or in special equipped gyms; dance classes; hiking; or any other physical activity.

d) Self-impose and respect a rest though sleep program – 8 hours work + 8 hours other activities + 8 hours sleep. Even in the case of insomnia the body should be provided with an horizontal position on the bed, eyes closed, unless there is a possibility of having a who hours sleep or rest in the afternoon...

d. 1. Rest, as the existence's universal force, essential health factor with extended utility, is opposed to fatigue caused by prolonged work or exercise (hypotonic fatigue), labor or intellectual effort (hypertonic fatigue) or insufficient sleep.

d. 2. Sleep, as a restorative period for the body, characterized by the suspension of waking, can be slow – up to 80 minutes, paradox – of approx. 10 minutes (REM – rapid eye movement), insomnia (symptom and disease) or dream.

1.3 **Adopting preventive behavior**, such as: diminish/eliminate smoking; reduce/eliminate alcohol consumption; avoid crowded public places or with a high risk; use of safety belt in car, motorbike helmet, knee protection, armrests and other protection equipment.

Of course, one can draw a "map of the mind", by which to diagnose what is healthy and recommended to be kept (raw food and less processed, water consumption, time for oneself and self-respect, happiness and passions in life...), what is harmful and desirable to be removed (alcohol, tobacco, drugs of any kind, plants, coffee – in excess...); what is better to adopt if not yet in one's behavior.

The incredible body regenerative capacity can fulfill its function though a series of complementary therapies [37]:

- To improve lifestyle: naturopathy, relaxation, visualization, meditation.
- For a state of wellness: Alexander technique, Tai Chi, Chi King.
- Natural: homeopathy, herbal medicine.
- Touch: massage, Shiatsu, aromatherapy, reflexology.
- Yoga.

- Through arts: dance, painting, music, sculpture.
- Through manipulation: osteopathy.
- Mental: healing, psychotherapy, hypnotherapy,
- Oriental: Ayurveda, Chinese traditional medicine, acupuncture.

Conclusions

A somewhat detached analysis, or at least unbiased, of the homogeneous compositions of the performance of a team cannot be carried out strictly from the economic or sociological point of view. A wide range of psycho-physiological determinants have already been discussed in detail or only mentioned. Maybe we should start from a new vision, another understanding of reality:

- Nothing, except laws, is mandatory, but advisable.
- "You don't have to, is good to"....
- Life lived intensely, fast-paced, with concerns, shortcomings and worries stops people from thinking about themselves, about their needs, their pleasures, their aspirations, their ideals...
- Forgetting one's self leads to fatigue, illness or extra pounds, motivation disappears, as well as the energy and joy of living.

We can no longer afford not to understand the need to encourage the change in the existential paradigm, by adopting a different approach to causation and effects of phenomena, especially by simplifying our existence – for instance, reducing the daily number of needs (from the 11,000 the modern man has).

Regardless of their professional profile, any person should know, not just a good manager, that adopting a healthy lifestyle in harmony with nature, can influence genetically a person. "Living healthier, eating healthier, exercise and love stimulates the development of brain cells, disabling the disease-generating genes, turning them into beneficial ones" (dr. Dean Ornish, president and founder of the Preventive Medicine Research Institute of Sausalito, California, in a recent TED conference in Monterey).

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THE CONTRIBUTION OF THE EMOTIONAL INTELLIGENCE ON LEADERSHIP FROM ORGANIZATIONAL PSYCHOLOGY PERSPECTIVE

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Abstract
Talking about intelligence as a complex system of operations which conditioning the general approach and solving different problematic situations and tasks, we have insight operations and abilities such as: adaptation to the new situations, the deduction and generalization, the correlation and integration into a unified whole of rather disparate parties, the consequences and anticipation of the outcome, the qiuck comparing of actionable variants and retaining the best alternative, the correct and accurate solutions of some problems with increasing degrees of difficulty. All these skills and operations reveals at least three fundamental characteristics of intelligence: the ability to solve the new situations, quickness, mobility, adaptability, the suitable and efficient flexibility to the circumstances.The intelligence appears as a quality that whole mental activities, as expression of higher organization of all mental processes, including the emotional - motivational. According as forming and developing the mechanisms and operations of whole mental functions, we encounter a flexible and supple intelligence. At present, is still continue in psychology the question if the intelligence is the capacity to acquire knowledge, to reason and solve problems, or it involves different types of skills. The majority is choose the first assumption. The new research made by cognitive psychology perspective and neuropsychology, which connects the intelligent behavior of neurological efficiency, brings valuable clarification in this regard. The study is approaches the complexity of this side of personality, which arising from the approach advocated in the history of philosophy and psychology. The opinions considering to the intelligence have ranged from acceptance and highlighting its role in knowledge, to the decrease its significance or even to eliminate it from human existence.

Keywords*: emotional intelligence, leadership, emotional management, general intelligence.*

1. Introduction

This paper aims to show that emotional intelligence and leadership are intrinsically linked to specific. Emotional intelligence provides spiritual component, the instinctive leadership, acting in conjunction with cognitive skills, technical competence and strategic thinking. An emotional dominated leadership behavior is beneficial, whether they apply to a large mass of people, a team or even ourselves mice, but low levels of emotional intelligence are extremely harmful to leadership in any situation.

Intelligence emerges as a stable system features its own individual and the human subject is manifested as intellectual activity centered thinking. Central process of thinking is closely linked, even combined with all other organic. Moreover, the psychology of thinking, various distinctions were made between analytic and synthetic, pragmatic and theoretical, reproductive and productive, crystallized and fluid, etc. convergent and divergent. In connection with lateralized brain, considering that the left hemisphere specializes in verbal and semantic order and the right hemisphere has features for handling spatial relationships and the configuration of images, will probably shape the intelligence to research options logico-semantic dominant or spatial imaging.

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Considering that intelligence as an instrumental structure, its own individual personality, we must show that the very experience of life and especially education and professional experience a highlight, and to assess them. Empirically, intelligence can be assessed after learning efficiency, as the ease and depth of understanding and by the difficulty and novelty of problems which the subject is able to solve them.

2. Emotional intelligence vs. general intelligence (IQ)

Although this paper seeks to explain the advantages of emotional intelligence should not be overlooked general intelligence as measured by IQ. In fact many psychologists still believes that IQ is only that can guarantee success. If you are a smart, if you have a high IQ if you graduated from a recognized university, or a higher qualification, you can not worry about. IQ is very important, but to increase your competitiveness, you need to build your future development plans Encompassing own emotional intelligence. Based on the adaptive role of emotionality was found that people who have an IQ (IQ - an index of development level of intelligence, mental age determined by reference to chronological age) or high academic intelligence is doing very well developed, much less everyday life, while another group of subjects, but have a lower IQ compared with the first, had good results in practice.

Where did the question: "How do they manage to have success in critical situations, to cope with life circumstances at any time?". asked people on the streets to demonstrate what they understand by an intelligent person. Following analysis of responses to the survey concluded that they have a different skill than academic intelligence, able to overcome obstacles which makes everyday life (Goleman D, R., Boyatzis 2005). This ability was originally reported to social intelligence, which refers to the ability to understand and establish relationships with people. Unlike IQ, which changes very little after adolescence, emotional intelligence appears to be largely learned and continue to develop as we go through life and learn from experience. Our expertise in this area can continue to grow, and for this there is a popular word: maturity.

Unlike IQ, emotional intelligence (EI) has proved to be a more reliable predictor of success in personal and professional life. IQ and not IE opposing powers, but rather separate, yet one can not operate at its maximum potential without the second. It is useful to note that there are often differences between the innate potential of a person's emotional intelligence and its development potential throughout life. Each child is born with a potential for emotional sensitivity, emotional memory, emotional control, with a potential ability of emotional learning.

This innate intelligence can be developed or altered by life experiences, especially emotional lessons given by parents, teachers, professors, family, etc.. during childhood or adolescence. These lessons can have a positive or negative, unhealthy on the evolution of innate emotional intelligence. It is possible for a child to start life with a high level of innate intelligence, then heads to unhealthy emotional habits from living together in family abuse. Such a child will be when it grows, a much lower level of emotional intelligence than the level it was at birth, because lived experiences during childhood . On the other hand, it is also possible that a person has a low level of emotional intelligence at birth, but received a positive emotional growth and modeling in childhood, it will increase its level of emotional intelligence. However, the child's emotional intelligence is more easily altered than developed, following the principle that it is much easier to destroy than to build.

Currently, models including the model of emotional intelligence Mayer / Solovey / Caruso combines variables measuring innate emotional (emotional sensitivity, emotional memory, emotional control, emotional learning ability) with the same environmental variables influenced.

3. Emotional intelligence in business romanian

3.1. Why is emotional intelligence so important at work?

For years, trainers, professionals in human resources, teachers, recruiting teams, managers and other people have found out what is that differentiates the normal workers from those who are

rendering themselves evident in the crowd. It is not about technical skills – these are relatively easy to learn, and is easy to determine if a person has this kind of skills or not. It is not necessarily the intelligence either. It is about something else, something you know that exists only when you see it but that is difficult to define clearly. It is about personal abilities (R.Carusso 1999).

After many years of discussions regarding personal abilities, the people working in training, management and employment fields have finally let themselves convinced. The discovery of the essence of what makes people evident at work brought this discussion in front. Starting from now on, we can replace the subjective term "personal abilities" with a more objective and exact one – "emotional intelligence". Those who never appreciated the ability of "reading" or understanding the people, or understand their feelings because they were too "soft" and couldn't be measured, will have a very accurate measuring instrument. And this is because the emotional intelligence is an intelligence form or a set of skills.

3.2. IE enter the market of training and recruitment.

Romanian market are already several companies using the concept of IE or in their work or giving presentations or training. Those who drive them have in common revelation made by finding the concept and usefulness IE passion for this area and wish to share with others what they learned.

Not incidentally, is among those companies and Korn / Ferry International, the American firm recruitment and management consulting and leadership in over 40 countries, the market leader for leadership development. Effectiveness of training on IE is best evidenced in the case of companies that have direct relationships with customers and especially for financial professionals who are often in a position to help customers achieve their personal and professional goals.

3.3. What is the role of feelings at work?

Let's consider, for example, feelings like fear, anxiety or concerns. Assume a car factory whose management decided to increase the productivity. The workers will have to work faster then before and, yet, to maintain the same product quality. If the speed imposed is still at a reasonable level, people can mobilize and they will become aware of the fact that they have to be more attentive and to work harder. But if the rhythm increases to a level where the workers feel they cannot resist, they will start to worry. They will worry about not making mistakes and not harming themselves. They can also ignore those feelings and continue to work. If they ignore their feelings, all could be normal or, on the contrary, many errors may occur and people might lose their jobs.

Worries, fear and anxiety are feelings that may mean that something is not going well. Worries can give an alarm about future dangers. When concerns regarding the increase of production rhythm occur, they may be used in a constructive way. For example, they can increase the sleeping time so that they are more refreshed at work. Or the breaks between the different sets of operations can be shortened. Or, the management can be told that the more products produced the more defects. All feelings are extremely important at work, not only fear or concerns. Satisfaction, for example, is a sign that the works are going well. A feeling of pleasure at work may signify a thing well done. It is important to know that feelings comprise critical information that we have to take into consideration if we want to be efficient.

3.4. Where does emotional intelligence intervene in work's success?

Emotional intelligence cannot predict for itself the work success, a satisfying career or an efficient leadership. It is only one of the components which are important.

The quality of being a good user of emotional intelligence also comprises the understanding of the fact that it is not and it shouldn't be thought of as a replacement or subtitute of abilities, knowledge or skills obtained in time (I 2000). The emotional intelligence increases the chances of success but it does not guarantee the success in the absence of the necessary knowledge. The

emotional intelligence is always helping the individual. It is a good thing for it to exist. But also the other abilities and competences are important.

Use emotional intelligence at work (Goleman 2001, p.88)

Some ways in which emotional intelligence may help in the day by day activity are presented below.

Identification of emotions

• One should be aware of the own feelings and emotions so that not to be "blind" by feelings;

• One should be aware of the feelings of the others as this is a key point when working with people.

Use the emotions

• Creativity may come from the ability of generating a certain state or a proper feeling;

• To feel "for" the others, to be able to be emphatic, may come from the ability of generating a feeling that the other persons perceive.

Understanding the feelings

• To know what motivates the people;

• To understand the point of view of other people;

• To understand and to manage with the interaction within the group.

Emotions control

• All the time to be aware of your own emotions which contain valuable information and use this information to resolve your problems;

• Whenever you are sad, find out the root cause for your frustration, why have you been disappointed, and solve the problem;

• When you are upset, find out the reason why you are frustrated and solve the problem;

• When you are anxious, find out the reason of your worries and solve the problem;

• When you are pleased, find out the root cause for your happiness and repeat it.

4. Specific applications of emotional intelligence at work

4.1. Considerations regarding the intelligence concept in the companie's operations

The Companie's operation may be defined as the assembly of homogenous and/ or complementary activities performed by the working personnel having a certain qualification and specialization that use certain specific methods and techniques in order to achieve the objectives of the company (Dănăiață I., A.Nicolae, Predișcan M. 2002, p.95).

According to the author's approach, the main activity fields, functions respectively within a company are the following:

1.The research – development function

2.The production or operational function

3.The commercial function

4.Financial – account function

5.The function of personnel (human resources)

Taking into account the fact that the functions of an economical company are generally the same, this meaning that they do not differ from one branch of the economy to the other depending on the object of the activity performed, a general theory of the involvement of the intelligence concept at the organization level may be developed.

Starting from the model of Multiple Intelligence made by Howard Gardner (Gardner 1993, p.104), the following question may rise: which of the seven types of intelligence mentioned by the author has a more important role in making more efficient and for a good development of each of the functions of the company?

According to the multiple intelligence theory, not only that individuals posess numerous mental representations and languages of the intellect but the individuals differ one from another by the form of these representations, of their size or the easy ways in which they are used and also the way in which these representations can be changed.

As regards the **function of research - development**, it comprises all the activities in a company oriented towards the achievement of the objectives in the field of generating new ideas that should materialize in products, useful services (elaboration of product development strategies, of technologies and development of the activity). The main characteristic of this function is its innovative character that assures the adaptation of the company to the needs of the consumers, and clients, as well as to the evolution of science and technique.

We may say that in order to be successful in this kind of activities, a high level of intelligence type visual-spatial, visual-liguistics, logical-mathematical is more than necessary. We define the visual-spatial intelligence as the "ability to perceive visually what is around us", a determining factor when elaborating some research-development activities in the light of the need to identify the necessity upon which the specialists will concentrate their efforts (Slater 2009).

Next to this type of intelligence, we define "the ability to use reason, logic and numbers", this meaning the logical-mathematical intelligence, this representing maybe the main characteristics taken into consideration when developing some research activities, mainly in the technical domain.We cannot neglect the fact that, generally, the research-development activities are performed within teams, and rarely these responsibilities are being delegated or assigned to individual level. In this way, types of intelligence such as the verbal-linguistics and inter-personal intelligence (the ability to use words and to speak, as well as the ability to understand and interact with the others) are needed for establishing an open cooperation and understanding atmosphere within the group.

The production or operational function is defined as the assembly of basic activities of the company/organization through which the work objects are being transformed into products, finite services meant for selling towards customers (Adriana 2005).

The experience of some visits to big companies in Timişoara or in the country have strengthened my opinion that in the case of individuals directly involved in this kind of activities, the visual-spatial intelligence, the logical-mathematical intelligence as well as the kinaesthetic intelligence (the ability to control the body movements and of dexterity in working with different objects) are essential for the success of the activities undertaken. We have to remind once again that many of the activities included in the production function need team work, thing for which the inter-personal intelligence is playing an important role in reaching the common group objectives.

The following activities are being taken into consideration:

a)Technical-material provisioning;

b) Storage, preservation and management of fuels, materials and raw materials stocks;

c)Transportation outside the economical unit;

In the case of the first three activities, it is obvious that types of intelligence such as: visual-spatial intelligence, logical-mathematical intelligence and kinaesthetic intelligence are necessary attributes to the directly involved persons. Besides the intellectual effort, the transportation, preservation or management of raw materials and of materials, also imply the usage of kinaesthetic or dexterity abilities.

As regards the **commercial function**, (Robert 2001) which includes the sales and marketing activities, competencies as the verbal-linguistic, musical, inter and intra personal ones (the ability of self-reflection and awareness of the own ego) have a significant importance if we think of individual's abilities such as creativity, persuasion, ambition, negotiation ability etc. Therefore, the **commercial function** includes all types of intelligence mentioned by Howard Gardner, and one of the conclusions might be that the group of individuals directly involved in the component activities of this function reunites the whole palette of the above mentioned abilities and competences.

The financial – accountant function comprises the assembly of the following activities: financial planning and execution, accountancy, costs and price calculation, economical-financial analysis. These activites have a strong synthesis character (Nicolescu 2006), highlighting, in monetary expression, the economical aspects of the activity of the entire company.

By the self nature of these activities, it is obvious the fact that the dominant feature that has to be taken into consideration in the case of this function, is the logical-mathematic intelligence, this meaning the ability to use reason, logics and numbers.

Gardner sustains the fact that any person has a certain coefficient of each of these intelligence types (visual-spatial, vizual-linguistic, logical-mathematic, kinaesthetic, musical, inter-personal, intra-personal), the only thing that makes the difference being the way in which they vary or combine with one another.

The components of the **personnel function** are very complex because each person is a unicate (Dănăiață I., A.Nicolae, Predişcan M. 2002). The activities included in this function are determination of the personnel needed, personnel recruiting, personnel evidence, appreciation and promotion, rewarding and punishing the employees, training and perfecting, protection and work hygiene, as well as administrative activities.The most of those who studied emotional intelligence consider that it can be applied in all domains of life as knowing to work and to communicate with people is an ability that no one can live without. In the conditions of quick changes within organizations, the high level of emotional intelligence has become an important factor of success, which sometimes exceeds the technical professional competence.

In fact, it is a reality that, at present, people are being employed based on an interview whose purpose is to appreciate the emotional abilities of the individual. It goes even further in the way that promotions and dismissals are the result of this interview.

Activities included in the personnel function as well as the considerations regarding the role of emotional intelligence concept upon them can be found in the next section, but what we have to keep in mind up to now is the following: the emotional intelligence finds its importance in each of the functions of the company, by its components also shown by Howard Gardner in the Multiple Intelligence model: verbal-linguistic intelligence, musical intelligence, inter-personal and intra-personal intelligence.

According to Daniel Goleman, for an organization to work well is necessary to pay attention to the emotional abilities of its members, assuring compatibility between them, in emotional-affective terms. In the past ten years, a new type of management has shaped, namely the emotional intelligence management within an organization. The organizational psychology researches led to the conclusion that managers (starting with the team leaders or the working team and up to the general manager), as well as the employees having a higher emotional coefficient are more successful than those who only have a good professional qualification. They are better seen in the organizations, are more cooperant, stronger motivated intrinsicly and more optimistic.

5. Conclusions

The conclusion that can be withdrawn from all these studies is that besides the "professional" intelligence or the high level of professional abilities, the capability of an individual of being "intelligent emotionally" brings that plus of value which transforms a simple employee in a formal or informal leader within the organization to which he/she belongs. We conclude by saying that now and in future should be kept a model for applying emotional intelligence to improve their adaptation in tensoinate situations that may arise in the evolution of a company. Identify situations associated emotions is useful and necessary because it encourages leaders to take an active attitude and to develop an effective plan.

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MARKETING STRATEGIES IN PUBLIC INSTITUTIONS – FASHION OR NECESSITY?

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Abstract
The marketing strategy, as core of the marketing policy, in the contemporary society and in the public institution, becomes a necessity not just a fashion. We undertake to reinforce this statement by arguments and to outline the specificity of the marketing strategy in the public institution of the modern society. Although public institutions are created and supported only if there is a large amount of social needs to be met during a certain period of time, the adoption of adequate marketing strategies and tactics is a must in order to achieve their efficiency.

Keywords: *marketing strategies, marketing policies, marketing tactics, marketing mix, public institutions*

1. Introduction

The society we are living in at the beginning of this millennium reveals a surprisingly rapid evolution due to the technical and scientific progress and to the ways it opens for its application in the social and economic practice. Therefore, we assist to an exponential evolution of the society needs in general and of the social needs in particular. This imperiously imposes for the marketing research in the contemporary society to represent a priority not only in the economic field, but also in the social and political field and particularly in the public field. Thus, the public sector should know and foresee the society needs, to analyse, systematise and hierarchically classify them in order to be able to clearly and rationally select those needs reflecting the general interest and to define them as *social needs* of public interest, on short, medium and long term.

Marketing, a science largely recognised in the post-war period, represents today the main instrument of the society as a whole, of any economic, public or non-profit organisation, allowing them to become acquainted with the social needs and their quantitative, qualitative and structural evolution. Therefore, the adoption of marketing strategies by any public institution cannot be perceived any longer as fashion but as a imperious necessity.

In this paper, we undertake to prove that the implementation of marketing strategies by the public institution is not only possible, but absolutely necessary under the specific conditions of its operation. This allows us to outline the particularities of the strategic marketing in the field of public services, as well as the concrete modality of achievement of marketing studies and marketing planning activities in the public sector.

The importance of studying this issue resides in the fact that, nowadays, no public institution, in order to carry out an efficient activity, able to promptly and favourably satisfy as many citizens' needs as possible, can ignore any longer the use of marketing methods and techniques providing it with a large range of information based on which it can adopt a corresponding strategy beneficial for its evolution in society.

In our recently published studies, we have brought, in our opinion, sufficient arguments supporting the necessity and opportunity of applying the marketing principles, methods and techniques also in public institutions. But the implementation of marketing in the public sector implies a specific attitude to be adopted by the related public institutions, the delimitation of the

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strategic directions and of the practical modalities of their accomplishment, concretised in the marketing policy essence.

The specific literature concerning the public sector marketing is at an incipient stage, the new marketing specialisation being subject to a crystallisation process. Most of the references may be found in the papers dedicated to the New Public Management or to the Services Marketing. The most consistent work dedicated to this specialisation of marketing belongs to the well-known American specialist Ph. Kotler, who published in 2007, with Nancy Lee, the paper entitled "Marketing in the Public Sector: A Roadmap for Improved Performance". This work has been already translated into Romanian in 2008, thus providing the theoreticians and especially the practitioners with the possibility to understand how to use the marketing instruments to attract the citizens' support in order to allow the settlement with maximum efficiency of their problems by the public institution.

We hope to offer support to practitioners, by the ideas rendered hereinafter, in carrying out a much more efficient activity in the public institutions, so that the citizens' and the public institutions' interests might be satisfied as quickly and favourably as possible, both quantitatively and especially qualitatively .

2. The marketing Strategy – Essence of the Marketing Policy

The public institution of the contemporary society is involved in the achievement of welfare, meaning the well being of citizens, of the natural environment and of the public administration, as expressly underlined by Ph. Kotler and Nancy Lee. This involves the assimilation of a new philosophy regarding the satisfaction of the society needs, based on the orientation towards citizens as unique beneficiaries. The marketing philosophy o the public institution aims at satisfying the "welfare" with its triple dimension: social, economic and ecological, by the combination of which to ensure the highest welfare possible of as many people as possible".

The implementation of the marketing philosophy in the public institution activity is achieved by its marketing policy which represents an important component of the general policy adopted by the public institution.

The marketing policy expresses the philosophy of the organisation regarding its existence and evolution, the directions towards which it is oriented and the concrete modalities of achievement of the objectives undertaken by it depending on the available resources at a given period of time. The adoption of the marketing policy outlines, on one hand, the overall conception and options of the public institution and, on the other hand, the principles and norms it complies with and the actions by which the undertaken objectives are fulfilled. This involves the unity of the strategy by which it delimitates the objectives and tactics by which it determines the adequate modalities for reaching the said objectives concretised in programmes of actions specific to the established time interval. The success of a unitary and coherent marketing policy resides in the harmonious combination of the marketing strategy, expressing the purposes pursued, with the marketing tactics, reflected in a set of actions that render into practice the strategic options, on the moment when these ones should be implemented by the persons in charge.

The marketing strategy has a central role within the marketing policy, as it derives from the organisation purposes and indicates the activity directions, but the marketing tactics should be synchronised with the former. Basically, the strategy is the theoretical side, relatively abstract, which may be achieved only by adequate practice, by concrete modalities of fulfilment of the established goals, in compliance with the citizens' needs, but also with the possibilities of the public institution. Therefore, tactics will be permanently subordinated to strategy, the latter remaining relatively stable for a given time interval. The tactics is the one to be permanently changed in order to adapt to the changes occurring in the social, political and economic environment. It has to generate a perfect concordance with the strategy and hence, it has to be anticipative, active and adaptive, so as to provide the adequate positioning at a given time, in order to create the adequate framework for the evolution of the public institution.

An efficient marketing tactics consists in the assembly of variables controllable by an organisation, combined in such a manner allowing them to get the desired reaction of the target market. The elements it can use to influence the demand manifested on the market are: the rendered public services, representing its product, the tariffs at which it provides such services, representing the price, the concrete manner of provision of public services, meaning the distribution of its supply, and the promotion of the public services it supplies to its citizens with whom it has to communicate as efficiently as possible. This set of variables controllable by the organisation, combined, designed and integrated in different proportions into a marketing programme, form the classical marketing mix, meant to detail the marketing strategies and to influence the market so as to provide the maximum possible efficiency of the activity carried out by the public institution. Certainly, when establishing an optimum marketing mix – as main instrument of the marketing tactics in any organisation – at the public institution level, other variables should be also considered: population, public institution's personnel, team, physical support, public service achievement process etc. By the harmonious combination of these ingredients and the adequate dosing of the available resources, the public institution can act in order to obtain the maximum impact on the citizen consuming public services.

3. Importance of adopting a marketing strategy in the public institution

The marketing strategy defines the attitude and behaviour of the public institution, the missions and aims to consider, the directions to follow in order to fulfil its established goals. It expresses the tendencies and exigencies imposed in order to obtained adequate performances. A successful strategy indicates what is essentially pursued in a given period of time, the modality of achievement of the related objectives and the answers to the fundamental questions of any supplier of public products and services:

- what services should be currently provided and what services shall be provided in the future
- which is the market share to be approached – the target market
- which is the maximum level of the tariff perceived for the said service
- what should be communicated to the potential consumers
- how to better provide the said service to the consumer

The modality of answering these questions reflects the concrete forms combined by the market strategy and the marketing mix strategy, meaning the product (service) strategy, the price (tariff) strategy, the distribution strategy and the promotion (communication) strategy which encompasses all the marketing functions.

If for theoreticians, the adoption of a marketing strategy by the public institution is nowadays a necessity, for practitioners, the most frequently, it is perceived as a fashion coming and going, mainly determined by the currently use by mass-media of terms such as: publicity, promotional price, brand, mix, public relations etc. belonging to marketing. Even certain specialists sustain that the use of marketing in public institutions has become "an officially approved fashion", especially if we analyse from the perspective of "promoting consumers' interests" which starts becoming a preoccupation of governors. They expressly require the managers of public institutions to pay an increased attention to the consuming citizens' desires, as they might frequently find alternatives to meet many of their requests in the non-profit and even in the private sector. This will lead to the decrease of the citizen's interest in relation to the public institution's supply and, in consequence, to the lowering in importance and opportunities of some public institutions, with unfavourable consequences for their employees.

For now, the social practice reveals that the promotion of the citizens' interests is made only theoretically, by words instead of facts and concrete actions, just because this is required by the central public authority and has to be ticked, so that the public institution's managers have the

possibility justify themselves before their hierarchical superiors and before citizens when the electoral campaign approaches.

Even if the consuming citizen's power started to increase as for the adoption of important decisions by the provider of public services, yet there is a power disequilibrium between the supplier of public services and consumers, in favour of the former, the user having finally just the alternative of not buying or of selecting from the existing rage of options, as the case may be. As such options usually do not exist, the provider being in a position of monopole, and if the consumer's need is urgent, the latter will accept the provided product or service and, in such circumstances, there is no interest for the supplier to promote the marketing principles, methods and techniques, unless it intends to promote its image and, considering the "trendy character" of the marketing techniques, it will use them in order to outline the openness to new in the knowledge era.

The beneficiary of the public service is traditionally called "public service user". Lately, we remark that increasingly more public institutions, especially those providing public services paid by consumers, use the term "customer" with multiple dimensions, inclusively representing the legal relationship between citizens and administration, beside terms such as "market", "transaction" etc., frequently encountered, deemed as trendy.

It has become "fashionable" to speak about the efficiency and efficacy of the activities carried out in public institutions, about the rationality of distributing the available resources so as to satisfy some social and collective needs. Any manager of a public institution justifies his failures, the inadequate quality of the public services provided, by the requirements of using with maximum efficiency the resources, especially the material and financial ones, according to the normative deeds.

The use of marketing in public institutions has become a fashion also due to the marketing opportunities, to its openness to multiple types of socio-humanist activities, to its universality having imposed it as a special way to draw the public's attention and to create human relationships. This openness of both citizens and employees of public institutions to marketing, even if just for its trendy tendency, has to be used in order to render into practice the marketing principles, methods, techniques and requirements, by the adoption and implementation of marketing strategies and adequate tactics finally leading to maximum results with minimum expenses, so that more and more social needs might be satisfied as quick as possible.

Passing from a superficial vision, according to which marketing is just a fashion, to a realistic and rational vision, imposing the use of marketing strategies as urgent necessity also by public institutions, becomes an increasingly important issue within the current international context. The dynamism of the contemporary society has lead to an unexpected quantitative, qualitative and structural acceleration of the society needs, but also of the necessity and possibility to meet them to a larger extent. As such, for any type of organisation: economic, non-profit or public, it becomes impetuously necessary to become conscious of such needs and of their evolution, so as to be able to settle realistic goals, achieving, by their fulfilment favourable circumstances for existence, subsistence and development.

The delimitation in each stage of social needs, reflecting the public interest, is highly important for the evolution of the public sector, and of the public institutions it represents. The modification of the social needs structure leads to the diversification of the activity carried out in public institutions and to its restructuring. It determines, on one hand, the establishment of new public institutions (as those emerged as result of the integration into the European Union, charged with the management of the European funds, the protection of human rights, immigration etc.) and, on the other hand, the dissolution or reduction of others' activity. For instance, as the individual resources of the society members increase, certain needs initially deemed to be of public interest may become simple individual needs or needs belonging to small communities, which may be successfully met by individuals or non-profit organisations, at local level.

The end of the first millennium revealed a modification of the vision regarding the evolution of society as for the ratio between three sectors: private, institutional (governmental) and non-profit.

Therefore, we ascertain an incredible development of the third sector, namely the non-profit sector which disputes with the institutional sector the opportunity to meet the social needs characterised by increasingly more dynamism, diversity and sophistication.

The non-profit sector turns into a serious competitor for the institutional one as concerns the provision of resources and the prompt involvement in the satisfaction of the ever evolving social needs.

Especially at the level of more developed economies, where by taxes and fees the public institutions mobilise significant financial resources, the marketing strategy becomes an essential component of their power-related policies, as they provide them with the chance to quickly discover and foresee the social needs generated by the technical and scientific progress. The community takes part in and supports public institutions in meeting the existing social needs to the extent they provide it in a more efficient and prompt manner than the non-profit organisations. Therefore, the community will focus its interest on those organisations most appropriately answering to its requirements.

Even if at first sight, the three sectors developed in the contemporary society have established direct competitive relations with one another, each of them having in view to extend the borders relating to the satisfaction of the needs of the society's members by means of the other one, in fact, they are obligated to cooperate so as to obtain optimum conditions for achieving the established goals. The public sector is the one who can and must ensure a favourable environment, but it depends to a larger extent of the resources obtained from the private sector. Mutually advantageous relationships may be achieved based on the partnerships concluded between the public and private sectors, between public institutions and between them and the non-profit organisations, by which financial resources as well as the support of those initiatives allowing the satisfaction of social needs might be provided. Such partnerships offer a very good opportunity to turn a possibility into reality, "to transform something good into something very good" as Ph. Kotler used to say. Under these circumstances, the eradication of the harmful phenomena manifested at the society level or the diminishing of some of their negative effects becomes possible. An adequate marketing strategy creates the premises for establishing partnerships that contribute to the improvement of the citizens' and communities' living standards.

A marketing strategy is necessary also in order to improve the image of the public sector, which is frequently negative, distorted and fragile, incorrect and incomplete. This unfavourable image of the public sector as a whole is deemed to be also the result of the objectives and subjective arguments formulated by the other sectors (private and non-profit) so as to justify the necessity to amplify their role and to gain as many supporters as possible.

It is important for each public institution to contribute to the perception changing and this may be done by implementing an adequate marketing strategy.

Implementing the New Public Management as an efficient modality of organisation and operation of the institutional system as a whole and of each component involves the use of marketing as main instrument. The marketing strategy allows the manager to clearly establish the vision (where he undertakes to achieve), the fundamental goal (what he wants to obtain), but also the primary and secondary goals which are sometimes controversial and not fully shared by the society or community.

4. Significance of the Marketing Strategy in Public Institutions

The marketing strategy of public institutions consists in a set of decisions acting as laws, regarding the target market, the positioning of public services and the level of marketing expenses. It has as purpose the optimum finality of the public institution activity within a certain period of time, clearly formulating the stage objectives towards which the efforts to be mobilised are directed. It is the result of a mix between managers' experience, intuition and hope as well as between their knowledge and skills.

The drawing up, implementation and assessment of the management strategy of public institutions is based on the same principles (rules) as in the economic organisation, but it deals with a series of *particularities* originating in the nature of the public institution's activity, the customers' components, the modalities of manifestation of the market mechanism etc., namely:

- the "product" supplied by the public institution is not a good with certain concrete characteristics, with attributes conferring it an obvious utility making it fit for sale, but it is a public service, the utility of which could be found in the dark corner of abstraction. In other words, something is offered, its value not being intrinsically useful but rather indirectly tangible or more exactly intangible but having to be subject to assessment.
- the large range of public services are increasingly diversified and are used simultaneously with their "production" by direct contact between providers (public institutions) and users (citizens).
- certain public services are rationalised and they are distributed based on a public will act. It is not supplied on demand, but according to the existing needs.
- other public services are provided for free in order to allow the access of all people needing them.
- there are also public services paid by users at a tariff equalling the production costs.
- in some cases, the customers entitled to use a public service are designated by political decision.
- as the facets of the term "customer" are various, it is necessary, in order to draw up a marketing strategy, to delimitate the types of customer to which the said public services are addressed. Even if in the public field the consumer of public services is not treated as a "king" as in the economic area, he or she is appreciated and deemed to be a "voice" among others to be heard.
- if, within the economic organisation, the market share to which the product is addressed is delimitated, the intention of the public institution is to simultaneously satisfy different target groups, thus determining changes in the process of implementation of the marketing strategy.

All these issues relating to the public sector should be considered within the activity of drawing up and implementation of the marketing strategy which should lead to the obtaining of the performances concerned.

The marketing strategy of public institutions represents an ample and permanent process of information, analysis and decision, a process of research of optimum solutions relating to the settlement of some clearly defined problems. The concrete formulation of the related goals shall be synthetically expressed in the strategic plan representing, beside the tactic plan, the essential instruments for directing and coordinating the organisation's marketing efforts and for orienting its activity in the future.

The marketing plan may concern a certain programme, service, area, share or even entity, in other words it may be partial or general, total (for the institution as a whole). The most frequently, the reference period ranges from one to three years, this also imposing adequate updating if domestic or foreign factors bring changes to the internal or external environment where the public institution carries out its activity. It should be drawn up by a team usually including a programme manager, a specialist in communication, in the financial field, a representative of the partnership, as the case may be, etc. Thus, a system, method, agenda and budget allowing the assessment of the marketing activity are provided. A practical model of a marketing plan in a public institution should include the following chapters:

- analysis of the existing standing meant to outline the strengths and weaknesses, opportunities and threats (SWOT analysis), as well as the direct and indirect competitors and therefore to provide the general information in order to define the goals pursued;
- general and concrete objectives (fundamental and derived – primary, secondary and individual);
- target public;
- positioning;

▪ classical marketing mix: service (product), tariff (price), distribution, promotion and/or other modern components;
▪ assessment;
▪ budget;
▪ implementation plan.

Such a plan based on a strategic conception will reflect the type of marketing strategy adopted by the public institution at a given moment, within the activities it undertakes to achieve.

Even if theoretically there is a large variety of marketing strategies to be used, due to the multiple issues to be considered, in practice, the public institution might resort to several strategies in the field of public services, types delimited based on a series of criteria (V. Olteanu, 2006):

1. the modality of occurrence:
- deliberated strategy – that consciously pursue and execute the established goals by the organisation development plan;
- emergency strategy – meant to settle unexpected issues.
2. the diversification level:
- common strategy;
- differentiated strategy.
3. the demand-supply relationship:
- concentrated strategy (on a single market share);
- differentiated strategy
- non-differentiated strategy
- inefficiently differentiated strategy
4. the nature of the relationships with environment:
- strategies promoting the partnership-related relationships that may be:
❖ preferential relationships
❖ tolerance relationships
❖ cooperation relationships
- traditional competitive-type strategies that may be:
❖ differentiation strategies
❖ alignment strategies
❖ strategies of : - customers' attraction
- customers' maintenance
- customers' regaining
5. the dynamics of the services market:
- strategies for market penetration
- strategies for developing services
- strategies for developing markets

Each type of strategy expresses just a part of the whole image. The selection of a successful strategy depends to a larger extent on the ability, knowledge and skills of the marketing manager and of the managerial team of the public institution in interpreting the environment and in organising themselves in such a manner allowing them to take maximum advantage from the occurring opportunities, in order to carry out an efficient social and economic activity.

5. Conclusions

Although several years ago (10-15 years), the implementation of marketing and especially of the marketing strategy in public institutions was perceived just as fashion (considering many of the new things as fashion has become a characteristic of the end of millennium), nowadays, without any doubt, it has become an imperious decision of the normal evolution of the society we are living in,

which is obligated to meet a series of general and collective needs, often with more and more limited resources.

The new philosophy of the contemporary world regarding the satisfaction of the society needs imposed a new relationship between the existing sectors: the private sector where the quasi-totality of available resources is created, the institutional sector that should provide the general framework relating to the carrying out of activities and the non-profit sector which takes over the tasks regarding the achievement of certain general and collective needs that the public sector cannot fulfill.

The marketing studies provides the public sector with the possibility to discover and assess the existing social needs and, on these grounds, to select those needs which may and must become of public interest and to satisfy them via the public institutions representing it, under the best possible circumstances.

The use of the marketing strategy in public institutions is an imperious necessity, for the following reasons:

- it allows it to precisely define its place and role in society, at present and especially in the future.

- the implementation of the New Public management grounded on two pillars: the orientation to market, towards the society requirements that can be satisfied more favorable at collective level than at individual level and the efficiency of allotting the public resources so that the expense on unit of useful effect be minimum involve the use of specific marketing instruments by which bureaucracy may be reduced.

- the non-profit sector competition becomes more and more serious and, in certain fields, it might represent a threat to a series of public institutions.

- the partnerships between public institutions, between them and private companies, between public institutions and non-profit organisations, offer a very good opportunity "to transform something good into something very good".

- the image of the public sector as a whole and of each public institution should be improved, as it is frequently negative, fragile, incorrect and incomplete.

The conception and implementation of the marketing strategy in public institutions is based on the same rules specific to economic organisations but it deals with a series of particularities determined by: the activity nature, the customers' structure, the modalities of manifestation of the market mechanism etc.

The marketing science provides the public institution with a series of types of marketing strategies from which the most adequate might be selected and implemented by strategic planning.

The diversity of the fields the public institutions operate in renders the drawing up of the related marketing strategies largely differentiated. Hence we undertake to continue our research in order to discover and formulate marketing strategies which might be implemented in fields such as: public administration, education, health, culture etc.

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NEW ASPECTS OF COMPETITION IN THE CONTEXT OF THE FUNCTIONAL SPECIALIZATION

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Abstract
Economists and managers should be aware today of the fact that some concepts and economic mechanisms need to be reconsidered in the context of the new aspects of globalization. There are aspects regarding: the new division of labour based on the "functional" specialization; the definition, on the basis of the new stategies of the "functions" arbitrage, of new structural and functional types of economic actors: "the globally integrated companies"; the appearance of a new type of management that we can call "the management of a globally integrated business"; the redefinition of such concepts as "the product" and "the producer"; the changes in the content of competition, etc. We want to point out some new facets regarding competition among companies in a decade when some of them engage in new structures of business like the "globally integrated business" that we have defined in a previous study. Competition among integrated companies is widened by competition with the globally integrated businesses and by competition among the globally integrated businesses, including wast supply chains.

Keywords: *competition, "functional" specialization, "globally integrated business"*

1. Introduction

The choice of writing this article originates in the findings that we are now in a period of **profound changes, even radical ones, of the content of the economic globalization process.**

This new economic globalization content is given by two major coordinates: the shifting of the gravity center from the globalization of markets, which was specific in the '80s, to the globalization of production and services in the last 10-15 years, simultaneously with **the appearance of a new type of specialization of companies**, favoured by the fantastic progress of the information and communication technologies, which we call "**functional specialization".** This specialization take place at the level of the distinctive functions involved in the processes of designing and supplying a product and originates in:

a) the modularization of the production process and

b) the global value chain reconfiguration

The modularization of production has generated an outsourcing stream, which has advanced rapidly, from phases of production, to the whole productive process, determening some transnational companies to give up production completely, this function beeing undertaken by a new category of economic agents, named "contract manufacturers".

The reconfiguration of the global value chain is based on the same functional specialization which exceeds this time the segment of the "manufacturing process" and can be found anywhere on the chain: innovation - product design and technological development - production - distribution and marketing - post-sales services. The value chain becomes more fragmented, as the functions involved in one or another business are differentiated in more and more specialized activities, up to the most narrowly specialized. This increasing modularization also generates more competition **in every point**

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of the value chain and for each function or mix of functions that a company keeps in its structure, it confronts rivals who focus their resources to become top performers of that function.

In this new competitive context, **there are two key issues of the corporate strategy:**

- selection of specific functions of the global value chain, meaning which ones to retain and which ones to outsource. A trend can be observed, namely that transnational companies tend to keep the less tangible functions of the value chain, those most intensive in knowledge, such as product innovation, research and development, management, marketing and brand management.

- selecting the most suitable integrators for the outsourced functions and their location.

"Globally integrated companies" have to be conceptually bounded from "global companies" which, in terms of market globalization, inply a large-scale implementation of the strategy of market aggregation.

"Globally integrated companies" reflect the integration in a certain formula of the value chain components of a "product" and the distribution of their fulfilment in at least two countries. Integration implies also, on a larger scale, the functional interdependence between at least two independent companies that together perform the global value chain of the "product" and generate through this symbiosis a **"globally integrated business".**

The transactional nature of the relationships between firms is replaced on this occasion with a symbiotic and "inter-functions" nature of these relationships.

2. The changing content of competition

"Traditional" competition between companies is replaced, in the context of the "globally integrated businesses", by new types of competition specific to the new types of structures and new management concepts, which are currently consolidated under the new division of labor. Competition between companies which include the achievement of all "functions" of the value chain is replaced, when companies have realized the tremendous potential offered by the functional specialization, by a **competition localized at the level of a certain function or a set of functions retained in a company's portfolio.**

When the manufacturing is outsourced by several companies to the same contract manufacturer, it is obvious that differences in competitiveness will result from other functions held within the company (research, design, logistics, marketing, etc..). Competition moves to the level of the "functions of excellence" retained inside the company, while competition in the outsourced functions becomes residual and results rather from the arbitrage of the advantages that the competing providers of functions can bring (when not resorting to the same provider).

A new type of competition is observed also **between the networks of suppliers**. This competition is more complex than the competition **between supply chains** and even more complicated when some members are part of several networks that may be competing themselves. In such cases, when a network intends to give a strong blow to another network competing in the same branch, it is very likely that it will be itself affected by this maneuver.

"Competition between networks means that a company that has access to the best networks will surpass rivals today, but will be able to overcome their rivals in the future as well. Such companies can create superior supply chains now, but can also project new supply chains based on the existing networks. Thus, companies have many more options to meet customer needs. **The best networks give rise to the best supply chains"**.

"Competition is no longer limited to company against company, but rather to supply chain against supply chain. Partners in the chain are the same team members who are trying to optimize value. If a chain eliminates another chain, all the members of the defeated chain fail. The better the chain members cooperate with each other, the more competitive they will be against rivals. This is a different vision of partnership and a broader vision on the company itself.

This idea changes the way the supply chain members interact with each other. In traditional supply chain (or other "value chains" that deliver products or services), suppliers were trying to

extract the best prices from buyers. Buyers sought concessions from suppliers. Each player optimized a part of the supply chain.... the overall efficiency of the chain being usually sacrificed for the optimization of the results of a single strong player.

But the success of a modern supply chain depends not just on efficiency, and an antagonistic relationship can damage a lot. Antagonistic relationships diminish supplier's creativity, reduce flexibility and weaken the chain in many ways. As flexibility is becoming increasingly important, the cost of such lack of coordination becomes increasingly higher. Collaboration, on the other hand, can improve supply chain as a whole"[1].

Synthesizing the above, we could say that in relational terms, a the supply chain may be:

a) a classic one, based on antagonistic relationships between its components, namely between firms in a position of sellers or buyers, each trying, in their bilateral relations, to maximize profits through the negotiated prices. Thus, some links are strengthened and others are weakened. The latter will later endanger the whole supply chain.

b) a modern one, based on relations of cooperation between its components, collaboration that aims to overall chain efficiency and results in its strengthening in competition with other supply chains.

On the other hand, it is useful to look at supply chain in structural terms, namely:

a) static supply chains, based on a fixed number of components, mostly invariant over long periods of time in respect of the supplying companies identity.

b) dynamic supply chains, based on networks that can reconfigure, whenever necessary, a certain supply chain, in order to optimize its overall responsiveness (an extension of the classical concept of efficiency), increasing chain flexibility and stimulating suppliers creativity.

In this point of the analysis, we can conclude that the dynamic supply chains of collaborative nature are better positioned in the competition fight.

The supply networks that generate these supply chains are also competing each other and the outcome of this competition will translate into a greater number of prestigious Western companies that will contract that network to carry out the supply chains specific functions.

A different level of the analysis of the business structures engaged today in the field of the global competition, could be that of the comparison between the matrix structures (from the functional point of view) of TNCs (with their branches system) and the matrix structures of the supply networks.

There are definitely matrix response skills to market demands in both structures, but it seems that a conclusion can be drawn is that networks have competitive advantages over TNCs, at least in the field of the manufacturing function. These advantages result, among others, from the following reasons:

a) The geographical and functional structure of a TNC is more rigid than that of the supply chain. It is fastened by its original structure, built on the strategies of market adaptation or the aggregation of similar market demands. This structure largely cancels from the start the permissiveness of a rapid implementation of a new production matrix. In a supply network such as that orchestrated by Li Fung, consisting of over 12,000 suppliers located in over 40 countries, the formulation and implementation of a new production matrix is possible immediately and with reduced operational costs.

b) The ownership structure of TNC is more rigid than that of the supply chain. While the flexibility of the first is increased through green-field investments or mergers and acquisitions, the second enjoys an incomparable flexibility both in the development stage of the existing structure, based on the adherence to the network that can leave aside ownership involvment, as well as well as

[1] Victor K.Fung, William K.Fung, Yoram (Jerry) Wind: Concurenta intr-o lume plata: cum sa construim o companie intr-o lume fara granite, Ed.Publica, 2009.

in the functional stage, when, for a similar result, a number of operational combinations (matrix) can be made readily available.

c) The strategy of the arbitrage factors that finaly define the manufacturing efficiency (seen in its entirety of the manufacturing "function") is optimized in the network because, in comparison with many TNCs, it can configure at any moment, from "n" possible variants, the matrix that optimizes coordinates like: assigned functions, costs, location, speed of execution, etc.). In this context, the arbitrage strategy applied inside its own structure of a TNC is expected to turn more extensively into a strategy arbitrage in respect of choosing the right supply network. Partnering with a supply network equates in the same time with the outsourcing of the arbitrage strategy regarding manufacturing (lately acompanied by activities of design, marketing and logistics) from a TNC to the selected supply chain. In this context we will probably witness the emergence of a new concept, that of the "outsourcing of the arbitrage strategy" from under the roof of some TNCs to some supply networks, which turned themselves also into "globally integrated businesses".

3. Other aspects of the analysis

a) The organic growth model, based on the ownership of assets, is no longer, as in the classical economic theory, the only model of enhancing the economic strength of a company.

Within the functional specialization, following the segmentation of the global value chain, a number of TNCs have outsourced the "function" of manufacturing, keeping higher value-added functions in which they focused their highest skills, that set them apart from competitors (such as research and development, planning and design, innovative marketing and distribution strategies).

The outsourcing of the manufacturing function to contract manufacturers discharged those companies of the need of managing some high-value assets that are no longer to be found in their heritage. The resources thus made available were assigned to other functions, functions that have generated a more notable increase of the company value.

If in the past, the vertical structure and the organic growth have paved the way towards profitability and reputation, now the deverticalized structures prove to be more profitable.

The fact that the property model can be successfully overcome is shown, perhaps the most eloquent, by the integrators of functions who have specialized in orchestrating vast networks of suppliers. Although their contractual commitment is to supply products manufactured products, it is possible that these integrators, owing no production facility, to report turnover of billions of dollars.

These networks consist of thousands of suppliers, some of which exceed the known concept of a supplier and provide even complex and distinct functions like the fabrication of product modules, assembly, logistics, retailers activities, etc..

The construction of this network is vertical, but not a single company's courtyard. This democratic structure consisting of "n" independent owners is made functional and effective not by property relationships (belonging to one company), but by a new type of management, innovated and perfected over the last 10-15 years by some visionary companies which early seized the new opportunities offered by the "functional" specialization and the availability of some brand companies, mainly American, to apply to the international outsourcing (offshoring) of manufacturing and services.

b) **The expanding and deepening of the interdependence relationships between independent companies, based on the "functional" dependability between them.**

This kind of dependency between the seller and the integrator of functions, pave the way merely to relationships of cooperation and to a balance of power between partners. The "functional" interdependence has already come to overshadow, through its potential, the older structures such as strategic alliances. It is also a challenge for managers of many companies that face difficulties in assimilating the new conceptual principles of networked businesses.

The symbiotic relationship between partners emerges from the fact that the seller of the production function knows and represents the market of demand, while the integrator of that function knows, organize and represent the market of the supply of production factors.

c)**In the context of the "globally integrated businesses", the pricing strategies will be shaped differently**

It is expected that traditional means of competitive struggle between transnational companies[2], including the central role of pricing strategies and the use of transfer price mechanism, to be reconsidered, especially in connection with the new matrix of the "globally integrated businesses" in which, for example, the mechanism of transfer prices is no longer operative and competitive advantages are distributed and focused on "functions".

d) The reconfiguration of competition in businesses involving functional specialization has implications for the overall competition. Analysis of changes in the competitive environment should be separated by areas, due to the particularities of the new business structures and their symbiosis with the classical ones.

In the past 20 years we can observe an almost exponential growth of the contract manufacturing, in all its forms (original technology manufacturers, original design manufacturers, global suppliers) and almost in all industrial fields. However it may be noted that in the light industry the strategic options of functions integrators were more varied than in other areas (a comparison should be made first of all with the electronics industry), because in terms of assets and functions, they could engage in more diverse forms of structuring the business (supply chains, supply networks).

There are still plenty of examples of running a successful business in property-based systems, as in the case of vertically integrated companies, and in the light industry the vertical pattern is often fulfiled, out of conjunctural or competitive reasons, by lohn contracting.

A parallel between a model of structuring a business including a supply network and a model that includes a network of manufacturers in a lohn system would certainly lead to the idea that the first is more competitive than the classical one. The main reason lies in the "offshoring" of the management of the manufacturing function from the outsourcing company to the company that manages the supply network, leading to an increased focus of the outsourcing company on the management of the relationship with the market, leading finally to the optimization of the flow from the demand study of demand to the suitability of supply.

The transition to the network model also implies a shift from the "supply chain management", which focuses on optimizing a fixed and relatively limited set of assets, to the "orchestrating or management of a network", which focuses on optimizing the response to customer needs, using the assets of a vast network of partners. Innovations in the field of network management define in fact another type of management, the dynamic management of probable structures.

The "decoupling" of the supply chain management from the management of markets, at the level of some independent companies, will generate not only a tendency to maximize the specific managerial skills, but also a competition which is not this time located at the level of vertically structured companies, but at the level of those couples formed by the outsourcing company and the company managing the supply network.

4. Conclusions

Analysis of new strategic concepts put into practice by a significant number of companies, both from developed countries, as well as from emerging ones, puts us in the position to sense also the reconfiguration of the content of economic competition.

[2] Serghei Margulescu, Elena Margulescu: Preturi si concurenta, Ed. Cartea Studenteasca, Bucuresti, 2007.

"Traditional" competition between companies is replaced, in the context of the "globally integrated businesses" and the "functional" specialization, with types of competition specific to the new structuring of companies and businesses and to the new management concepts in the process of consolidation. Competition between companies which include the achievement of all "functions" of the value chain is replaced, in the case of those companies that have realized the tremendous potential offered by the functional specialization, by a competition which is localized at the level of the function or set of functions retained in its portfolio. Competition moves to the "functions of excellence" retained intra-company or created.

A new type of competition is observed also between the networks of suppliers. This competition is more complex than the competition between supply chains and is further complicated when some members are part of several networks that may, themselves, be in competition.

The reconfiguration of competition in businesses involving functional specialization has implications for the overall competition. The "decoupling" of the supply chain management from the management of markets, at the level of some independent companies, will generate also a competition located at the level couples formed by the outsourcing company and the company managing the supply network. Traditional business models will have to adapt on the way, unless they do not restructure themselves too, to the new competitive challenges that the functional specialization of companies has brought lately in the field of international economic relations.

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MARKETING MIX POLICIES IN FMCG CASE-STUDY: THE ADVERTISING STRATEGY

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Abstract
This paper explores the relationships between selected marketing mix elements in the area of FMCG. It discusses the nature and sometimes negative consequences of the dominating marketing paradigm of today, marketing mix management, and furthermore discusses how modern research into, for example in the case of FMCG Companies, the marketing policies as well as customer relationship tactics shows that another approach to marketing is required. It proposes a conceptual framework in which marketing elements are related to the dimensions of brand equity and brand awareness. It also presents a case study deriving from advertising strategies of FMCG Companies showing that the change in advertising spending is related to changes in market share, changes in product plans and changes in the number of competitors modified by the number of customers, their concentration and the size of the advertising budget.

Keywords: *marketing mix, marketing theory, FMCG, advertising*

1. Introduction

This paper is a starting point in the research project I am currently involved in, at the Doctoral School of the Academy of Economic Studies, searching on Marketing Mix Strategies.

This paper is a Research Analysis made on Marketing Mix Policies updated to the 21'st Century Marketing Research. It debates on the Advertising and Promotional importance of the advertising campaigns in the Marketing Mix policy, concerning Consumer, Retail and Fast Moving Consumer Goods Companies. It emphasizes the paradigm of 4P and marketing Mix and it also proposes a new conceptual framework regarding the marketing mix strategies. The concepts presented in this paper are labeled as a "vision driven approach" for today's management.

The results presented in the paper show that high advertising spending, high price, good store image, and high distribution intensity are related to high brand equity. This makes an important point out of the fact that corporate branding and awareness are two key factors in the right implementation of Marketing Mix Strategies.

The Case-Study presented in the Final part is made on Slovakia's FMCG market based on similarities with the Romanian one.

The Research Paper is important because it clears out the previous analysis made on fast moving consumer goods market, regarding the marketing mix strategies and results, that companies do not want to be exposed to the general public. Also, the paper is a starting point for a future analysis on the Romanian FMCG Market regarding the Advertising Efficiency and Promotional Strategies.

The existent specialized literature on Marketing Mix Strategy is long and consistent, but fewer studies have been made regarding FMCG policy in general and none regarding the Romanian Market.

The literature presented in this paper is consistent and it may be consulted in the Reference part of the Research Paper.

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2. Marketing mix elements in FMCG

Few topics of the commercial theory have so intensively inspired as well as divided the marketing academia as the **4Ps Marketing Mix framework**, "the Rosetta stone of marketing education" according to Lauterborn (1990). The Mix has its origins in the 60's: Neil Borden (1964) identified twelve controllable marketing elements that, properly managed, would result to a "profitable business operation". Jerome McCarthy (1964) reduced Borden's factors to a **simple four-element framework: Product, Price, Promotion and Place**. Practitioners and academics alike promptly embraced the **Mix paradigm** that soon became the prevalent and indispensable element of marketing theory and operational marketing management.

The majority of marketing practitioners consider the Mix as the toolkit of transaction marketing and archetype for operational marketing planning (Grönroos 1994). While empirical evidence on the exact role and contribution of the Mix to the success of commercial organizations is very limited, several studies confirm that the 4Ps Mix is indeed the trusted conceptual platform of practitioners dealing with tactical/operational marketing issues (Sriram and Sapienza 1991; Romano and Ratnatunga 1995; Coviello et al. 2000). [1]

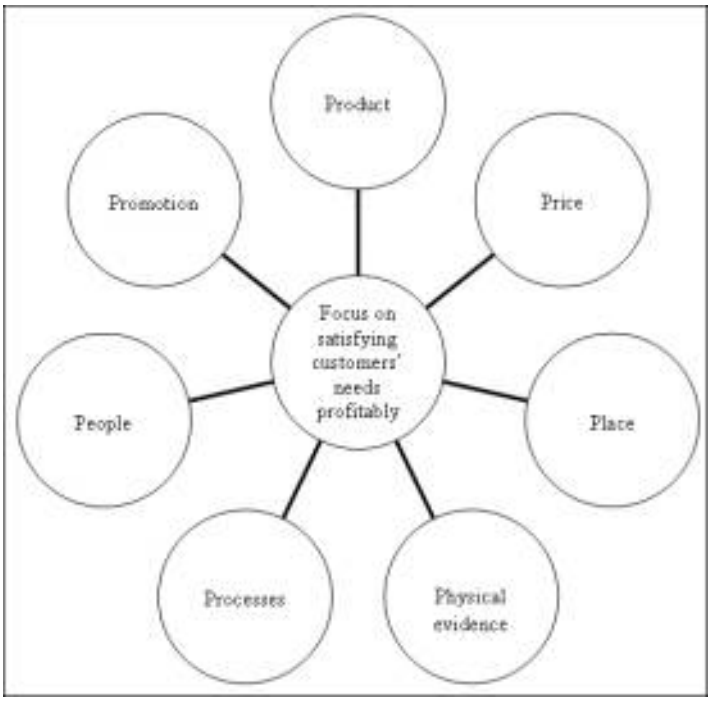
The wide acceptance of the Mix among field marketers is the result of their profound exposure to this concept during college years, since most introductory marketing manuals embrace it as "the heart of their structure" (Cowell 1984) and identify the 4Ps as the controllable parameters likely to influence the consumer buying process and decisions (Kotler 2003). An additional strong asset of the mix is the fact that it is a concept easy to memorize and apply. In the words of David Jobber (2001): "The strength of the 4Ps approach is that it represents a memorable and practical framework for marketing decision-making and has proved useful for case study analysis in business schools for many years". Enjoying large-scale endorsement, it is hardly surprising that the 4Ps became even synonymous to the very term marketing, as this was formulated by the American Marketing Association (Bennet 1995).

Next to its significance as a marketing toolkit, the Marketing Mix has played also an important role in the evolution of the marketing management science as a fundamental concept of the commercial philosophy (Rafiq and Ahmed 1995), with theoretical foundations in the optimization theory (Kotler 1967; Webster 1992). The theoretic endorsement of the Mix in its early days was underlined by the sympathy of many academics to the idea that the chances for successful marketing activities would increase if the decisions (and resource allocation) on the 4P activities were optimized; **Philip Kotler elucidated in 1967** how "mathematical programming provides an alternative framework for finding the optimal marketing mix tool that allows the optimal allocation of the marketing effort"3. **The theoretical value of the Mix** is also underlined by the widely held view that the framework constitutes one of the pillars of the influential Managerial School of Marketing along with the concepts of "Marketing Myopia", "Market Segmentation", "Product, Positioning" and "Marketing Concept" (Kotler 1967; Sheth et al. 1988).

American Marketing Association, in its most recent definition, states that "marketing is the process of planning and executing the conception, pricing, promotion and distribution of ideas, goods and services to create exchange and satisfy individual and organizational objectives"

[1] Christian Grönroos, From Marketing Mix to Relationship Marketing: Towards a Paradigm Shift in Marketing, Management Decision, Vol. 32 No. 2, 1994, pp. 4-20

Figure 1: The 4P-7P of Marketing



Adapted from: Palmer (2004)

Corporate branding

Among the changes that businesses make as they move toward globalization is a shift in marketing emphasis **from product brands to corporate branding** (e.g. Aaker, 1996; Aaker and Joachimsthaler, 2000; Balmer, 1995, 2001a; de Chernatony, 1999; Dowling, 2001, 1993; Harris and de Chernatony, 2001; Hatch and Schultz, 2001, Ind, 1997; Kapferer, 1992; Keller, 2000a, b; Knox *et al.*, 2000; Olins, 2000; Schmitt and Simonsen, 1997)[2]. This is usually ascribed to the difficulties of maintaining credible product differentiation in the face of imitation and homogenization of products and services, and the fragmentation of traditional market segments that occurs as customers become more sophisticated and markets more complex.

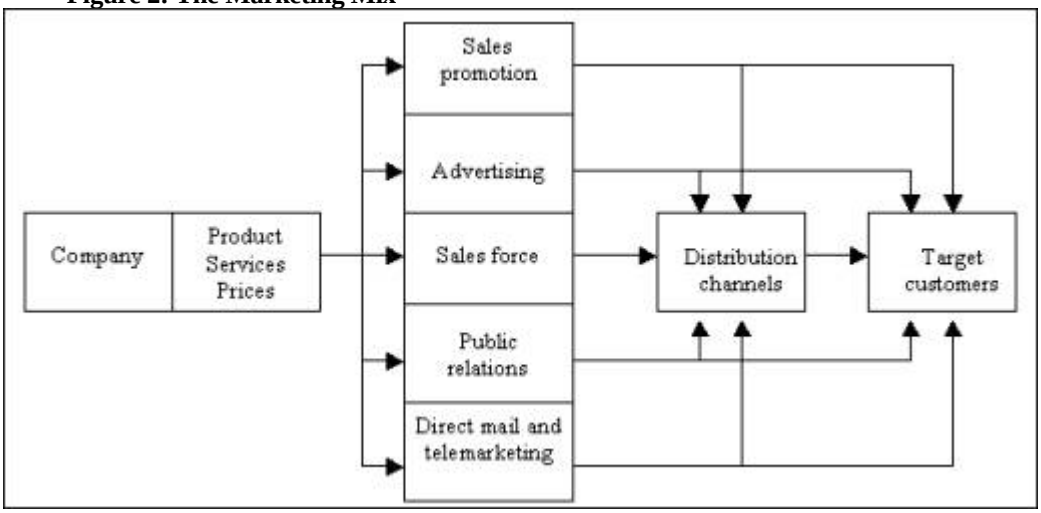
Support for the shift to corporate branding often comes from within marketing. For example, some marketing researchers have claimed that a strong corporate brand has significant impact in creating positive consume perceptions of existing products and new product extensions (e.g. Brown and Dacin, 1997; Ind, 1997). Others have addressed the special processes of creating corporate brands in the service area, **emphasizing the differences between services and fast-moving consumer goods** as foundations for corporate branding processes (McDonald *et al.*, 2001). In either case, corporate branding brings to marketing the ability to use the vision and culture of the company explicitly as part of its unique selling proposition (Ackerman, 1998; Balmer, 1995, 2001a; de Chernatony, 1999, 2001) or as suggested by Knox *et al.* (2000) and Knox and Maklan (1998), as part of its unique organizational value proposition.

[2] Mary Jo Hatch, Majken Schultz, Bringing the corporation into corporate branding, European Journal of Marketing, Vol. 37 No. 7/8, 2003, pp. 1041-1064

Parallel to this shift in the marketing area, scholars in corporate identity are moving in the direction of what Balmer and Soenen (1999) **labeled a "vision driven approach" to management.** The vision approach expands the concept of corporate identity into a much more comprehensive mix of **"mind, soul and voice".** In their review of this new approach, the authors show how identity management has been transformed from a dominating concern with visual manifestations into strategic change management (see also Balmer, 2001b). Similarly, de Chernatony (2001) argued for the importance of strategic vision to identity and branding, as a means to integrated brand building.

American corporations collectively spend hundreds of billions of dollars on **advertising and promotion**, an amount that exceeds the gross domestic product of several nations such as Singapore, Sweden and Switzerland. Even individual companies, for example, **Procter and Gamble**, spend several billion dollars on marketing activities. Consequently, the determination of the marketing budget and its allocation to several marketing activities — referred to as **"planning the marketing mix**"— is of paramount importance.

Figure 2: The Marketing Mix



Adapted from: Kotler, Ang, Leong and Tan (1999)

3. Marketing mix management – a new paradigm today

The marketing mix management paradigm has dominated marketing thought, research and practice since it was introduced **almost 40 years ago.** Today, this paradigm is beginning to lose its position. New approaches have been emerging in marketing research.

The **globalization of business** and the evolving recognition of the importance of customer retention and market economies and of **customer relationship economics**, among other trends, reinforce the change in mainstream marketing.

Relationship building and management, or what has been labeled ***relationship marketing,*** is one leading new approach to marketing which eventually has entered the marketing literature. A paradigm shift is clearly under way. In services marketing, especially in Europe and Australia but to some extent also in North America, and in industrial marketing, especially in Europe, this paradigm shift has already taken place. Books published on services marketing and on industrial marketing as well as major research reports published are based on the relationship marketing paradigm.

A major shift in the perception of the fundamentals of marketing is taking place. The shift is so dramatic that it can, no doubt, be described as a paradigm shift.

Marketing researchers have been passionately convinced about the paradigmatic nature of marketing mix management and the Four P model. To challenge marketing mix management as the basic foundation for all marketing thinking has been as *heretic* as it was for Copernicus to proclaim that the earth moved.

The Marketing Strategy Continuum

The major **problem and also a negative consequence** with the marketing mix and its Four Ps has been their position as the major and in many situations as the only, acceptable marketing paradigm. **Relationship marketing** must not become such a straitjacket.

However, developing enduring customer relationships and achieving exchanges in such relationships through a relationship marketing approach is not only another addendum to marketing mix management. Rather, it is a different approach as compared to achieving exchanges in isolated transactions through the use of the Four Ps of the marketing mix. As Reichheld observes, "building a highly loyal customer base cannot be done as an add-on. It must be integral to a company's basic business strategy"[3]. Hence, it should be useful to think about possible marketing approaches or strategies along a ***marketing strategy continuum***. **Relationship marketing is placed at one end of the continuum**. Here the general focus is on building relationships with customers (and other parties as well, although only customers are discussed in this context). **At the other end of the continuum is *transaction marketing*** where the focus of marketing is on one transaction at a time. Thus marketing revolves around creating single transactions or exchanges at a time and not around building long-term relationships.

The Paradigm Shift in Marketing

From a **management point of view** the Four Ps may have been helpful at one time, at least for marketers of consumer packaged goods. The use of various means of competition became more organized. However, the Four Ps was never applicable to all markets and to all types of marketing situations. The development of alternative marketing theories demonstrates that even from a management perspective, the marketing mix and its Four Ps became a problem.

On the other hand, marketing is more and more developing in a direction where the toolbox thinking of the marketing mix fits less well. In industrial marketing, services marketing, managing distribution channels and even **consumer packaged goods marketing itself,** a shift is clearly taking place from marketing to anonymous masses of customer to developing and managing relationships with more or less well-known or at least somehow identified customers.

Marketing mix management with its four Ps is reaching the end of the road as a universal marketing approach. Some authors now use the **7P Model** (**see Figure 1).**

However, even if marketing mix management is dying as the dominating marketing paradigm and the Four P model needs to be replaced, this does not mean that the Ps themselves, and other concepts of the managerial approach such as market segmentation and indeed the marketing concept, would be less valuable than before. Relationships do not function by themselves.

Most certainly **relationship marketing** will develop into such a new approach to managing marketing problems, to organizing the firm for marketing, and to other areas as well.

4. Review of a Marketing Management Paradigm: The Backgrounds of the Debate

Developments on the commercial landscape and changes in consumer and organizational attitudes over the last four decades, have frequently prompted marketing thinkers to explore new theoretical approaches addressing specific marketing problems and expanding the scope of the marketing management theory. The most important landmarks of the evolution of the marketing management theory include**…"the broadening of the marketing concept during the 70's, the emphasis on the exchange transaction in the 80's, the development of the Relationship**

[3] Reichheld, F. and Sasser, W. (1990), "Zero Defections: Quality Comes to Services", *Harvard Business Review*, Vol. **68,** 5 pp. 105-111 .

Marketing and Total Quality Management in the 90's" (Yudelson 1999) **and last but not least the emergence of Information and Communication Technologies as major actors of the 21st century Marketing**. At the same period the consumer behavior has also evolved; one of the noticeable changes has been the gradual evolution from the mass consumer markets of the 60's (Wolf 1998) towards increasingly global, segmented, customized or even personalized markets of today (Kotler et al. 2001) where innovation, customization, relationships building and networking have become issues of vital significance. The developments on the ground have prompted the development of new theoretical approaches dealing with specific rather than general marketing problems and situations.

In the course of these developments the **4Ps Marketing Mix framework** has been one of the subjects that frequently became the source of controversy and scientific debate (Dixon and Blois 1983; Rafiq and Ahmed 1992).

Surprisingly in a sense, this scientific debate has hardly been echoed in the practitioners' quarters. Unlike academics, practicing marketers have been reluctant to question, let alone dismiss the trusted paradigm (Sriram and Sapienza 1991; Grönroos 1994), presumably anticipating that the academic debate will yield some new, apparently better marketing methodologies and usable concepts.

Some of the criticism to the address of the 4Ps frame*work* ***has its roots in the discrepancy between the philosophy behind the Marketing Mix on one hand and the fundamentals of the Management School of Marketing on the other.*** The Management School that embraced the Mix as one of its "most important conceptual breakthroughs" (Sheth et al. 1988) has given the Mix, as already mentioned, similar status with the **Marketing Concept** and the **Market Orientation principles** (Kotler 1984). Yet the very nature of the fourP's as manageable i.e. controllable factors combined with the explicit lack of market input in the model (Kotler 2003) is in sharp contrast with the Marketing Concept and Market Orientation principles implying that marketing activities should be based on identification of customer needs and wants, typical external and therefore uncontrollable factors. This paradox has been highlighted by researchers like Dixon and Blois (1983) and Grönroos (1994).

The debate has been focused on developments of consumer and organizational behavior, the increasing complexity of the environment and the growing importance of technology as marketing enabler. (Kaufman 1995; Brown and Eisenhardt 1998; Beinhocker and Kaplan 2002).

A Disciplinary Classification of the Marketing Mix Criticism

One of the criteria for classifying the attitudes of researchers towards the 4Ps Marketing Mix framework is the disciplinary origin of the arguments, but such a classification can raise always questions; the apparent difficulty of this approach is to exactly demarcate the different marketing domains, something that underlines the complexity of the marketing environment today. A "qualitative" classification offers however a good insight to research attitudes in analyzing and modeling a changing, expanding and sometimes turbulent marketing environment.

On the basis of the disciplinary approach the theoretical status quo of the Marketing Mix will be reviewed based on publications **referring to five traditional and one emerging Marketing Management sub-disciplines: Consumer Marketing, Relationship Marketing, Services marketing, Retail Marketing, Industrial Marketing and E-Commerce.** It speaks for itself that further research in other marketing sub-disciplines is needed for drawing up final conclusions and comprehensive judgment on the question of the value of the 4Ps.

Consumer's Relationships tactics

During the last few years there has been a growing interest in studying the economics of long-lasting customer relationships. Heskett introduced the concept of *market economies*, by which he means achieving results by understanding the customers instead of by concentrating on developing scale economies. **Long-term relationships** where both parties over time learn how to best interact with each other lead to decreasing *relationship costs* for the customer as well as for the supplier or

service provider. The relationship cost theory which is based on literature on, for example, *quality costs* and *transaction costs* have been suggested by Grönroos. A **mutually satisfactory relationship** makes it possible for customers to avoid significant *transaction costs* involved in shifting supplier or service provider and for suppliers to avoid suffering unnecessary *quality costs*.

The Marketing Mix and the Consumer's Marketing

Significant cultural, social, demographic, political and economic influences during **the last decades of the 20th century,** combined with rapid technological advances have radically transformed the consumer's needs, nature and behavior. The new consumer has been described as existential, less responsive to traditional marketing stimuli and less sensitive to brands and marketing cues while the influence of family or other types of reference

The Marketing Mix Revisited groups on the new consumer's behavior is changing or diminishing

(Christopher 1989). More researchers share the view that the modern consumer is different: demanding, individualistic, involved, independent, better informed and more critical (Capon and Hulbert 2000; Lewis and Bridger 2000). A factor underlining the change is the increasing consumer power and sophistication due to wide availability of affordable personal computing power and easy access to online global commercial firms, networks, databases, communities or marketplaces. These developments have intensified the pressure on marketers to switch from mass marketing approaches towards methods allowing *personalization, interaction and sincere, direct dialog with the customer*. Such approaches allow marketers not only to improve communications with their target groups but also to identify the constantly changing and evolving customer needs, respond quickly to competitive movements and predict market trends early and accurately.

Table 1: Review of Consumer Marketing Theory Literature

Author(s)	**Arguments**	**Propositions**
Kotler 1984	External and uncontrollable environmental factors are very important elements of the marketing strategy Programs	The Marketing Mix should include: Customers Environmental variables Competitive variables Two additional Ps to the 4 traditional ones: Political power Public opinion formulation
Ohmae 1982	No strategic elements are to be found in the marketing mix. The marketing strategy is defined by three factors	Three Cs define and shape the marketing strategy: Customers Competition Corporation
Robins 1991	The 4Ps Marketing Mix is too much internally oriented	Four Cs expressing the external orientation of a Marketing Mix: Customers Competition Capabilities Company
Vignalli and Davies 1994	Marketing planning will contribute to the organizational success if it is closely related to strategy. The Marketing Mix is limited to internal and non-	The MIXMAP technique allows the exact mapping of marketing mix elements and variables, allowing the consistency between strategy and tactics.

	strategic issues	
Doyle 1994	While the 4Ps dominate the marketing Management activities most marketing practitioners would add two more elements in this mix in order to position their products and achieve the marketing objectives	Two more factors must be added to the 4P mix: Services Staff
Bennett 1997	Focused on internal variables therefore incomplete basis for marketing. Customers are disposed to buy products from the opposite direction to that suggested by the Marketing Mix	Five Vs are the criteria of customer disposition: Value Viability Variety Volume Virtue
Yudelson 1999	The 4Ps are not the proper basis of the 21st century marketing. The Marketing developments of the last 40 years require a new flexible Platform while the simplicity of the old model remains an attractive facto	4 new Ps based on exchange activities: Product -> Performance Price-> Penalty Place-> Process Promotion-> Perceptions
Schultz 2001	Marketplaces today are customer oriented. The 4Ps have less relevance today, they made sense the time they were invented	End-consumer controls the market Network systems should define the orientation of a new Marketing A new Marketing mix must be based on the Marketing Triad Marketer, Employee and Customer

Source: E. Constantinides, The Marketing Mix Revisited: Towards the 21st Century Marketing (2006)

Several shortcomings of the Marketing Mix have led the majority of the authors reviewed to suggest that the **4Ps framework should** not be considered as the foundation of Consumer Marketing management any longer. In the reviewed papers and books **the criticism is** focused on three main areas:

- **Internal Orientation:** a frequent objection underlying the Mix's explicit lack of customer orientation. Kotler (1984), Robins (1991), Vignali and Davies (1994) Bennett (1997) and Schultz (2001) are one way or another identifying this as the prime limitation of the Mix.

- **Lack of consumer interactivity**: Doyle (1994) and Yudelson (1999) argue that the Mix ignores the evolving nature of the consumer who demands not only higher value but also more control on the communication and transaction process. Allowing better interaction reduces the customer defection rates and increases customer trust.

- **Lack of strategic elements:** Ohmae (1982) Vignali and Davies (1994) argue that lack of strategic content is a major deficiency of the framework, making it unfit as planning instrument in an environment where external and uncontrollable factors define the firm's strategic opportunities and threats.

The majority of the reviewed authors propose alternative frameworks while those willing to accept a role for the 4Ps often propose modified versions, with new elements added to the traditional parameters.

Marketing Mix and the Retail Marketing

As recently as two decades ago most manufacturers of consumer products considered communication with the final customer as one of their essential marketing tasks. Being the dominant market party, producers would employ mass marketing campaigns aiming at increasing brand recognition, product awareness and mind share, as basic ingredients for stimulating product demand. **Retailers** and other intermediaries were considered as somewhat secondary actors in the marketing process, their responsibility confined in the functions of stocking and re-selling products (McCarthy 1978).[4]

Consolidation of the retailing sector, globalisation and private branding **has transformed the retailing landscape.** A significant power migration along the supply chain gave retailers gradually more control over the marketing processes and at the same time exposed them to increasing industry competition. Trying to build up strong market positions and competitive advantages, retailers were forced to adopt more professional and proactive commercial approaches, becoming gradually real marketers, rather than distributors and in-store merchandisers (Mulhern 1997). Supply chain management, efficiency, customer retention and customer lifetime value (Reichheld and Sasser 1990; Rosenberg and Czepiel 1992) form the cornerstone of many retailers' marketing strategies today. The consistent effort to build long-term relationships with the customer shifted the focus from the passive application of the 4Ps to "execution" *where retail formats, personnel, service and presentation are becoming the critical elements of retail marketing.* [5]

The retail marketing theory embraces **elements of both services marketing and relationship marketing, previously discussed.** E. Constantinides arguments against using the 4Ps as basis for services and relationship marketing can be easily expanded to retail marketing.

Yet retail marketing includes some additional, distinctive aspects that the Marketing Mix also fails to address: *physical evidence, shopping experience, atmosphere* (Mulhern 1997; Kotler 2003) *and personalized rather than mass contacts* (Wang et al. 2000). The idea is that the 4Ps do not present an adequate platform for planning of marketing activities in this domain. Most researchers suggest replacing the mix with new concepts or adding new elements to it. Personnel, Presentation and Retail Format are factors contributing to unique customer experience as basis of differentiation and retention.

5. Marketing mix and Brand equity

There are many relationships between selected marketing mix elements and the creation of brand equity.

There is a conceptual framework in which marketing elements are related to the dimensions of brand equity, that is, **perceived quality**, **brand loyalty, and brand associations** combined with **brand awareness**. These dimensions are then related to brand equity.

The practice results show now that frequent price promotions, such as **price deals,** are related to low brand equity, whereas **high advertising spending, high price, good store image,** and high distribution intensity are related to **high brand equity.**

Brand equity is the incremental utility or value added to a product by its brand name, such as Coke, Kodak, Levi's, and Nike (Farquhar, Han, and Ijiri 1991; Kamakura and Russell 1993; Park and Srinivasan 1994; Rangaswamy, Burke, and Oliva 1993).[6] Accordingly, research has suggested that brand equity can be estimated by subtracting the utility of physical attributes of the product from

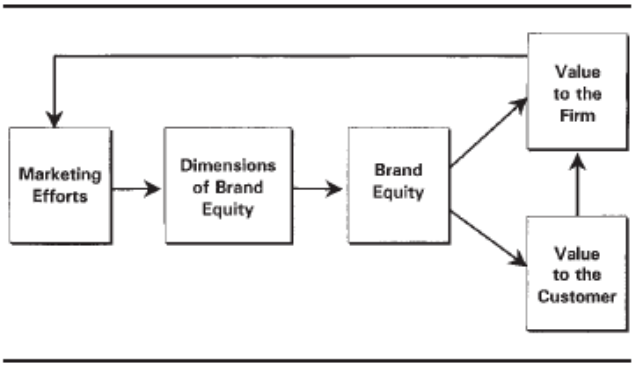
[4] McCarthy, E.J. (1978), *Basic Marketing, a Managerial Approach*, Sixth Edition, Homewood, Ill.: Richard D. Irwin, Inc.

[5] E. Constantinides, The Marketing Mix Revisited: Towards the 21st Century Marketing, *Journal of Marketing Management* 2006, 22, 407-438

[6] Wright, Robert W., Lundstrom, William J., Do government subsided programs effect perceived product quality and brand equity? Journal of Academy of Business and Economics, Date: Feb, 2007 Source Volume: 7 Source Issue: 2

the total utility of a brand. As a substantial asset to the company, brand equity increases cash flow to the business (Simon and Sullivan 1993). From a behavioral viewpoint, brand equity is critically important to make points of differentiation that lead to competitive advantages based on non price competition (Aaker 1991).

Figure 3: A Conceptual Framework of Brand Equity



Source: Boonghee Yoo, Naveen Donthu and Sungho Lee (2000)

By strengthening the dimensions of brand equity, we can generate brand equity. Understanding the brand equity phenomenon properly requires tapping the full scope of brand equity, including **awareness, perceived quality, loyalty, and associations (**Aaker 1991).

Zeithaml (1988) defines **perceived quality** as "the consumer's [subjective] judgment about a product's overall excellence or superiority". Personal product experiences, unique needs, and consumption situations may influence the consumer's subjective judgment of quality.

High perceived quality means that, through the long-term experience related to the brand, consumers recognize the differentiation and superiority of the brand. Zeithaml identifies perceived quality as a component of brand value; therefore, high perceived quality would drive a consumer to choose the brand rather than other competing brands.

Therefore, to the degree that brand quality is perceived by consumers, brand equity will increase.

Oliver (1997) defines **brand loyalty** as "a deeply held commitment to rebuy or repatronize a preferred product or service consistently in the future, despite situational influences and marketing efforts having the potential to cause switching behavior". Loyal consumers' show more favorable responses to a brand than non loyal or switching consumers do. Brand loyalty makes consumers purchase a brand routinely and resist switching to another brand. Hence, to the extent that consumers are loyal to the brand, brand equity will increase.

Brand awareness with strong associations forms a specific brand image. Aaker (1991) defines brand associations as "anything linked in memory to a brand" and brand image as "a set of [brand] associations, usually in some meaningful way". Brand associations are complicated and connected to one another, and consist of multiple ideas, episodes, instances, and facts that establish a solid network of brand knowledge. The associations are stronger when they are based on many experiences or exposures to communications, rather than a few (Aaker 1991). Brand associations, which result in high brand awareness, are positively related to brand equity because they can be a signal of quality and commitment and they help a buyer consider the brand at the point of purchase, which leads to a favorable behavior for the brand.

Marketing Mix Elements and Brand Equity

We investigate consumers' perceptions of **five selected strategic marketing elements**: ***price, store image, distribution intensity, advertising spending, and frequency of price promotions.*** The selected factors do not embrace all types of marketing efforts but are representative enough to demonstrate the relationships between marketing efforts and the formation of brand equity.

Price. Consumers use price as an important extrinsic cue and indicator of product quality or benefits. High priced brands are often perceived to be of higher quality and less vulnerable to competitive price cuts than low priced brands (Blattberg and Winniewski 1989; Dodds, Monroe, and Grewal 1991; Kamakura and Russell 1993; Milgrom and Roberts 1986; Olson 1977). *Therefore, price is positively related to perceived quality.* Rao and Monroe (1989)[7] show that a positive relationship between price and perceived quality has been supported through previous research. By increasing perceived quality, price is related positively to brand equity.

There is not any significant relationship between price and the other brand equity dimensions, brand loyalty and brand associations. Although price implies high quality, it does not create loyalty to the brand per se. Neither loyal nor non loyal consumers use price as an evaluative criterion of the product, and they are not influenced by price considerations (Helsen and Schmittlein 1994; Meer 1995).

Brand-loyal consumers are willing to pay the full price for their favorite brand because they are less price sensitive than brand-non loyal consumers are. Thus, changing the price level alone does not affect brand loyalty. Also there is no directional relationship between price and brand associations, because both low and high prices can be equally strongly linked to the brand in memory for the benefits that each brings to consumers. A low-priced product would give transaction utility (i.e., paying less than the consumer's internal reference price), whereas a high-priced product would give high-quality image or acquisition utility, leading to reduced consumer risk. Either a low- or high-price strategy would help consumers be equally aware of the product.

Store image. The importance of channel design and management as a marketing tool of increasing brand equity is growing (see Srivastava and Shocker 1991). In a distribution channel, retailers encounter a firm's ultimate consumers. Selecting and managing retailers is therefore a firm's major marketing task in satisfying consumers' needs. In particular, distributing through good image stores signals that a brand is of good quality. Dodds et al. (1991) find significant positive effects of store image on perceived quality. The store name is a vital extrinsic cue to perceived quality. The quality of a given brand is perceived differently depending on which retailer offers it. C**ustomer traffic** will be greater in a store with a good image than in one with a bad image. Good-image stores attract more attention, contacts, and visits from potential customers. In addition, such stores provide greater consumer satisfaction and stimulate active and positive word-of-mouth communications among consumers (Zeithaml 1988). Therefore, distributing a brand through an outlet with a good image will create more positive brand associations than distributing through an outlet with a bad image.

Store image appears to have no relationship with loyalty to a specific brand. Consumers perceive good store image when their self-concept is congruent with store image (Sirgy and Samli 1985). Thus, if the store image does not match the perceived image of the product, consumers would not be impressed enough to show loyalty to the product. In other words, only when there is consistency between product and store images will consumers be loyal to the product that is available in the store.

Distribution intensity. Distribution is intensive when products are placed in a large number of stores to cover the market. To enhance a product's image and get substantial retailer support, firms

[7] Boonghee Yoo, Naveen Donthu and Sungho Lee, An Examination of Selected Marketing Mix Elements and Brand Equity, *Journal of the Academy of Marketing Science* 2000; 28; 195.

tend to distribute exclusively or selectively rather than intensively. It has also been argued that certain types of distribution fit certain types of products.

Consumers will be more satisfied, however, when a product is available in a greater number of stores because they will be offered the product where and when they want it (Ferris, Oliver, and de Kluyver 1989). Intensive distribution reduces the time consumers must spend searching the stores and traveling to and from the stores, provides convenience in purchasing, and makes it easier to get services related to the product. As distribution intensity increases, therefore, consumers have more time and place utility and perceive more value for the product. The increased value results mostly from the reduction of the sacrifices the consumer must make to acquire the product.

Such increased value leads to greater consumer satisfaction, perceived quality, and brand loyalty and consequently, greater brand equity. Accordingly, positive brand associations will increase along with a consumer's satisfaction with the product.

Advertising spending. Overwhelmingly, **advertising researchers found advertising is successful in generating brand equity, whereas sales promotion is unsuccessful** (Boulding, Lee, and Staelin 1994; Chay and Tellis 1991; Johnson 1984; Lindsay 1989; Maxwell 1989)[8]. Simon and Sullivan (1993)[9] find a **positive effect of advertising spending on brand equity**. Cobb-Walgren, Beal, and Donthu (1995)[10] find that the dollar amount spent on advertising has positive effects on brand equity and its dimensions.

Advertising is an important extrinsic cue signaling product quality (Milgrom and Roberts 1986)[11]. Heavy advertising spending shows that the firm is investing in the brand, which implies superior quality (Kirmani and Wright 1989)[12]. In addition, Archibald, Haulman, and Moody (1983)[13] find that advertising spending levels are good indicators of not only high quality but also good buys. Aaker and Jacobson (1994) also find a positive Yoo et al relationship between advertising and perceived quality.

Hence, advertising spending is positively related to perceived quality, which leads to higher brand equity.

Advertising plays a pivotal role in increasing brand awareness as well as creating strong brand associations.

Repetitive advertising schedules increase the probability that a brand will be included in the consideration set, which simplifies the consumer's brand choice, making it a habit to choose the brand (Hauser and Wernerfeldt 1990)[14].

Thus, a greater amount of advertising is related positively to brand awareness and associations, which leads to greater brand equity. In addition, according to an extended hierarchy of effects model, advertising is positively related to brand loyalty because it reinforces brand-related associations and attitudes toward the brand.

Promotions (e.g., short-term price reductions such as special sales, media-distributed coupons, package coupons, cents-off deals, rebates, and refunds), are believed to erode brand equity

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[8] Boonghee Yoo, Naveen Donthu and Sungho Lee, An Examination of Selected Marketing Mix Elements and Brand Equity, *Journal of the Academy of Marketing Science* 2000; 28; 195

[9] Simon, Carol J. and MaryW. Sullivan. 1993. "The Measurement and Determinants of Brand Equity: A Financial Approach." *Marketing Science, Winter 28-52*

[10] Cobb-Walgren, Cathy J., Cynthia Beal, and Naveen Donthu. 1995. "Brand Equity, Brand Preferences, and Purchase Intent." *Journal of Advertising* 24 (3): 25-40.

[11] Milgrom, Paul and John Roberts. 1986. "Price and Advertising Signals of Product Quality." *Journal of Political Economy* 55 (August): 10-25.

[12] Kirmani, Amna, and Peter Wright. 1989. "Money Talks: Perceived Advertising Expenditures and Expected Product Quality." *Journal of Consumer Research* 16 (December): 344-353.

[13] Archibald, Robert B., Clyde A. Haulman, and Carlisle E. Moody, Jr. 1983. "Quality, Price, Advertising, and Published Quality Ratings." *Journal of Consumer Research* 9 (March): 347-356.

[14] Hauser, John R. and Birger Wernerfeldt. 1990. "An Evaluation Cost Model of Consideration Sets." *Journal of Consumer Research* 16, (March): 393-408.

over time despite immediate short-term financial gain. **Sales promotion may not be a desirable way to build brand equity because it is easily copied and counteracted** (Aaker 1991) and only enhances short-term performance by encouraging sales and momentary brand switching (Gupta 1988). In the long run, sales promotion may convey a low-quality brand image. Furthermore, frequent price promotions may jeopardize brands in the long run because they cause consumer confusion based on unanticipated differences between expected and observed prices, which results in an image of unstable quality. Consumers cannot forecast correct point of- purchase prices, and forecasting errors due to the gap between expected and observed prices negatively affect brand choice decisions as well as perceived quality, which leads to a decrease in brand equity. Also, price promotion campaigns do not last long enough to establish long-term brand associations, which can be achieved by other efforts such as advertising and sales management. Relying on sales promotion and sacrificing advertising would reduce a brand association, which leads to decreasing brand equity**.**

Price promotions do not seem to be related to brand loyalty, although they are consistently found to enhance temporary brand switching (Gupta 1988). They often fail to establish a repeat purchase pattern after an initial trial.

This is because consumers are momentarily attracted to the brand by the transaction utility that the price promotions provide, and when deals end, they lose interest in the brand. Thus, change in brand loyalty after the end of deals may not occur unless the brand is perceived to be superior to and meet consumer needs better than its competing products. Similarly, on the basis of self-perception theory, Dodson, Tybout, and Sternthal (1978)[15] find that brand switching behavior ends when it is attributable to price promotions (i.e., an external cause) rather than when it is attributable to a liking for the purchased product (i.e., an internal cause). Thus, the behavior disappears when the external cause is removed, and the loyalty level does not change.

6. Case study – The Advertising strategy

Advertising is an inevitable part of marketing activities in each business operating on consumer (B2B) markets. Behavior of customers can be very strongly influenced by advertising and therefore companies should give an appropriate attention to this issue. „Advertising is the non-personal communication of information, usually paid for and usually persuasive in nature, about products (goods and services) or ideas by identified sponsors through various media (Arens, 1996)[16]." „It is the beating heart of marketing for many organizations. Advertising is the engine that branding experts fire up whenever they want to shift awareness or attitudes (Shaw, Merrick, 2005, p. 67)[17]"

We can classify advertising forms into **six major categories: print, electronic, out-of home, direct mail, digital interactive and other** (Arens, 1996, p. 95). Advertising media include **newspaper, magazine, direct mail, radio, television, internet, inside transit, outside transit**, **outdoor** (Pride, Ferrel, 1999, p. 466). To avoid wasting the money on any activities and to know into which extend the goals (including communication goals) have been fulfilled companies should control and measure them. Control and measurement are very close interconnected. „Control is the process by which information or feedback is provided so as to keep all functions on track" (Soltani et al., 2007). Measurement is a procedure for assigning a number to an object or an event. Performance is a comparison between the outputs obtained and the set goals for outputs of a process. The most common criteria for measuring of the marketing performance are **increases in sales and market share** (Shaw, Merrick, 2005 p. 29). However we can evaluate advertising performance from two points of view: effectiveness and efficiency. Advertising effectiveness means how successful the

[15] Dodson, Joe A., Alice M. Tybout, and Brian Sternthal. 1978. "Impact of Deals and Deal Retraction on Brand Switching." *Journal of Marketing, Research* 15 (February): 72-81.

[16] Arens, W.F. 1996. Contemporary Advertising. Chicago: Irwin/ Mc Graw- Hill., ISBN 0-256-18257-4.

[17] Shaw. R., Merrick D. 2005. Marketing Payback. Harlow: Pearson Education, 2005. ISBN 0 273 688847.

advertising is in communicating the message – whether people saw it, whether they liked it etc. Necessary elements of advertising effectiveness measurement include: 1 measurement instruments, 2. benchmarks, 3. a control, 4. money and commitment, 5. a research plan, and 6. time (Bentley, 1996)[18]. Effectiveness is one of the key themes in advertising research. Advertising effectiveness can be defined as the extent to which advertising generates a certain desired communication effect (Buschken, 2007). Advertising can be evaluated before, during and after the campaign (Dibb, Simkin, Pride, Ferrel, 1997, p. 501)[19]. Evaluations performed before the campaign begins are called pre-tests. These include: concept testing, consumer juries, psychological measures, portfolio tests, readability tests, dummy advertising vehicles, theater tests and on air tests. Post-testing methods include inquiry tests, recognition tests, recall tests, day-after recall tests, test marketing, single source tracking studies and tracking print. Well known managerial expert Peter Drucker states, that effectiveness means „doing the things right". **To measure the marketing performance we can use** also ROI (Return on Investment), ROMI (Return on Marketing Investment) or ROME (Return on Marketing Expenditure). **Specifically for advertising** we can use **ROAI (Return on Advertising Investment).** These measures refer to **efficiency**.

At the beginning of the 20th century an American businessman John Wanamaker claimed that "Half the money I spend on advertising is wasted; the trouble is, I don't know which half." These words represent a basic idea what efficiency in advertising means. Efficiency means „doing the right things". **Advertising efficiency means** the financial return on the advertising expenditure. The efficiency of advertising could be measured **dividing net profits** from the campaign by the amount of the **advertising costs** (Lawless, 2007)[20]. Measurement of advertising performance can be very useful for companies. They find out whether the **main objective of the campaign has been reached**, they find out the return on advertising investments and get data for preparing the future campaigns. According to Lawles (2007) apart from that enterprises can learn the following from the campaign assessment as well: effects on customer knowledge, effects on customer attitudes, effects on customer intentions, effects on customer behavior, effects on our brand image, financial benefits stemming from the campaign, information on the campaign itself (likeability, interestingness, popularity, etc.). It's not easy to measure for a start, but that does not mean companies should not try. Up to now, **nobody has ever invented a 100% secure advertising test,** as usually the some problems occur (see **Table 2).**

Table 2 – Problems with control and measuring of advertising performance and reasons of failing to do post- campaign testing

PROBLEMS with control and measurement of advertising performance	Abstract character of the results
	Long term effects of campaigns
	Combined influence of more effects at once
	Costs of testing
	Lack of information
	Realization problems
REASONS of failing to do post-campaign testing	Lack of time
	Lack of money
	Lack of information on advertising post-testing
	Lack of human resources

Source: Elaborated according to Lawles, 2007

[18] Bentley, S., 1996 Marketing Week. London., ISSN: 01419285.

[19] Dibb, S., Simkin L., Pride W. M., Ferrel, O.C. 1997. Marketing Concepts and Strategies. Boston: Houghton Mifflin Company , 1997. ISBN 0-395-79005

[20] Lawless, P. Which Forms of Advertising May Be Most Effective? 2007, available online: http://www.3r.ie/marketing-blog/which-forms-of-advertising- may-be-most effective/, seen 08.04.2009

Advertising performance of the fast moving consumer goods companies in Slovakia

„Fast moving consumer goods (FMCG)" also known as consumer packaged goods, are products that have a quick turnover and relatively low cost. Though the absolute profit made on FMCG products is relatively small, they generally sell in large numbers and so the cumulative profit on such products can be large. Examples of FMCG generally include a wide range of frequently purchased consumer products such as *toiletries, soap, cosmetics, teeth cleaning products, shaving products and detergents, as well as other non-durables such as glassware, bulbs, batteries and paper products. FMCG also include pharmaceuticals, food products and drinks*"(Coulthart, 2006).

In our analysis we use a case study made in Slovakia in 2010. We used this case-study for some important reasons like:

- The Slovakian FMCG market is similar to the Romanian FMCG market
- The type of FMCG Companies present in Slovakia, are similar with "brand" names present into the Romanian Market in 2010
- The Supermarket Brands in Slovakia are likely to be found also on the Romanian market: Billa, Kaufland, Lidl, Carrefour
- Slovakia is an ex communist country, now member of the European Union

The case-study deals with the measurement of advertising activities in *Slovak fast moving consumer goods companies*. The work presents results of the primary field research concerning on these issues. **The main aim of the research** *was to find out if and to what extent fast moving consumer goods companies in Slovak Republic measure results of their advertising activities, to identify the methods they know and use and to reveal the problems that companies have with evaluation of advertising effectiveness and efficiency.* The research was quantitative in nature and a method of questioning with the e-mail form questionnaire has been selected.

The research **was quantitative** in nature. For collecting of primary data the authors used questionnaires. They distributed the questionnaires through e-mails to 390 FMCG enterprises in Slovakia. An e-mail questionnaire has been sent to the persons from marketing department as they are the best specialist from companies to answer the questions. They have chosen these companies so that we went to the supermarkets **Tesco, Billa, Kaufland, Lidl and Hypernova**.They were looking there among products for names of producers and suppliers of FMCG. They received back 32 completed questionnaires. The rate of returned completed questionnaires was only 8.2%. Some companies wrote them, that they do not fill in the questionnaire, because they assume such information as internal and too private. The authors considered that *the respond rate not to be sufficient to develop general statements about all FMCG enterprises in Slovakia, but we are sure that they can reflect certain reality.*

Conclusion of the study on the Slovakian FMCG market

48.8% of the companies *do not measure their campaigns* according to their effectiveness in comparison with 51.2% companies that conduct it. More than two thirds of companies (81.0%) assess advertising campaigns *after the campaign*. Before the campaigns only 6.3% of the companies evaluate and during the campaign 12.7% of them. This percentage is not satisfying since if they conduct the measurement before and during advertising campaigns they could reveal and avoid possible problems and mistakes before they happen.

They further examined the ways in which companies evaluate their advertising performance. They wanted to know which of them companies know and use in their practice. In this question there was not limited amount of possibilities, which companies could select.

The best known from the methods of measurement of advertising effectiveness are *consumer juries* (40.6% know it and 31.3% use it). The second best known method is *Tracking print/ broadcast ads*, which is known by 37.5% companies and it is used by 21.1% companies. The next well known (34.4%) and used methods (28.1% of respondents) are *Readability tests*. The Physiological measures are known by 34, 4% companies but nobody uses them. Other methods are not very known and used. They are known maximally by 28, 1% of respondents and used maximally by 15.6% of respondents. There are many methods not known and not used.

Regarding efficiency the most of the respondents (72.2%) **know the method of Return on advertising investment.** This method is used by 50% of the companies which carry out the evaluation of their advertising campaigns. The method Increase in profit is quite a lot well known and used too. 61% companies know it and 55.6% of respondents use this method of measurement of advertising efficiency.

All companies which carry out the evaluation of advertising performance execute the evaluation themselves. The reasons for it can be that small and medium sized enterprises do not have enough financial resources to pay outsourcing companies for such services or that they do not want to pay for such services to external companies.

Control and measurement of advertising is a very important activity to ensure that the money were spent but not wasted. **Advertising should be effective and efficient**. It does not mean that efficient advertising is automatically effective or vice versa. And therefore it is not enough to evaluate only effectiveness or only efficiency; both of them should be controlled and measured. From the research only **56.3% of fast moving consumer goods enterprises control and measure their advertising performance**. This share is as very small and it has been suggested changing the current state.

Some companies do not have enough financial resources for control and measurement of advertising or they do not want to spend money on this activity. The companies which do not want to spend money on such issues should change their opinions.

The study also suggested that 43.8% of companies in the research do not assessed their advertising because of lack of information.

The major conclusion of the Slovakian study was the fact that : **advertising spending is related to changes in market share, changes in product plans and changes in the number of competitors modified by the number of customers, their concentration and the size of the advertising budget. In other words: Advertising makes Sales go up.**

7. Conclusions

The main outcomes of this Research may be found in the presentation of the marketing paradigm of today Marketing Mix Strategy and the 4Ps.

From a management point of view the Four Ps may have been helpful at one time, at least for marketers of consumer packaged goods. The use of various means of competition became more organized. However, the Four Ps was never applicable to all markets and to all types of marketing situations.

Marketing mix management with its four Ps is reaching the end of the road as a universal marketing approach. Newest studies have shown the importance of the 7Ps analysis and of the *relationship marketing* at one of the pillars of a globalized market economy and the importance of brand awareness and analysis on the corporate market that impact strategies regarding FMCG industry.

Most certainly soon the *relationship marketing* will develop into such a new approach to managing marketing problems, to organizing the firm for marketing and to other areas as well.

The research results indicate that different marketing mix elements impact also the creation of brand equity with different levels of intensity, as well as that some elements of marketing mix can negatively affect the creation of brand equity.

The case-study made on Slovakian FMCG market found similarities with the Romanian FMCG market and also showed that for the FMCG companies the Advertising Strategy occupies a key position in order to reach brand effectiveness and awareness and increase general sales.

Also, related to the way of analyzing the Slovakian market Inquiry tests can be made which are really objective and not complicated method of measurement of advertising performance.

From methods of measurement of efficiency for companies is recommended the method Return on advertising investments which is not difficult and also not very time-consuming. With change of attitude of companies to control and measurement of advertising we can expect increase of economic development of the companies.

Also, this research paper can be useful background for a future market analysis on the Romanian FMCG industry, based on questionnaires, quantitative but also qualitative methods.

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QUESTIONNAIRES PRETESTING IN MARKETING RESEARCH

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Abstract
Designing the perfect survey questionnaire is impossible. However, researchers can still create an effective research. To make your questionnaire effective, it is necessary to pretest it before actually using it. The following paper reveals some general guidelines on pretesting and what to do for a more effective marketing research giving the fact that the existing literature highlights the importance and indispensability of pretesting and on the other hand, does not provide sufficient information in terms of methodology about it. Also, we have tried to explain the importance of questionnaires pretesting before applying them in order to obtain the best results in marketing research and we've kept in mind that high quality in this domain means using new tools and improving the existing ones if one searches for efficient results.

Key words: *questionnaire, pretesting, focus group, cognitive interviews, behavior coding.*

1. Introduction to questionnaires pretesting

Pretesting is one of the key stages of the survey questionnaire construction process, as shown in Figure 1, a stage of undisputed importance, without which even the most experienced researchers may come to administer uncertain instruments that will lead to the accumulation of doubts about the research results[1].

A more careful examination of the literature on pretesting survey questionnaires reveals a paradox. On the one hand, pretesting is the only way to evaluate in advance whether a questionnaire poses problems for interviewers or respondents and, consequently, elementary textbooks and experienced specialists declare pretesting indispensable. On the other hand, most textbooks provide minimal, if any, guidance about pretesting methods, and survey reports usually provide no information about questionnaire pretesting, whether questionnaires were pretested, and if so, how, and with what results[2]. Moreover, until recently, there have been few methodological studies on pretesting. The universally acknowledged importance of pretesting has been, until now, honored more in theory than in practice; therefore, we know very little about the various aspects of pretesting, including the extent to which pretesting serves its intended purpose, and leads to improved questionnaires.

Pretesting is generally defined as the testing of a set of questions or a questionnaire on subjects from the target population, and dates back to the founding of the modern survey, in the mid 1930s.

We agree that designing a perfect questionnaire is impossible. Nevertheless, researchers can still conduct efficient research by designing an efficient questionnaire. In order to create such questionnaire, its pretesting is required before being actually used, activity that can help us determine the strengths and weaknesses of the survey questionnaire. Questionnaire pretesting enables us to identify inappropriate terms in question wording, an inappropriate order, errors in questionnaires

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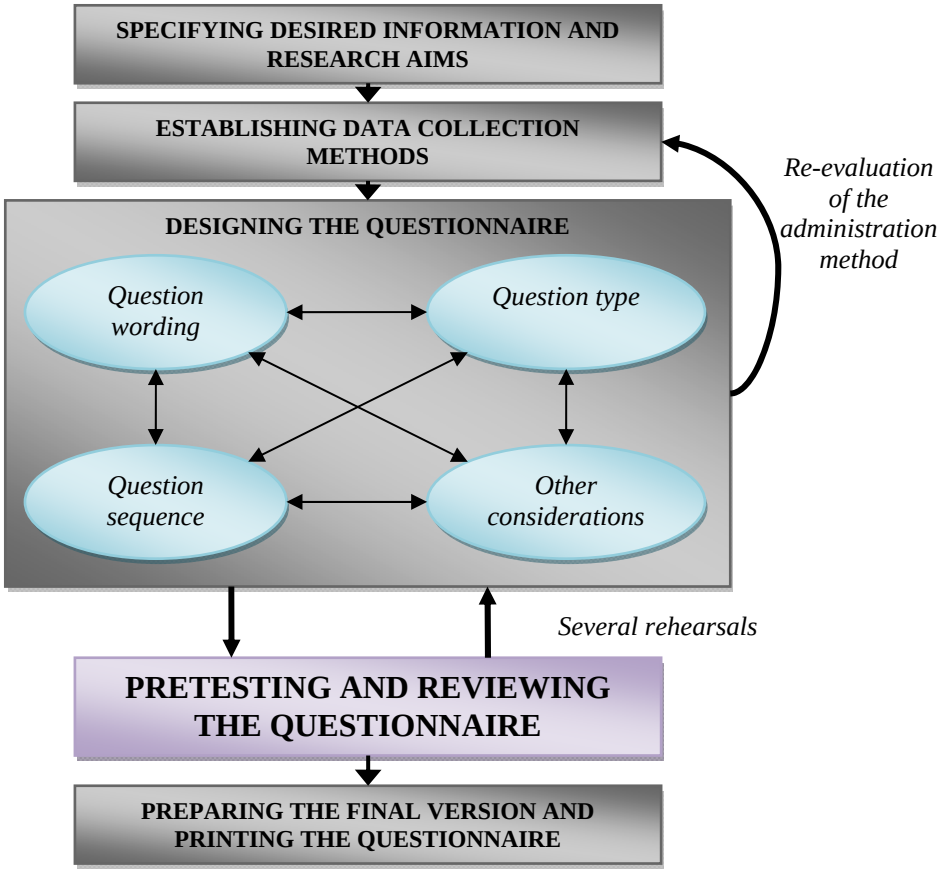
[1] Voicu, M.C., „Questionnaire – tool in sample research", *Romanian Statistical Review*, Supplement May 2008, pp.112-125, ISSN 1018-046x, category B+, CNCSIS, monitored ISI Thomson Philadelphia (SUA)

[2] Presser, S., Couper, M.P., Lessler, J.T., Martin, E., Martin, J., Rothgeb, J.M., Singer, E., „Methods for testing and evaluating survey questions", *Public Opinion Quarterly* (2004), Vol. 68, No. 1, pp. 109-130, American Association for Public Opinion Research, http://poq.oxfordjournals.org/cgi/reprint/68/1/109.pdf

related to their layout and instructions, as well as problems caused by the respondents' inability or refusal to answer certain questions.

Figure 1. *Questionnaire design stages*



Source: adaptation from Synodinos, N., „The „art" of questionnaire construction: some important considerations for manufacturing studies", *Integrated Manufacturing Systems* (2003), Vol. 14, No. 3/2003, pp. 221-237, ISSN 0957-6061; Cătoiu, I., Bălan, C., Popescu, I.C., Orzan, Gh., Vegheș, C., Dănețiu, T., Vrânceanu, D., *Marketing research*, Uranus Publishing House (2002), Bucharest, p.313

In this context, the questionnaire pretesting process must look for an answer to the following questions:

- Does every survey question measure what it should measure?
- Do respondents understand all the terms?
- Are questions interpreted in the same manner by all the respondents?
- Did closed questions provide at least one answer choice that would apply to every respondent?
- Does the questionnaire create a positive impression, thus motivating people to answer?

- Are the answer choices to be selected correct?
- Does any aspect of the questionnaire suggest any biasing attempt from the researcher?

2. Pretesting methods

Pretests can be applied in both field, and office or laboratory settings[3]. Most field pretests are conducted on the target population, using the procedures being considered for the main survey. The consensus among most researchers is that experienced interviewers should be used in the pretesting process, as they are more likely to notice errors and identify problems.

Furthermore, survey questionnaire pretests may have two forms: participating (declared) pretests, and undeclared pretests.

Participating (declared) pretests entail that the respondents are informed that this is a pretest. In this case, the idea is that instead of asking the respondents to simply fill in a questionnaire and that is all, the participants in the pretest should be involved in this activity, being asked to explain their reactions to the question format, wording and order. The respondent may also be asked to rephrase a question in his/her own words, to think aloud while trying to formulate his/her answer, or to do other things that will be briefly discussed. The goal of this pretesting method is to elicit the respondents' "immediate" thoughts and reactions to a survey question or problem, so that we can establish whether the questionnaire is understood.

On the other hand, when conducting an *undeclared pretest*, the respondents are not informed that they participate in a pretest. In this case, pretesting is conducted in a manner similar to that of the actual survey. The post-interview survey of the respondents can be carried out in connection with individual questions or replies, but the number and scope of the survey questions is much smaller and limited than in the case of a declared pretest. Its goal is to take the pulse of the dynamics of the entire interview, in other words, how well the survey questions "flow", whether the "skip" patterns work, what quantity of time is needed to conduct the interview and so on. This type of pretest enables us to verify whether our choice in respect of the analysis and standardization of the conducted survey is correct.

Specialists in the field recommend that, if the researchers have sufficient resources to carry out more than one pretest, they should first conduct a participating pretest, followed by an undeclared pretest.

According to the specialists, in recent decades, a growing awareness of the draw-backs of conventional pretesting[*] has led to changes in this field, as follows[4]:

- first, there has been a subtle shift in the goal of pretesting, from an exclusive focus on identifying and fixing the problems encountered by interviewers and respondents, to a broader concern for improving data quality so that measurements meet the survey's objectives;
- second, new testing methods have been developed or methods already in use have been adapted for other uses. These include: cognitive interviews[5] (method that has become common

[3] Czaja, R., „Questionnaire Pretesting Comes of Age", *Marketing Bulletin* (1998), No. 9, pp. 52-66, Article 5, http://marketing-bulletin massey.ac nz

[*] conventional pretesting is the process of conducting the survey on a small scale, in which the interviewer identifies problems related to the questionnaire; the specialists supporting conventional pretesting have established that conducting a survey by completing a set of 12-25 questionnaires is sufficient in order to realize the limitations and weaknesses of the questionnaire, and other specialists have established an interval of 20 to 50 questionnaires for pretesting.

[4] Presser, S., Couper, M.P., Lessler, J.T., Martin, E., Martin, J., Rothgeb, J.M., Singer, E., „Methods for testing and evaluating survey questions", *Public Opinion Quarterly* (2004), Vol. 68, No. 1, pp. 109-130, American Association for Public Opinion Research, http://poq.oxfordjournals.org/cgi/reprint/68/1/109.pdf

[5] Noël, V., Prizeman, G., "Using cognitive question testing to pretest a questionnaire for a large-scale postal survey of nonprofit organizations", *International Society for Third Sector Research/EMES* (2005), Paris, http://www.cnm.tcd.ie/publications/GP,VN%20ISTR%20EMES%20April%2005.pdf

practice in questionnaire pretesting), response latency, expert panel, behavior coding, vignette analysis, experiments, formal respondent debriefings and statistical modeling, reinterview and reconciliation method[6], Three-Step Test-Interview[7] (used to pretest self-administered questionnaires) etc.

Qualitative research is frequently used in questionnaire testing, in order to determine how respondents react to the designed questionnaire[8].

The focus group is a pretesting method that works best when applied in the first phases of questionnaire and question construction, and when a set of objectives and tasks that must be fulfilled is specified before the group meets. The focus group is the best method for determining:

- the respondents' level of understanding of key terms and concepts;
- how respondents recall the information;
- whether behavioral frequencies are numbered, estimated, or "calculated", using strategies of another nature;
- whether respondents understand the inquiry based on the current question wording;
- the frame of reference or the respondent's interpretation of the worded question.

One advantage of the focus group is the fact that its members may use other people's ideas and opinions in order to crystallize their own ideas. Moreover, the participants' observations and reactions may often provide valuable perspectives for the questionnaire and question review approaches. A very large quantity of information can be collected from a 90-minute focus group, which is audio or video recorded. The draw-backs of this method are due to the fact that it is very hard to work with its results, which are time consuming in respect of their interpretation, and that only a limited number of words, topics and problems can be discussed during a 90-minute session.

Cognitive interviews are face-to-face interviews between an interviewer and a respondent from the target population, which are usually conducted at the premises of a research organization. One of the cognitive interview techniques used is the *"think-aloud" technique,* which derives from psychological procedures described by Ericsson and Simon (1980). Consistent with this technique, respondents are instructed to think aloud or verbalize their thoughts in their attempt to understand the question, to recall relevant information and to formulate their answers. The interviewer interjects very little during the interview, except to say "tell me what you are thinking", when the subject pauses for long periods of time.

The "think-aloud" technique can be either concurrent, when probe questions are asked after the respondent answers the question, or retrospective, when probe questions are asked at the end of the interview. Interview sessions are usually taped so that non-participating staff can listen to the tapes and analyze such sessions. A major objective of this technique is to achieve a better comprehension of the cognitive processes that the interviewees go through while formulating the answer. A "think-aloud" interview does not observe the same pattern as a normal interview, and, therefore, it does not provide any indication of the existing problems in the common interview process. This happens because thinking aloud and probing for specific answers break the flow of questions, as well as the relationship between questions, thus affecting the answers given by respondents.

The main advantages of the "think-aloud" technique are due to the fact that:

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[6] see Morton, J.E., Mullin, P.A., Biemer, P.P, „Using Reinterview and Reconciliation Methods to Design and Evaluate Survey Questions", *Survey Research Methods* (2008), Vol.2 , No.2, pp. 75-82, ISSN 1864-3361, European Survey Research Association

[7] Hak, T., Kees van der Veer, Jansen, H., „The Three-Step Test-Interview (TSTI): An observation-based method for pretesting self-completion questionnaires", *Survey Research Methods* (2008), Vol.2, No.3, pp. 143-150, ISSN 1864-3361, European Survey Research Association

[8] *Statistics Canada Quality Guidelines***,** Fourth Edition – October 2003 ,Statistics Canada – Catalogue no. 12-539 –XIE, page 27

▪ the interviewer contributes little other than the reading of the survey question, except to occasionally prompt the subject to state what he/she is thinking, therefore, the subject's responses are very little biased;

▪ the interviewer mainly reads survey questions, and then listens to what the interviewee has to say; therefore little training or special expertise is usually necessary;

▪ the interviewee's verbalization is guided only minimally, therefore, he or she may provide information that is unanticipated by the interviewer. Consequently, "think-aloud" interviewing is especially valuable when the subject is outgoing, articulate, and has had significant experience with the topics covered by the survey questions.

On the other hand, the "think-aloud" technique also has several disadvantages, namely[9]:

□ because thinking aloud is somewhat unusual for most people, this technique typically requires significant training of the subjects to be interviewed, in order to elicit a sufficient amount of think-aloud behavior. The subjects' preliminary training may eat into the amount of productive time that can be devoted to the interview;

□ despite all preliminary training in the activity, many individuals tend to simply answer the questions, without further elaboration, as necessary;

□ this technique places the main burden of the interview on the subject;

□ the subject controls the nature of much of the elaborative discussion. Therefore, it is very easy for an interviewee to wander off of the important topic, and to spend a significant amount of time on one question, often delving into irrelevant areas, so that the interviewer must struggle to "bring the subject back". In general, the think-aloud technique results in relatively few survey questions being tested within a particular amount of time.

□ by its nature, thinking-aloud forces subjects to invest a considerable amount of mental effort into processing the survey questions, relative to what they do when simply answering the questions. This technique entails more intensive effort, and more justification of each answer, than when one simply provides an answer such as "yes", "no" or "I agree". Therefore, it is very possible that the activities associated with this technique might contaminate the cognitive processes used in formulating the answer to the question.

The second form of cognitive interviews is *retrospective probing*, when the interviewer asks probe questions to the respondent, after the latter answers a survey question or a series of survey questions. Retrospective probing means that respondents are asked to either interpret a key phrase, or define one term used in a particular question, or justify a particular aspect of their answer, or evaluate the clarity of a phrase or a concept, or identify words or phrases that are difficult to understand. The goal of this method is to identify terms or concepts that respondents do not understand or interpret differently than what the researcher intended, and to determine whether respondents lose sight of important words or qualifiers that are part of the question.

Response latency is a less common undeclared pretesting technique, which can be used in combination with the cognitive interview method or as a method in itself, particularly in computer-assisted surveys. The time delay before a respondent starts to answer a question is most often measured with the help of computers from tapes of cognitive interviews. Unusually long delays may mean that the question is too complex, or that respondents have difficulties in recalling the information they need to formulate their answers. Otherwise, unusually quick answers may indicate that respondents did not understand the questions.

The expert panel often consists of a small group of persons (3 to 8 persons), which examines the questionnaire from various perspectives. This method makes it possible to detect problems that could not be identified through the other techniques. The main advantage of this method is that it is relatively cheap. The panel consists of experts in the field and professionals with expertise in survey

[9] Willis, G.B., *Cognitive Interviewing – A „How To" Guide*, short course presented at the 1999 Meeting of the American Statistical Association

planning, data collection, coding and data analysis. In a work session, the panel examines the questionnaire, question by question. The strength of this approach stems from the variety of expertise and interaction taking place during the panel meeting. Expert panels are often used before conducting a field pretest and, again, during the questionnaire review process carried out after field pretesting.

Behavior coding is the undeclared pretesting technique developed by Charles Cannell and his colleagues at the University of Michigan (1996), which can be used to evaluate both interviewer behavior and survey questions. This method relies on the assumption that any deviation from the ideal model, in which the interviewer reads a question exactly as written and the respondent provides a full answer, indicates that there is a problem with that question. Behavior coding involves conducting of taped interviews during an undeclared field pretest, and then coding, for each question, the frequency of occurrence of one of the following interviewer or respondent behaviors:

- The interviewer makes a minor change in wording when reading the question;
- The interviewer makes a significant change in wording when reading the question;
- The respondent interrupts the reading of the question in order to provide his/her answer;
- The respondent requests clarifications;
- The respondent's initial answer is inadequate;
- The respondent provides an "I don't know" answer;
- The respondent refuses to answer the question.

Oksenberg and his colleagues[10] (1991) suggested that, when one of the abovementioned behaviors occurs in at least 15% of the pretest interviews, it is likely that the question will pose problems during the data collection process.

Behavior coding is a simple and cheap technique designed to analyze conventional pretest interviews, and to identify problem questions. Although the most important draw-back of this technique is that it fails to indicate the source of the problem identified in the questionnaire, the research cited by Fowler and Cannell (1996) attempted to correlate various behavior codes with certain types of problems. These authors synthesized the preliminary general findings of this research, as follows:

- the questions that are not read as formulated indicate the fact that they are clumsily worded or they contain words which are difficult to pronounce;
- the questions that are misinterpreted and frequently interrupted often provide unrelated explanations at the end;
- the questions that result in clarification requests often elicit answers which do not suit the respondent's experience or frame of reference;
- the questions that require clarification are often vague or contain a badly defined term or concept;
- the questions that result in inadequate answers often request a greater level of detail than the respondent can possibly offer.

Vignette analysis. Vignettes are hypothetical scenarios used to determine whether respondents understand and apply a key concept or phrase in the manner intended by researchers. The goal of this method is to evaluate the respondent's level of understanding, especially how he/she defines and applies key phrases or terms in the process of providing answers to questions. One of the draw-backs of this method is that it requires the interviewer to be aware of the terms or expressions that are likely to present difficulties, so that appropriate vignettes can be designed in order to test alternative question wordings.

Experiments. The aforementioned pretesting methods identify questionnaire problems, and, implicitly, lead to revisions designed to address the problems. To determine whether the revisions are

[10] Oksenberg, L., Cannell, C.F., Kalton, G., „New strategies for pretesting survey questions", *Journal of Official Statistics* (1991), No.7 (3), pp. 349-365

improvements, however, there is no substitute for experimental comparisons of the original and revised survey items. Such experiments are of two kinds. First, the original and revised items can be compared using the pretesting method(s) that identified the problem(s). Thus, if cognitive interviews showed respondents had difficulty with a survey item, the item and its revision can be tested in another round of cognitive interviews in order to confirm that the revision shows fewer such problems than the original. Second, original and revised items can be tested to examine what, if any, difference they make for a survey's estimates. Fowler (2004) illustrates, in his studies, how cognitive interviews and experiments are complementary: the former identify potential problems and propose solutions, and the latter test the impact of the solutions. As he argues, experimental evidence is essential in estimating whether different question wordings affect survey results, and if so, by how much.

Statistical modeling. Questionnaire design and statistical modeling are usually thought of as worlds apart. This is unfortunate, as researchers who specialize in these two fields should work together for survey research to progress. One specific statistical modeling instrument, called "latent class analysis", is used to estimate the error associated with questions when the question has been asked of the same respondent two or more times. The specific statistical modeling methods require large numbers of cases, and thus are relatively expensive to conduct.

3. Pretesting perspectives in marketing research

The development of these methods has raised issues of how they might best be used in combination, as well as whether they in fact lead to improvements in survey measurement. The amount and type of pretesting that is necessary depends, of course, on research objectives and complexity and on the number of new questions. Specialists in the field recommend using a variety of techniques to evaluate survey instruments in various stages. In addition to informal testing of questions on colleagues, students or other persons, in the initial stages of questionnaire construction, one can use focus groups, cognitive interviews, and expert panels, and in the subsequent stages, field pretesting may include behavior coding and/or vignette analysis. The final stage should consist of a pilot study on a sample selected from the target population, and should imitate, as much as possible, the procedures that are being considered for the main survey.

In addition, the adoption of computerized questionnaire administration modes poses new challenges for pretesting, as do surveys of special populations, such as children, companies and organizations, and those requiring questionnaires in more than one language - all of which have greatly increased in recent years.

The proliferation of data collection modes has at least three implications for the evaluation and testing of survey instruments. Pretesting methods must take into consideration the question delivery mode. A second implication is that survey instruments consist of much more than words therein, e.g., their layout and design, logical structure and architecture, and the technical aspects of the hardware and software used to deliver them. All of these elements need to be tested, and their possible effects on measurement error explored. A third implication is that survey instruments are ever more complex and demand ever-expanding resources for testing. The older methods that relied on visual inspection to test flow and routing are no longer sufficient. Newer methods must be found to facilitate the testing of instrument logic, quite aside from the wording of individual questions. As Hansen and Couper (2004) argue, computerized questionnaires require interviewers to manage two interactions, one with the computer and another with the respondent, and a good questionnaire design must help interviewers manage both interactions to optimize survey data quality.

Different pretesting methods, and different ways of carrying out the same method, influence the numbers and types of problems identified in questionnaires. Consistency among currently used questionnaire pretesting methods is often low, and the reasons for this need more investigation. One perspective that should be thoroughly investigated by studies is that lack of consistency may occur because the methods used are suited for identifying different problem types. On the other hand,

inconsistencies may reflect a lack of consensus among researchers, cognitive interviewers, and coders about what is regarded as a problem with the questionnaire. The kinds and severity of problems that questionnaire pretesting aims to identify are not always clear, and this lack of specification may contribute to the inconsistencies that have been found.

4. Conclusions

This paper aims to resolve the paradox encountered in the specialized literature, namely that, on the one hand, it argues the importance and indispensability of pretesting to marketing research and, on the other hand, it fails to provide sufficient methodological information concerning pretesting.

Indeed, when summarizing the aforementioned, we, too, can draw the conclusion that questionnaire pretesting constitutes an important stage, considering that developing a perfect data collection instrument is almost impossible, and that pretesting is the only way of testing and improving the efficiency of the data collection instrument. Therefore, we have focused especially on pretesting methods that can be applied, and on aspects related to when, and how they can be used.

Theoretical and empirical research must be expanded, as specified above, to identify the most efficient pretesting modes and methods, and the new developments in survey questionnaire pretesting, which occurred as a result of the adoption of new computer-assisted survey modes and surveys of special populations.

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- * * * - *Statistics Canada Quality Guidelines***,** Fourth Edition – October 2003 ,Statistics Canada – Catalogue no. 12-539 –XIE, page 27

CORPORATE REPUTATION INFLUENCES CONSUMER SATISFACTION AND LOYALTY: EVIDENCE FROM CELLULAR INDUSTRY OF PAKISTAN

IMRAN ALI[*]

Abstract
Research suggests that it takes five times more expenses to attract new customer than to retain existing consumer. The growing concern of corporations in today's competitive environment is to retain consumers. As a result, plenty of researches have been conducted to identify the approaches to satisfy and retain consumers. The current study examines the affects of corporate reputation on consumer satisfaction and consumer loyalty. The primary data has been collected from the consumers of cellular industry in Pakistan. The rationale behind selecting respondents from cellular industry is the intense competition, which is enduring in the cellular companies of Pakistan. The study used SPSS and AMOS to analyze the data. The correlation analysis, regression analysis, reliability analysis and model fit index analysis has been used to test hypotheses and interpret some interesting results. The study found significantly positive associations of corporate reputation on consumer satisfaction and consumer loyalty. The study also found strongly positive affects of consumer satisfaction on consumer loyalty for the case of cellular industry of Pakistan. The study proposes some useful recommendations for policy makers in the area.

Keywords: *Corporate reputation, consumer satisfaction, consumer loyalty, cellular industry, Pakistan.*

1. Introduction

Corporations are recognized on the basis of their worth of the in the marketplace. There is growing appreciation by the academic researchers and professional executives regarding the significance of corporate reputation for all the corporate stakeholders engaged in the legal, functional, and monetary judgments of any corporation. Corporate reputation, when understood by numerous stakeholders, is decisive as it helps to slash the operational costs, and positively affects both monetary and customer-related indicators, like consumer satisfaction, confidence and loyalty (Kreps and Wilson 1982; Shapiro 1983; Williamson 1985; Dowling 2001; Roberts and Dowling 2002; Caruana et al. 2004; Rose and Thomsen 2004). Kay (1993) recognized corporate reputation as extremely critical aspect for higher corporate performance. Many researchers, for instance Gotsi and Wilson (2001) and Groenland (2002) suggested that companies with superior reputation have distinctive lead over their contemporaries to magnetize consumer. Most past studies on corporate reputation to quote few (Doney and Cannon, 1997; Fomurun et al 2000; Davies et al. 2002; and Page and Fearn, 2005) has applied multiple stakeholder approach to corporate reputation and explored influence of customers' behavior regarding corporate reputation. Researchers considered consumers as one of the most essential stakeholder groups as they generate revenue flows for corporations. Research scholar has also emphasized on consumer satisfaction as one of the strongest determinant of consumer loyalty. Higher satisfaction level motivates consumers to adopt repetitive buying behavior and recommending others to do the same. Altogether, if corporation is having strong reputation within the consumers and they are also satisfied with the quality of services provided by the corporations, it would ultimately lead them to adopt loyal behavior to that corporation. Therefore, current study emphasizes on corporate reputation which is mainly associated with consumer behavior towards corporation. The study is conducted in the context of service industry; in service industry the

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strong corporate reputation and higher level of consumer satisfaction and loyalty are more important than other industries. The study has particularly focused the cellular industry of Pakistan. The cellular industry is undergoing through oligopolistic competition. There are only few cellular service providers, but they are having very extreme competition and trying to build good image in the industry as compare to their competitors. Cellular companies in Pakistan are also facing high switching costs due to rapidly changing pricing and other policies to provide customer maximum value of their money. Therefore, the main focus of corporations is to retain their existing consumers after attracting new customers. There is contest amongst cellular service provider companies for doing well e.g corporate social performance to create positive image and reputation in the industry in Pakistan. Corporations are trying to find out the social areas where they can intervene and build positive image of doing good in the society.

The objective of this study is to investigate the affects of corporate reputation on consumer satisfaction and loyalty and to examine the affects of consumer satisfaction on consumer loyalty. The following questions have been investigated in this research:

- Does corporate reputation influences consumer satisfaction in cellular industry of Pakistan?
- Does corporate reputation influence consumer loyalty in cellular industry of Pakistan?
- Does consumer satisfaction influence consumer loyalty in service industry?
- How the findings add to the knowledge regarding effects of corporate reputation on consumer behavior?

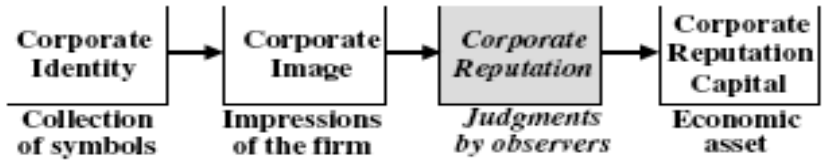
To answer these questions the paper has been structured in various sections. The following section contains theoretical discussions on the topic along with development of the hypotheses. The succeeding section contains the research methods including sample and sampling, measurement and instrumentation and data and analysis. The subsequent section includes results and discussions on the results. The final section concludes the paper with useful recommendations for policy makers.

2. Theoretical Framework and Development of Hypotheses

2.1. Corporate Reputation and Consumer Satisfaction

The concept of corporate reputation emerged from corporate image in 1950's and evolved into corporate identity in 1970's and 1980's (Bennett and Kottasz, 2000). Corporate is the general perceptions of stakeholders regarding any corporation. Corporation reputation has been defines by many authors in various ways. Fombrun (1996) stated that reputation is based on a set of collectively held beliefs about a company's ability and willingness to satisfy the interests of various stakeholders. Bromley (2002) and Sandberg (2002) viewed reputation as a socially shared impression and a consensus about how firm will behave in any given situation. These definitions denote that a reputation is the widely shared beliefs of stakeholders that the corporation will behave in the best of their interests and the future actions of corporations can also be predicted to be in favor of stakeholders. Therefore, corporations always keep perspectives of all stakeholders in the center in its decision making. Most remarkable contribution towards corporate reputation is done by Fombrun and van Riel (1997) who bridge the gap of diverse perspectives on corporate reputation and build Reputation Institute and the journal to address confusions between corporate image, corporate reputation and corporate identity. Baranett et al. (2006) also moved forward in this field and declared reputation capital; they predicted the future of reputation and anticipated that corporations with higher reputation are having higher capital enjoy more benefits than those having low reputation. Gray and Balmer (1998) stated that in today's competitive environment, the firms' ultimate survival depends upon building and maintaining a good corporate reputation. The progression from corporate identity to corporate reputation capital is presented in Figure 1 given below.

Figure 1: Disaggregating Corporate Reputation



Source: Barnett et al. (2006)

Corporate reputation conveys significantly important messages to number of stakeholders which facilitates them in decision making regarding various transactions pertaining to corporations. Numbers of studies have identified the prospects of corporate reputation in the eyes of stakeholders. These stake holders includes investors who consider investing into any corporation owing to its reputation in the market, another important stakeholder in this context is consumer who primarily takes into account corporate reputation in his purchase decision. For instance Walsh et al. (2006) found strongly significant association between corporate reputation and customer satisfaction in the context of Germany. Shapiro (1983) and Wilson (1985) and Lines (2003) declared customers as one of the main stakeholders that spread the corporate reputation in the market. Helm et al. (2010) also analyzed the relationship between corporate reputation and consumer satisfaction and declared corporate reputation as an antecedent of consumer satisfaction. The following hypothesis can be generated based on previous theoretical discussion.

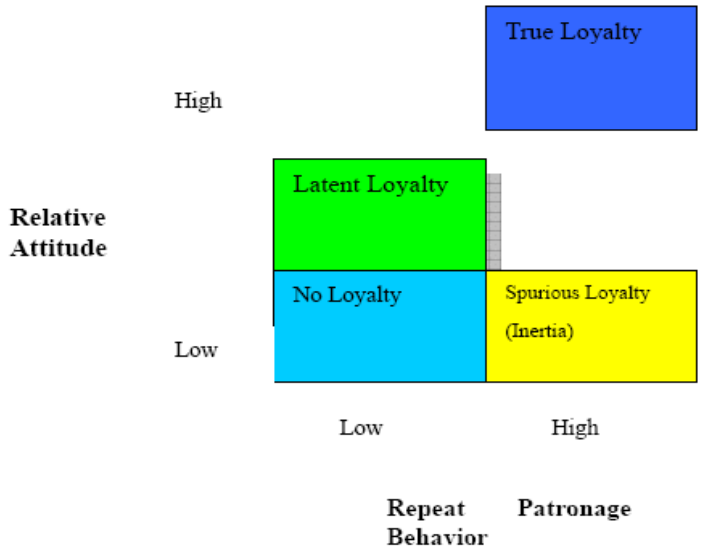
H1: Consumer satisfaction is positively influenced by higher level of corporate reputation

2.2. Consumer Satisfaction and Consumer Loyalty

Cardozo (1965) initially addressed the term customer satisfaction and stated that customer satisfaction results in enhancing the repeated buying attitude. Oliver (1981) viewed customer satisfaction as an emotional reaction resulted from any specific transaction. Both authors stressed customer's feeling about the corporation, therefore satisfaction is all about attracting and influencing customers' emotions and paving his/her attitude in favor of corporation. Several assumptions can be found in literature regarding customer satisfaction, for instance one assumption is that customer can be influenced by internally established standards for quality. Another assumption presumes that customer's future purchase behavior can be predicted by customer satisfaction level.

Consumer loyalty has been explained many researchers in marketing literature. Trucker (1964) hold that consumer's loyalty with any specific corporations can be judged by the repeated purchase of services by the consumers. Jones and Sasser (1999) stated customer loyalty as the sense of belonging and affection that customers hold towards certain firm's staff, products or services. Oliver (1999) presented more comprehensive approach to measure customer loyalty and offered four components of loyalty i.e. cognitive loyalty, affective loyalty, conative loyalty and behavioral loyalty. Number of studies have examined the predictors of consumer loyalty and majority of them have pointed consume satisfaction as basic component of consumer loyalty. Cornin et al (2000) found that service quality influences on consumer loyalty via consumer satisfaction.

Figure 2: The Loyalty Conditions



Source: Weiwei (2007)

Consumer loyalty in the service industry also referred as service loyalty means customer's faithfulness to specific brand in the service industry. Therefore customers maintains a series of loyalties to the organizations whose service they usually consumer. Their faithfulness level with corporations also determines their purchasing behavior. Researchers therefore, measure the loyalty level of consumers with organizations with their buying behavior. Controversy existed regarding consumer loyalty for a long span of time, few researchers considered loyalty as behavior whereas some also viewed consumer loyalty as attitude. Dick and Basu (1994) resolved this conspiracy by conceptualizing consumer loyalty as a composite construct. Dick and Basu (1994) defined consumer loyalty as strength of the attitude towards the target relative to available alternates and patronage behavior. Later researchers developed the metrics of loyalty and found that 'true loyalty' can only be achieved when strong positive relative attitudes are associated with high levels of repeated patronage. Different associations of loyalty conditions are explained in Figure 2.

Existing literature in marketing confirms the relationship between customer satisfaction and consumer retention. For instance Fornell (1992); Jones and Sasser (2000) found customer satisfaction as a mean to retain customer and attain sustainable growth. Brown and Gulycs (2001) hold customer satisfaction as an antecedent of customer retention. Ali et al. (2010a; 2010b) also investigated the relationship between consumer satisfaction and consumer retention in cellular industry of Pakistan. In their study Ali et al. (2010) analyzed the determinants of consumer satisfaction and retention and reported strong influence of customer satisfaction on consumer loyalty. Juan and Yan (2009) also documented association between customer satisfaction and customer loyalty in the context of China.

H2: Consumer loyalty is positively influenced by consumer satisfaction

2.3. Corporate Reputation and Consumer Loyalty

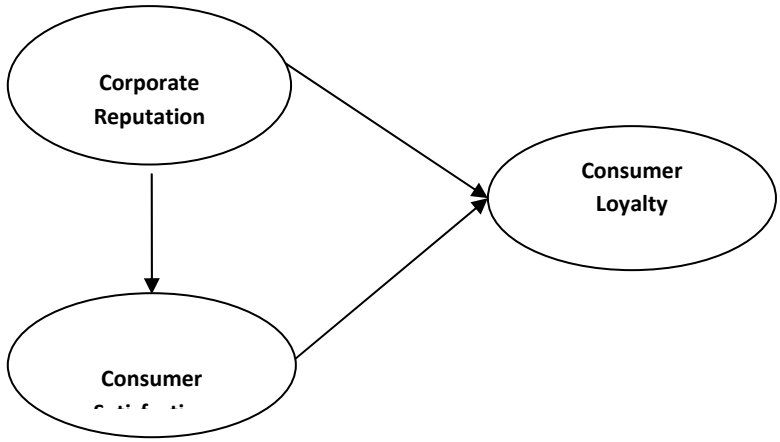
Corporate reputation is acknowledged as one of central determinants of consumer loyalty. Corporate reputation not only motivates the existing customers to adopt favorable attitude, but also to potential customers. Potential customers conceive idea about corporations from their advertisements

and from other sources for instance word of mouth from existing customers. Building strong corporate is more important in the context of service organizations who are not offering tangible products to customers. Therefore, service providing organizations uses corporate reputation as a tool to mold consumer behavior for repetitive purchases from the organizations. Tang and Weiwei (2007) stress the significance of corporate reputation for service industries more important than those providing tangible products. Corporations are increasingly working hard to build positive image and good reputation in the community. Previous researches also confirm strong relationship between positive corporate reputation and consumer loyalty. For instance Shapiro (1982) asserted that good corporate reputation results in higher market share of firms and better financial performance. Porter (1985); Yoon et al. (1993); Robertson (1993); and Andreassen and Lindestad, (1998) suggests that good reputation help firms building stronger relationships with customer. Nguyen and Leblanc (2001) hold that degree of consumer loyalty is perceived to be higher when consumer is having strong and favorable perceptions regarding corporation reputation.

H3: Consumer loyalty to corporation is positively influenced by corporate reputation

The following conceptual model can be developed on the basis of above theoretical discussion. The self-explanatory model presented in Figure 3 shows the association between corporate reputation, consumer satisfaction and consumer loyalty. In this relationship consumer loyalty is the result of higher level of corporate reputation and consumer satisfaction. Moreover, consumer satisfaction can also be increased through higher level of corporate reputation in the eyes of consumer.

Figure 3: Conceptual Model of CSR, Investor Satisfaction and Investor Loyalty



3. Research Methods

Sample and Sampling

The target population in this study is the consumers using cellular services in Pakistan. The reason behind selection of cellular industry is the intense competition enduring in the cellular companies in Pakistan. The companies are rigorously trying to develop some competitive advantage over their contemporaries. They are trying to offer products at minimum possible prices in order to

snatch existing consumers from their competitors. In this scenario corporate reputation plays an important role to retain satisfied and loyal customers. A total of 250 questionnaires were distributed in the university students in Pakistan. Student being more critical about the quality of services, corporate overall reputation makes rationale decisions to maximize its value from the cellular services. The students were given sufficient briefed to consider the case of cellular service provider companies and provide their response to the given items. A total of 243 questionnaires were found useful. The sampling technique may be attributed as convenience sampling which is quite appropriate for such research.

Measurement and Instrumentation

The study contains three variables, corporate reputation, and consumer satisfaction and consumer loyalty. The instrument to measure corporate reputation was adopted from Sabrina (2007) the instrument contained 10 items which discusses different aspects which contribute in building strong image of corporation to gauge the perceptions of the respondents regarding over reputation of corporation. The instrument measured the response of respondents on 7 points Likert scale attributing 1= a very good reputation and 7= a very bad reputation. The instrument to measure consumer satisfaction was adopted from Cornin et al. (2000) and is quite similar to Oliver (1997). The instrument contained 3 items measuring satisfaction level of consumer regarding products of corporations. Whereas, the instrument to measure consumer loyalty is adopted from Zeithaml et al (1996). The instrument consisted of 5 items explaining level of consumer loyalty with some corporation. The instruments for measuring consumer satisfaction and consumer loyalty were measured on five point Likert scale ranking from 1 for Strongly Agree to 5 for Strongly Disagree.

Data and Analysis

The data collected through self administered survey was entered in to SPSS sheet. Correlation and reliability analysis are conducted through SPSS; the correlation analysis explains the correlations between all variables whereas reliability analysis depicts the correctness of the data. Both of these analyses are useful before proceeding to final analysis. Regression analysis and model fit analysis are carried through AMOS. The structural equation model (SEM) is mainly adopted to test the hypotheses.

4. Results and Discussions

Table 1 represents the table of correlations. This table reflects variables – corporate reputation and consumer satisfaction – are positively correlated to consumer loyalty ($r = .500$, $p = .000$ and $r = .649$, $p = .000$ respectively). The magnitudes of correlations of corporate reputation and consumer satisfaction are greater than 0.3 in the absolute terms, which shows the moderate correlations between the said pair of the variables. All the correlations are statistically significant at one percent level of significant.

Table 1: Correlations

		Corporate reputation	Consumer satisfaction	Consumer loyalty
Corporate reputation	Pearson Correlation	1		
	Sig. (2-tailed)			
	N	243		
Consumer satisfaction	Pearson Correlation	.580**	1	
	Sig. (2-tailed)	.000		
	N	243	243	
Consumer loyalty	Pearson Correlation	.500**	.649**	1
	Sig. (2-tailed)	.000	.000	
	N	243	243	243

** Correlation is significant at the 0.01 level (2-tailed).

Table 2: Index of Fit of the Model

Model Summary		
Chi Square	Degree of freedom	P value
129.342	12	0.000

Table 2 depicts the index of fit for our model. The degree of freedom is (12) which meets the general standard of model fit. It apparent from our analysis that over all research model is significant (Chi= 129.342), (P<0.05).

Table 3: Hypotheses testing based on Regression Weights

Estimates	**Estimates**	**S.E.**	**Critical Ratio**	**P-value**	**Results**
CS <--- CR	.888	.125	7.089	.000	Accepted
CL <--- CR	.296	.146	2.024	.043	Accepted
CL <--- CS	.561	.095	5.883	.000	Accepted

Table 3 presents the results of the regression analysis. The results show that consumer satisfaction is significantly and positively influences by higher level of corporate reputation, therefore, we accept our H1. Ali et al. (2010) found significant association between consumer's perceptions about corporations' quality of product on consumer satisfaction in the context of cellular industry of Pakistan. Walsh et al. (2006) also found strongly significant association between corporate reputation and customer satisfaction in the context of Germany. Consumer loyalty is also significantly and positively affected by the corporate reputation as shown by the values of the

corresponding P-values (.043), we therefore accept our H2 as well. Nguyen and Leblanc (2001) found strongly favorable connection between corporate reputation and consumer loyalty. Helm et al. (2010) declared corporate reputation as antecedents of customer satisfaction and customer loyalty.

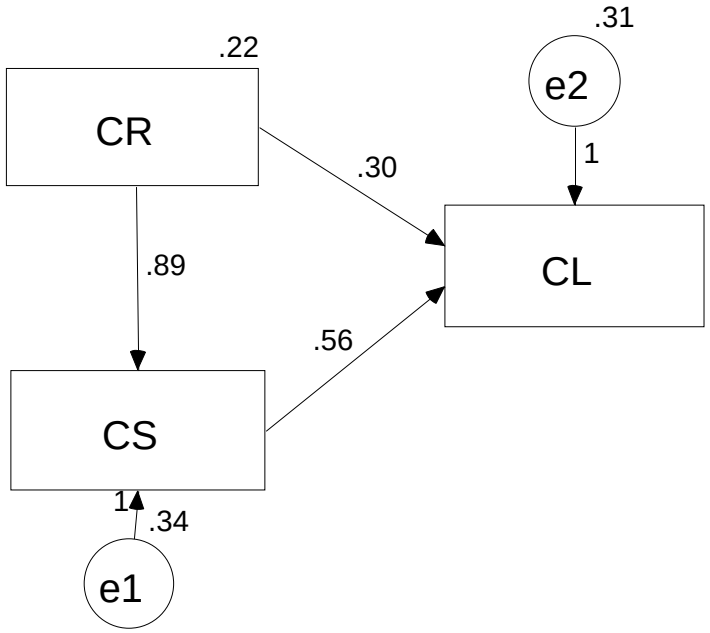
Finally, the results shows highly significant and positive association between consumer satisfaction and consumer loyalty, leaving our H3 accepted. Ali et al. (2010) also found positive relationship between consumer satisfaction and consumer retention in cellular industry of Pakistan. Juan and Yan (2009) also documented strong association between customer satisfaction and customer loyalty in the context of China. This test shows that the coefficients of all the predictors are statistically significant at less than five percent level of significance. All of the significant coefficients have the positive signs.

Table 4: Reliability Statistics

Cronbach's Alpha	N of Items
.790	3

Reliability analysis of this model is also conducted in order to check the health of collected data. Table 4 shows the reliability of data. The value of cronbach's Alpha is 0.790 which is statistically strongly reliable.

Figure 4: Structural Equation Model of CR, CS and CL



Above given Figure 4 shows the structural equation model (SEM) of this study. The SEM model displays positive associations between all three variables i.e. corporate reputation, consumer

satisfaction and consumer loyalty. The model also presents the values of error term and the nature of relationship between all variables.

5. Conclusions

This study is conducted to investigate the nature and levels of associations between corporate reputations, consumer satisfaction and consumer loyalty in the cellular industry of Pakistan. This is an important study because it provides pertinent research findings to cellular industry of Pakistan. The cellular industry is one of the leading industries amongst the growing industries in Pakistan. The cellular industry of Pakistan is also facing intense competition and cellular service providing corporations are striving hard to develop some competitive advantage over its contemporaries. They are also having the high consumer switching costs. Therefore, any research which focuses on their real world problems would be highly beneficial to them.

The study concluded that strong corporate reputation is mandatory in terms of overall quality of products, value of services which company is delivering to its customers against their money, their commitment to protect environment, offer better welfare opportunities to employees and their families, orientation towards customer, contribution towards charitable avenues, qualification of its management and above all the credibility of corporations claims in its advertising claims. Higher corporate reputation leads to higher level of satisfied customers. Therefore, if any corporation intends to develop its highly good reputation in the eyes of consumers, it must pay utmost attention to above mentioned points. Higher satisfaction level of consumers results in higher level of customer loyalty which in turn motivates consumers to purchase services of corporations again and again. Moreover, higher corporate reputation also leads to higher level of customer loyalty. The study therefore, declares corporate reputation as one of the leading indicator not only to satisfy and retain existing customers but also to attract new customers as well.

The findings of this study provide fruitful thoughts and directions for the future researchers in this field. It also provides useful recommendations for professionals and policy makers to enhance corporate performance through higher level of consumer satisfaction and consumer loyalty.

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USING THE SNOWBALL METHOD IN MARKETING RESEARCH ON HIDDEN POPULATIONS

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Abstract
Following the classical sampling theory, the researcher selects samples of people, businesses or others, in order to obtain the desired information. Drawing the samples is usually done by randomly selecting from a list representing the target population. In practice, this list is often not available. There are cases in which the population of interest is not fully known, not well defined and fully listed, and creating a sampling frame is difficult or impossible for the researcher.The solution to this situation comes from the snowball sampling method, the best way we can study hidden populations in marketing research. In this paper we are approaching the snowball method as a mean of accessing vulnerable and more impenetrable social groupings revealing the latest advances of this technique.

***Key words**: market research, survey, hidden population, snowball method, non-probabilistic sampling*

1. Introduction

Subject to particularities of the statistical population and the objectives of the research, a series of non-random approaches, also named rational selection techniques have been developed in marketing survey practices[1]. One of the most important non probability sampling methods used in marketing we learn about in our marketing research course is the "snowball" sampling[2]. We are also briefed during the same course on the non-probability character of this approach which does not allow prior establishment of the possibility of including each particular subject in the sample as it is done in the probability surveys, fact which prevents definition of interferences.

Also known as the referral method or network sampling, the "snowball" sampling is normally used wherever there is little knowledge on the target population, whose boundaries or number are hard to define and the development of a sampling database is difficult if not impossible to achieve by the researcher[3]. The most frequent examples of using this method are met in the surveys intended to identify sensitive information or in researches carried out on *hidden populations.*

The term hidden populations, synonymous with "very rare human populations" or "difficult to approach populations" is being used to generally designate the populations for which there is no official information or which represent less than 2% of the population. In other words, these populations are difficult to identity, approach or recruit for research purposes, more often than not because of their social stigmata, legal status as well as subsequent lack of visibility of members of

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[2] Gabor, M.R., Non-probabilistic Sampling Use in Qualitative Marketing Research. Haphazard Sampling. Volunteer Sampling, *The Annals of Oradea University* (2007), TOME XVI 2007 VOLUME II, pp. 954-958, ISSN 1582-5450, http://anale.steconomice.evonet ro/arhiva/2007/management-and-marketing/56.pdf; Porojan, D., Ciocănel, B., *Survey basics*, Irecson Publishing House (2006), Bucharest, p. 102-104

[3] Heckathorn, D.D., Respondent-Driven Sampling: A New Approach to the Study of Hidden Populations, *Social Problems* (1997), Vol. 44, No.2, May 1997

such population[4]. These categories of populations include relevant groups for public health purposes such as injectable drug consumers, relevant groups for public politics such as street youth and the homeless, as well as relevant groups in terms of art and culture, such as jazz musicians and other kinds of musicians or artists and the list remains open. Bryam (1999) used this method to create a sample consisting of British visitors of thematic Disney parks and Venter, Boshoff and Maas (2005) have also used this method to identify the owners or successors of small and average family companies in South Africa[5] to list only a few practical examples.

Inadequate public records raise difficulties in terms of sampling the developing countries which causes a significant part of the general population to qualify as "hidden" for sampling purposes. This category also includes the highly specialized target groups such as networks being formed or transformed very quickly or temporarily.

The "snowball" method also stands as an extremely valuable marketing research instrument whenever we want to access highly informed and experienced individuals in a specific field, product, production process, etc, individuals who can provide in-depth information which is not available elsewhere or in another manner[6].

2. Brief history

The "snowball" method has been developed based on the multiplicity sampling prepared by Sirken at the end of the 1960s for the sampling of rare populations[7]. In Sirkin's method the respondent is requested to indicate not only if a specific condition affects one's household but also if it affects a certain group of households such as those of children and brothers. The information concerning a phenomenon or event thus becomes available not only from the respondent's household but also from other households related to the respondent. Multiplicity is generated by the fact that the information referring to a certain event may be obtained from several sources and thus the capacity to detect rare events is significantly improved.

The approach based on multiplicity has been extended to the "snowball" sampling by Rothbart, Fine and Sudman (1982). They suggested adding to the survey a question related to the number of eligible respondents known to the respondent. The dimension of this network then offers the basis for multiplicity adjustment where the respondents are weighted with the opposite of the dimension of their network.

3. Definition and application methods

The *"snowball" method* implies the identification of an initial set of respondents who will be interviewed and who will be requested at the end of their interview to recommend potential subjects who share similar characteristics and who are relevant for the purpose of the subject survey. Request for referrals shall be initiated by the researcher by means of a phrase such as: " It was a great pleasure to meet you and I really appreciate the time you have so kindly offered. I was wondering if you happen to know other persons who share the same interest/experience as yours and who would be willing to meet me".

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[4] Gabor, M.R., Types of non-probabilistic sampling used in marketing research."Snowball" sampling, *Management-Marketing Review* (2007), no. 3/2007, ISSN 1842-0206, http://www managementmarketing ro/ pdf/articole/72.pdf

[5] Bryam, A., Bell, E., *Business research methods*, Second Edition, Oxford University Press (2007), ISBN 978-0-19-928498-6

[6] Gray, P.S., Williamson, J.B., Karp, D.A., Dalphin, J.R., *The Research Imagination: An Introduction to Quantitative and Qualitative Methods*, Cambridge University Press (2007), ISBN – 13:9780521705554

[7] Heckathorn, D.D., Extensions of respondent-driven sampling: analyzing continuous variables and controlling for differential recruitment using dual-component sampling weights, *Center for the Study of Economy and Society Working Paper Series* (2007), paper No. 37, April 2007, http://www.economyandsociety.org/publications/ wp37_Heckathorn_07.pdf

It is recommended to select the initial sample of respondents at random although easiness of access always dictates the initial sample in practice. The second set of respondents is interviewed and also requested to recommend names of other potential respondents for the subject survey. The process continues until the moment the researcher decides the sample is large enough to satisfy the purpose of the study or until the moment the respondents start repeating the names recommended which indicates that subsequent rounds of interviews would not bring additional relevant information[8]. There are certain specialists who consider that the satisfactory threshold is reached not by meeting a specific number enforced by statistical requirements but rather by access to a specific amount of relevant, quasi complete information on the investigated field.

Use of this method often raises the problem of defining the individuals who belong to the initial sample of respondents. The most important problems to be approached and solved to this effect are:

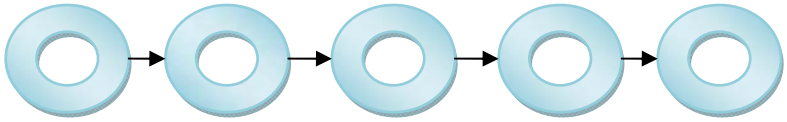
- Who holds sufficient authority to supply the opinions needed?
- How large is the hidden population?
- Can we define the limits of the hidden population?
- The manner in which we shall access the members of the hidden population;
- How can we obtain a high response rate?
- How can we measure and interpret the errors caused by non-replies?
- How can we effectively manage the interviews in a short period of time without negatively affecting their validity?

The relationship between the "snowball" sampling and the in-depth interview method is quite obvious and is established by the very definition of this sampling method[9]. Under these circumstances the quality of the process of obtaining referrals is of course related to the quality of the interaction between the respondent and interviewer – the respondent should not leave the interview with a feeling of dissatisfaction while the interviewer should gain the trust and sympathy of the respondent so as to increase his chances to her referrals from the respondent.

The main manners of using the "snowball" method are represented by:

➥ *the linear method* (see Figure 1) – which implies requesting from the first sample of initial respondents a single referral from the target population of the survey, a single referral being also requested during subsequent cycles of the survey;

Figure 1. *Graphic representation of the linear version of the "snowball" method*



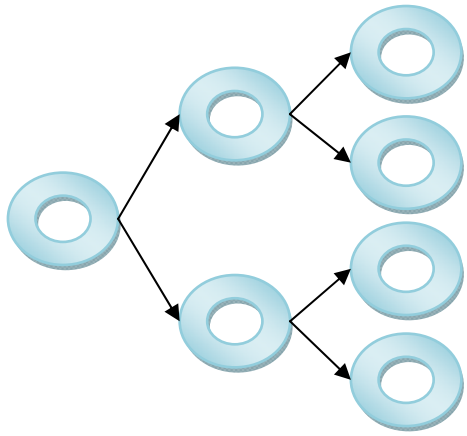
➥ *non discriminative exponential method* (see Figure 2) – which implies that the interviewer asks the initial respondents to indicate all the individuals they know and who belong to

[8] Swisher, M.E., *Non-Probability Sampling*, course notes, Family, Youth & Community Sciences (2009), http://fycs-swisher.ifas.ufl.edu/OTS/Non-Probability%20Sampling.pdf

[9] Noy, C., Sampling Knowledge: The Hermeneutics of Snowball Sampling in Qualitative Research, *International Journal of Social Research Methodology* (2008), Vol.11, No.4, October 2008, pp. 327-344; Atkinson, R., Flint, J., Accessing Hidden And Hard-to-Reach Populations: Snowball Research Strategies, *Social Research Update* (2001), Issue 33, Department of Sociology, University of Surrey, ISSN: 1360-7898

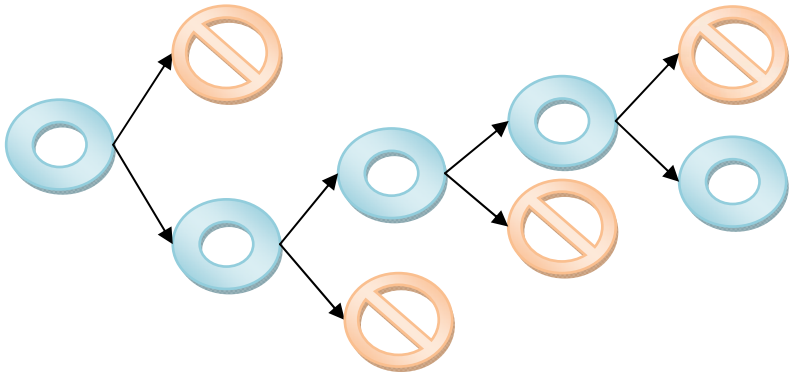
the target population of the survey, the same system being applied to the subsequent cycles of the survey, the researcher interviewing all referrals obtained;

Figure 2. *Graphic representation of the non discriminative exponential version of the "snowball" method*



➥ *discriminative exponential method* (see Figure 3) – is similar in many respects to the non discriminative exponential method in the sense that the researcher asks the respondents to name all the persons they know within the target population of the survey. The difference from the former method resides in the fact that the researcher shall randomly select a certain number of individuals from the referrals offered by each respondent.

Figura 3. *Graphic representation of the discriminative exponential version of the "snowball" method*



4. Advantages and disadvantages of using the "snowball" method

The advantages of the snowball method reside in the first place in the advantages of the non-probability sampling methods which are much faster and cost effective than the probability methods, allowing adjustment of the survey during progress thereof should the subject of the survey prove to

be "difficult"[10]. These surveys are recommended whenever it is not necessarily intended to generalize the data for the entire population, but rather to collect certain detailed informed on specific events or phenomena, whenever a list of the population being surveyed is not available or when the target population is hard to identify[11].

Use of the "snowball" method in marketing surveys brings along a series of advantages specific to this method:

- the method of referrals allows the surveyor to reach populations which are otherwise difficult to be sampled using other sampling methods;
- application of this sampling method does not require a complex planning and the staff used is considerably smaller in comparison to other sampling methods.

The major disadvantages of this method are basically related to the general disadvantages resulting from use of a non-probability sampling method[12]:

- the units being entered in the sample in an arbitrary manner, the probabilities of selecting the units in the sample can not be calculated. It is thus no longer possible to calculate variance and displacement of the estimator. Estimation of parameters by a trust interval is not allowed for this method.
- due to the selection manner of the survey units, there is no guarantee that all simple units of the population have a chance to enter the sample. As calculation of variance and displacement of estimator is not possible, the only way to evaluate the quality of data collected is to compare them to data available in an older report or in a different survey.

In addition to the limitation enforced by the non-probability character of the "snowball" method there is another series of limitations related to the specific characteristics of this method:

- the surveyor has limited control over the method. The individuals the surveyor may interview basically depend on the subject formerly interviewed;
- the surveyor is not familiar with the real distribution of the population and the sample;
- given the fact that the initial respondents tend to name the persons they know best and who share the same opinions, it is very likely that the subjects posses the same features and characteristics and thus the sample finally obtained by the surveyor represents only a small subgroup of the entire population or small target groups will pass unnoticed.

The most often errors occurring in the application of this method are caused by the following:

- interferences being obtained are only based on the initial sample of respondents as long as the subsequent respondents are not selected at random. However, as the initial sample is not selected at random in practice, interferences may not be obtained at the initial sample either;
- the samples extracted by means of this method tend to be un-representative due to the fact that the co-operant persons who agree to participate in the survey are over-represented;
- errors are also caused by the fact that part of the participants "hide" the referrals trying to protect friends or acquaintances, a problem which is difficult to solve particularly where there is a strong concern for confidentiality of data;

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[10] Gabor, M.R., Non-probabilistic Sampling Use in Qualitative Marketing Research. Haphazard Sampling. Volunteer Sampling, *The Annals of Oradea University* (2007), TOME XVI 2007 VOLUME II, pp. 954-958, ISSN 1582-5450, http://anale.steconomice.evonet ro/arhiva/2007/management-and-marketing/56.pdf;

[11] Tansey, O., Process Tracing and Elite Interviewing: A Case for Non-probability Sampling, *Annual meeting of the American Political Science Association* (2006), Marriott, Loews Philadelphia, and the Pennsylvania Convention Center, Philadelphia, PA, September 2006, http://www.asu.edu/clas/polisci/cqrm/APSA2006/Tansey_Process_ Tracing.pdf

[12] Voicu, M.C., Aspects regarding the non-probabilistic survey method, *Romanian Statistical Review Supplement* (2009), No. 9/2009, pp.211-215, ISSN 1018-046x, category B+, CNCSIS, monitored ISI Thomson Philadelphia (SUA)

➥ referrals are obtained by means of the relationships between people, so that people belonging to a large social network shall be over-represented while individuals relatively isolated shall be under-represented.

Used in marketing surveys, the "snowball" sampling may be applied in the exploratory qualitative and also descriptive surveys without allowing however extrapolation of results for the target population although this method is incorrectly being used for this purpose.

5. Improvement in using "snowball" method

To improve the efficiency of the "snowball" method Frank and Snijders (1994) have created, starting from it, a method for the estimation of the hidden populations using a sample selected by the one-cycle referral method. To achieve this, they have selected a heterogeneous group of initial subjects, each of these drafting a list with all the known members of the target population. The dimension of the target population is then estimated based on the coverage rate of the members listed. In a similar manner, Klovdahl (1989) suggests the term random walk for the procedure which allows obtaining a sample of the hidden population by asking the respondents to suggest potential respondents who might possess the characteristics being studied and from which a unit is selected at random[13]. The results of this process highlight the structural characteristics of the connection network of the hidden population. In addition to this, Spreen and Zwaagstra (1994) suggest a combination between the "snowball" sampling method and the oriented sampling which uses ethnographic representation for location of the initial sample which becomes the basis for a network sampling.

Despite all these improvements and extensions of the "snowball" method, there are several problems yet to be solved to this day. The main problem in the methodological debate concerning sampling and analysis of the hidden populations is – how do we extract an (initial) sample at random?

The concentrated efforts of the specialists to improve the main disadvantage of the "snowball" method resulted in the respondent driven sampling (RDS) based on the referrals of the respondents by means of the combination between the referral method and a mathematic method which weights the sample in order to compensate its selection by a non-random method and where appropriate use of stimulants may lead to cutback of errors occurring in sampling by the referral method.

The respondent driven sampling (RDS)[14] based on the respondents' referrals basically consists in the respondents' recruiting other respondents among their acquaintances same as it is done in the "snowball" method and the surveyors' following who recruited whom, by means of the coupon[*] each respondent must offer to each acquaintance/friend/colleague[15] recruited, as well as the number of social contacts of the respondents. Then, using a mathematic model of the recruitment process, the sample is weighted to compensate for the non-random recruitment. This model is based on a synthesis and an extension of two areas of mathematics, the theory of Markov chain and the theory of the biased network, which have not been formerly used as standard instruments in the sampling theory. The statistics theory which resulted from the incorporation of these theories, named respondent driven sampling (RDS) allows the surveyors to supply both estimations on the population as well as indicators on the accuracy of these estimations.

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[13] Thompson, S.K., Targeted Random Walk Designs, *Survey Methodology* (2006), June 2006, Vol. 32, No. 1, pp. 11-24, Statistics Canada, Catalogue No. 12001XIE

[14] Heckathorn, D.D., Extensions of respondent-driven sampling: analyzing continuous variables and controlling for differential recruitment, *Center for the Study of Economy and Society Working Paper Series* (2007), paper No. 38, April 2007, http://www.economyandsociety.org/publications/wp38_Heckathorn_07.pdf

[*] the coupon includes contact information on how to reach the interviewer or the location where the interview takes place and the coupon code which allows reconstruction of the network

[15] Schonlau, M., Liebau, E., *Respondent Driven Sampling*, Research Notes of the German Data Forum (RatSWD) (2010), No. 45, September 2010

The problems of the "snowball" method occurring with each use of the method are being solved in the RDS method as follows:

Table 1. *Errors occurring following use of the "snowball" method and solutions offered by the RDS method*

Characteristics of the "snowball" method	***Errors occurring following use of the "snowball" method***	***Solutions offered by the RDS method***
Respondents may recommend a countless number of persons	1. Differential recruitment: those with a large size network may recruit a larger number of persons who are likely to possess similar characteristics; 2. Clustering: leads to decrease of the effective dimension of the sample.	Restriction of recruitment by restricting the number of recruitment coupons.
Characteristics of the social network are ignored	1. Grouping of individuals based on the network characteristics can not be measured; 2. Dimensions of the social network affect the selection probability.	1. Encoded coupons allow association of the respondent with the recruiter and the enlisted subjects; 2. Weighted comparison to take into account the measurable properties of the network
The respondents offer referrals, the interviewers must determine them to respond	Members accessible to outsiders participate only	The respondents are those who recruit the referrals, which also include the capacity to also exercise a social influence wherever the interviewer does not possess any; respondents remain in their offices.
Convenience sample – analysis restricted to definition of weights in the sample; generalization is not possible.	Selection probability is unknown	Collection of data referring to dimension of network of respondents to calculate the selection probability within the network; use of network properties to take into account clustering effects.

Source: adaptation of Johnston, L.G., Sabin, K., *Sampling hard-to-reach populations with respondent driven sampling*, Methodological Innovations Online (2010), 5(2), pp.38-48, ISSN 1748-0612online

As you can notice in the table above, RDS differs from the traditional "snowball" method in several respects. First of all, while sampling using the "snowball" method usually implies use of a participation incentive, RDS implies a dual stimulant system – reward granted for having been interviewed (primary reward) plus a reward for recruitment of other members of the hidden population (secondary reward). The recruiter exerts an additional pressure to this double reward, which may lead to a smaller number of non-replies as long as those not willing to participate in the survey on financial grounds may however accept participation as a favour to a friend. Secondly, the subjects are not requested to identify and name the other known members of the hidden population to the recruiter, but are requested to recruit these persons themselves. The RDS approach thus reduces the respondents' tendency to "hide" the referrals, offering the respondents the opportunity to allow

those being recruited to decide themselves if they are willing to participate in the survey. In the third place, the referrals are limited to a number of respondents who may be recruited by means of a pre-established number of coupons (normally 3 or 4), thus minimizing the influence of initial respondents on the structure of the final sample. Such limitation of the number of persons recruited stimulates achievement of long recruiting chains thus raising the degree in which the survey may approach the most hidden areas of the target population. And last but not the least, the relationships between the recruiters and the persons being recruited are documented allowing assessment and adjustment of recruitment errors during the final stage of data analysis, and the information on the dimensions of the personal network of each respondent is collected to allow weighted comparison by post-stratification to compensate over-sampling of respondents with large social networks.

The RDS method implies the existence of four essential elements in whose absence the method may not be named RDS approach. These elements are represented by[16]:

- the documentation referring to who recruited whom being constructed by means of coupons;
- recruitment must be rationalized by means of not more than 3-4 coupons normally allocated to a single respondent;
- the information concerning dimension of network must be collected and recorded;
- the recruiters and the persons being recruited should know each other (should have a previous relationship).

The efficiency of the RDS method is based on two remarks. In the first place, in the event the referral chains are long enough, namely the process of development of referral chains consists in sufficient recruitment cycles or waves, the structure of the final sample shall become independent from the initial sample in terms of characteristics and behaviour patterned studied. After a certain number of cycles the structure of the sample becomes stable and all the members of the target population have a selection probability different from zero. Hence, an essential element in the design of the RDS method implies application of the methods which lead to increase of the referral chains. While the final structure of the RDS sample is independent from the initial sample, the process for selection of the components of the initial sample may affect the rate in which a balance is reached as well as the speed of the sample selection process. In other words, the subjects of the initial sample possess certain characteristics which are more adequate than others in that they facilitate a higher "production" of referrals.

Following requirements should be observed during the selection process of the subjects of the first sample to improve efficiency of the RDS selection process:

- respondents of the initial sample should have a great diversity in terms of factors whose impact is crucial in the development of social relationships within the population. These factors normally include basic demographic characteristics such as race, nationality, religion, caste, social standing and age.
- as most of the social relationships are based on proximity, such as subjects living in the same street or working for the same company, initial subjects should be extracted from a variety of geographical areas occupied by the target population;
- initial subjects should be individuals who maintain multiple social relationships and enjoy the appreciation of the target population. It would be much easier for such individuals to promote participation and speed up recruitment.

The second remark on which efficiency of the RDS method is based refers to the fact that the information collected during the sampling process may offer the means for calculation of the relative selection probabilities which in their turn offer the means for the calculation of both non-displaced

[16] Magnani, R., Sabin, K., Saidel, T., Heckathorn, D., Review of sampling hard-to-reach and hidden populations for HIV surveillance, *AIDS* (2005), (suppl 2): S67-S72

estimators within the population and the variation of these estimators. In case of traditional sampling methods, such as simple random sampling or the stratified sampling, the sampling framework is built as a rule before selection of the first respondent. In a simple random sample, the selection probabilities are equal, while in a stratified sample, the special interest subgroups are over-represented and the selection probabilities are therefore unequal. The selection probabilities are established in both cases before selection of the first respondent the effects of the sampling scheme being quantified at a later stage.

In case of the RDS method however, the sampling framework is developed after completion of sampling based on two types of information collected during the sampling process. First of all, each pair of recruiter-recruited person is documented, thus offering the basis required for control of errors entered by the tendency of individuals to build social relationships in a non random manner. The information concerning who recruited whom is used to quantify the sampling errors caused by the non random structure of the network offering the basis for performing the estimations. Secondly, the respondents are asked how many other members of the target population they know. On a network based sample, the selection probability of an individual depends on the number of persons within the target population the subject individual is connected with and which gives him his so called class. The recruitment process may proceed for instance as follows: a typical respondent in the RDS method, namely Mr Popescu recommends Mrs Ionescu; without knowing the names of the two respondents, the researcher will ask Mrs Ionescu to supply information on the nature of her relationship with the person who had handed her the coupon; by means of the coupon code we shall then associate her to Mr Popescu and the information supplied on the nature relationship between the two; when Mr Popescu returns to receive his reward the recruiter will also ask him as well information on the nature of his personal relationships with the individuals recommended and this information shall be associated to the network; the recruiter shall also ask Mr Popescu to indicate the number of persons he knows in the target population; if his reply is 30 the recruiter can conclude that Mrs Ionescu had a selection probability of 1 to 30.

Despite all these improvements the RDS method still presents several disadvantages:

□ despite its apparent potential for fast recruitment, the RDS sampling may result in practice in a very slow recruitment for various reasons including:

- the small dimensions of the network;
- lack of relationships between the members of the target population;
- lack of enthusiasm for participation;
- inadequate incentives;
- a high degree of stigmata.

The real disadvantage consists in fact in the unpredictable response rate.

□ there is no software developed for the analysis of data collected by means of RDS. The only software developed so far is RDSAT intended for the definition of basic statistical estimators only.

The respondent driven sampling has been recently extended to the internet, extension which offers the possibility to sample large electronically connected populations in a fast way and with the minimum resources[17].

6. Conclusions

As popularity of qualitative surveys has significantly increased in the last years, both worldwide and in our country, it is only natural to focus on the non probability methods used in the

[17] Wejnert, C., Heckathorn, D.D., Web-based network sampling: efficiency and efficacy of respondent-driven sampling for online research, *Sociological Methods and Research* (2007), May 18, 2007, http://www respondentdri vensampling.org/reports/web_rds1.pdf

marketing surveys, the theoretical and practical issues being very seldom approached in the textbooks. Such is the case of the "snowball" sampling, a method often used along the years both in exploratory and descriptive surveys, due to its capacity to discover precious information on the so called "hidden" populations.

In the paper we have presented above we have approached the "snowball" method basically in connection with the multiple advantages and also the improvements it may offer in marketing surveys. The latest and most popular improvement is named the respondent driven sampling based on the recommendations of the respondents which can be used to mitigate the non probability character of the method in order to correlate statistical interferences.

Despite the series of improvements brought to the "snowball" method, as presented above, there still are several issues which continue to raise the interest of researchers and which include:

- Identification of respondents and initiation of referral chains;
- Checking of eligibility of potential respondents;
- Employment of respondents as informal survey assistants;
- Control of types of referral chains and of the number of cases associated to each chain;
- Stimulation and monitoring of the referral chains and of quality of data collected.

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LANDMARKS IN THE EVOLUTION OF THE SOCIAL RESPONSIBILITY OF ORGANIZATIONS IN THE TWENTIETH CENTURY

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Abstract
The social responsibility of organizations concept has become the subject of considerable researches, debates and commentaries especially in the second half of the last century. According to ethical principles organizations and individuals have the obligation to act in the benefit of society at large. Consequently, the social responsibility of a business is related to its duties and obligations directed towards the social welfare. The role of corporations in society and the issue of corporate social responsibility have been increasingly debated in the last century.
Based on a literature review our paper seeks to describe and summarize some of the main contributions to the development of the social responsibility of organizations. The aims of our paper are to explore the evolution of the social responsibility of organization concept in the last century and to emphasize its various approaches, mostly in the business field. This historical trace identifies both similarities and differences related to social responsibility themes.

Keywords*: social responsibility, corporate social responsibility, corporations, organizations, stakeholders*

1. Introduction

Since the beginning of the twentieth century scholars and researchers from different field of study (e.g. business, sociology, philosophy, theology, law, economics etc.) have become interested in the social responsibility of organizations concept. The concept has become the subject of considerable researches, debates and commentaries especially in the second half of the last century.

The roots of social responsibility emerged earlier in the history of civilization. In essence, the genesis and evolvement of social responsibility are linked to the evolution of human society. Any responsibility an individual/organization has towards the society as a whole is called social responsibility. According to ethical principles organizations and individuals have the obligation to act in the benefit of society at large. Consequently, the social responsibility of a business is related to its duties and obligations directed towards the social welfare. The role of corporations in society and the issue of corporate social responsibility (CSR) have been increasingly debated in the last century. Scholars all over the world have laid the stress on the fact there is an ethical responsibility of firms to drive their progress in the direction favorable for global society (Sady and Guja, 2010). Either passive, by avoiding engaging in harmful or destructive actions, or active, by achieving environmental and social goals or promoting an active citizenship, more and more companies have understood the need to act in a responsible manner.

In spite of the fact there is little agreement about the definition of CSR the evolution of the CSR concept suggests a multidimensional construct worthy of a multidisciplinary approach. As no universally acceptable definition of CSR exists a lack of consistency in this area has emerged (Fifka,

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2009). This could be partially explained by the existence of a relatively long history of the concept. That is why it is necessary to look at the emergence and development of the concept over the course of time, especially in the twentieth century. Over the last century the concept of CSR has continued to grow in importance (Carroll and Shabana, 2010).

Based on a literature review our paper seeks to describe and summarize some of the main contributions to the development of the social responsibility of organizations. The aims of our paper are to explore the evolution of the social responsibility of organization concept in the last century and to emphasize its various approaches, mostly in the business field. This historical trace identifies both similarities and differences related to social responsibility themes.

2. A retrospective of the evolution of the social responsibility of organizations

Since the ancient time it has been a permanent concern regarding the consequences of human activities, especially economic activities, upon society. During the history people have shown a continuous interest in ensuring durable resources for the economic activities. There has always been a tension between the use of resources and the population needs.

The Hindu Vedic and Sutra, the Buddhist Jatakas and the Islamic Zakat were among the first oldest texts that included ethical admonitions on usury or wealth tax. In the "Code of Hammurabi" the king of Babylon pleaded for the protection of slaves. The Roman senators voiced many protests about the insufficient contributions of businesses to fund the military campaigns of the Roman Empire.

In the Middle Ages the landlords were preoccupied to keep in balance the exploitation of their lands, livestock and forests. The French King Louis XIV took measures for the long term safekeeping of forests. In the eighteenth century and the nineteenth century workers were subjects to systematic exploitation (e.g. unhealthy working conditions, low wages etc.). In the second half of the nineteenth century a "corporate paternalism" emerged, especially in the United States of America (USA) and Great Britain. Some of the wealthiest capitalists supported philanthropic activities.

A. Carnegie earned a fortune in the American steel industry. One of the so-called "captains of industry" he was also a large-scale philanthropist by donating most of his money to the establishment of many institutions in the USA and Great Britain (e.g. universities, schools, libraries, foundations, charities etc.). On the eve of the twentieth century Carnegie published "Wealth", an article that called both for the reconciliation of the rich and the poor, and for the spending of the great sums accumulated by the rich people for public purposes. By using his fortune to enrich the community within he acts the "man of Wealth" has to produce the most beneficial outcomes for it. According to his Dictum that illustrates once again his generous nature, the life of a wealthy industrialist should be divided in the following three periods:

- Getting all education he can.
- Making all the money he can.
- Giving the money for worthwhile causes.

On the other coast of the Atlantic Ocean the Quaker capitalism promoted the idea that wealth creation was not only for the benefit entrepreneurs but also for the benefit of employees, community and society at large. The Quaker businessmen felt that their companies existed for more reasons than just to make money and that they had a huge responsibility to give back something valuable to the community (Cadbury, 2010). Starting from its puritanical hard work ethic and sober austerity George and Richard Cadbury proved to be highly concerned with the quality of life of their employees. Therefore they decided to move the Cadbury factory from Birmingham to a country location and to build a factory town in a village, known as Bournville. A housing reformer interested in improving the living conditions of his employees, G. Cadbury envisaged Bournville as a community that served more than their employees. In a relative short period of time Bournville became the "factory in the garden" where Cadbury provided housing, gardens, football and cricket pitches, swimming pools,

shops, social clubs, schools, a concert hall and a lecture theatre. Each residence had a large garden with flower and fruit trees. As "doing good…is good for business", G. Cadbury founded the Bourneville Village Trust, a charitable trust and registered landlord, in 1900. Its mission statement has promised to:

- Promote good quality social housing which protects the environment.
- Manage all the housing and estates to the highest standards to the residents.
- Encourage residents to share in decisions affecting their communities.

The community spirit remained strong through the years and guided Cadbury's business philosophy.

On his turn, the American industrialist J. H. Patterson chose to spend a great deal of his fortune on their own employees by introducing the industrial welfare movement into factory life. The architects he engaged designed a "daylight factory" which ensured the comfort and the safety of his workers. For example, the air throughout the factory was changed every fifteen minutes and hundreds of shower baths were provided for the use of all employees. Moreover, Patterson enjoyed nature and launched the children's garden movement in an attempt to provide to all communities such gardens. Under his direction an energetic campaign of education for better government started in order to make Dayton a model city. In this respect Patterson laid the foundation of the Department of Public Welfare of Dayton and wrote the Dayton Charter. By giving expression of a new conception regarding the duty of the state to all citizens, the charter stipulated that the Director of the Public Welfare Department had to (Garland, 1916, pp. 194-195):

- Manage all charitable, correctional and reformatory institutions and agencies belonging to the city.
- Enforce all laws, ordinances and regulations relative to the preservation and promotion of the public health, the prevention and restriction of disease.
- Provide for the study of and research into causes of poverty, delinquency, crime and disease and other social problems in the community.
- Promote the education and understanding of the community in those matters which affect the public welfare.

A man of rare vision, Patterson created the Dayton Foundation aiming to strengthen the community through philanthropy and leadership. From an initial 250,000 USD donation by the Patterson family in 1921 the foundation reached 371 million USD in assets in 2010, ranked the 38th among the wealthiest community foundations in the USA. Three primary goals have been identified for the Dayton Foundation in the last decade as follows:

- Providing community leadership/impact, by working with area not-for-profit organizations in direct partnership programs or services and identifying one major community initiative.
- Increasing donor development and financial stewardship, by continuing to grow overall assets and increasing the number of funds and legacy commitments.
- Developing and strengthening the organization to be more responsive to the needs of the Foundation's donors, financial and estate planning advisors, and not-for-profit organizations.

In the early 1900s A. Heald advised the business leaders not to forget that they were trustees of the public interest. Later, the trusteeship concept of business responsibility, enunciated before by A. Carnegie, emerged in the practices of the rulers of General Electric, O. D. Young and G. Swope. They both sought to establish partnerships with government, community and labor.

One of the founders of the theory of workable competition, J. M. Clark shared his father's view, J. B. Clark, of the importance of ethical issue. He advocated both the social control of industry for the general benefit and the control of trusts as follows: "...we can make very large corporations legitimate and safely avail ourselves of their productive power. The government can use insight, discover how nature is already working, be guided to the right experiment and try it promptly. It can

liberate the competitive forces that even now, trammeled as they are, make our state endurable, and it can enable them to develop their full influence and make the condition comfortable and encouraging. It can do this while fostering and not repressing general prosperity, and while increasing and not lessening our chance of success in the fierce economic rivalries into which nations are entering." (Clark and Clark, 1914, p. 14). Emphasizing the power of corporations over the wellbeing of individuals Clark called for the implementation of an economics of responsibility, embodied in the working business ethics. In this type of economics businesses have to recognize and admit their responsibilities to act in the light of social norms. The results of businesses actions (e.g. unsafe products, pollution etc.) are "things over which someone can exercise control and that means they are things for which someone is responsible" (Clark, 1916, p. 213). He also traced one of the lines of the social responsibility of corporations (CSR) when he stated that business responsibilities have to include the known results of business dealings.

W. B. Donham showed in the late 1920s that businesses did not yet recognize the magnitude of their responsibilities for the future of the civilization. In order to identify, estimate and measure the social performance of businesses, T. J. Kreps used for the first time the term "social audit" while introducing the subject of "Business and Social Welfare" to Stanford University in 1931 (Kreps, 1962). As a tool of measurement, the social audit "is a natural evolutionary step in the concern for operationalizing corporate social responsibility and, in its essence, represents a managerial effort to develop a calculus for gauging the firm's socially oriented contributions" (Carroll and Beiler, 1975, p. 589). In his opinion the social audit is the real acid test of business and not the profit-and-loss statement. In this way Kreps developed a framework for measuring the social involvement of companies which reported on their social responsibility.

One year later, A. A. Berle and G. C. Means warned about the fact that huge American corporations had come to dominate major industries in the USA: "the economic power in the hands of the few persons who control a giant corporation is a tremendous force which can harm or benefit a multitude of individuals, affect whole districts, shift the currents of trade, bring ruin to one community and prosperity to another. The organizations which they control have passed far beyond the realm of private enterprise- they have become more nearly social institutions." (Berle and Means, 1932, p. 46). In their opinion the few wealthy people who managed the big corporations had to repay society by contributing through various programs to its benefit. In the same year E. M. Dodd affirmed that corporations served a social service, as well an economic function (e.g. profit-making).

The C. Barnard's "Functions of the Executive" of 1938 constituted "a substantial primer on leadership that resonates a profoundly humanistic ethic" (Aupperle and Dunphy, 2011, p. 156). He stated that the survival of an organization depends on its willingness to cooperate, its ability to communicate and its desire to ensure the integrity of its purpose. Starting from the structural concepts (e.g. individual, formal organization, informal organization etc.) and dynamic concepts (e.g. free will, cooperation, authority etc.) he considered the word "responsibility" as a quality that confers credibility, predictability, caution, and social responsibility as a function of the executive class. In his opinion the executive functions are different from other functions due to the fact that they impose the necessity of creating moral codes. Also, the durable organization depends on the quality of management which is based on morality. A high responsibility is necessary in any organization, either big or small, according to Barnard. His writings emphasize "competence, moral integrity, rational stewardship, and professionalism" (Mahoney, 2002, p. 162).

F. Capra, a film director at Columbia Pictures, launched the movie "Mr. Smith Goes to Washington" in 1939. Based on an explicit defense of America and its Christian values the film presents the story of a boy scout leader turned US senator who fights corruption. Capra embedded the individuals in a social matrix and demonstrated that once they became part of an artificial society they are no longer unique and irreplaceable. Fueling the theme of human alienation Capra called for the reinstallation of the individual at the center of the social reality and insisted on the fact that the social responsibility of the individual has not to be neglected or forgotten. He insisted on the idea that

each human being must take care of the people around him. In his concern about individual he proved his adoration for the Christian social ethics by taking up the theme of goodness and simplicity in a deeply selfish society.

In the 1940s P. F. Drucker, the "father of modern management", argued that every company has both economic and social purposes. In his landmark study "The Concept of the Corporation" he emphasized that any corporation should be a social institution and a community for all employees: "…the essence of the corporation is social, that is human, organization" (Drucker, 1946, p. 31).

The famous Harvard Business Review published in 1949 two distinct articles written by B. Dempsey and D. K. David. Dempsey asserted that there are four concepts of justice at the foundation of the responsibilities of businessmen:

- Exchange justice.
- Distributive justice.
- General justice.
- Social/contributive justice.

The social/contributive justice refers to the obligation of businessmen to contribute to the wellbeing of individuals and society. David also stated that one of the priorities of businesses is to be constructive namely to operate in ways that respect the communities.

Since the end of the Second World War scholars and researchers have provided a huge number of theories about CSR. Therefore the theoretical literature on CSR can be divided in different phases (Table 1).

Table 1- Phases in the evolution of the theoretical literature on CSR

No.	Authors	Phases
1.	P. Katsoulakos, M. Koutsodimou, A. Matraga, L. Williams (2004)	a) CSR initiation phase (1960-1990) b) CSR momentum building phase (1990-2000) c) Mainstreaming initiation phase (2000 onwards)
2.	M.-C. Loison, A. Pezet, C. Berrier (2009)	I. Corporate Social Responsibility (1950s-1960s) II. Corporate Social Responsiveness (1970s-1980s) III. Corporate Social Rectitude (1980s) IV. Corporate Social Performance (1990s) V. Corporate Citizenship (2000s)

In the 1950s F. W. Abrams launched the idea that the managers of corporations should voluntarily assume public responsibilities by acting as trustees of the public interest. Besides profits, companies had to take into consideration their employees, customers and the public at large. The modern era of social responsibility started when H. R. Bowen, the "father of CSR", published his book entitled "Social Responsibilities of the Businessman" in 1953. He gave the first definition of the social responsibility in business: "it refers to the obligations of businessmen to pursue those policies, to make those decisions, or to follow those lines of action which are desirable in terms of the objectives and values of our society" (Bowen, 1953, p. 6). Thus, Bowen thought about CSR as a way of integrating the societal values beyond the interests of shareholders. However, T. Levitt warned the business world about the dangers of the social responsibility. In his view social concerns were not the responsibility of business world, but of government.

The 1960s brought an effervescence of ideas related to the field of social responsibility. In 1960 K. Davis indicated that social responsibility implies businessmen's decisions and actions taken for reasons beyond the direct economical or technical concerns of the firm. W. C. Frederick affirmed that social responsibility implies a public posture of the businessmen towards society's economic and human resources. He asserted that an adequate theory of business responsibility had to meet several requirements as follows (Frederick, 1960, pp. 59-60):

- "First, its criterion of value should be drawn from our increasing awareness of the requirements of socially effective economic production and distribution, and particularly the necessities of economic growth and development on a broad social scale.
- …The second requirement of an adequate theory of business responsibility is that it be based upon the new concepts of management and administration that are now emerging.
- …Third, an adequate theory of business responsibility will recognize that the present business system is an outgrowth of history and past cultural traditions.
- …The fourth requirement of a theory of business responsibility is that it recognizes that the behavior of individual businessmen is a function of the social role they play in business and society.
- …Fifth, there should also be a recognition that socially responsible business behavior is not to be produced automatically but is rather to result from deliberate and conscious efforts of those institutional functionaries who have been given this task by society."

One year later, R. Eells and C. Walton referred to corporate social responsibilities as ethical principles that ought to govern the relationships between corporations and society. On his turn G. Goyder considered social audit as a management tool in his book "The Responsible Company". Based on the idea that with God's grace a man can do anything he wants to Goyder's business philosophy promoted efficiency and justice. He stated that the purpose of management is to create a balance among the responsibilities towards shareholders, employees, consumers and community.

Recognizing the primacy of economic interests for businesses J. W. McGuire provided a broader idea of their social responsibilities in the 1960s. He thought that corporations have not only economic and legal obligations, but also responsibilities to society. In 1970 M. Heald published a comprehensive history of the social responsibilities of business in which he analyzed the business policies and practices related to social responsibility. He focused on the ways businessmen experienced social responsibility. On his turn M. Friedman affirmed that the social responsibility of business is mainly to increase its profit. Along the same lines with A. Smith who promoted the pursuit of self-interest in a free market system, Friedman considered that enhancing profitability and shareholder value are the true responsibilities of business. One year later, the Committee for Economic Development (CED) showed that businesses functions by public consent and aims to serve the societal needs. The CED proposed a model for corporate responsibility according to its "three concentric circles" approach:

- The inner circle includes the efficient execution of the economic function.
- The intermediate circle encompasses a responsibility to exercise this economic function.
- The outer circle outlines the emerging and still amorphous responsibilities.

Also H. L. Johnson noticed that social responsibility was important since companies necessitated to achieve a balance among various interests (e.g. employees, shareholders etc.) in order to accomplish their multiple goals. S. P. Sethi launched the corporate social performance model, a major advancement in the CSR theory, which articulated the following evolutional stages (Sethi, 1975):

- Social obligation.
- Social responsibility.
- Social responsiveness.

In the late 1970s W. C. Frederick made the distinction between CSR1 (corporate social responsibility) and CSR2 (corporate social responsiveness) concepts. The former has ethical or moral threads and the latter is concerned only with the managerial processes. On the other hand, A. B. Carroll developed the "three dimensional conceptual model" of corporate performance. The social responsibilities can be divided into four main categories (Table 2), neither cumulative nor additive (Carroll, 1979).

Table 2- The four social responsibility categories according to A. Carroll

No.	Category	Characterization
1.	Economic responsibilities	The business institution is the basic economic unit in our society. It has a responsibility to produce goods and services that society wants and to sell them at a profit.
2.	Legal responsibilities	Society laid down the laws and regulations under businesses are expected to operate. Society expects companies to fulfill their economic mission within the framework of legal requirements.
3.	Ethical responsibilities	There are additional behaviors and activities that are not necessarily codified into law but nevertheless are expected of business by citizens. In sum, society has expectations of business over and above legal requirements.
4.	Discretionary/ volitional responsibilities	There are responsibilities left to individual choice and judgment. They are at business's discretion; however, societal expectations do exist for businesses to assume social roles over and above described.

In the 1980s K. E. Goodpaster and J. B. Mathews Jr. stated that a corporation can and should have a conscience. Later, R. E. Freeman introduced the stakeholder theory starting from the problem of value creation and trade. He considered that corporate management has a fiduciary responsibility to stakeholders, which are groups and individuals who have a stake in the success/failure of a company. S. L. Wartick and P. L. Cochran broadened the CSR concept to corporate social performance (CSP), based on principles, processes and policies. In their opinion the CSP represents "the underlying interaction among the principles of social responsibility, the process of social responsiveness and the policies developed to address social issues" (Wartick and Cochran, 1985, p. 758).

In the 1990s the term corporate citizenship gained visibility. Corporate citizenship (CC) designates the initiatives undertaken by companies to act responsibly in society and represents a discretionary activity, a choice for businesses to put something back into the community within they function. Also, the CC is a fruitful business practice both in terms of internal and external marketing (Maignan, Ferrell and Hult, 1999).

D. Wood provided an explanation of the socially responsible behavior of industries and firms. She also gave an explanation of how socially responsible objectives might be formulated and achieved. In her view the CSP is "a business organization's configuration of principles of social responsibility, processes of social responsiveness, and policies, programs, and observable outcomes as they relate to the firm's societal relationship" (Wood, 1991, p. 693). Close to the stakeholder theory, M. B. E. Clarkson defined CSP as the ability to manage and satisfy the different corporate stakeholders (Clarkson, 1995). On their turn, T. Donaldson and L. Preston expanded the stakeholder theory by emphasizing the moral and ethical dimension of CSR, as well as the business case for involving in such activities.

S. L. Hart tried to explain the competitive advantages starting from the environmentally responsible firms and by adapting the resource based view of the firm. J. Elkington launched the "triple bottom line" as an attempt to introduce an accounting paradigm to the social and environmental issues. Besides the responsibility of the company to generate economic welfare there are also the responsibilities to care for the society and the environment (Elkington, 1998).

At the end of the twentieth century researchers sought to demonstrate that the 21st century most successful global businesses will draw profit from their environmental and social responsibilities. They also called to learn to deal responsibly with all types of waste. This is why "a society that wastes its resources wastes its people and vice versa" (Hawken, Lovins and Lovins, 1999, p. 55).

3. Conclusions

The understanding of the historical evolution of the social responsibility of organizations is based on the view of what role they play or should play in society, especially businesses. Various definitions of social responsibility have appeared both from theoreticians and practitioners all over the world, often independently. A socially responsible organization has the duty to satisfy the needs of its stakeholders. On their turn, companies have social obligations in addition to their economic purposes. There is no social responsibility for businesses if their philosophy is separated from ethical principles. It means that they have a social responsibility towards the society within they perform.

A multifaceted concept, CSR has encouraged companies throughout the world to look at their social responsibilities as well as their usual responsibilities (e.g. economic). The dynamism of the CSR concept during the last century echoed its multidimensional nature. This means that there is an urgent need for coordinated efforts towards the study of the history of CSR based on a multidisciplinary research.

Our paper suggests that it may be useful to identify the landmarks in the evolution of the social responsibility of organizations in the last century in order to better understand this concept. It is our hope that this paper could serve as a starting point for further researches.

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LEADERSHIP IMPORTANCE AND ROLE IN THE PUBLIC SECTOR - FEATURES IN THE CONTEMPORARY CONTEXT

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Abstract
Nowadays leadership is considered a managerial and organizational process that influences and guides the activities of the companies. As a management process, leadership can systematically influence the relationships that occur between managers and employees as a result of applying the management functions application. This study aims to highlight the main elements that designate the modern and revolutionary concept named"leadership". The main objectives of the study are: 1). explaining the importance of leadership in the contemporary context; 2). analyzing the similarities and differences between two seemingly similar concepts - "leadership" and "management"; 3). description of the main management styles; 4). analyzing the correlation between leadership and emotional intelligence; 5). explaining leadership role in the public sector in Romania. In every company leadership has a very important role in achieving performance. The leader also plays an important role in a company, because a leader is the person who influences the behavior, actions, positive or negative attitude of others who are determined to act and take decisions voluntarily without fear of being punished if they do not follow the leader. Emotional self-awareness, trust, adaptability, initiative, optimism and team spirit are the ingredients of modern management style which determines the competitiveness of an organization.

Keywords: *leadership styles, emotional intelligence, performance, and competitivness.*

1. Introduction

This study highlights the main aspects that define leadership style in the contemporary business context. The main types of leaders and the essential features of leadership in the public sector in Romania are described. In the present paper we set ourselves to present the main management styles applied by leaders at organizational level, and also to exhibit the role an efficient management style has in Romania's public sector. It is important to identify the main management styles, as managers can obtain success and performance by applying certain management styles. In literature review, the main leadership styles are closely related to leaders' personality, and they are also analyzed in the present paper. Moreover, analyzing the similarities and differences between the concepts that appear to be similar (management and leadership), as well as analyzing the relationship between leadership and emotional intelligence constitutes and highlights the important role leadership has with respect to businesses.

We have to think that leadership is an attitude of life which is required in order to obtain performance and success in everything we do. Leadership is a modern and revolutionary concept and should be adapted to the demands of a modern society which is continuously changing.

The idea that leadership should focus on individual and organizational behavior is important. The community and the organizations should learn together, should create and explore ideas that can generate the proper development of managerial activities. In order to be a successful leader some conditions must certainly be fulfilled, and these conditions are: a leader must think positive, must encourage teamwork, must promote and develop the management culture, creativity and innovation,

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must acknowledge the value of teamwork, must have a clear vision of achieving goals, must be responsible, must assume both praise and failure, must use effective communication tools in his relationships and must facilitate the optimal work climate in the enterprise.

2. Literature review

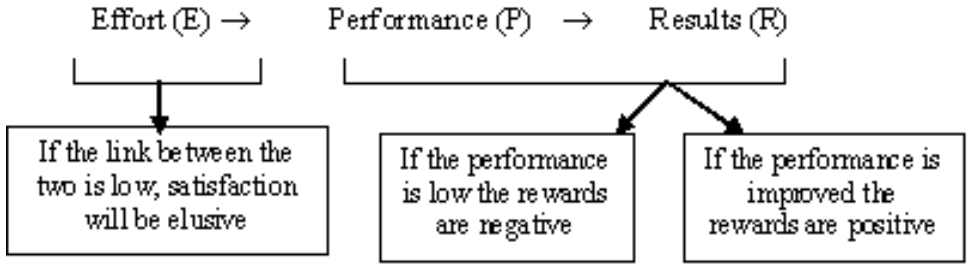
In existing studies of leadership in both private and public organizational contexts, writers have defined leadership in three ways: as a set of exemplary traits, values, and behaviors that individuals possess; the ability to influence action and motivation based on situational contexts and follower characteristics; and ascription among followers.[1] It is important the idea that leadership should focus on individual and organizational behavior. The community and organizations should learn together, should create and explore ideas that can generate the proper development of managerial activities.

People's behavior is influenced by their moods. They take into account a few principles which help them to act in a proper way.

A. Maslow's theory presents the consumers' needs on a certain scale, called "hierarchy of needs" (Maslow's pyramid).The order is as it follows [2]: physiological and safety needs – primary and inferior needs- and social, esteem and self-realization needs - secondary and higher needs. A. Maslow said that an individual makes decisions in order to satisfy his needs in optimal conditions. This is a fundamental premise. A competent leader should focus their subordinates so that they acquire that knowledge and needs that might move them to the top of the pyramid.

Starting from Maslow's hierarchy of needs, F. Herzberg broadened the area of the debate highlighting both the hygiene factors (working conditions, colleagues, salary, security, and personal life) and motivational factors (promotion, responsibility, recognition).

L. Porter and Lawler have developed Vroom's theory. According to this theory, the performances of the firm depend on certain variables: effort, expected performance and results, personality awards. Lawler's model is based on the motivational behavior which is influenced by tow types of experiences:[3]



Expectation (A) calculation model: $A = (E \rightarrow P) \times \sum [(P \rightarrow R) \times V]$, V = valence results.

Leadership is the art of expressing how to think and act according to principles, courage and discipline. Through leadership an organization can achieve its objectives that lead to obtaining the expected results and performance. Management styles are performance instruments and can affect the relations between the organization members and its customers.

[1] A Carol Rusaw, *Administrative Leadership in the Public Sector* ; Public Administration Review. Washington:May/Jun 2009. Vol. 69, Iss. 3, p. 551-553 (3 pp.)

[2] A. Maslow, *Motivation and Personality*, New York, Harper& Row, 1954.

[3] Vezi Cătălina Bonciu, *Introducere în managementul resurselor umane*, Editura Credis, Capitolul III, Bucureşti, 2008.

Two types of leadership are presented in the literature review: formal leadership and informal leadership. Formal leadership is based on the capacity of the leaders who have a superior position to influence their subordinates. Informal leadership emphasizes the leader's ability to influence an informal group with positive or negative characteristics. Thus, there are two types of leaders: formal leaders, who cannot be accepted in a group and informal leaders, who have the ability to guide and understand their subordinates.

3. Leadership versus management

This table summarizes the differences between being a leader and being a manager:

Table no.1

Subject	**Leader**	**Manager**
Essence	Change	Stability
Focus	Leading people	Managing work
Seeks	Vision	Objectives
Dynamic	Proactive	Reactive
Wants	Achievement	Results
Power	Personal charisma	Formal authority
Have	Followers	Subordinates
Horizon	Long-term	Short-term
Conflict	Uses	Avoids

Source: adapted from www.changingminds.org

There is a question regarding the difference between leadership and management, but the correct answer cannot be found at the first try. At the first sight this are two similar concepts, but in reality they are different.

Leadership reflects the human dimension of management, that side which makes it possible for a manager to influence and lead the group (…).This concerns not only an operational side, but also an emotional one, which is based on the authority of the manager and on his human qualities (...)[4]. This is leadership, a component of the management.

Management deals with an overview of the various complex issues. Is important to note that just by thinking of the main function of the management, leadership can be included in this complex process that is management.

4. The importance of management styles

The management style leaders can express the performance obtained by them and it may be the instrument through which can be identify employees' satisfaction at the individual or group.

M. Zlate makes a complex identification of the management styles and shows that this analysis is given by[5]:

-practicing a certain style of leadership which has relevant effects on the psychological climate and on the labor productivity;

[4] V. Cornescu, I. Mihăilescu, S. Stanciu, *Managementul organizaţiei*, Editura ALL BECK, Bucureşti 2003, p. 221-222

[5] vezi Mielu Zlate, *Leadership şi management*, Editura Polirom, Iaşi, 2004.

-leadership style which influences the actions of the team members;

-leadership is an organizational variable that influence the interpersonal relations in the organization and is affecting all people. Presentation of the leadership styles is complex, but in the literature review the following management styles are acknowledged and studied thoroughly:

1). Leadership styles depending on how decision are made.

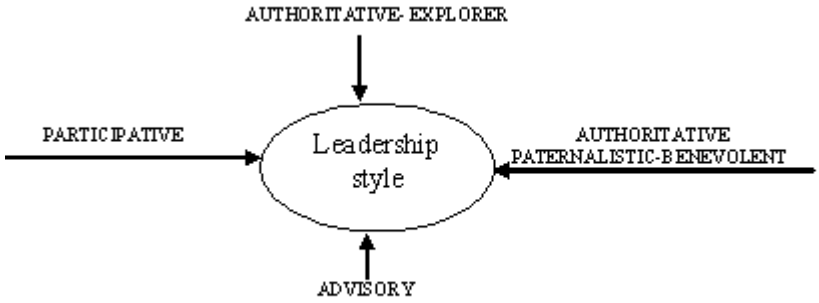
2). Leadership styles in relation to the efficiency criterion.

3). Leadership styles in relation to the values that guide the behavior of management staff for their work in an organization.

1). Leadership styles depending on how decision are made

Kurt Lewin, a renowned specialist in the field of research has identified three leadership styles[6]: authoritative leadership styles, democratic leadership styles and permissive leadership style (laisser-faire). Seeing this classification research has not stopped. These studies have been extended by R. Likert, R. Lippi, R.K White, N. Mayer, J. Brown and other researchers in the field.

In his research R. Likert [7] has identified four leadership styles:



Source: Authors

Authoritative leader does not allow to the subordinates to express freely their opinion and he is always preoccupied by the desire to occupy high positions. He also has a critical attitude regarding his behavior towards his subordinates and always creates always conflicts. These leaders are dynamic persons who have a great confidence in their forces and can appreciate their own performance because they think that only they can successfully fulfill certain responsibilities. Because of their authorative behavior most of the subordinates are discouraged and their interests regarding certain tasks are relatively low. Authoritative leaders are concerned about recognize and praise their hits instead of encourage their subordinates who carried out certain activities. In case of failure, authoritative leaders are not realistic and honest, placing the responsibility for a failure to the other team members. These leaders don't accept the idea that they may be wrong because they considered that everything they do is perfect. **Democratic leader** can obtain performance only if he involves the subordinates in establishing the organizations goals. He must ensure that the subordinates participate to the tasks distribution. This management style brings only benefits to the leaders because through it they can diminish the tensions that arise between the team members. **Permissive leader** is characterized by the expression of its disinterest in the coordination of the group. The members' teams are allowed to set the organizations goals. They are, also, let to distribute the tasks. If a leader is practicing this leadership style he cannot obtain performance. He can obtain only confusion and inefficiency.

[6] Kurt Lewin, *Psychologie dinamique*, Paris, PUF, 1967, p. 196-227.

[7] R. Likert, *New Patterns of Management*, McGraw-Hill Book Company, New york, 1961.

J. Brown has identified the following types of leadership: authoritative leader (absolute authoritative leader, benevolent authoritative leader and incompetent authoritative leader) and democratic leader (democratic advisory leader and participative democratic leader).

Absolute authoritative leader is a severe leader whose orders are followed by the subordinates. The subordinates take action like their leader does without expressing their own opinion. **Benevolent authoritative leader** involves his subordinates in setting the goals and distributing the tasks, but the major decisions belong to them.**Incompetent authoritative leader** is always insecure of his decisions.**Democratic advisory leader** takes into account the subordinates opinion when he launches an idea, but the decision belongs to them. **Participative democratic leader** involves his subordinates in making the decisions.

2). Leadership styles in relation to the efficiency criterion

The following types of leaders are emphasiyes in the literature review according with the criterion of efficiency[8].

The Organizer takes actions rationally and accurately, organizes the work of subordinates, but gives them independence to make decisions in various situations. He is a formal leader who solves the problems in a regular way.

The Participator is a leader who encourages teamwork using the communication means, direct collaboration, and who accepts criticism and suggestions of team members.

The Entrepreneur is the leader who seeks to obtain positive results and stimulates competitiveness. He is strict with his subordinates and tries to resolve conflicts openly.

The Realist is the leader who lets his subordinates to come up with proposals and solutions of specific problems which are arising in the business management and he believes that mutual respect and trust are the requirements to be met best in the relationships within the enterprise.

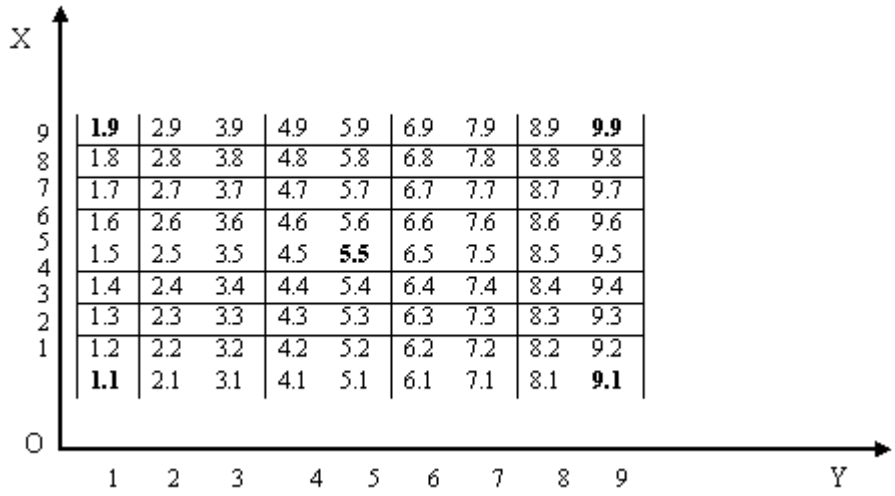
The Maximalist is a leader who wants to achieve his purpose quickly. He is rigorous with his subordinates and he gets positive results in some conflicts. **The Bureaucrat** uses his diplomas and titles to intimidate his subordinates, avoids making decisions that require a great responsibility through from his part. He doesn't encourage the communication and the views of subordinates who have special practical skills. **The Demagogue** is a leader who encourages his subordinates, team spirit leads his actions, he does not encourage fighting, and even avoids them.**The Technocrat** is a leader who has an authoritative attitude and the respect for hierarchy in the firm is a necessary prerequisite to his subordinates. The interpersonal relationships are threatened by his dictatorial attitude which creates tension. Those subordinates who did not respect his decisions are respectfully removed by him. **The Opportunist** is the leader who is attentive to obtain personal satisfaction using intrigue in his relationship with his subordinates. He is the one who uses the compromise to achieve his goal. **The Utopist** is the leader who makes decisions in hurry and is not a good organizer of the team. He spends time encouraging the discussions and so, he doesn't obtain positive results.

To be a successful leader, certainly some conditions must be fulfill in , and these are: a leader must think positive, must encourage teamwork, must promote and develop the management culture, should promote creativity and innovation, must recognize the value of the teamwork, must have a clear vision of achieving goals, must be responsible, must assume both praise and failures, must use effective communication tools in his relationships and should facilitate the optimal work climate in the enterprise.

3). Leadership styles in relation to the values that guide the behavior of management staff for their work in an organization are presented in the literature review accordance with two criteria: two-dimensional criterion and three-dimensional criterion.

Robert R. Blake and Jane S. Mouton proposed a dimensional management styles classification. According to these criteria, managers' activity is oriented towards production and towards staff[9].

[8] Vezi W. J. Reddin, *Les „ 3 dimensions du dirigeant"*, Management France, Paris, 1968.



OX→ degree of interest is oriented towards production;

OY→ degree of interest is oriented towards staff.

The authors have presented only five leadership styles:

1). **1.9 Style** is characterized by a great attention directed towards production. The interest regarding the personnel's is lower.The leaders are authoritative and the subordinates' opinions are not taken into account. The effort is small, the results are poorly and, in this case, the performance is lower.

2). **9.1 Style** is characterized by a greater attention which is oriented towards personnel, and little interest towards production. The leader motivates his subordinates and takes into account their point of views. Performance is good, but the manufacturing activity is low.

3). **1.1 Style** is characterized by a low interest regarding the production activities. Team performance is smaller and the leader is not involved in major decisions. The subordinates are those who make decisions.

4). **5.5 Style** is characterized by a moderate attention towards staff and a medium interest towards production activity. The leader, in this case, is a person who avoids conflicts, accepts some compromises and finds solutions to obtain a satisfactory performance.

5). **9.9 Style** is characterized by a great attention directed both towards production activities and towards staff. The leader who applies this leadership style makes rational decisions, achieves maximum performance, encourages power, compromise and avoids open conflict.

J. Reddin suggested a dimensional classification of the leadership styles, such as: managers' orientation towards goals or tasks, managers' orientation towards interpersonal relations and, also, the group psychology and its performance.[10]The apparent correlation of these three categories generates the following types of leaders[11]: **the negativist** whose actions are not oriented towards goals, interpersonal relations or efficiency; **the bureaucrat** whose actions are oriented towards obtaining the incentive profit; **the authoritative benevolent** whose actions are oriented towards

[9] R. R. Blake, J.S. Moutin, *Les deux dimensions du management*, Les Editions d'Organisation, Paris, 1972.

[10] W. J. Reddin, *Les 3 dimensions du dirigent*, Management France, Paris, 1968.

[11] Vezi V. Cornescu, I. Mihăilescu, S. Stanciu, *Managementul organizației*, Editura ALL BECK, București 2003, Capitolul XI.

tasks and efficiency; **the hesitator** whose actions are oriented towards tasks and interpersonal relations; **the altruist** whose actions are oriented only towards interpersonal relations; **the promoter** is that leader who stimulates human relations and whose actions are oriented towards achieving efficiency; **the creator** is the real manager who gives importance to the three dimensions.

5. An effective leadership approach and the emotional intelligence

A leader can obtain succes by practicing an effective management style. If we ask why they are so effective we think about strategy, vision and incentive ideas. But the reality is different ... true leaders are those who feel and live with those involved in the organization activity. Emotions are the source of success.

Daniel Goleman said that, no matter what leaders aim to do - to create strategy or mobilizing teams to action- their success depends on how they act. Even if they do well in all other chapters and fail in the basic task of channeling emotions in the right direction, everything they do cannot be like they wished.[12].

The prosperity of a modern organization depends on the emotional responsibility of the leader who is influencing the results obtained by the whole team. The leader is the person who influences and guides the emotions of the team. They should create a link between them and their subordinates in order to obtain positive results. But if the leader directs the emotions in a negative sense, subordinates are pessimistic, and they can not obtain good results.

Emotional intelligence is the key toleadership. Leaders who take full advantage of the benefits of leadership based on emotional intelligence, channel the emotions that guide them in the right direction[13].A company that is lead by a leader who motivates and inspires his subordinates can be considered a modern and innovative company.

The specialists believe that emotional intelligence is the competency key that can lead a company to obtain the desired performance.Emotional intelligence is the art by which leaders stimulate their subordinates, and success or failure of an organization depends on how they manage their emotions.

Emotions influence the results obtained by the leaders and their subordinates. Strong emotions generate tension between the team members.But when negative emotions, anger or anxiety, appear are seen only the negative side of the situation and all the negative things in it. Negative emotions such as anger, or feelings of uselessness, influence and distorts the work of team members.

Daniel Goleman emphasize an important issue, namely that leaders influence business climate and hence the propensity of employees to satisfy customers [14].

For example, according to a survey of 19 insurance companies, the working climate created by the leaders was the indicator of business performance throughout the organization: in 75% of cases, companies could be divided into companies with high rate and profits and companies with small profits and increase rate, only depending on the working climate[15]. So, how do people feel when they are working influencing business results.

We often think who is affecting the business climate? The answer is simple: leadership actions determine the extent of 50% -70% on how people perceive the professional climate in a company.

The leader must submit self-confidence, positive emotion, clarity, seriousness in making decisions. Effective relationships with subordinates and customers, can lead to achieving performance in a modern organization.

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[12] Daniel Goleman, Annie McKee, Richard Boyatis, *Inteligență emițională în leadership*, Editura Curtea Veche, București, 2007, p. 19.

[13] Daniel Goleman, Annie McKee, Richard Boyatis, *Inteligență emițională în leadership*, Editura Curtea Veche, București, 2007, p. 22.

[14] Ibidem, p. 33.

[15] Daniel Williams, *Leadership for the 21st Century: Life Insurance Leadership Study*, LOMA/ Hay Group, Boston, 1995.

6. The role of leadership in the public sector in Romania

In our country leadership role in the public sector should be considered in connection with sudden changes occurring continuously in the business environment.

In Romania, leader's creativity and innovation should not be influenced by legal regulations which are governing the work of employees in the public institutions.Generally, in the public sector the concept of effective leadership style is confused with the notion of authoritarian leadership style, without distinguishing leadership from management. True leaders are those who encourage the team spirit, motivate subordinates, and develop creativity and innovation. Communication with their subordinates is the best solution for a leader to achieve performance. Performance is the result of communication and of a flexible management style. Only a leader who takes into account the ideas of his subordinates can achieve the organizations targets in a short time. Leaders should stimulate the competition among their employees. Those who are involved in the organization activity are always concerned about getting good results so that they can find appropriate solutions in achieving the targets. If the leader encourages and requires an appropriate working climate, the employees become receptive to his ideas. In our country, leadership development must become a priority that must take into account the creativity and innovation of those persons who work in a company.

According to John Aidair, an effective leadership is influenced by leaders who can provide an appropriate working climate to their employees.

Table no. 2:
How to apply an effective leadership

1.Do	*establish and assign the tasks to the team members;
2.Act	*be in contact with the team members and forward the tasks;
3.Check	* initiate action, make decisions, always check the work of the team;
4.Stimulate	*stimulates creativity, promotes innovation, eliminates the tension between the team members;
5.Plan	*take into account the opinion of subordinates, review their ideas and put them into practice;
6. Estimate	* evaluate the activities of team members by checking their plans and their decisions.

Source: Adapted from John Adair, Understanding Motivation, Guildford, London, 1990, p 78-79.

7. Conclusion

The implementation of an effective leadership style is conditioned by leaders' skills in finding new ideas. They should transform these ideas in realizable actions to obtain the success. Leaders are those who find many ways in leading their subordinates in order to achieve the organizational objectives.

Leadership style is also reflected by leader's behavioral features. An effective leader can lead a company and its employees to find solutions to a various problems.

Leaders are those who implement an effective strategy, but they put first the employees' needs instead their own success.

There is no leader to born with the ability of a perfect leader. This capacity is acquired and can increase if the leader interacts with his subordinates. But if the leadership style is incorrectly applied the results are inefficient and can create tensions and conflicts.

S. Certo believes that leadership influences the individuals' behavior. The management functions highlight the complex relationship that exists between leadership and management, focusing on behavioral issues. Leaders are using certain tools to stimulate and motivate their subordinates, to encourage their actions, to promote the teamwork. In this way, the subordinates are confident in their own forces and the results are positive and effective.

The effectiveness of a leader is recognized when he combines features of leadership style with a flexible cooperative behavior. The leader should be optimistic, enthusiastic and friendly with his subordinates. He should have a modern vision, should be creative and should encourage his subordinates to express their own ideas. The main qualities of an effective leader are: intuition, perseverance, self-control, modesty and responsibility.

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TRANSACTIONAL ANALYSIS IN THE BUSINESS CONTEXT

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Abstract
Every day people are faced with changes that are sometimes spontaneous, and that influence our state of mind, depending on the circumstances. The Transactional Analysis managed to identify these states of the Ego being at the same time an instrument of communication and interconnection in this direction. Starting a business means the entrepreneurs must stand risks and make continuous efforts. Moreover, they must face challenges and novelty that define the business environment which is continuously changing and moving. Starting and developing a business mean the entrepreneurs must make a real effort; they are always trying to develop their business in order to meet the various needs of potential customers. The study, presents the following main issues: 1).emphasizing the role of business in the current economic context; 2).presenting the economic and strategic business construction; 3).showing the main steps in developing a business; 4). identifying the role of transactional analysis and its influences in business; 5). highlighting the main principles and rules of business behavior in the contemporary context. Transactional Analysis helps businessmen adapt their future actions to concrete situations. Therefore, Transactional Analysis is a tool for analysis and action and its application allows businessmen to master more than ever the so called "rules of business".

Keywords: *competitiveness, strategy, transactional analysis, business, communication.*

1. Introduction

This study emphasizes the main aspects that define transactional analysis in the contemporary business context, and also the main elements that influence the development of a business.

The importance of this study is reflected by presenting the main elements that contribute to business success, such as business economic and strategic development, as well as identifying the main steps entrepreneurs must undertake in order to start a business. The main methods for determining the price, reflected by business economic development, are also presented in literature review. These methods are highlighted in the present study. Moreover, by presenting transactional analysis aspects, one tries to analyze the personality of businessmen, since their attitude can influence business success.

Companies must face unpredictable changes, must exploit existing advantages, must implement appropriate strategies in order to survive, and why not, even thrive. This permanent concern to adapt all actions to the business environment is the most important thing for a managerial team. The managers' attitude has a major role in achieving the company's targets.

Business ethics, principles and rules that must be followed are the components of a long and difficult process. Along this road of obtaining performance the businessman faces many obstacles, that once exceeded can complete the business success. An entrepreneur must be smart and innovative to succeed in business. Although an entrepreneur applies intelligent strategies he sometimes fails. Therefore it is very important to learn from failures, to analyze the failure's causes and to identify mistakes in order to turn failure into success.

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Business has an economic construction, and also a strategic one. The economic construction of the business reflects the relation between price and performance, and the other one, the strategic construction, takes into account the main steps of achieving the businessman's goals.

2. Literature review

Throughout time, businesses have had periods of development, as well as downfalls. The way they have been tackled throughout time represented their starting point.[1]

In antiquity, although there were small traders and salesmen, trade was seen as a profitable activity. In ancient Rome and in ancient Greece trade has developed, and businesses have gradually grown.

The Middle Ages was a period of stagnation in business, economic development being threatened by the feudal system. Aristocracy and clergy couldn't trade because trading was seen as a disdainful activity. However, in the last period of the Middle Ages, there had been a fundamental change in the conduct of trade in some cities in Italy.

In the ethical capitalism, the gradual development of urban planning determined the expansion of business, and the attitude regarding trade became positive.

Adam Smith in his volume "Wealth of Nations" published in 1776 laid the theoretical foundations of the capitalist development ethics. He thought economic freedom is the premise of the self-interest maximization, each person contributing to the wealth fare of society.[2]

In the contemporary period, businesses have experienced a period of expansion, innovation and technological and economic progress that contributed to their development.

The person who creates a business is called entrepreneur. In the past, in ancient times, the common entrepreneur was represented by the military and by traders. By applying successful strategies, military and traders could obtain substantial benefits.

In the middle Ages, even if the trade was considered a disdainful activity, the entrepreneur was a clergyman who got involved in huge projects (construction of castles and fortifications, public buildings, monasteries). He didn't take risks, he only found material and human resources for the project's development. However, later, it was established that an effective entrepreneur must know potential risks and must be well informed about the quality and price of the products.

In the 17th century, entrepreneurs were considered land speculators and farmers. They were sealing bargains with buyers who wanted to acquire a particular product.

In the 18th century, the entrepreneur's role was recognized and exploited for the first time. Richard Cantillon thought that the entrepreneur is someone who takes risks, buys and sells products at available and consistent prices.

In the 19th century, the entrepreneur was thought to be the business manager. He wasn't distinguished from the manager. Jean-Baptiste Say thought that an entrepreneur was the supervisor and the manager of a business, who had to possess the following qualities: perseverance, intuition, modesty, flair, tenacity.

In the 20th century the entrepreneur was acknowledged as an innovative person who used to promote change. According to J. Schumpeter he was usually a creative person. In other words, an entrepreneur was the person who used to start and develop a business. In many cases, he used to take risks in order to obtain personal or material satisfactions.[3]

[1] Constantin Sasu, *Inițierea și dezvoltarea afacerilor*, Editura Polirom, București, 2003.
[2] Vezi Ghe. Popescu, „Evoluția gândirii economice", Editura C.H. Beck, București, 2009, Partea a-II-a.
[3] Constantin Sasu, *Inițierea și dezvoltarea afacerilor*, Editura Polirom, București, 2003, p.17.

Nowadays, as a consequence of technology and science progress, society is increasingly concerned about the quality of work factor, which depends a lot on a person's level of general education and vocational training. The economic development of a country is also an important element in this matter. Thus, the 21th century entrepreneur is a person with a high level of training, who provides, organizes, coordinates and controls the company activity to obtain the optimum efficiency in business.

The businessman has several qualities which are acknowledged on the business market. He is the person who: has the ability to take risks, has an innovative and creative spirit, and has experience in human relationships and management conflicts. Today, the businessman has an essential role in contemporary society. The business environment is uncertain and changeable. Entrepreneurs can obtain the incentive profit only if they take into account certain particularities of the business market. Business market should not be confused whit the consumer goods market.[4]

Business market versus consumer goods market

Is derived from the demand on the consumer goods market
Has an inelastic character, because any change of the products price from consumer goods market attracts a smaller change on the business market.
Has a variable character, because a smaller change from the consumer goods market generates a bigger change on the business market.

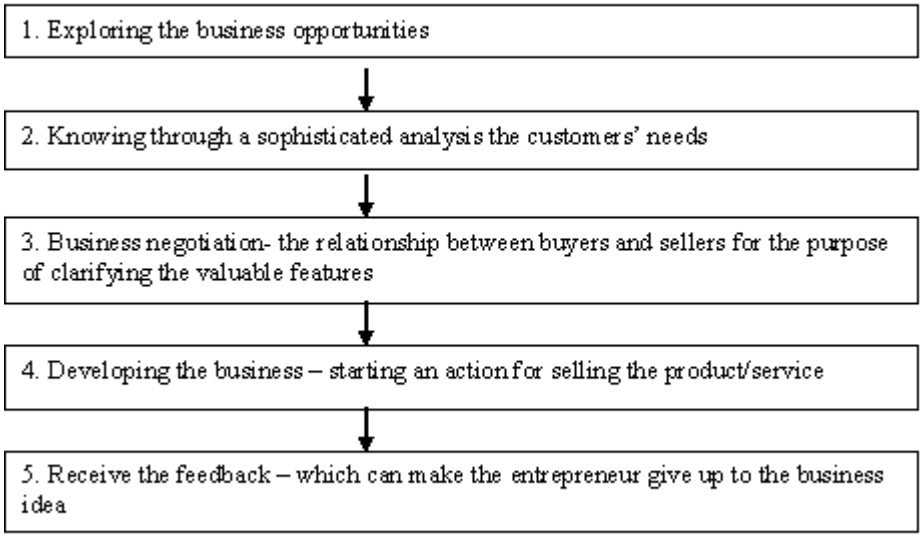
Source: Authors

3. Strategic and economic construction of the business

The business is a commercial, industrial or financial activity based on speculation, and it implies the organized effort of economic agents to produce and to sell in order to obtain maximum profit, assets and services that meet the request of the citizens. In other words, the business is one's intention to develop an activity that generates profit.

[4] Vezi Virgil Balaure, „Marketing. Ediția a II-a revăzută și adăugită, Editura Uranus, București, 2002, Capitolul IV.

Figure no.2: Steps which must be followed in starting and developing a business



Source: Authors

In order to succeed an entrepreneur must take into account the business novelty degree (usually a relative novelty). Development of a business can be seen as an adventure because starting a business is a challenge for the business partners. Entrepreneurs must use efficient strategies because a business is characterized by complexity.

The Strategic construction of a business designates few interconnected elements which allow a selection of the business and, also, the correct positioning of the company on the business market. Thus, the following actions are necessary:

1). Choosing the proper business so it can represent an idea or an existing product in appropriate situation when the existing offer is insufficient and the supplier is able to hold a competitive advantage.

2). Understanding the goals set, in order to survive on the business market, or to obtain an incentive profit.

3). Understanding each step in business development in correlation with other stages: selection, construction, beginning and operation.

4). The need for understanding the level of price as an instrument of attraction for the consumer. New understandings of price are: a). non-monetary value (the consumer buys the product not because of the low price, but due to the intrinsic value they bring to the product); b). emotional attraction – the product attracts the consumer's attention because it has started a whole industry of sophisticated and attractive packing.

5). A business must be seen as a multidimensional activity with a legal, responsible, ethical and technically advanced economic construction.

Business strategic objectives must be appreciated in correlation with the entrepreneur's objectives. There are tactical, strategical and practical objectives.

The tactical objectives are the following: strengthening the position in correlation with competition; attracting the new customers; targeting new markets.

The strategic objectives are the following: price strategy regarding the business differentiation; price strategy regarding cost control; price strategy regarding the competitive advantage.

The strategic vision of the businessmen expressed the market orientation in the near future. The main guidelines that reflect the strategic vision are: geographic expansion, attracting new customers, diversifying the product range, business expansion through franchising, closing the business, selling the business, selling the brand, merging the business especially in air transport, vertical integration that involves opening a new business segment correlated with the first, creating strategic alliances.

4. Economic construction of the business

On the basis of business economically construction there are four levels of correlation in terms of price – performance relation:

1). Price war (it is generally considered a lose-lose strategy);

2). The level of competition through price (the price is a key element in directing strategically option);

3). Non-price competition.

Methods for determining the price reflects the economic construction of the business. These methods can be divided into three main groups:

1). Method of price formation through cost: a). cost pricing method – which consists in determining the price by adding a commercial addition to the overhead costs; b). mark-up pricing method – which express the method of determining the price by adding a higher commercial addition to variable costs (20%) or lower (10%) than average total cost.

2).Methods based on demand: a). break-even pricing method- expresses the determination of optimal price corresponding to the break-even point so that it can have an upward trend; b). experience curve pricing method – expresses the determination of prices according to the short-term dynamics of demand at the certain businesses which have started for a while their activity on the market.

3). Methods based on competition: a). price taker method – expresses the actions in buying and selling stocks of the most investors who don't have enough power to change the security of the prices; this method is opposed to the price setter method; b). method of auction price – which has two specific types: a normal variant of auction (it starts at a lower price, then price starts to rise) and the second variant, Dutch auction price variant (it starts at a higher price).

5. Transactional Analysis and business environment

Transactional Analysis was developed in 1965 when has been created "The International TA Association" (ITAA) and in 1976 the "European Association for TA" (EATA).

The definition developed by the I.T.A.A. regarding the Transactional Analysis is: *"Transactional Analysis is an explanatory theory of personality and is a psychotherapeutic system dedicated to the development and personal change"*.

Eric Berne's contributions to business are significant. He said that the businessmen' moods are the results of their spontaneous personality.

Transactional Analysis is a set of methods and techniques through which the businessmen' personality can be analyzed. This identification is based on analytical scales where the most important scale is the businessman's mood. Transactional Analysis is a practical approach that emphasizes the capacity of people regarding the communication skills.

There are various questions about how Transactional Analysis find the answers, such as: why a certain consumer systematically chooses the same product and doesn't try to buy another one which can probably satisfy his various needs – the answers are found in the analysis of their moods;

or why sometimes even if we find a solution to our everyday problems, we often face with an ability to confront reality and we get "stuck".

Transactional Analysis can be used in various domains (organizational, educational, and social) and it finds answers to the consumers' questions that need to know what the consequences of their moods are. So, the consumers' decisions are the results of their ego-states. In line with this transactional theory, **Ego-State** (Parent-Adult-Child or PAC model) represents an essential component of the human personality. Eric Berne mentioned that we shouldn't invest our energy in a single state.

The Parent ego-state is a state of the ego in which individuals barrow their parents' (or other parental figures) attitude and behavior. A businessman with this side of personality is based on some well structured information and at the same time he has the capacity to anticipate the possible risks that may affect his business. Parent ego-state can be: critical Parent ego-state and careful Parent ego-state. The Critical Parent ego-state reflects that side of the personality which is divided by rules, norms and principles. The Careful Parent ego-state provides protection, affection and caring, while the Critical Parent ego-state imposes rules and responsibilities. A businessman who is influenced by this state has the ability to see his partner in a friendly way. He tries to take into account all possible alternatives for their actions, using his skills and business flair.

The Adult ego-state is governed by the principle of rationality and clarity, and also by the safe behavior and emotional detached. The businessman is self-confident, is responsible for his actions which are based on concrete facts. He rigorously assesses his actions without taking into account the emotional implications and risks.

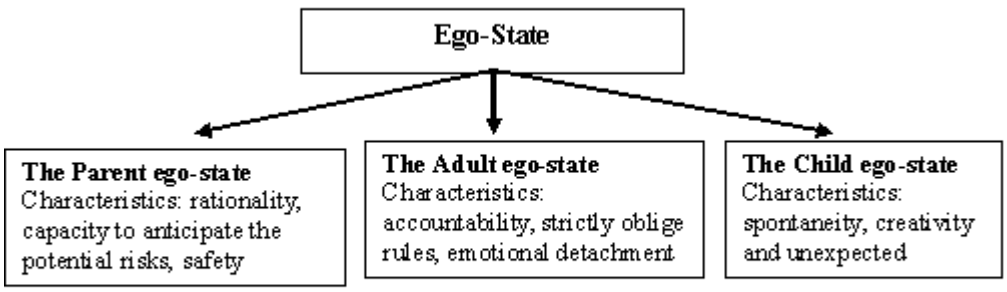
The Child ego-state reflects a spontaneously and creative behavior and attitude. This state of the ego is characterized by changing moods in a positive or negative ways. Three Child ego-states are presented in the literature review: Adapted Child ego-state, Creative Child ego-state, Spontaneous Child ego-state.

Adapted Child ego-state is the state of the ego in which the individual knows his own potential and tries to supplement his knowledge by accepting the influence of the others.

Creative Child ego-state expresses the individual's ability to show in a creative way his desires and expectations. The businessman, who takes into account these characteristics, chooses the matters that have a degree of absolute novelty. In this case the innovation can be expressed permanently.

Spontaneous Child ego-state expresses the unexpected behavior of the individual because sometimes he has the tendency to question the rules.

Figure 4: Perspective of the Ego-States



Source: Authors

6. Behavior principles and rules in business

The main form of business communication is direct conversation with the customer. It is very important for the businessmen to be trained for the meeting. He must know the following information about the customer: age, sex, social status, vocational training, hobby and personality items, knowing the value and objectives of the organization, knowing the product market. He must identify the filters from the communication process. These filters should be established when the conversation starts. The filters of the conversation express some obstacles, shortcomings in the conversation between partners. There are physical filters (hearing deficiencies, sight deficiencies, speech expression deficiencies) and psychological filters (preconceived ideas, superstitions, lack of interest, dispositions).

Statistics show there are various percentages of information retention. Depending on how information is transmitted, these percentages are: 10% if the information is read, 20% if the information is written, 30% if the information is written and heard, 50% if the information is seen and heard, and 80% if the information is mixed.

Some main elements are important in business communication. These are: the volume, the articulation, the intonation, the sight, the accent, the rhythm, the mimicry, the breaks.

The following process is known in business. It is called "lobby" and refers to a small group that sometimes puts pressure on policy makers and executive groups to influence them and to promote their interests. In the field of business practice this process named "lobby" has demonstrate its influence being organized under the rule of "5 of 20%" in the following domains: 20% law, 20% politics, 20% economics, 20% diplomacy, 20% communication.[5]

For a successful business to develop an entrepreneur must apply a few rules. The businessman should take into account a few principles because in this way he can stimulate a potential customer to act on the market.

In a negotiation, the rules of communication are the following: in a negotiation you mustn't be the first to make an offer; you mustn't take the first offer; you must know when to stop; you must know both the strong and the weak point of the opponent; in order to have a successful negotiation you must be flexible.

The businessman should take into account the main principles of the collaboration with the customers. These are the following:

1. The businessman should ensure trust to his customers! In order to do so he should take into account their needs!

2. The businessman should request a feedback! In this way he can collaborate in the future with his customer or he can improve his business!

3. The businessman should promote and encourage the honest communication and business ethics!

4. The businessman should avoid conflicts and promote amiable solutions in negotiations!

5. The businessman should sell quality products that satisfy customers' sophisticated needs and ensure that the products reach the customers on time!

As a result of global competition, business integrity is an essential attribute in negotiations. Integrity and credibility are key elements that must be taking into account by the entrepreneurs when they try to start a negotiation.

[5] Popescu, D., „Conducerea afacerilor", Editura Scripta, Bucureşti, 1998, p.115.

7. Conclusions

This paper explores the current literature on transactional analysis and its importance in the contemporary business context.

Transactional Analysis is an action instrument and has the role to respond to the questions which appear during the communication process. Starting a business is a difficult process that should take into account the opportunities of the business environment. The role of the marketing mix in this process is essential and the businessman should apply efficient strategies. The businessmen must have an ethical behavior when they interact with their clients. To succeed in business, they must satisfy the most sophisticated needs of the customers. Good progress of a business and positive results are relevant aspects for any entrepreneur. Achieving the goals of the business in an efficient way is the dream of any businessman.

"Business world" is a fascinate place and is also considered "a battle field". There is a fierce competition among entrepreneurs as they are trying to attract the most important customers. They can obtain the desired success only by applying knowledge acquired through their continuous effort in achieving the business competitiveness.

Success can only be obtained by applying earned knowledge and by means of businessmen continuous effort to obtain business competitiveness. Business ethics, the principles and rules that must be complied with are the elements of a long and difficult process. On the road to success, the businessman faces various obstacles that once overcome shall only complete the performance, and so the success is well-deserved.

Business success depends on the businessman's creativity, intelligence and tenacity. Even if a businessman tries different strategies, the results are not positive. It is thus very important for a businessman to learn from his failures, to analyze the causes of the failure, to identify his mistakes in order to turn the failure into a success.

Laying down a business plan is essential in order to obtain success. The business plan is a leading instrument that the entrepreneur needs. Negotiating a business depends on the existence of a business plan. As an element that can attract potential investors, the business plan helps maintaining the business, offering efficient strategies that derive from an entrepreneur's professionalism and tenacity. Developing a business plan depends on the businessman's tenacity to take into account the profile of the business. The business negotiation depends on the existence of a business plan. The business plan must be properly realized and must provide confidence and reliability in order to start the business and ensure the success. The businessman has to identify the main economic, technical, social and ethical factors. The businessman must be an individual with social responsibility, who observes certain business communication rules and standards. The future of the business depends on this behavior. The ability to take risks and his flexibility to sudden changes in the business environment can be seen as two elements that influence performance. Businessmen's activities should be dynamic, but should at the same time support the development of the business. They must take responsibility for their enterprises.

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A NONPARAMETRIC ANALYSIS OF INVESTMENT BANKS' EFFICIENCY IN THE CURRENT GLOBAL CRISIS

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NICOLAE DARDAC[**]
IUSTINA ALINA BOITAN[***]

Abstract
The purpose of this study is to assess to what extent the business model practiced by investment banks, before the beginning of the financial crisis, has influenced their performance indicators, and especially those who express shareholders' satisfaction. To this end, we have applied a nonparametric method, called Data Envelopment Analysis, which allows obtaining the efficiency scores for each financial institution considered. The sample included two pure investment banks, Lehman Brothers and Goldman Sachs, and seven international financial groups carrying out investment banking activities. The model tested assumed the maximization of selected output variables (ROE and the dividend distributed), by considering several input variables, meant to summarize the risk profile and costs arising from implementing a particular business model. The results obtained, in the form of high inefficiency scores, indicate that the business model of investment banks was not better performing than that applied by financial groups, because it failed to ensure a balance between ownership compensation and sustainable expansion of financial activity.
JEL classification: C14, G24

Keywords*: investment banks, business model, data envelopment analysis, efficiency score.*

Introduction

Over the last decades the field of investment banking activity has been the subject of extensive changes, especially in terms of services granted to customers. Consequently, the composition of the revenues recorded has evolved from the commissions they earned to the revenues from trading debt instruments, particularly in the OTC market and income from corporate advisory business.

According to Morrison, Wilhelm (2007), the fundamental role of investment banks consists in acting like an intermediary between those holding information and wanting to sell it and the investors and security issuers who purchase it. They argue that *investment banks exist because they maintain an information marketplace that facilitates information-sensitive security transactions* (Morrison, Wilhelm 2007, p.10).

In our paper we intended to assess to what extent the business model adopted by investment banks proves to be efficient, from the standpoint of their performance indicators. The second part of the article presents the changes recorded by the investment banking landscape, focusing on the interference between investment banks and merchant banks' activity and the pace of growth of this industry over the last ten years. In the third part we question whether the investment banks' business model is still viable, in the post-crisis period. We have discussed some trends, as a result of economic and legislative constraints, that will significantly influence the future development of this industry and will reshape investment banks' business strategies. In the fourth part we have empirically investigated whether the investment banks' business model is more efficient, in terms of maintaining

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shareholders' satisfaction, than that employed by traditional banks which provide investment banking services, too. The study comprised two pure investment banks, Lehman Brothers and Goldman Sachs, and seven international financial groups carrying out investment banking activities, during an eight years period. Efficiency scores were computed for each bank in the sample, by applying the Data Envelopment Analysis non-parametric technique. The fifth part synthesizes the results obtained while the last part concludes.

1. Investment banking industry dynamics

In the framework of the financial system, although, in practice, there is a very fine demarcation line between investment banks and merchant banks, however, the two types of institutions providing financial services fulfil different functions. Traditionally, merchant banks activate in the field of securities underwriting, while investment banks participate in financing transactions.

Pure investment banks provide funds for the private businesses and governments, by issuing debt and capital securities, and selling them on the market. In addition, they facilitate mergers and acquisitions and provide financial advisory to companies (Shiller, 2009). Traditionally, they do not operate with the public.

Merchant bank institutions provide international funding, such as corporate investment, foreign real estate investment and international financial transactions. Some of these transactions involve letters of credit, funds transfer, consultancy and co-investment in projects.

Broadly speaking, investment banks focus on initial and private public offerings of shares. Merchant banks tend to operate on a smaller scale (with smaller companies) and offer creative financing options (bridge financing, mezzanine financing, corporate loans). In other words, investment banks are oriented towards big companies, while merchant banks provide services to companies that are too large for venture capital or too small for a public offering of securities.

The doctrine according to which investment banks offered prosperity for all was fully accepted by 2007, the year of the global financial crisis' onset. The specialists outlined the view that commercial banks were dealing with financial capital, while investment banks and merchant banks controlled the intellectual capital.

The economic literature claims there are three key areas of investment banking business, according to the developments of which one can evaluate the performance of this industry, namely: success in running IPO's, business consulting and involvement in mergers and acquisitions. Regarding the first element, that of conducting IPO's, we mention that the main beneficiaries of companies' transformation into public companies were the investment banks. For example, in the U.S., the peak of the IPO's launching had been reached in 2000, with over $ 100 billion. Studies on successful investment banks, in terms of launching IPO's, show a gradual increase in the cost afforded by companies seeking to benefit from an IPO: in only a few years the commission received by the underwriting syndicate (gross spreads) tripled its level to 7%, double than that practiced in Europe or Asia. According to Hansen (2001), a similar trend has been recorded by the offer price. This stood at 8% during 1978-1991, and then rose to 12% during 1991-1994. In 1995 the initial gain offered by an IPO exceeded 20%, increasing to 69% in 1999 and 56% in 2000.

The quality of consultancy provided to companies, in the form of studies, is the second area of interest when analysing investment banks' performance. Studies show that analysts' recommendations could produce abnormal returns of the market, 98% of all recommendations being of buying, which has generated more business than the recommendation to sell, because they addressed to investors who had cash and wanted to invest.

Regarding the growth recorded by this industry, we point out that in 2007 the gross incomes amounted to $ 84.3 billion, with 22% more than in 2006 and double than 2003. U.S. was the primary source of revenue for investment banks, with 53% of the total, Europe with 32% and Asia with 15%. Revenues rose with 80% in U.S., in Europe by 217% and in Asia by 250%. Investment banking

industry is concentrated in a few financial centres: London, New York, Hong Kong and Tokyo. It's an industry that must respond rapidly to major developments in financial markets, the main trends consisting of vertical integration and debt securitization.

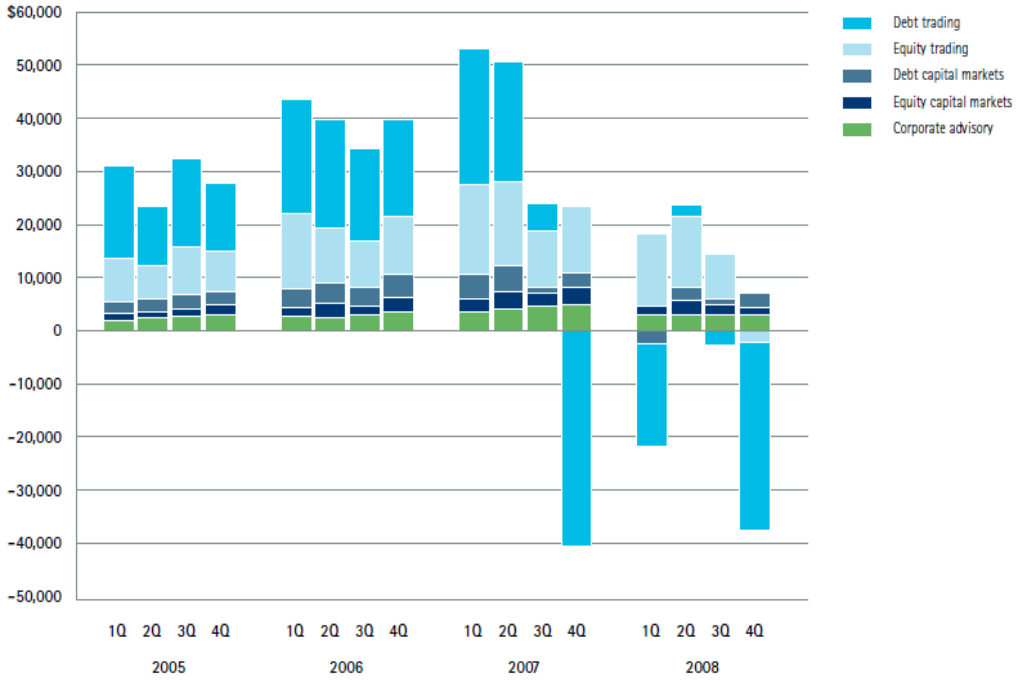
The investment banks' involvement in a broad range of activities may be associated with a conglomerate with numerous subsidiaries and with a high degree of cross risk and price transfer between lines of business. For this reason it is difficult to assess the degree of profitability for each line of business. In general, it is believed that the brokerage business is the most volatile but also the most competitive line of work.

Podolny (1993) examined the correlation between bank's profit and status, considering that the market on which they are positively correlated is more stable than the one in which status is inversely correlated with profit. The author made the assertion that investment banks have a higher status than commercial banks and can better protect the market. However, it appeared that in only 15 years their profitability has deteriorated significantly. According to Podolny (1993), the relationship between status and profitability need not be on the long run, but an effective relational mechanism. The author defines status as being represented by the performance of a bank in underwriting securities. A bank that proves a high proficiency in the underwriting process can be regarded as if it has a high status, compared to a bank that does not demonstrate such competence.

According to the Securities Industry Association, the average ROE profitability registered by investment banks in the U.S. has evolved from 48% during 1980-1984 to 22% during 1985-1989, 14% during 1990-1994, 21% during 1995 - 1999 and 30% during 2000-2004. Explanation of these increased returns, compared with other types of credit institutions, is due to financial market characteristics. If the market were efficient, then competition would lead to lower prices and commissions, lower returns recorded for the entire industry as a whole. The returns' level specified above shows that the market has not worked effectively due, primarily, to entry barriers, limiting the number of competitors and practicing strategic pricing.

Research carried out by Gach, Sproule (2009) revealed that in the economic boom years the transaction incomes held a share of 75% in total income, while income from corporate advisory business stood at 20%. The years 2008-2009 marked the orientation of investment banks to less risky lines of business, traditional business consulting revenue growth accounting for up to 40%. Analyzing the structure and evolution of revenues (Figure 1), it can be noted that the consultancy is the only line of business which has not experienced significant fluctuations. At the opposite pole lies the revenue from trading debt instruments, particularly in the OTC market.

Figure 1. Investment banking revenues in the period 2005 - 2008 ($ millions)



Source: Gach, Sproule (2009), p. 4

2. The opportunity of developing a new business model for investment banks

By 2007, there were no interrogations on investment banks' business model viability. The collapse of investment banks, began in 2007, marked the beginning of wider debate on the possibility of implementing a new business model, to save investment banks. According to the authors Gach, Sproule (2009), a new business model must be based on the concepts of transparency, liquidity and strengthening the supervision of such financial institutions.

In 2008, the Fed has adopted the measure of changing the status of investment banks, which, in turn for having access to credit facilities, were forced to convert into bank holding companies. A bank holding company is a corporation under the control of two or more parties. Becoming holding companies, investment banks can easily obtain capital and agree to be supervised by authorities. As holding companies, Morgan Stanley and Goldman Sachs will create more retail units, in order to attract deposits from customers. The decision took by Morgan Stanley and Goldman Sachs to convert into bank holding companies was considered exceptional, because they were the last independent banks. Turning into bank holding companies, they have had to reduce their leverage.

Change of status means more stability, but lower profits. Such a bank can be regarded as a more secure institution, with a cleaner balance sheet and with a variety of ways for raising funds. This institution will become more bureaucratic and more risk averse. Change of status meant for Morgan Stanley and Goldman Sachs the ability to receive deposits from customers, to receive financial facilities from the Federal Reserve, the possibility of merging with other banks. The immediate effects were the leverage reduction (and hence, lower default risk for the entire financial system) and the possibility given to the two financial institutions to survive.

According to Demirgüç-Kunt, Huizinga (2009), the U.S. went through a complete cycle in terms of regulating financial activity, from the separation of financial institutions in commercial

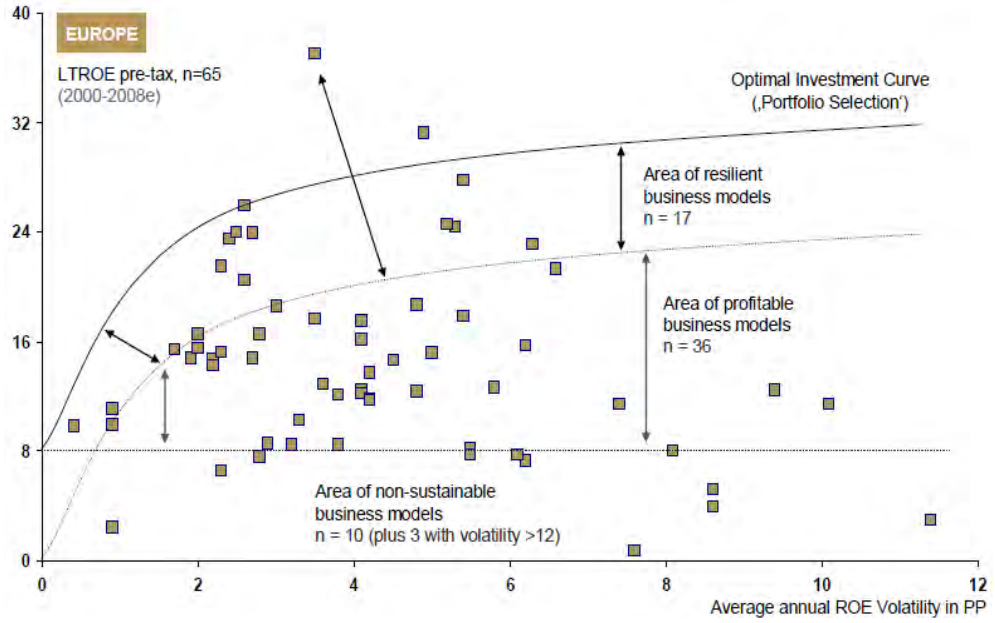
banks and investment banks (the Glass-Steagall Act in 1933), the reintroduction of universal banking (the Gramm-Leach-Bliley Act in 1999) and by the disappearance of major investment banks in 2008.

Efforts of these banks towards increasing liquidity and transparency will assume a new capital structure. In terms of liquidity risk, complex derivatives will not disappear, but their use will be translated to financial institutions that are better accommodated at managing this risk. Moreover, after 2007, the necessary liquidity for conducting operations has increased and banks' management became more conservative, being less receptive to risk taking.

New regulations, designed to improve transparency in financial markets, are similar to a new standardization in transactions, which means that liquidity providers will be encouraged to enter the market. The core element, around which investment banks' activity will articulate, will be represented by the customer-oriented financial products, which offer an attractive risk/return ratio, in terms of liquidity and increased transparency.

Fremerey and Hagen (2010) argue that long-term success of a business model is based, generally, on five key elements: the growth of business, asset mix, financial institution's size, cost/revenue and market share. The research undertaken by them on 65 banking groups in Europe, which carry out also activities in the field of investment banking, revealed that their orientation towards adopting a business model specific to investment banks hasn't brought substantial improvements in long-term profitability. The authors pointed out that truly sustainable, resilient business models, characterized by low annual volatility of ROE (below 8%) and a rate of long-term ROE of at least 8%, positioned above the Markowitz frontier, are a minority, fact that requires a recalibration of their business strategy.

Figure 2. Distribution of banking groups according to the characteristics of the business model applied



Source: Fremerey F.S., Hagen J.U. (2010) European Banks –The Way Forward Toward Resilient Business Models, p.24

A study by Boston Consulting Group (Saumya, Chandrashekhar, Morel and Grealish, 2009) signals the need for investment banks' business model reinvention, by replacing the aggressive revenue growth strategy with the management of risk-adjusted profitability, while recognizing the

importance of further financial innovation developments. According to the authors, the new generation of investment banks will adopt a business model characterized by simplification and specialization of work, in the sense of maintaining those business lines in which expertise acquired over time can generate competitive advantages. On the other hand, Nielsen and Bukh (2008) state that the concept of business models is, perhaps, the most discussed but least understood of the newer business concepts.

The future of investment banks will be marked by a series of regulations and restrictions on mitigating aggressive strategies and better risk management, mandatory establishment of reserves, a move towards derivatives trading, corporate restructuring, a lower reliance on short-term funds and leverage.

In the current crisis, investment banks show a diminished appetite for risk taking and, in the future, they must face important changes, namely:

- ✓ have the potential to invest, without reaching a high level of leverage, giving investors an attractive return, coupled with the risk embedded;
- ✓ to undertake financial innovation on a documented base, by creating financial products able to generate value added. In this regard, it is anticipated that demand for complex, illiquid, traded OTC (e.g. credit default swaps) derivatives will narrow substantially.

Economic and legislative constraints (strict regulation, less leverage, high capital cost) will have, no doubt, influence on banks' investment strategies, in the sense of rethinking the mix of business lines, the preference for risk, a better correlation between target customer needs and products/services' characteristics.

3. Study assumptions and methodology

The process of financial liberalization was one of the factors that boosted banking activity nationally and across borders. The desire for better positioning based on market share and the rapid pace diversification of banking products and services (retail banking, corporate banking, asset management, investment banking, private banking, etc.) created incentives for large financial institutions to adopt a permissive attitude towards taking excessive risks, by focusing on the volume of activities, while relaxing loan granting practices and superficially monitoring the concentration of exposures to a particular customer segment or sector. In order to reduce risk exposure, they have resorted to creating sophisticated financial instruments, the trading of which being assumed to contribute at risk dispersion to other market players.

In this study we aimed to analyze whether the business model practiced by investment banks is more efficient, in terms of maintaining shareholders' satisfaction, than that employed by traditional banks which diversified their activity and provide investment banking services, too. Therefore, we examined the extent to which diversification of financial institutions' activity was reflected in the improvement of performance indicators which are closely related to the degree of shareholders' satisfaction, namely financial return (ROE) and the amount of dividend distributed. We determined a measure of banking efficiency, from the shareholders' viewpoint, by testing, separately, two models corresponding to the two variables of interest specified above. Our analysis focused on individual performances obtained both by pure investment banks and by a number of representative international financial institutions, which have an active investment banking department. Data were taken from the annual financial statements consolidated at group level, covering the period between the years 2001 to 2008.

Efficiency scores were obtained by applying the technique Data Envelopment Analysis – DEA (see Vincova, 2005 and Barr, 2004 for details related to computational aspects). Main arguments in favor of using DEA as a tool to evaluate the performance of financial institutions are:

- ➢ allows the testing of multi-input multi-output models;
- ➢ does not require defining a functional relationship between input and output variables;

- estimates are generally not affected by the multicollinearity problem between explanatory variables;
- variables can be expressed in different measurement units;
- each institution's performance is compared with that of other institutions in the analyzed sample, allowing the estimation of relative efficiency to the group analyzed and not to a theoretical maximum;
- generates for each inefficient institution a set of benchmark institutions, called "peer group", which include only the efficient ones, which have a structure of input-output variables similar to the inefficient entity analyzed.

It is important to specify the heuristic nature of our scientific approach, which lies in the fact that there is no predetermined, generally agreed structure of the models tested through the DEA method. As a result, we have adapted the components of the model to the specific of the financial institutions considered and to the goals of this study. Also, we mention that the efficiency scores obtained are not a single, generally valid solution, but a satisfactory, credible one for the given context, having an exploratory nature, as it is intended to extract new information existing in the initial set of variables.

We opted to implement a DEA BCC model (Banker, Charnes, Cooper) as it allows the use of variable returns of scale. The mathematical model (considering the hypothesis of a model oriented to maximize results) is:

$$max\ \theta = \alpha + s + e \quad (1)$$

With restrictions:

$$\sum_k \mu_k\ y_{tk} = \alpha y_{t0} + s_t,\quad t = 1, 2, \ldots . I \quad (2)$$

$$\sum_k \beta_k\ x_{tk} = x_{j0} - e_j,\quad j = 1, 2, \ldots . J \quad (3)$$

$$s_t \geq 0,\quad t = 1, 2, \ldots . I \quad (4)$$

$$e_j \geq 0,\quad j = 1, 2, \ldots . J \quad (5)$$

$$\beta_k,\ \mu_k \geq 0,\quad k = 1, 2, \ldots . n \quad (6)$$

Notations:

$\boldsymbol{\theta}$ = the efficiency score for each financial institution considered

n = the number of financial institutions included into analysis

I = the number of output variables considered

J = the number of input variables considered

μ = the weight attributed to output variables, appropriate to each financial institution

β = the weight attributed to input variables, appropriate to each financial institution

y = the vector of output variables

x = the vector of input variables

α = a parameter reflecting the value with which the vector of output variables increases, while maintaining input variables at a relatively constant level

s = parameter that quantifies the deficiencies in obtaining the output variable *i*

e = parameter reflecting the excessive use of input *j*

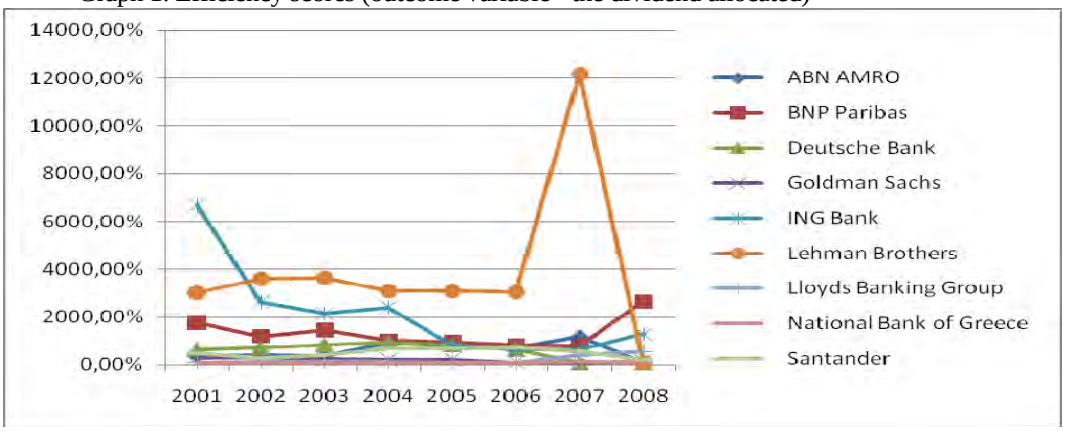
In the selection process of input variables we have applied the intermediation approach that takes into account the costs incurred in attracting financial resources (Mester, 2008). The chosen variables are: *total assets, financial assets held for trading, the cost/ income ratio* and *leverage*. Output variables are the *distributed dividend* and *net profit generated by a unit of capital invested*. The models implemented are oriented towards maximizing the results (output oriented in DEA terminology), while maintaining a relatively unchanged level of input variables. We chose this orientation because, to be competitive, a financial institution with cross-border activity must carefully manage its costs, monitor the evolution of solvency and the characteristics of assets held in portfolio.

Regarding the chosen orientation, towards maximizing outputs, it is considered that banking activity is characterized by efficiency if the input-output combination allows the achievement of a financial performance standard, whose efficiency score is equal to 100%. Scores in excess of 100% indicate inefficiency in the optimization of results.

4. The results obtained and their interpretation

In a first step, we calculated the efficiency scores for each financial institution in the sample, under the assumption that the output variable is the dividend distributed. In other words, we show to what extent the amount of dividend distributed to shareholders is justified by the quality of the financial activity undertaken. Allocation of a dividend inconsistent with the institution's financial performance will lead to a state of inefficiency, signalled by a score whose value is higher than the limit of 100%. The graph 1 depicts the time evolution of efficiency scores for the corresponding financial institutions in the sample.

Graph 1. Efficiency scores (outcome variable - the dividend allocated)



In 2008, four financial institutions (ABN Amro, Deutsche Bank, Lehman Brothers and National Bank of Greece) have proved effective in this regard, achieving a score of 100%. Most inefficient proved to be BNP Paribas, with a score of 2644.4% and ING Bank (1280.87%).

In the year 2007 only two institutions (Deutsche Bank and Goldman Sachs) had a score of 100%, which means that the dividend was properly distributed, according to annual financial results obtained by each of them. However, we noted also the highest inefficiency score recorded for the entire sample of institutions, during the period 2001-2008, of 12169.05% obtained by Lehman Brothers. If we look at the scores obtained by this financial institution we see that during the years 2001-2006 it has been constantly the most inefficient institution, recording values exceeding 3000%, which explains, among other causes, the sudden failure of this investment bank in September 2008. This permanent state of inefficiency can be argued by the aggressive growth strategy practiced on each business line (Capital Markets, Investment Banking and Investment Management). As a result, by 2007, Lehman Brothers reported net income per share and a dividend record.

In 2005 and 2006, in the top of efficient institutions were positioned just Lloyds Banking Group and National Bank of Greece. In each of the years 2004, 2003, 2002 and 2001 a single financial institution has reached a score of 100%, namely National Bank of Greece.

If we analyze the time evolution of the net dividend amount per share, we note that each financial institution considered experienced a progressive increase in the period 2001-2007, followed by an abrupt adjustment in 2008 to a value of 1 euro per share or lower. Although the stated aim of

the institutions considered was to increase the dividend distributed each year, the high scores obtained (higher than the threshold of 100%) suggest a generalized state of inefficiency. Thus, we can appreciate that the value of the dividend distributed to shareholders was not correlated with changes in financial results or there wasn't an optimal management of available capital.

In a second step, we estimated efficiency scores for each financial institution considered, under the assumption that the output variable is the most significant expression of banking profit, from the shareholders' standpoint, namely the financial return (ROE). It is the main measure of shareholder wealth, reflecting the net profits made by a monetary unit of invested capital.

Chart 2. Efficiency scores (outcome variable - ROE)

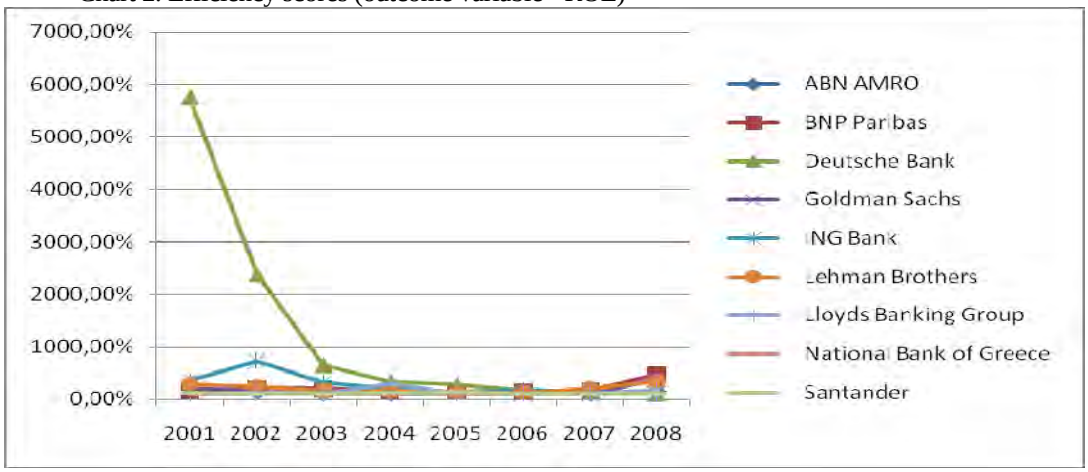


Chart 2 shows that efficiency scores for the model whose output variable is ROE, have a more uniform development in time, compared to the ones shown in chart 1, suggesting that the degree of inefficiency, seen against the net profit generated by one unit of capital invested is significantly lower.

In tables 1 and 2 we have illustrated, comparatively, the efficiency scores corresponding to the two models which evaluate, complementary, the two dimensions of shareholders' satisfaction: the return on invested capital and the dividend policy, the last row in each table summarizing the average efficiency scores for the entire eight year period.

Table 1. Efficiency scores under the assumption of distributed dividend

	ABN AMRO	BNP Paribas	Deutsche Bank	Goldman Sachs	ING Bank	Lehman Brothers	Lloyds Banking Group	National Bank of Greece	Santander
2001	376,85%	1767,25%	648,31%	276,78%	6679,52%	3006,94%	106,27%	**100,00%**	464,34%
2002	397,21%	1195,60%	699,62%	337,67%	2639,41%	3595,17%	140,48%	**100,00%**	280,26%
2003	366,10%	1445,36%	842,79%	237,84%	2137,19%	3630,72%	123,27%	**100,00%**	422,05%
2004	915,63%	1012,59%	943,00%	196,85%	2404,54%	3096,00%	112,99%	**100,00%**	687,58%
2005	796,37%	959,42%	826,43%	223,41%	850,54%	3098,70%	**100,00%**	**100,00%**	677,96%
2006	722,83%	815,99%	649,80%	103,43%	646,60%	3058,89%	**100,00%**	**100,00%**	721,07%
2007	1180,10%	792,99%	**100,00%**	**100,00%**	640,38%	12169,05%	399,23%	147,98%	564,21%
2008	**100,00%**	2644,40%	**100,00%**	137,48%	1280,87%	**100,00%**	551,79%	**100,00%**	220,83%
average	606,89%	1329,20%	601,24%	201,68%	2159,88%	3969,43%	204,25%	106,00%	504,79%

Table 2. Efficiency scores under the assumption of ROE

	ABN AMRO	BNP Paribas	Deutsche Bank	Goldman Sachs	ING Bank	Lehman Brothers	Lloyds Banking Group	National Bank of Greece	Santander
2001	134,83%	165,67%	5762,08%	179,27%	349,19%	285,38%	**100,00%**	**100,00%**	117,43%
2002	122,85%	213,92%	2376,49%	224,07%	724,26%	248,91%	120,01%	**100,00%**	**100,00%**
2003	**100,00%**	198,65%	653,95%	172,95%	326,97%	157,84%	**100,00%**	**100,00%**	107,40%
2004	102,65%	166,28%	334,63%	146,88%	198,20%	163,87%	299,37%	**100,00%**	121,10%
2005	127,50%	150,65%	278,65%	143,85%	150,21%	136,21%	**100,00%**	**100,00%**	140,56%
2006	158,09%	143,12%	169,56%	**100,00%**	175,64%	131,16%	**100,00%**	**100,00%**	111,54%
2007	**100,00%**	156,96%	153,43%	100,41%	137,08%	198,77%	**100,00%**	**100,00%**	**100,00%**
2008	146,73%	468,64%	100,00%	379,71%	**100,00%**	345,23%	185,00%	**100,00%**	**100,00%**
average	124,08%	207,99%	1228,60%	180,89%	270,19%	208,42%	138,05%	100,00%	112,25%

For the period under review it can be observed that the National Bank of Greece's activity was characterized by a state of good performance in paying shareholders, recording a rating of 100% for both models tested in 2001, 2002, 2003, 2004, 2005, 2006 and 2008. The implementation of a strategy of rational, balanced market share growth, diversification of lending both to the public and private sector, low concentration of loans in the sectors that have been adversely affected by the global financial crisis are just some of the factors that contributed to achieving and maintaining a good financial performance, reflected in the permanence in time of the state of efficiency in rewarding shareholders.

This performance was achieved in 2005 and 2006 by the Lloyds Banking Group, in 2007 only Goldman Sachs's results were characterized by efficiency, and in 2008 Deutsche Bank has been effective in both the proposed criteria.

If we refer only to efficiency scores from table 2, we note that the number of banks located on the efficiency frontier, as they recorded a score of 100%, is significantly higher than for the model which quantifies the efficiency of the dividend allocation (see table 1). Thus, in 2008, Deutsche Bank, ING Bank, National Bank of Greece and Santander have been optimal in terms of the return on capital, according to financial results obtained. In 2007, five financial institutions have proven to be effective (ABN Amro, Goldman Sachs, Lloyds Banking Group, National Bank of Greece and Santander), three in 2006 (Goldman Sachs, Lloyds Banking Group and National Bank of Greece), two in 2005 (Lloyds Banking Group and National Bank of Greece), National Bank of Greece in 2004, three in 2003 (ABN Amro, Lloyds Banking Group and National Bank of Greece), two in 2002 (Santander and National Bank of Greece) and other two in 2001 (Lloyds Banking Group and National Bank of Greece).

If we consider the standard ROE rate of 15-20%, required by international practice, most financial institutions in the sample fall within this range, and even ahead of it. When we integrate this level of ROE in the context of the volume of activity and costs, the results indicate a state of inefficiency for most institutions considered.

This result is supported by the empirical research conducted by Fremerey, Hagen (2010), which show that the growth pace of business, combined with effective management of costs, contribute to a higher ROE.

Conclusions

Nouriel Roubini, renowned professor of economics, which accurately foresaw the magnitude of the current financial crisis, has given a prognosis: in the future, there will be only a few independent business brokers, since the main problem is short-term liquidity. Investment banks will not disappear in the future, but there will be small and specialized institutions such as merchant banks, business advisor, hedge funds, and private equity funds. Investment banks have changed the

financial world by the fact that it is the largest deployment that requires a rethinking of their values and a recalibration in terms of their structure.

As regards the empirical results obtained, comparing performance in terms of efficiency, recorded by financial institutions in the sample, we can argue that the two pure investment banks considered (Lehman Brothers and Goldman Sachs), although they were listed as key players in the financial market, which had record levels of net profit and dividend per share, have not correlated the dividend growth rate to the level of capitalization and asset portfolio structure, and hence, they received high scores of inefficiency. Consequently, investment banks have not proved superior to financial groups, which, in addition to performing traditional banking activities, have also, investment banking-type activities, because they failed to maintain a balance between shareholders' rewarding and sustainable expansion of financial activity.

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APPROACHES FOR EVALUATING AND FINANCING INVESTMENT PROJECTS

MARIA-LOREDANA POPESCU*

Abstract
This article presents the financial investment approach and the investment evaluation methods, which are criteria for assessing both investment projects and their funding sources.
An important role in the analysis carried out is played by the investment decision and financing decision quality. Making an investment decision implies computing the related investment efficiency indicators. They allow the comparison of several variants of the same investment project as well as their comparison with other projects in the same industry or in other industries.
The financing decision concerns the selection between their own sources (share capital, depreciation fund, profits, reserve funds, additional capital, revenues from investments), attracted sources (domestic resource mobilization) and borrowed sources (credits).

Keywords: *financial approach, investment evaluation methods, investment decisions, profitability, funding sources.*

Introduction

Adopting an investment project involves a careful analysis of the company overall standing. Investment projects have a particular importance for developing a business as they prepare the production capacity and conditions to be achieved, therefore influencing the results and the financial balance. The project idea comes from the need to meet a current demand or from the desire to take advantage from some opportunity.

The decision regarding the project accomplishment requires that a lot of elaborated basic actions should be carried out by specialists from various fields of interest. As investments require important long-term financial resources, investment projects present significant risks, most often their launching being irreversible. Favorable financial perspectives can be obtained either by continuing the existing activities or by making investments and launching new activities. The company's financial managers must assess past investments and future investment needs. The past investments must be evaluated and the effects of the future accepted projects must be foreseen.

The term "investment" means, strictly speaking, the use of financial resources that are meant to allow the entry into the company's patrimony of fixed inputs (buildings, constructions, machinery, plants, equipment, tools, etc.) either by acquisition or by their effective creation.

In financial terms, investment means a long-term capital asset undertaking so as to achieve higher future returns.

The funding of investments covers, to a large extent, the sphere of financial requirements at company level and takes into account both the own and borrowed sources as well as the permanent and temporary sources.

The investment effect enhances the volume and quality of a company's activity.

The works carried out concern the analysis of investigations in this field, the fundamental results of such analysis, in general, and their evaluation in particular. The investigations rendered by this article are based on the works of several theorists, as follows: M. Adochiței, Vintilă Georgeta, Ilie Vasile, Ion Stancu, Mihai Toma, Felicia Alexandru, Bistriceanu Gh, Adochiței M., Negrea E.,

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Dumitrescu D., Dragotă V. A. Ciobanu, V. Ilie, M. Teodorescu, V. Juravle, G. Vintilă. Such authors have mainly focused on evaluating, and also on financing investment projects.

1. Financial approach of investment projects

Defining investment and delimiting the field of investment policy can be made in various ways. In terms of accounting and legal areas, expenses are considered investment only when they result in a purchase of durable goods, as tangible, financial or intangible assets. Thereby the purchase of a building, of a land, of means of transport, of the shares or investment certificates appearing as investment operations. Any expense that has no direct patrimonial incidence is not considered an investment, even if it increases the potential and business performance. This exclusion doesn't seem to be justified because recent economic studies evaluate only about 40% of the investment property in the global effort of investment of the companies and thus emphasize the determinant role, of 60% of "immaterial" investments which are not found in simple purchases assets.[1]

While accounting and legal approach of investments highlights the nature of the items purchased by making expenditures, the psychological definition is focused on the intention of the individual or the company which invests, insisting that, in time, investment leads to the offset consumption. From this perspective, the investment is giving up immediate goods in exchange for future goods.

The monetary definition considers that investments are all costs incurred in order to obtain monetary income in the future. Any immediate payment which is capable to bring future revenue is assumed as investment policy.

The investment decision is based on complex and accurate information about need, opportunity, duration of implementation and operation investments, the expenditure volume and financial resources, the input and output flows of funds throughout the investment operation, the ensurance of profitability and liquidity, the recovery of invested capital, etc.

The investment decisions are founded on a convenience and efficiency study based on several versions of the project from which is going to be chosen the one that ensures maximum results with minimum effort.[2]

The opportunity is closely related to the need, the effectiveness and the optimal time for delivery and commissioning of the production's capacities, to the formation of financial resources and supplying and trading conditions.

Efficiency is reflected in the ratio of operating results or in the outcomes of the investment and the efforts or expenditures for the investment. The efficiency of investments depends on a number of factors, the most important being the cost of production and the sales volume. Unit production costs will be even lower, since the investments and operating costs will be distributed on some higher sales. Therefore, it is necessary for strategic analysis of markets to be made, knowing that the investment requirements and profitability will differ depending on the sellers and the degree of competition. A dominant enterprise will be more profitable than those that own small market segments.

Assessment indicators of investment efficiency should allow the comparison to other projects from the same branch, from other branches and even from across the entire economy as well as the comparison of several project variants for the same investment and choosing the best among them.

All operations that represent lasting enrollment of various capital forms (monetary, material, human) are subscribed in the area of investment policy in order to maintain or to improve business potential and performance.

[1] Ilie, Vasile, *Gestiunea financiară a întreprinderii*, Editura Meteor Press, București, 2008, p. 244

[2] M. Adochiței, *Finanțele întreprinderii în economia de piață*, Tipografia "Mitrea", Piatra Neamț, 1994, p. 62-71

In an enterprise, investments are of great diversity: technical, human, social, financial, commercial, for publicity and advertising etc.

Depending on the risk that investments involve for the enterprise's future, we can structure them in: replacement, modernization, development (expansion) and strategic investment.

Replacing investments of completely absolute equipment has a very low risk because it doesn't involve changes in the manufacturing technology, the new equipment generally have, similar characteristics to the old ones.

Modernization investments for the operational existing equipment involves a low risk as a result of a few essential changes in the manufacturing technology. These investments are intended to improve profitability and productivity, resulting in: lowering the production's costs, direct labor savings, standardization of production process.

Development investments, the expansion of some sections, plants, require a higher risk related to the enterprise growth in traditional or recent markets.

Strategic investments structurally involve the enterprise and they assume a high degree of uncertainty and considerable risk. These investments relate to automating the entire manufacturing process, the merger with another company or the setting up of foreign subsidiaries.

Financing sources for the first two categories of investments are generally long-term credits granted under advantageous conditions of payment, repayment and guarantees because profitability is safe and has low risk. The last two categories will be funded, particularly from their own sources or external sources. The latter are more difficult to obtain due to the high risk and less probability of investment's profitability.

The financial criteria for evaluating the investment projects are:

- the projects' influence on the enterprise's results and profitability;
- the influence on financial stability;
- the impact of projects on the risk borne by the enterprise.

The projects' influence on the enterprise's results and profitability. Each investment project taken under consideration or made on business's expenses needs income throughout its lifetime. The evaluation of the project contribution to the profit of the company is made through results which are determined by comparing the initially allocated funds with the future possible results. On the one hand, the project evaluation is based on accounting profits resulted from the comparison of the total revenue with the total expenditure incurred during each project, and on the other hand the assessment could be based on gross income or cash flow, the additional revenue resulting from the deduction of the additional payments of the companies' activities that are incurred by implementing the investment.

The influence on financial stability. This criterion takes into account the investment operations incidence over the enterprise solvency. The initial project funding allocation for the purchase of fixed assets questions global financing, either by purchasing additional external resources or by carrying out a sampling of the working capital and accepting a certain damage to the treasury. The investment involves over its lifelong the need for additional working capital. This corresponds to the attributable allocations to the project deemed necessarily. This can be written as:

The need for additional working capital due to an investment project = investment + Changes in inventories attributable to trade receivables - Change in liabilities to suppliers[3]

The incidence of financial investments on the financial balance results from the deduction of additional resources with additional needs which they generate:

[3] Vintilă, Georgeta, *Gestiunea financiară a întreprinderii*, Editura Didactică şi Pedagogică, Bucureşti, 2000, p. 353

Additional Needs	Additional Resources
- Initial costs (property acquisition and related expenses) - Additional working capital needs	- Additional cash flow - Recoveries of possible assignments

Source: Ilie, Vasile, *Gestiunea financiară a întreprinderii*, Editura Meteor Press, Bucureşti, 2008

The impact of projects on the risk borne by the enterprise. The investment projects taken under consideration or launched by the company affect the level of risk which the enterprise bears. Three types of risk can be identified:

- The expenses for treasury business finances which affect investment involve a risk of solvency or bankruptcy

- The uncertainty of future operations and results imply a worsening of the risk of exploitation. The specific risk is defined in relation to the variability or instability of the results and the company is, therefore doubly affected by the new investment which increases the dispersion of possible results and tends to increase the fixed costs incurred by it.

- Additional funding required to cover additional needs arising from the investment project exposes the company to financial risk whose magnitude depends on the ratio between the rate of return of invested assets, the economic profitability, and the cost of the used resources, which are mainly acquired.

2. The evaluation of investments profitability

The financial evaluation of investment projects generally aims at two objectives. It primarily aims at making comparisons between competing projects, in order to set up priorities. Secondly an assessment of the inner value of the project should be made.

The investment profitability is one of the basic criteria on which the decision of choosing a investment is made. Financial evaluation of investment projects can be done either by putting emphasis on the average profitability or through updated methods.

The methods based on the average profitability are:

- Average rate of return to service
- The term of recovery of costs

The searching methods based on measuring the size of the *average return rate* of type are the relationships between the average annual outcome and the average annual operating expenditure. Their application determines various formulations according to the indicator chosen to measure the annual results (benefit accounting, gross operating surplus) and the size chosen for the used capital.

Cost recovery period is the time for the fund investor to reconstruct the original advanced funds.[4] This is the number of years in which the initial investment is recovered, based on annual cash flow released from the project and it is a way of choosing the investment alternatives according to the duration of the initial investment recovery.

The term recovery can be determined by summing annual flows that the investment yields until the initial value is reached, without exceeding it, resulting the number of years of recovering the project. It is calculated as the ratio between the initial cost of investment and the annual cash-flow environment.

According to a variant of this method, at the end of each year we calculate the recovery period by comparing the cash flow obtained from the commissioning of the investment with the initial cost of investment.

The interest in such a method is that it takes into account the time, the duration of operation, but the methods of evaluation of the investment projects based on updating take into account time in a much more satisfactory way.

[4] Ilie, Vasile, *Gestiunea financiară a întreprinderii*, Editura Meteor Press, Bucureşti, 2008, p. 251

The methods based on updated cash flows are:

- Net Present Value (NPV)
- Profitability Index (PI)
- Internal rate of return (IRR)

The three methods are in the mean time criteria for the evaluation of investment projects.

Net Present Value (NPV) of an investment project is the difference between the total expected discounted cash flows and the initial cost of investment.

NPV criterion determines actuarial profit which is generated from the investment project as the difference between the sum of all discounted future cash flows and the initial investment.

If NPV <0 then the project is rejected because the rate of return of the investment project is less than the cost of capital.

If NPV = 0 the project can be accepted or not because the capital invested is remunerated at compound interest charged by commercial banks.

If NPV> 0 the project is accepted for the return of the investment is higher than the interest rates or the cost of capital.

Out of the projects that the company holds, by applying the NPV criterion they can identify the acceptable set of projects.

Concerning investment project that requires initial funds F_0 and determines a set of cash-flow forecast F_1, F_2, F_3, ... F_n during its lifetime, if the discount rate applied by the firm is r, NPV can be calculated as follows:

NPV(r) = - cost + initial amount predictable cash-flows discounted

$$NPV = -F_0 + \frac{F1}{1+r} + \frac{F2}{(1+r)^2} + \ldots + \frac{Fn}{(1+r)^n} \text{ or } NPV = -F_0 + \sum_{j=1}^{n} \frac{Fj}{(1+r)^j}$$

Applying NPV meets two difficulties. The first is to forecast the cash-flows that will be generated by the investment. Technical, economic and financial studies prior to the financial evaluation of the investment are needed.

The profitability index (PI) is the net return on invested monetary unit and it is the relative form of expression to net added value. This index is calculated as the ratio of future cash flows and initial expenses. The disadvantage of this indicator is that it supports projects with low initial costs and that is why the NPV indicator is used.

For each project – exclusively, the IP profitability index falls often in conflict with the NPV. In such a case the project as best shown by the NPV is selected.

Internal Rate of Return (IRR) is the discount rate that makes net present value of zero.

$$F_0 = \frac{F1}{1+r} + \frac{F2}{(1+r)^2} + \ldots + \frac{Fn}{(1+r)^n}$$

This rate corresponds to the maximum cost that the company could bear for financing the investment. IRR should be interpreted by comparing with the *weighted average cost* (WAC) of the enterprise resource. If r > WAC, the investment cost is low and allows compensation resources. Internal rate of return is an important criterion to classify the degree of potential investment return.

This involves determining the rate of profitability of the investment capital equivalent to the return that would be obtained if the investor would put the net investment value over a period of time equal to the lifetime of the project, in the system of compounded interest at a bank. Basically, this internal return of investment value is obtained by equating the sum of all future financial flows discounted at the specific rate which is generated during the lifetime of the investment.

The use of IRR criterion is limited. If the company has several projects available for investment then it will choose that internal rate project of return which is the highest. Limited nature of this criterion is that it does not give any reference if the project is accepted or not. For the acceptability of an investment project, in financial practice the NPV is used.

3. Sources of investment funding

In practice, the decision to finance and investment can not be separated. Concerning the capital, with impact over the investments, there are a number of limitations determined by the ability of the company's debt, the market conditions, etc. Such a situation requires rationalization of capital and it implies taking into account the financial factors in measuring the expenses of the investment.

As usual ways of overcoming the financial constraints, expenditure distribution with investments is used for a period of time or doing it in cooperation. In case of financial constraint the decision rule seeks to achieve maximum efficiency for the activity, taking into account the capital costs and the risk class of the project.

If self-financing capacity is insufficient, the company uses external sources of capital.[5] Financing on investment can be made through their own sources (capital fund, depreciation, profits, reserve funds, additional capital, income from investments), attracted sources (domestic resource mobilization) and borrowed funds (loans).

The social capital is the source of financing the investment by which a company is created. Its size is determined by the initiative group, which proposes to the holders of capital the development of the business that the future company is represented by. The depreciation fund aims to replace of fixed assets when they are out of service. Since creating the fund is gradually made on account of sales, the fund is available between the time of formation and the time of use, so that during this time it can be used to finance the investment.

Its destination is thus expanding the volume of additional fixed assets and, on this occasion, their technical improvement (technical progress).

Profit as a source of investment financing, aims at increasing the stock of capital (net fixed capital formation company) and as a complementary destination the replacement of fixed assets. The part of the profit used for this purpose is included within the profit it is determined annually by the Board of Directors in conjunction with the dividend policy, but also with other factors, such as investment, financing needs and other activities/operations, attracting other sources, size profit etc.

Reserve funds are made by profits, annually, through allowances provided either in legal rules (which lead to the formation of legal reserves) or in the status of the company's formation or in the decisions of the Board of Directors. In terms of balance sheet, these funds have equity scheme. The formation of these funds is the existence of additional resources which ensures their reserves of major financial risks. The continuity of collecting these funds makes their quantum important.

The investment decision to use the part of the legal reserve that exceeds the rate established by law is taken as a decision of additional social equity.

The company can earn income from investments in the form of dividends, interest and exchange differences. These revenues "round" the existing availability and can be used to finance the investments when one of the projects for expansion, modernization, renewal included in the company's long term strategy becomes useful.

Mobilizing domestic resources is another source of financing the investment. This source is temporary and it can be used for a relatively short time (three months, usually), until the possibility to establish long-term sources arises. Unlike all other sources of investment, which are recorded in separate accounts, this one doesn't appear in any account.

Domestic resources represent only a temporary release of resources resulting from changes in a given time (one month, one quarter), of the accounts balances of uses and requirements that reflect the investment business.

Loans are another important source of investment financing. The call for credits can be:

- short term (less than one year) to cover monthly or quarterly gap between the investment is borrowing requirements (planned spending is for investment or just starting current) and their sources available for such investment
- medium to long term (over one year) to supplement its own resources.

[5] Stancu, Ion, *Finanțe.Gestiunea financiară a întreprinderii*, vol. III, Editura Economică, Bucureşti, 2003, p. 329

In the second case the call credit is usually established when the investment project is made.

The repayment of loans and associated expenses is made by the company's current and future results and by the net financial flows released from the investment after its entry into service. For short-term loans, the repayment is made from their own sources, if they are available in the following period, in conformity with the existing funding schedules which are approved by the investment project. The formulas of financing the investment through loans vary a lot:

- *Issuance of single-issue bonds*
- *Issuance of convertible bonds*
- *Eurobond* issuance is usually made by banking groups, with multinational interests, in order to invest in an area of interest without having to export capital.
- *Loans from financial institutions* are based on economic resources mobilized by them as investment funds or from insurance companies.
- *Bank credit* is obtained from banks (commercial, investment, mortgage, etc..) under a loan contract credit which states the repayment terms and the guarantees that are required to be established by the debtor.
- *Credit-lease*, called lease or "creditbail", the entrepreneur is the beneficiary of the credit, the creator of the investment and life interest of the resulting object from the investment he made.

The leasing contract is concluded for a period equal to the required one for the full amortization of the investment and cannot be cancelled at the same time by either party. The object of the investment appears only in the annual balance sheet of the owner, while in the entrepreneur's balance there are included only the financial commitments assumed through the contract.

Other sources. This category includes amounts derived from the liquidation of fixed assets, asset sales and recovery of materials resulting from the preparation of the land for construction, from digging foundations or liquidation of temporary buildings on the site.

Conclusions

Given that each investor is interested in obtaining higher profits from the invested funds, considering the specific circumstances of each year and the existing market standing, it is necessary to make assessments of the project or the investment level, in other words this means making the financial analysis of the investment project.

The development of procedures for diagnosing, evaluating and investment decision–making requires a prior delimitation of the operations defined as investments. The analysis based on investment project appreciation criteria leads to the selection of the most beneficial ones.

The provision in due time of the resources needed for the financial covering of investments is a first order necessity and an objective of the company's finances. Investments involve a significant capital mobilization, which determines the need for purchasing or acquiring the related resources.

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INTANGIBLE ASSETS – IMPORTANT RESOURCE FOR ENTERPRISE PERFORMANCE MANAGEMENT

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Abstract

Along time, the goal of intangible assets became very important for the activity and prosperity of business. This matter is achieved as well as more and more the companies operate in a global economy which has as main base the digital revolution and information management. The increase of the immaterial investments percent requires evaluation and recognition criteria by knowledge, intelligence and human competence. But recently, the accounting standards were about to accord negligible attention or even totally ignored the appropriate modalities of report this category of assets. The accounting, obliged to bend to economic, financial and juridical logics, in a „Taylor" modality, presents an unreal image of the company economic life and particularly of investment activity. In a competitive environment, the reliability of future economic benefits, generated by investments, depends less on their material or immaterial nature and more on the characteristics of the market they operate on. These are just a few reflections which determined us to focus our attention to this thought-provoking domain of immaterial investments, appreciated as a potential for the company.

Keywords*: intangible assets; immaterial investments; competences; intelligence; knowledge; competences; potential.*

Introduction

New potent (able) that brought them "information age" led to considerable renewal of the ways in which business is carried out.

Major trends that have broad implications on the performance of firms are: economic activity will continue to internationalize, markets for consumer and intermediate goods will become more sophisticated, the pace of technological change will remain rapid.

In this context, the performance capability of a firm depends on more than one distinctive resource of any company, as an economic system, namely **knowledge.**

What differentiates one from the other is "its ability to use all types of knowledge – from the scientific and technical up to the social, economic and management"[1] to achieve something that has value market.

As an universal social resource, knowledge is not a resource of a firm. A crucial resource of any company is located outside so, as its economic results which are obtained by "exploitation of opportunities".

Deep changes taking place in today's world of business involving the movement of forces driving economic growth, from matter and energy to information and knowledge. The process of "dematerialization" of economic activity changes the source value toward design and innovation activity, knowledge management and organizational skills.

In this context, intangible investments are becoming more important than material investments, by spending more and more significant that a company engages in the design, innovation, training, organization, or exploring new market opportunities.

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[1] Drucker P. – "Management strategic", Editura Teora, Bucureşti, 2001, p. 11

Business employing increasingly more spending in areas like research and development, staff training, production organization and marketing. These charges are intended to increase the competitive capacity of the company long term, creating value for shareholders.

Including all these costs in the category seems very risky investments because of uncertainty effects that entail:

- Knowledge and skills, in large part, cannot be dissociated from human or material resources (equipment) that incorporates, is hardly controllable by the enterprise;
- Irreversible nature of the expenses involved in training and research, further up the productive sphere, with lasting effects (strategic) to give them the status of invested costs, the risks of non-recovery;
- "perishability" accumulated knowledge and skills is often in a discontinuous and unpredictable world, requiring reconsideration and updating constantly.

Growing importance of intangible investments in increasing business

performance and competitiveness requires an approach and an appropriate accounting treatment for a relevant and reliable financial reporting.

1. Deficiencies of current accounting systems

Current accounting systems, whose tools and financial reporting practices are

still strongly imbued taylorism, difficulties in indentifying and measuring intangible investments.

The major difficulty comes from the absence of relationship "cause-effect" in recognition of intangible expenses such as investment and thus "activate" their balance sheet.

Balance sheet, by his role to represent the company's financial structure, offers, on the one hand, investors (or potential) ability to assess risk assessment estimated return on investment, and offers all guarantees of creditors, as legal protection, recovery amounts advanced temporarily. On the other hand, balance sheet, through the assets they represent, enables the potential capacity to provide liquidity entity.

Although dominated by conflicting demands, the accounting system should highlight the economic potential to support decision allows different categories of users.

Between the two components of financial statements there is a constant tension because they are interconnected and cannot serve different interests. The capital market is concerned primarily profit, at it is apparent from the income statement. If financial statements are primarily aimed at measuring earnings, this means that the balance will reflect "the results of the evaluation process residues"[2].

From this perspective, the accounting system pays excessive attention to short-term financial objectives, to assess business performance. The emphasis on the influence on the outcome of the exercise and financial reporting systems is justified by the speculative interests of managers. They, many times seeking to "invent" means to achieve levels of financial indicators assigned based on whether it is appreciated and the underlying activity remunerated.

The most dangerous consequence management by quantifying the financial indicators of short-term performance is encouraging that is type of behaviour to reduce the intangible investments and the precautionary principle should treat them as expenses in the period. It's vocation of the "informational asymmetry"[3], the precautionary principle may lead to harmful phenomena embellishment of images about wealth and business performance, which may represent an unfair attack on the relevance of accounting information.

[2] Epstein B., Mîrza A., - IFRS 2005 – Interpretarea şi aplicarea Standardelor Internaţionale de Contabilitate şi Raportare Financiară, Editura BMT, Publishing House, Bucureşti, 2005, p.32

[3] Feleagă N., Feleagă M – "Contabilitate financiară – o abordare europeană şi internaţională", vol.I, Editura InfoMega, Bucureşti, 2005

For short-term objectives, to maximize value creation for shareholders (by maximizing the profit or loss) is sacrificing long-term performance. Strategic abdication of responsibilities aimed at a lasting effect, increase the value of the company (through innovation, new markets and products, training and motivation, customer loyalty). Adaptability and even threaten the survival of the enterprise.

It is obvious that these charges, which produce medium and long-term effects that can be regarded is immaterial investments, must have an appropriate accounting treatment.

Forced to obey certain logic while legal, economic, financial, accounting presents a distorted picture of the economic life of the company, neglecting or ignoring for too long the appropriate methods for recognizing and reporting of these investments, assets (property) intangible. As a consequence, practice has not evolved beyond the traditional rules of historical cost.

2. Recognition and evaluation of intangible assets

After a long discussion, an international accounting referential addressed for the first time in detail the accounting for intangible assets by IAS 38 (enacted in 1998), and determining criteria for recognition, measurement bases and reporting requirements of such an assets.

Recognition of intangible assets requires compliance with the following key criteria:

- identifiable character of intangible assets;
- possibility of control over use of such property;
- their ability to generate benefits (economic benefits) of future credible assessment.

Character of an identifiable intangible assets requires it to be "distinguished from goodwill"[4]. Identification condition is satisfied if the intangible asset is separable (can sell, transfer, permit, lease or exchange and may distribute its future economic benefits, without undertaking to deprive future economic benefits from other assets used in the same activities). At the same time, intangible assets should flow from contractual or legal rights of another kind, whether those rights are transferable or separable from the entity or from other rights and obligations.

Identifiable intangible assets include patents, copyrights, licenses, software, marketing rights and know-how specialized. Feature that these elements have in common is nonexistent material substance, physical and having a useful life grater than one year, (determined or undetermined).

Certain intangible assets can be kept in or an object (support) physical: CD (in case of software), legal documentation (for a patent or a license). Clearing up confusion for their correct classification (as property, plant and equipment under IAS 16 or as an intangible asset after IAS 38) should appeal to professional reasoning to identify the relative importance or comparative basis, the most significant element.

For example, software that is part of the operating system (from a computer or computer equipment) is an essential component of that hardware and treated as tangible assets. If the software is not part of the hardware related equipment, it is treated as an intangible asset.

To ensure that only assets which are capitalized and deferred amounts recoverable in future periods is required, under international accounting referential, identification and recognition as more individualized items. This approach is useful because the residual value of acquisitions costs allocated is treated globally, in goodwill, whose impairment is less likely than an asset identified, thus providing less transparent to investors.

The ability to have control over the use of intangible assets: control involves the entity's ability to attract both benefits, future economic benefits arising from their involvement property.

Usually, the entity to obtain or protect their ability to control the legal rights as registered copyrights, patents, restrictions on trade agreements (if this is allowed) or legal coercion of employees to retain confidentiality.

[4] Standardele Internationale de Raportare Financiara, Interpretari la 1 ianuarie 2005, Editura CECCAR, 2005

In the absence of these rights, the entity cannot usually sufficient control of the economic benefits expected from teams of professionals and training programs and training and through specific technical or management skills.

Thus, considerable costs incurred for staff training, building a portfolio of customers, market share, customer or their fidelity can still be recognized as intangible assets, although these expenditures are investments in marketing and as "engines" that bring profits long-term.

"A balanced company is the research and development department and marketing at sharing responsibility to achieve a successful market-oriented innovation"[5]. In practice, however, characterized inter-relationships, often by rivalry and mutual distrust, determine missing several good opportunities.

Creating a foundation for constructive cooperation can only be in the interest of the company, but being aware that each carry a potential impact depending on customer satisfaction and thus to attract economic benefits for the firm.

Advantages (benefits) that may be associated with future economic intangible asset may take the form of revenue from selling products or services, savings, cost reductions and other economic benefits resulting from the use of intangible asset to the firm.

However, is recognition of an intangible asset conditional probability that the economic benefits attributable to it to return the entity. Evaluating the likelihood of the future economic benefits must be made on the basis of rational calculations that represent the best estimate for the set of economic conditions existing during the life of the asset.

Use reasoning to assess the safety associated with its future economic gain intangible asset is based upon the evidence available to initial recognition, giving priority to external evidence. Calling at fair value, determined primarily by reference to an active market or, failing that, using the best available information involves determining the present value of cash flow, adjusted according to the probability of its realization and the time value of money. Even at a low probability of occurrence of cash flow, fair value is considered as can be determined, and the asset will be recognized.

At the international level referential rightly converge more and more opinions to reflect the probability assessment of an asset, instead of its use as a threshold criterion of recognition, which will lead to amendment of the framework.

Credible evaluation of intangible assets is contingent on how to obtain them, such as initial assessment is done at their cost of production.

For a separately acquired intangible asset, the price paid for getting to the expectations about the probability that future economic benefits associated with immobilization purchased to return the enterprise. In other words, the effect probability is represented in the cost of immobilization. Or acquisition cost includes purchase price, including tax and excise duty stranded plus costs directly attributable to the intentional use immobilization preparations (handwork including employee benefits, arising directly from bringing the asset to its operating condition, professional fees arising from the same end, the costs of testing the proper functioning of immobilization). As in the case of tangible assets (IAS 16), capitalization of costs ceases when the intangible asset is ready for its intended use.

In many case, are internally generated intangible assets. Baseline to which they are recognized as assets is difficult to determine due to the nature of these categories of property, for which many were committed to spending at the time of their recognition as an asset.

Expenditure on intangible assets are getting treated according to the stage where they are involved in their creation or in the research phase or stage of development.

The whole reasoning is based on credible evaluation of the project concept (as a set of joint actions and schedule for a particular purpose). Capitalization of expenses incurred in obtaining an intangible asset is subject to their reliable measurement using a customized project.

[5] Kotler Ph. – Managementul marketingului, Editura Teora, Bucuresti, 2005

In the research phase of an internal project, expenditure on activities whose purpose is to obtain new knowledge, searching, delivering, evaluating and selecting alternatives. These costs are recognized as cost in the period were employed.

The development phase of an internal project involves expenses that can be capitalized of it is demonstrated the technical feasibility of completing, the intangible asset, intending to complete their ability to use or sell the restraint, the mechanism by which future benefits will likely evolve the ability to assess credible cost attributable to immobilization during its development.

In practice, the distinction between research costs and the phase of the development phase is, in many cases quite difficult.

Categories of assets that brand-names, may be difficult to estimate values that meet the criteria for their recognition as separate assets of internally generated goodwill. Not recognize them as assets is justified by the principle of prudence, capitalization of expenses involving failure to uncertainty rather than on evaluation methods with the volatile nature of their value. Hence the unequal treatment of acquired intangible assets from internally generated is not limited to their initial recognition, but it also regards their depreciation policy. The life of an intangible asset may be very long or even indefinite. Uncertainty justify caution to estimate the duration of her life, but life does not justify an unrealistically short. There may be both economic factors and legal factors that influence the life of an intangible asset. Economic factors determine the period in which the company will receive future economic benefits.

Legal factors may restrict the period in which the company controls access to those benefits. Life is the shortest of the periods determined by these factors, and the depreciated value of intangible assets will be allocated on a systematic basis over the term.

The life of an intangible asset is regarded as an undetermined time based on analysis of all factors (intended use of the asset by the enterprise, the typical life cycles, technology usage, commercial or other types of wear, stability domain, the expected actions of competitors, the costs of maintenance, control over the immobilization period, depending on the asset useful life that of another asset) there is no foreseeable limit to the period during which the asset is expected to generate net cash flows for the enterprise. In this case allegedly immobilization test for impairment under IAS 36, recoverable value comparing the carrying amount annually and whenever there is evidence that immobilization may be impaired.

Conclusions

The issue of recognition and evaluation of intangible assets, for which we tried to point out some defining elements, continues to incite controversy more so as, in a society marked by competition and change, the estimate of future benefits arising from investment depends less on the nature material or immaterial, and features more than the market within which it operates (the degree of competition, rapid technological change).

Relevance and reliability of accounting information claiming an appropriate accounting treatment, and international bodies (IASB and FASB) accounting standard – they put on their agenda a long-term joint project of accounting for intangible assets.

For now, the accounting regulations encourage (with out requiring) companies to disclose in the notes the categories of investments that have an impact on long-term performance of the company, but not above the threshold limiting their recognition as assets (IAS 38) in the balance sheet.

Accounting evolution is slow and there is always a gap between the volume of investments and intangible assets recognized immaterial, because you cannot make a reliable assessment of all components involved in the investment process.

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COMPARATIVE ANALYSIS OF THE LEVEL OF TAXATION IN ROMANIA AND EUROPEAN UNION

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Abstract
This paper contains a statistical and economic analysis of the tax system of Romania in the last decade, as well as comparisons with the other states of the European Union.
The overall tax ratio of Romania, i.e. the sum of taxes and social security contributions in the Gross Domestic Product (GDP), is the lowest in the European Union. Considering the fact that the GDP value, that constitutes the denominator of the overall tax ratio, includes estimates of production by the informal sector (the "grey" and "black" economy), this reduction can be explained not only by tax reductions, but also by the high tax evasion.

Key words: *taxation, tax revenues, tax policy, tax system, implicit tax rates*

Introduction

Taxes bring revenues to the public budget and those who pay them are directly interested by the system and the way in which the government spends the money. Taxes are the basis of a stable and prosperous society. As a result of the global economic crisis, the collecting of taxes is more and more difficult. Although is quite obvious that governments have to increase taxes and reduce public expenses, they will have to take these measures carefully, given the fact that „too much tax kills the tax".

We shall present in this work in a concise and theoretical way the concept of tax burden (emphasizing the factors which determine its level and the consequences of the level of tax burden upon the economy of a country), then we will analyse the level of taxation in EU and Romania in the last decade, and finally we will try to identify the taken fiscal measures and the ones that should be taken by the government of Romania, and by the governments of other Member States, for answer to the present global financial crisis.

The greater part of data presented and analysed in this work are taken from the 2010 edition of the report „Taxation trends in the European Union"[1], published by Eurostat, the Statistical Office of European Union and European Commision - Taxation and Customs Union. This report presents a number of fiscal harmonized indicators, based upon The European System of Accounts (ESA95), a system which allows a fair comparison of taxation systems and fiscal policies between the Member States of EU.

The present work focuses also upon the report „Doing Business 2011"[2], realised by the World Bank (WB) in co-operation with International Financial Corporation (IFC) and upon the study „Paying taxes 2011"[3], realised by WB, IFC and PricewaterhouseCoopers (PwC). This last report looks at tax systems from the business perspective, because business plays an essential role in contributing to economic growth and prosperity by employing workers, improving the skills and

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[1] http://ec.europa.eu/eurostat
[2] www.doingbusiness.org
[3] www.pwc.com/payingtaxes

knowledge base, buying from local suppliers and providing affordable products that improve people's lives. Business also pays and generates many taxes. As well as corporate income tax on profits, these include employment taxes, social contributions, indirect taxes and property taxes. Therefore, the impact that tax systems have on business is important. The two reports of WB, IFC and PwC analyze the facility in paying taxes in 183 economies from world-wide. The indicators used measures the cost of taxes paid by a standard company, but also the administrative charges due to accomplishment of fiscal obligations. Both aspects are very important for a company. These are measured through the identification of three sub-indicators: total tax rate (cost of all paid taxes), necessary time to accomplish the fiscal obligations (income tax, social security contributions paid by the employer, property taxes, transfer of properties taxes, dividends tax, capital income tax, financial transactions tax, wastes collecting taxes, as well as motor vehicle taxes and road taxes), as well as the number of fiscal payments made by the company during a fiscal year.

1. Tax burden. Factors of influence and consequences

Tax burden shows the level of pressure of taxes or in other words, how much is the fiscal burden lying heavy on tax payers' shoulders. The most common way to measure the tax burden of a country is the overall tax ratio (OTR), i.e. the sum of taxes and social security contributions as a percentage of gross domestic product (GDP). This indicator reflects the part from revenues created at the level of real economy that is shifted to the State through the taxes and social contributions. OTR is influenced by two categories of factors: external and internal.

Through the external ones, we can mention:

- the level of development of the country, given by the GDP value per inhabitant. Usually, the tax burden is greater in the countries which have a high level of GDP per inhabitant since the capacity of fiscal contribution of inhabitants is higher in these States.

- the level of taxation from other countries. The fiscal policy of a state has to take into consideration the fiscal policies of other countries, since a high tax burden can determine a migration of money and manpower to countries with a lower taxation.

- the level and structure of public expenses. In countries where public expenses for education, culture, health, social security etc. are greater, the State can pretend higher taxes, since their degree of reversibility is substantial.

The internal factors which influence the level of taxation are:

- the type of used tax rates (generally progressive or proportional rates). In states where the progressive rates are most used, the tax burden is higher.

- the methods of valuation and determination of the used tax base. Different methods can determine an overvaluation or an undervaluation of the taxable product.

- the offered fiscal facilities (exemptions, deductions or reductions to tax payment). The higher their number, the lower the tax burden.

Knowing the level of taxation is important because its high level can have bad consequences upon the economy of a country. Among these effects, we can mention:

- effects upon the production. A high level of taxation of labour, savings and investments determines the diminution of production under two aspects: discourages the setting up of a business (diminishes the enterprising spirit) and also discourages work.

- effects upon the purchasing power. When taxes increase, companies seek to include in the sale prices of these rises, and the employees want higher salaries to compensate for the reduction of purchasing power resulted from the rise of prices. The wage rises are introduced also in the sale prices and therefore we are put face to face to a vicious circle.

- effects upon the degree of tax receipts. In the case of tax burden rise, it appears the phenomenon of tax resistance, expressed by the underground economy and international tax evasion.

2. Level of taxation in European Union

In 2008, the first year of economic and financial crisis, the overall tax ratio was of 39,3% in EU-27[4], in a slight decrease as compared to 2007, when it was situated at 39,7% **(table no. 1)**. This ratio, which was of 40,6% in 2000, decreased till 38,9% in 2004, before rising till 2007.

Table no. 1. Total tax revenue (including social security contributions) in % of GDP

	2000	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**
Belgium	45,0	45,0	45,1	44,6	44,7	44,7	44,3	43,9	44,3
Bulgaria	32,5	30,9	29,6	32,2	33,1	34,0	33,2	34,2	33,3
Czech Republic	33,8	34,0	34,8	35,7	37,4	37,1	36,7	37,2	36,1
Denmark	49,4	48,5	47,9	48,0	49,0	50,8	49,6	49,0	48,2
Germany	41,9	40,0	39,5	39,6	38,7	38,8	39,2	39,4	39,3
Estonia	31,1	30,2	31,0	30,8	30,6	30,6	31,1	32,3	32,2
Ireland	31,6	29,8	28,5	29,0	30,3	30,8	32,3	31,4	29,3
Greece	34,6	33,2	33,7	32,1	31,2	31,8	31,7	32,4	32,6
Spain	33,9	33,5	33,9	33,9	34,5	35,6	36,4	37,1	33,1
France	44,1	43,8	43,1	42,9	43,2	43,6	43,9	43,2	42,8
Italy	41,8	41,5	40,9	41,3	40,6	40,4	42,0	43,1	42,8
Cyprus	30,0	30,9	31,2	33,0	33,4	35,5	36,5	40,9	39,2
Latvia	29,5	28,5	28,3	28,5	28,5	29,0	30,4	30,5	28,9
Lithuania	30,1	28,6	28,4	28,1	28,3	28,5	29,4	29,7	30,3
Luxembourg	39,1	39,8	39,3	38,1	37,3	37,6	35,6	35,7	35,6
Hungary	39,0	38,2	37,8	37,9	37,4	37,5	37,2	39,8	40,4
Malta	28,2	30,4	31,5	31,4	32,9	33,9	33,7	34,6	34,5
Netherlands	39,9	38,3	37,7	37,4	37,5	37,6	39,0	38,9	39,1
Austria	43,2	45,3	43,9	43,8	43,4	42,3	41,9	42,2	42,8
Poland	32,6	32,2	32,7	32,2	31,5	32,8	33,8	34,8	34,3
Portugal	34,3	33,9	34,7	34,8	34,1	35,1	35,9	36,8	36,7
Romania	30,2	28,6	28,1	27,7	27,2	27,8	28,5	29,0	28,0
Slovenia	37,5	37,7	38,0	38,2	38,3	38,6	38,3	37,8	37,3
Slovakia	34,1	33,1	33,1	32,9	31,5	31,3	29,2	29,3	29,1
Finland	47,2	44,6	44,6	44,0	43,5	44,0	43,5	43,0	43,1
Sweden	51,8	49,9	47,9	48,3	48,7	49,5	49,0	48,3	47,1
United Kingdom	36,7	36,4	34,9	34,7	35,1	36,0	36,8	36,5	37,3
EU-27 average									
- GDP-weighted	40,6	39,7	39,0	39,0	38,9	39,2	39,7	39,7	39,3
- arithmetic	37,2	36,6	36,3	36,3	36,4	36,9	37,0	37,4	37,0
EA-16 average									
- GDP-weighted	41,2	40,3	39,8	39,8	39,5	39,6	40,2	40,4	39,7
- arithmetic	37,9	37,6	37,4	37,3	37,2	37,6	37,7	38,1	37,6

Source: http://ec.europa.eu/eurostat

The total tax burden in euro area (EU-16[5]) was of 39,7% from GDP in 2008 as compared to 40,4% in 2007. From 2000, taxes in euro area had a similar tendency to EU-27, though at a slight higher level.

[4] Belgium, Bulgaria, Czech Republic, Denmark, Germany, Estonia, Ireland, Greece, Spain, France, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Malta, Netherlands, Austria, Poland, Portugal, Romania, Slovenia, Slovakia, Finland, Sweden, United Kingdom

In comparison with other countries, generally the tax burden remains high in EU-27. Thus, in 2008 OTR in EU-27 was with 13,2% higher than that registered in United States, with 11,2% higher than that from Japan and with 4,5 % higher than the average of OCDE Member States[6].

In spite of all these, the tax burden varies significantly from a Member State to another. In 2008 the most reduced levels of OTR were registered in Romania (28,0%), Latvia (28,9%), Slovakia (29,1%) and Ireland (29,3%), and the highest in Denmark (48,2%) and Sweden (47,1%).

Between 2000 and 2008, the highest reductions of OTR were registered in Slovakia (from 34,1% in 2000 to 29,1% in 2008), Sweden (from 51,8% to 47,1%) and Finland (from 47,2% to 43,1%), and the highest rises in Cyprus (from 30,0% to 39,2%) and Malta (from 28,2% to 34,5%).

In 2008, the effects of financial crisis were felt most at the level of public expenses than at the level of public revenues, because of the choosing of expenses programs meant to prevent the impact of crisis. OTR rose in nine Member States as compared to 2007.

Implicit tax rates (ITR) measure the effective average tax burden on different types of economic income or activities, i.e. on labour, consumption and capital, as the ratio between revenue from the tax type under consideration and its (maximum possible) base. The data from the **table no. 2** help us to understand how the level of taxation evolved under the aspect of these three economic incomes.

Table no. 2. The ITR by type of economic functions in EU Member States

	Implicit tax rates (%) on					
	Consumption		**Labour**		**Capital**	
	2000	**2008**	**2000**	**2008**	**2000**	**2008**
EU-27 average	**20,9**	**21,5**	**35,8**	**34,2**	**:**	**:**
EA-16 average	**20,5**	**20,8**	**34,5**	**34,4**	**26,5**	**27,2**
Belgium	21,8	21,2	43,9	42,6	29,3	32,7
Bulgaria	19,7	26,4	38,7	27,6	:	:
Czech Republic	19,4	21,1	40,7	39,5	20,9	21,5
Denmark	33,4	32,4	41,0	36,4	36,0	43,1
Germany	18,9	19,8	40,7	39,2	28,9	23,1
Estonia	19,8	20,9	37,8	33,7	6,0	10,7
Ireland	25,9	22,9	28,5	24,6	:	15,7
Greece	16,5	15,1	34,5	37,0	19,9	:
Spain	15,7	14,1	28,7	30,5	29,7	32,8
France	20,9	19,1	42,1	41,4	38,1	38,8
Italy	17,9	16,4	43,7	42,8	29,6	35,3
Cyprus	12,7	20,6	21,5	24,5	23,8	36,4
Latvia	18,7	17,5	36,7	28,2	11,2	16,3
Lithuania	18,0	17,5	41,2	33,0	7,2	12,4
Luxembourg	23,1	27,1	29,9	31,5	:	:
Hungary	27,5	26,9	41,4	42,5	15,9	19,2
Malta	15,9	20,0	20,6	20,2	:	:
Netherlands	23,7	26,7	34,5	35,4	20,8	17,2
Austria	22,1	22,1	40,1	41,3	27,3	27,3
Poland	17,8	21,0	33,6	32,8	20,5	22,5
Portugal	19,2	19,1	27,0	29,6	32,7	38,6
Romania	16,8	17,7	32,2	29,5	:	:
Slovenia	23,5	23,9	37,7	35,7	15,7	21,6

[5] Belgium, Germany, Ireland, Greece, Spain, France, Italy, Cyprus, Luxembourg, Malta, Netherlands, Austria, Portugal, Slovenia, Slovakia, Finland

[6] http://www.oecd.org

Slovakia	21,7	18,4	36,3	33,5	22,9	16,7
Finland	28,6	26,0	44,1	41,3	36,0	28,1
Sweden	26,3	28,4	47,2	42,1	43,4	27,9
United Kingdom	19,4	17,6	25,3	26,1	44,7	45,9

Source: http://ec.europa.eu/eurostat

The labour taxes remain the most important source of fiscal incomes, representing over 40% from total revenues in EU-27, followed by the consumption tax at about a quarter and capital tax, which represents little more than a fifth.

ITR on labour[7], which measures the degree of labour incomes taxation, remained as a matter of fact unchanged in EU-27, being situated at 34,2% in 2008 as compared to 34,3% in 2007, after has decreased from 2000, when it was of 35,8%. Among Member States, ITR on labour varied in 2008 from 20,2% in Malta, 24,5% in Cyprus and 24,6% in Ireland, to 42,8% in Italy, 42,6 % in Belgium and 42,4% in Hungary.

ITR on consumption[8], which increased in EU-27 between 2001 and 2007, it decreased from 22,2% in 2007 to 21,5% in 2008. In 2008, the lowest values of ITR on consumption were in Spain (14,1%), Greece (15,1%) and Italy (16,4%) and the highest in Denmark (32,4%), Sweden (28,4%) and Luxemburg (27,1%).

In EU-27 ITR on capital [9] was of 26,1% in 2008 as compared to 26,8% in 2007. The lowest values of the ration were registered in Estonia (10,7%), Latvia (12,4%) and Ireland (15,7%), and the highest in United Kingdom (45,9%), Denmark (43,1%) and France (38,8%).

In order to compare the maximum personal income tax rate and corporate income tax rate, we will use the data from **table no. 3**.

The maximum personal income tax rate (PIT)[10] rose in EU-27 in 2010, mostly because of an increase of 10 percentage points in United Kingdom. In 2010, the maximum personal income tax rates were highest in Sweden (56,4%), Belgium (53,7%) and Netherlands (52,0%), and the lowest in Bulgaria (10,0%) and Czech Republic (15,0%) and Lithuania (15,0%). Between 2000 and 2010, the highest diminutions were registered in Bulgaria (from 40,0% in 2000 to 10,0% in 2010), Romania (from 40,0% to 16,0%) and Slovakia (from 42,0% to 19,0%), these countries applying the single tax rate system. The highest rises of the rate in the same period were registered in United Kingdom (from 40,0% to 50,0%) and Sweden (from 51,5% to 56,4%).

[7] The ITR on labour is calculated as the ratio of taxes and social security contributions on employed labour income to total compensation of employees.

[8] The ITR on consumption is the ratio between the revenue from all consumption taxes and the final consumption expenditure of households.

[9] The ITR on capital is the ratio between taxes on capital and aggregate capital and savings income. Specifically it includes taxes levied on the income earned from savings and investments by households and corporations and taxes, related to stocks of capital stemming from savings and investment in previous periods. The denominator of the capital ITR is an approximation of world-wide capital and business income of residents for domestic tax purposes.

[10] The top statutory personal income tax rate reflects the tax rate for the highest income bracket. The rates also include surcharges, state and local taxes.

Table no. 3. The maximum income tax rate, in %

	Personal income tax rate				Corporate income tax rate			
	2000	**2009**	**2010**	**Difference 2000-2010**	**2000**	**2009**	**2010**	**Difference 2000-2010**
EU-27 average	**44,7**	**37,1**	**37,5**	**-7,2**	**31,9**	**23,5**	**23,2**	**-8,7**
EA-16 average	**48,4**	**42,1**	**42,4**	**-6,0**	**34,9**	**25,9**	**25,7**	**-9,2**
Belgium	60,6	53,7	53,7	-7,0	40,2	34,0	34,0	-6,2
Bulgaria	40,0	10,0	10,0	-30,0	32,5	10,0	10,0	-22,5
Czech Republic	32,0	15,0	15,0	-17,0	31,0	20,0	19,0	-12,0
Denmark	59,7	59,0	51,5	-8,2	32,0	25,0	25,0	-7,0
Germany	53,8	47,5	47,5	-6,3	51,6	29,8	29,8	-21,8
Estonia	26,0	21,0	21,0	-5,0	26,0	21,0	21,0	-5,0
Ireland	44,0	41,0	41,0	-3,0	24,0	12,5	12,5	-11,5
Greece	45,0	40,0	45,0	0,0	40,0	25,0	24,0	-16,0
Spain	48,0	43,0	43,0	-5,0	35,0	30,0	30,0	-5,0
France	59,0	45,8	45,8	-13,2	37,8	34,4	34,4	-3,4
Italy	45,9	45,2	45,2	-0,7	41,3	31,4	31,4	-9,9
Cyprus	40,0	30,0	30,0	-10,0	29,0	10,0	10,0	-19,0
Latvia	25,0	23,0	26,0	1,0	25,0	15,0	15,0	-10,0
Lithuania	33,0	15,0	15,0	-18,0	24,0	20,0	15,0	-9,0
Luxembourg	47,2	39,0	39,0	-8,2	37,5	28,6	28,6	-8,9
Hungary	44,0	40,0	40,6	-3,4	19,6	21,3	20,6	1,0
Malta	35,0	35,0	35,0	0,0	35,0	35,0	35,0	0,0
Netherlands	60,0	52,0	52,0	-8,0	35,0	25,5	25,5	-9,5
Austria	50,0	50,0	50,0	0,0	34,0	25,0	25,0	-9,0
Poland	40,0	32,0	32,0	-8,0	30,0	19,0	19,0	-11,0
Portugal	40,0	42,0	42,0	2,0	35,2	26,5	26,5	-8,7
Romania	40,0	16,0	16,0	-24,0	25,0	16,0	16,0	-9,0
Slovenia	50,0	41,0	41,0	-9,0	25,0	21,0	20,0	-5,0
Slovakia	42,0	19,0	19,0	-23,0	29,0	19,0	19,0	-10,0
Finland	54,0	49,1	48,6	-5,4	29,0	26,0	26,0	-3,0
Sweden	51,5	56,4	56,4	4,9	28,0	26,3	26,3	-1,7
United Kingdom	40,0	40,0	50,0	10,0	30,0	28,0	28,0	-2,0

Source: http://europa.eu/

The corporate income tax (CIT)[11] rates continued to decrease in 2010 in EU-27. The highest levels of CIT in 2010 were registered in Malta (35,0%), France (34,4%) and Belgium (34,0%), and the lowest in Bulgaria (10,0%), Cyprus (10,0%) and Ireland (12,5%). Between 2000 and 2010, the highest diminutions of rate were registered in Bulgaria (from 32,5% to 10,0%), Germany (from 51,6% to 29,8%), Cyprus (from 29,0% to 10,0%) and Greece (from 40,0% to 24,0%).

According to the data from **table no. 4**, in EU-27 the VAT standard average rate rose from 19,8% in 2009 to 20,2% in 2010. As compared to 2000, in 2010 the rise of VAT average rate was of

[11] Taxation of corporate income is not only conducted through the CIT, but, in some Member States, also through surcharges or even additional taxes levied on tax bases that are similar but often not identical to the CIT. In order to take these features into account, the simple CIT rate has been adjusted for comparison purposes: notably, if several rates exist, only the 'basic' (non-targeted) top rate is presented; existing surcharges and averages of local taxes are added to the standard rate.

1%. In 2010, the VAT standard rate varies from 15,0% in Cyprus and Luxemburg, to 25,0% in Denmark, Hungary and Sweden.

Table no. 4. Standard rate of value added tax, in %

	2000	**2009**	**2010**	**Difference 2000-2010**
EU-27 average	19,2	19,8	20,2	1,0
Belgium	21,0	21,0	21,0	0,0
Bulgaria	20,0	20,0	20,0	0,0
Czech Republic	22,0	19,0	20,0	-2,0
Denmark	25,0	25,0	25,0	0,0
Germany	16,0	19,0	19,0	3,0
Estonia	18,0	20,0	20,0	2,0
Ireland	21,0	21,5	21,0	0,0
Greece	18,0	19,0	23,0	5,0
Spain	16,0	16,0	18,0	2,0
France	19,6	19,6	19,6	0,0
Italy	20,0	20,0	20,0	0,0
Cyprus	10,0	15,0	15,0	5,0
Latvia	18,0	21,0	21,0	3,0
Lithuania	18,0	19,0	21,0	3,0
Luxembourg	15,0	15,0	15,0	0,0
Hungary	25,0	25,0	25,0	0,0
Malta	15,0	18,0	18,0	3,0
Netherlands	17,5	19,0	19,0	1,5
Austria	20,0	20,0	20,0	0,0
Poland	22,0	22,0	22,0	0,0
Portugal	17,0	20,0	20,0	3,0
Romania	19,0	19,0	24,0	0,0
Slovenia	19,0	20,0	20,0	1,0
Slovakia	23,0	19,0	19,0	-4,0
Finland	22,0	22,0	23,0	1,0
Sweden	25,0	25,0	25,0	0,0
United Kingdom	17,5	15,0	17,5	0,0

Source: http://europa.eu/

Between 2000 and 2010, the VAT rate remained unchanged in 13 Member States, rose in 12 Member States and diminished only in Slovakia (from 23,0% in 2000 to 19,0% in 2010) and Czech Republic (from 22, 0% to 20,0%). The highest rises were registered in Greece (from 18,0% to 23,0%) and Cyprus (from 10,0% to 15,0%).

The EU Commission forecasts that in 2009-2011 the overall tax ratio will remain well below 2008 levels, as governments are keen to maintain favourable conditions for business development. However, in the longer term, the accumulation of debt by Member States leads to expect that governments will try to consolidate their budgets, so that the tax cuts will be limited. In addition, EU general government expenditure has increased considerably: from 2007 to 2010 it has risen by more than five points of GDP, surpassing the 50% mark. The expenditure ratio is expected to start declining only in 2011.

3. Level of taxation in Romania

According to the data from **table no. 5**, the overall tax ratio in Romania was of 28,0% in 2008, with 9 percentage points lower than the average EU-27 (37,0%). The taxation level in Romania is the lowest from EU and significantly lower than in neighbouring countries Bulgaria (33,3%) and Hungary (40,4%).

Table no. 5. Taxation in Romania (2000-2008)

	2000	2001	2002	2003	2004	2005	2006	2007	2008	Ranking in 2008*
A. Structure of revenues (% of GDP)										
Indirect taxes	12,2	11,3	11, 6	12,3	11,7	12,9	12,8	12,6	12,0	**22**
VAT	6,5	6,2	7,1	7,2	6,7	8,1	7,9	8,1	7,9	**12**
Excise duties and consumption taxes	3,0	2,8	2,6	3,5	3,6	3,3	3,2	3,0	2,7	**17**
Other taxes on products (including import duties)	2,2	1,6	1,3	1,0	1,0	1,0	1,2	0,7	0,6	**21**
Other taxes on production	0,5	0,6	0,6	0,6	0,5	0,5	0,6	0,8	0,8	**17**
Direct taxes	7,0	6,4	5,8	6,0	6,4	5,3	6,0	6,7	6,7	**26**
Personal income	3,5	3,3	2,7	2,8	2,9	2,3	2,8	3,3	3,4	**25**
Corporate income	3,0	2,5	2,6	2,8	3,2	2,7	2,8	3,1	3,0	**15**
Other	0,6	0,5	0,4	0,3	0,3	0,3	0,3	0,4	0,3	**22**
Social contributions	11,1	10,9	10,7	9,4	9,1	9,6	9,7	9,7	9,3	**19**
Employers´	8,1	7,1	6,5,	6,2	5,9	6,4	6,3	6,2	6,0	**15**
Employees´	3,0	3,8	4,2	3,1	3,0	3,0	3,3	3,3	3,2	**13**
Self- and non-employed	0,0	0,0	0,1	0,2	0,2	0,2	0,1	0,2	0,1	**25**
TOTAL	**30,2**	**28,6**	**28,1**	**27,72**	**27,2**	**27,8**	**28,5**	**29,0**	**28,0**	***27***
Cyclically adjusted total tax to GDP ratio	32,6	30,1	29,2	28,4	26,8	27,3	27,0	26,7	24,8	
B. Structure by level of government (% of total taxation)										
Central government	59,5	59,7	60,1	62,8	63,4	63,0	63,0	62,2	62,9	***10***
State government	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	**n.a.**
Local government	3,9	3,8	3,1	3,5	3,4	3,1	3,4	4,0	3,2	***22***
Social security funds	36,6	36,5	36,8	33,7	33,2	33,9	33,6	33,0	32,9	***12***
EU institutions	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	**n.a.**
C. Structure by economic function (% of GDP)										
Consumption	11,5	10,6	10,9	11,5	11,1	12,3	12,1	11,8	11,2	***16***
Labour	13,2	12,9	12,4	11,1	10,7	11,0	11,6	11,8	11,6	***23***
Employed	13,2	12,8	12,3	11,1	10,7	11,0	11,5	11,8	11,5	***23***
Non-employed	0,0	0,0	0,0	0,0	0,0	0,0	0,0	0,1	0,1	***26***
Capital	5,5	5,1	4,8	5,0	5,4	4,5	4,9	5,4	5,2	***22***
Capital and business income	4,3	3,9	3,8	4,0	4,5	3,6	3,9	4,2	4,2	***22***
Income of corporations	3,0	2,7	2,6	2,8	3,2	2,7	2,8	3,1	3,0	***15***
Income of households	1,2	1,1	1,0	0,9	1,0	0,6	0,72	0,8	0,9	***12***

Income of self-employed (including SSC)	0,1	0,2	0,2	0,3	0,4	0,3	0,3	0,4	0,3	***25***
Stocks of capital / wealth	1,2	1,2	1,1	1,0	0,9	0,9	1,0	1,1	1,0	***20***
D. Environmental taxes (% of GDP)										
Environmental taxes	3,4	2,4	2,1	2,4	2,4	2,0	1,9	2,1	1,8	***25***
Energy	3,2	1,9	1,7	2,0	2,1	1,8	1,7	1,7	1,4	***23***
Transport (excl. fuel)	0,1	0,1	0,1	0,1	0,1	0,1	0,1	0,3	0,4	***17***
Pollution/resources	0,1	0,4	0,3	0,3	0,2	0,1	0,1	0,0	0,0	***22***
E. Implicit tax rates (%)										
Consumption	17,0	15,6	16,2	17,7	16,4	17,9	17,8	18,0	17,7	***21***
Labour employed	33,5	31,0	31,2	29,6	29,0	28,1	30,1	30,2	29,5	***21***
Capital	:	:	:	:	:	:	:	:	:	

Note: **The ranking is calculated in descending order.*

Source: http://ec.europa.eu/eurostat

According to data published by the Ministry of Public Finance of Romania, in 2010 Romania registered the lowest value of the overall tax-to-GDP ratio from the last decade: 27,1%, in decrease as compared to 2009, when it was of 27,4% **(table no. 6)**.

Table no. 6. Taxation in Romania (2009-2010)

Structure of revenues (% of GDP)	**2009**	**2010**
Indirect taxes	**10,7**	**11,7**
VAT	7,0	7,7
Excise duties and consumption taxes	3,2	3,4
Other taxes on products (including import duties)	0,1	0,1
Other taxes on production	0,4	0,5
Direct taxes	**7,0**	**6,4**
Personal income	3,8	3,5
Corporate income	2,2	2,0
Other	1,0	1,0
Social contributions	**9,7**	**8,9**
TOTAL	**27,4**	**27,1**

Source: http://discutii.mfinante.ro/static/10/Mfp/buget/executii/anexa2_bgcdec2010.pdf

The fiscal structure from Romania points out in many respects. In Romania the indirect taxes have a very great weight, since in 2008 Romania occupied from this point of view the fourth place in EU-27 after Bulgaria, Cyprus and Malta. Indirect taxes ensure 42,7% from total fiscal revenues, as compared to 37,6% EU-27 average, while the weight of social security contributions is of 33,3% (as compared to the EU-27 average of 30,2%) and of direct taxes of only 24,0% (the average in EU-27 is of 32,4%). An important element which determined this structure is the VAT high weight in total tax (28,2% in 2008), the third biggest within EU-27. The low level of direct taxes is due mainly to low personal income taxes (only 3,4% from GDP), comprising about 42% from EU-27 average. If in 2009 the structure of revenues from the three types of taxes modified in the sense of reduction of the weight of indirect taxes to 39% and of rise of weight of social security contributions to 35,4% and of direct taxes to 25,6%, in 2010, the structure of taxes was very close to that from 2008. **(table no. 7)**

Table no. 7. Taxation in Romania (2008-2010)

Structure of revenues (% of total taxation)	2008	2009	2010
Indirect taxes	42,7	39,0	43,1
Direct taxes	24,0	25,6	24,0
Social contributions	33,0	35,4	32,9
TOTAL	**100,0**	**100,0**	**100,0**

Source:
http://discutii.mfinante.ro/static/10/Mfp/buget/executii/anexa2_bgcdec2010.pdf
http://discutii.mfinante.ro/static/10/Mfp/buget/executii/dec2008.pdf

In 2008, the weight of central government revenues is more than a half from total (62,9%), while the local government revenues are marginal, composed of only 3,2%. The weight of social contributions is of 32,9%, with almost four percentage points over EU-27 average. In spite of all these, in percentage from GDP, the revenues from social security contributions are with 1,5 percentage points under EU-27 average.

The overall tax ratio decreased continually within the period 2000-2004 with a total of three percentage points, mainly due to a reduction of revenues from social security contributions paid by employers, which diminished with more than one quarter. The rise of revenues from all three major fiscal categories, lead later on to a rise of OTR from 27,2% (in 2004) to 29,0% in 2007. In the following three years, the ratio registered again a descending trend, arriving to 28,0% in 2008, 27,4% in 2009 and 27,1% in 2010.

In order to compare the level of taxation from Romania with the one from EU-27 under the aspect of the three economic functions: consumption, labour and capital, we shall analyse the data from **table no. 5.**

The ITR on consumption is of 17,7% in 2008, with 3,8 percentage points lower than EU-27 average. As a result of the very big weight of final consumption of households in GDP, the consumption taxes as per cent of GDP are still in conformity with EU-27 average (11,2% as compared to EU-27 average of 12,0%).

The ITR on labour decreased constantly during the period 2000-2005, in total with more than five percentage points. The most significant reduction, of about a percentage point, can be noticed in 2005, the year of introduction of flat rate of personal incomes taxation (16%). Although, in 2006, ITRL increased with two percentage points and remained enough stable in 2007, but decreased in 2008 to 29,5%. ITRL was significantly below EU-27 average (34,2%), mainly as a result of low receipts from wage income tax. The cause is not only the reduced level of rate, but also the illicit work that is a common practice in Romania.

Capital taxation is one of the lowest in EU-27, obtaining only 5,2% from GDP, as compared to EU-27 average of 7,5%. This is due to reduced revenues from all categories of capital taxes. Because of the lack of data, ITR on capital is not available for Romania.

On the basis of available data, the environment taxes of 1,8% from GDP in 2008, are much below the EU-27 average (2,6%). In fact, this value is the third lowest in EU. Most of these taxes are applied to energy. Each of the other two categories of environment taxes, transport and pollution taxes, raise at least than half from EU average. The incomes from environment taxes decreased in the last years.

In **table no. 8** there are comprised the structural modifications of main taxes according to „Fiscal-Budgetary Strategy" of the Government during the period 2011-2013.

Table no. 8. The structural modifications of taxes in Romania in 2011-2013

Taxes	**% in GDP**
Personal income tax	3,3%-3,4%
Corporate income tax	2,1%
VAT	7,9-7,8%
Excise duties	3,2%-3,1%
Social security contributions	8,9-8,2%

Source: http://discutii.mfinante.ro/static/10/Mfp/strategbug/STRATEGIA_FB_27sept.pdf

For this period, there are planned the following measures in the fiscal domain:

a) Personal income tax. The rate of 16% will be maintained.

b) Corporate income tax. The rate of 16% will be maintained.

c) VAT. The standard VAT rate was increased from 19% to 24% beginning with 1st July 2010. Regarding the reduced rates, the Government's goal is to maintain the present values, respectively the 9% rate for some deliveries of goods and services stipulated by Fiscal Code and the 5% rate for delivery of dwellings as part of the social politics.

Also, the Government will follow the continuation of legislation improvement for the harmonization with the EU legislation, by transposition into national legislation of directives adopted at european level in VAT domain.

Regarding the legislative measures of reduction of fiscal fraud in VAT domain, these were concretized in:

- setting up of the Register of Intra-Community Operators, beginning with 1st July 2010, a measure introduced with the purpose of diminishing the fiscal evasion in the domain of intra-community operations.

- application of inverse taxation mechanism for deliveries of goods within the country from the following categories: cereals and technical plants, vegetables, fruits, meat, sugar, flour, bread, and bakery products, between taxable persons registered normally for VAT purposes. This measure will be applied after the obtaining by Romania of the authorization for application of derogation from provisions of art.193 from 112/2006/CE Directive regarding the common system of VAT with the ulterior modifications and completions, and it will come into force till 31st December 2011.

d) Excise duties. The Government aims at rising the excise duties in view of attaining the minimum level imposed by the community legislation in field, according to transition periods offered to Romania by European Commission, stipulated in the Adhesion Treaty and in 2010/12/CE Directive of modification of tobacco directives.

e) Social security contributions. The rates of social security contributions will be maintained on middle term.

The moderate evolution of gross average salary on middle term and gradual implementation of second pillar of pensions will lead to the diminution of weight of social security contributions in GDP till 2013 as compared to the level registered in 2008.

f) Local government taxes. We have in view the modification of fiscal legislation in the sense of granting the right to local authorities to modify the level of local rates and taxes depending on local necessities and the degree of supportability of population and through the implementation of a calculation system of the tax value of buildings and lands from built-up area by relating to their market value, where this is obviously greater than that determined through the calculus formula.

4. Fiscal reform as anti-crisis solution

According to the study „Paying taxes 2011"[12], almost 60% of the States from world-wide made legislative and procedural modifications meant to facilitate the taxes payment, despite the impact of recession and of heavy economic recovery.

The report shows the fact that in the last year, 40 States simplified the payment procedures of taxes. For countries in question, the necessary time to accomplish the tax liabilities decreased with a week on average, the cost of fiscal administration decreased with 5% on average, and the number of payments decreased with almost four. In total, 90 States reduced the corporative tax burden as compared to 2006.

According to the study, a typical company uses almost half of its profit for the payment of rates and taxes and spends seven weeks on average accomplishing the administrative charges due to tax liabilities payment, making a payment on average at each 12 days.

The report shows that the payment of taxes is easier for companies from developed economies which have the lowest costs to accomplish the tax liabilities and the most reduced bureaucracy. These economies tend to have mature fiscal systems, a much reduced administrative burden and use more the electronic means for tax payment and filling out the financial statements.

The conclusions of the study „Paying taxes 2011"regarding EU can be synthesized thus:

- Seven States from EU implemented during 2009-2010 fiscal reforms to facilitate the taxes'payment: Bulgaria, Czech Republic, Hungary, Lithuania, Netherlands, Portugal and Slovenia.

- UE situates below the global middle level as regards all the three sub-indicators. The total tax rate is of 44,2% (as compared to global average of 47,8%), the necessary time to observe the tax liabilities is of 222 hours (global average: 282), and the number of payments is 17,5 (global average: 29,9).

- The average number of taxes that the standard company must pay is of 9 at global level. The average in EU is of 10,9, varying from 5 in Sweden to 17 in Hungary, Romania and Italy.

- The taxes and contributions on wages and salaries represent the biggest part of the tax burden in EU – that is 64,3% from total tax rate in EU, as compared to global average of 33,8%.

- Many EU Member States have numerous taxes and contributions on wages, fact which increases the fiscal bureaucracy.

- The VAT rate is regulated at the community level, but the necessary time to observe the tax liabilities comprised in the VAT legislation varies depending on various administrative used practices. For example, the observance of tax liabilities regarding VAT needs 222 hours in Finland and 288 in Bulgaria.

In the analyse that gathers 183 of 191 States recognized in the world, Romania situates on the 151 place from the point of view of the facility with which taxes of a business can be paid, in a slight regress in comparison with the previous edition when it came on 147 place. This positioning is not due only to the Romanian tax system itself, but also to the tax reforms implemented in other countries.

The position of Romania in the second half of the classification is strongly influenced by the great number of payments of rates and taxes: no less than 133 payments during a year, of which 84 refer to payments of social security contributions. Romania occupies the second place at global level regarding the number of payment of taxes, being surpassed only by Ukraine (135). The biggest problem is the fact that there is no functional electronic system for payments.

The number of necessary hours for the compliance with fiscal legislation increased during last year from 202 hours to 222 hours in this year report. This is due mainly to the introduction of more difficult regulations regarding the employment contracts, as well as to the regulations regarding the profit tax payment (the minimum tax was removed since 1st October 2010).

[12] http://www.pwc.com/gx/en/paying-taxes/pdf/paying-taxes-2011.pdf

More, specialists expect that the fiscal measures taken by the Government during 2010 affect in the future the indicator regarding the tax payment. It's about the VAT increase from 19% to 24%, together with the introduction of new regulations regarding the VAT payment, an increase of local taxes (for example the motor vehicle tax, certificate issue tax, notifications and authorizations for publicity), as well as the introduction of a new system of penalty for delays in paying taxes.

The Romanian Government has also postponed the introduction of a simplified advance corporate income tax payments system (already implemented for banks), until 2012. When the system is introduced, it is expected that it will make the compliance procedure easier for the taxpayer and reduce the number of hours required.

The reduction of bureaucracy and of taxation level could have a good effect now when investors run from neighbouring countries because of the tax increases and seek new alternatives. Romania can profit by the unattractive economic policies of its neighbours to bring more foreign capital in the country.

In the last years, Hungary was a destination loved by foreign companies. The Hungarians surpass us in the classification of most propitious countries to start a business, as it results from the report „Doing Business 2011". They situate on 52 place and Romania on 54. But last year, the Government from Budapest decided the imposing of new „crisis" taxes and increase of some taxes to bring money to budget. Thus, the profit tax for earnings of over 2,5 millions dollars was increased from 16 to 19%. The energy, telecommunication and retail domains (dominated by foreign investors) must now pay additional taxes, called by economists the „Robin Hood taxes", comprised between 1,05% and 6,5%. Moreover, although approved at the end of last year, they will be applied retroactively also for 2010. Many foreign companies warned Hungarian Government that if the situation didn't change, they would relocate their operations. Romania could become a target for them, with minimum of effort.

Global crisis is only one of the causes which led to the decrease of foreign capital in Romania. Our country didn't attain its maximum potential not even in the boom period of direct foreign investments (2008). If we look at the total tax rate (**table no. 9**), Romania is more competitive than its Austrian, Slovakian, Czech, Ukrainian, Hungarian neighbours. But, we still have a lot of work. For example, we should eliminate the great number of taxes that an entrepreneur must pay in Romania.

Table no. 9. Total tax rate in states of Central and Eastern Europe

	States of Central and Eastern Europe	**Total tax rate (%)**
1.	Belarus	80,4
2.	Austria	55,5
3.	Ukraine	55,0
4.	Hungary	53,3
5.	Czech Republic	48,8
6.	Slovakia	48,7
7.	**Romania**	**44,9**
8.	Poland	42,3
9.	Albania	40,6
10.	Slovenia	35,4
11.	Serbia	34,0
12.	Croatia	32,5
13.	Moldova	30,9
14.	Bulgaria	29,0
15.	Bosnia and Herzegovina	23,0
16.	Macedonia	10,6

Source: http://www.pwc.com/gx/en/paying-taxes/pdf/paying-taxes-2011.pdf

Conclusions

As a result of the current economic crises, the focus on the role that tax can play in international development has increased. Tax revenues are a more sustainable source of financing for developing countries than debt or aid. But there are many challenges to tackle in increasing tax revenues in developing countries, including combating capital flight from these countries, reducing the size of their informal economies and helping their tax authorities to monitor compliance and collect the taxes due. The "Paying Taxes-2011" study results show that tax rates tend to be higher and the compliance burden heavier in the developing world. Reducing tax rates, broadening the tax base and making it easy to pay, can be important in encouraging local business to register and pay tax.

In the last three years, in European Union the trend was of reduction of taxation level, especially in the domain of corporate income tax. The reason is the competition between States to attract foreign investments which imply new jobs and prosperity. All the States try to create a competitive business environment, a fact proved by the reduction of total taxes ratio in the commercial profits, whose average decreased from 50,6% in 2004 to 49,8% in 2008 and 47,8% in 2010[13].

Romania can boast with the most reduced level of taxation from EU. Though, because of the bad assigned tax burden (high weight of social security contributions and of indirect taxes) and because of the bureaucracy, corruption and legislative instability, Romania is far to be a „tax haven".

The fiscal policies promoted by Romanian Governments influenced not only the structural evolution of fiscal system but also the size of taxes. The level of taxation was determined by the proportions of granted fiscal facilities (exemptions, reductions, deductions), of the level and type of rates, but also by the sensibility of taxable product. The social-economic policies promoted in economy influenced the tax burden through some factors as: degree of economic development, structure of property, structural distribution of revenues, structural evolution of global consumption etc. More, the quality of fiscal debts administration and the level of fiscal education of the population influence, through the fiscal fraud, the tax receipts and the tax burden.

Having a the reduced level of taxation, Romania can profit by the fact that the investors run from neighbouring countries because of the tax increases and seek new alternatives. We consider that the following measures in the fiscal domain could prove efficient to attract more foreign capital in the country:

- Reduction of bureaucracy. The time lost by Romanian companies to pay their taxes to the State represents a too great obstacle for potential investors. The introduction of unique printed form for payment of taxes and social security contributions is the first step to the reduction of bureaucracy.
- Tax reduction. Although if we look only at the total tax rate, Romania is doing better than other neighbours, the indirect taxes and the social security contributions remain between the highest in Europe. Their diminution will stimulate investors, stir up the labour market and finally it will be reflected in the consumption increase.
- Fiscal predictability. In the last six years, the Fiscal Code was modified of 60 times. The situation is more critical as, in many cases, the changes came into force immediately, as it happened with the increase with five percentage points of the VAT (from 19 to 24%).
- Simplification of juridical system. If the period to solve litigation is long, the investors prefer to avoid the respective State. An inefficient juridical system is one of the first things that damages to the attraction of foreign capital.

If Romania will take these measures and know to use its advantages (cheap labour, geographical position, available agricultural land, easy access to natural resources with advantageous

[13] http://www.pwc.com/gx/en/paying-taxes/pdf/paying-taxes-2011.pdf

price, potential of market growth in financial-banking, energy, telecommunications, transports, retail domains etc.) it could attract foreign investors, situation that generates many taxes.

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FINANCIAL DEVELOPMENT AND ROMANIAN SMES

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Abstract

Research has shown that financial development accelerates economic growth but little has been discussed about the disproportionate effect a country's financial development has on the growth of its small firms. With this in mind we propose a panel data analysis of the Romanian SMEs over the period 2002-2008. The results show that financial development exerts a positive effect on small firms relative to large ones. The analysis is based on data regarding: (a) the relative size of Romanian small and medium size enterprises (SMEs) in sectors like: industry, trade and services (calculated as the share of value added by different size class SMEs in total country's value added); (b) each sector's employment share and (c) Romania's level of financial development.

Keywords: *financial development, SMEs, firm size*

Introduction

Financial development is defined *"as the factors, policies, and institutions that lead to effective financial intermediation and markets, and deep and broad access to capital and financial services"*[1]. Following this statement local financial development can be regarded as a tool in assessing a country's economic performance in terms of local market's capacity to offer a stable source of financing for the private and public sector.

The following paper aims to empirically investigate the extent to which the local level of financial development favors small and medium sized enterprises (henceforth SMEs) over large ones and in which sectors. By analyzing the impact of financial development on the distribution of Romanian SMEs by sector of activity and by size class we try to answer a simple question: which are the most favored SMEs by the Romanian financial system?

The study is important for at least two reasons:

a) Knowing which sectors are mostly sought by financial intermediaries offers a broad perspective on the allocation of financial resources on the market. In addition by examining the size class distribution we are able to identify which enterprises are more likely to benefit from financial intermediary development

b) Romanian SMEs play a less prominent role in the local economy than their counterparts do, on an average in other EU Member States. This holds true for their contribution to employment (63.6 % vs. 67.4 % in the EU) but especially for their contribution to value added (42.2 %) which is significantly below the European average (57.9 %)[2]. One of the reasons why such situation is present is the fact that Romania's financial system still lags behind in supporting SMEs growth in spite of the tremendous changes it faced during the last couple of years when considerable progress had been made in restructuring and consolidating the banking sector, liberalizing the markets and opening-up to foreign ownership[3].

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To study the impact of Romania's financial development on SMEs growth by sector of activity and size class we proposed an empirical analysis which integrates data regarding SMEs value added and employment for 38 sectors during 2002 and 2008.

Based on Beck, Demirgüc-Kunt, Laeven, and Levine (2008)[4] research this paper focuses on a specific country by examining a broad cross section of economic sectors in which SMEs are present and testing whether overall financial development influences a specific size class SMEs more than the others.

The remainder of the paper is organized as follows. Section 2 presents a brief review of the literature on the issue concerning the effects of financial development on economic and firm's growth. Section 3 provides a short overview on Romanian SMEs and the local financial development. Section 4 describes the data and methodology used. Section 5 illustrates the main results and tests performed, and section 6 gives the concluding remarks.

Literature review

In the last few years several influential papers have examined the relationship between finance and growth at industry-level and firm-level in an attempt to document in greater detail the mechanisms, through which finance influences economic growth. Rajan and Zingales (1998)[5] managed to empirically prove that industrial sectors that are relatively more in need of external finance develop disproportionately faster in countries with more developed financial markets. They concluded that the level of financial development can also be seen as a factor in determining the size composition of an industry as well as its concentration.

Using Rajan and Zingales methodology, Cetorelli and Gambera (1999)[6] examined the role played by banking sector concentration on firm access to capital, showing that bank concentration promotes the growth of industries that are naturally heavy users of external finance by facilitating credit access to younger firms. In a different study Beck, Demirgüc-Kunt, and Maksimovic (2004)[7] find that small firms use less external finance than large firms (especially in terms of banks and equity finance) but benefit the most from better protection of property rights and financial intermediary development.

Guiso, Sapienza, and Zingales (2004)[8] studied the effects of differences in local financial development for Italian firms. They find that financial development enhances the probability of an individual to start his own business, favoring new firms entry, increasing competition, and promoting growth. Their results suggest that local financial development is an important determinant of the economic success of an area even in an environment where there are no frictions to capital movements.

The relationship between firm size and financial and institutional development was further investigated by Beck, Thorsten, Asli Demirgüç-Kunt, and Vojislav Maksimovic (2006)[9] who

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[4] Beck ,Thorsten, Asli Demirgüc-Kunt, Luc Laeven and Ross Levine. "Finance, Firm Size, and Growth." *Journal of Money, Credit, and Banking* vol. 40(2008): 1379-1405

[5] Rajan, Raghuram G. and Luigi Zingales. "Financial Dependence and Growth." *American Economic Review*, no. 88 *(*1998): 559

[6] Cetorelli, Nicola and Michele Gambera. "Banking Structure, Financial Dependence and Growth: International Evidence from Industry Data", *Federal Reserve Bank of Chicago, Working Paper Series*, (1999): 1, 30-31, http://www.chicagofed.org/digital_assets/publications/working_papers/1999/wp99_08.pdf

[7] Beck, Thorsten, Asli Demirgüç-Kunt and Vojislav Maksimovic. "Financing Patterns around the World: Are Small Firms Different?" *World Bank Policy Research Working Paper* (2004): 22, http://siteresources.worldbank.org/DEC/Resources/84797-1114437274304/FinancingPatterns_Aug2004-revisions.pdf

[8] Guiso, Luigi, Paola Sapienza, and Luigi Zingales. "Does Local Financial Development Matter?" *Quarterly Journal of Economics*, no. 119 (2004): 929

[9] Beck, Thorsten, Asli Demirgüç-Kunt, and Vojislav Maksimovic. "The Influence of Financial and Legal Institutions on Firm Size." *Journal of Banking and Finance*, no. 30 (2006): 2995

presented empirically, by analyzing data across 44 countries, that firm size is positively related to financial intermediary development, the efficiency of the legal system and property rights protection.

Extending Rajan and Zingales approach, in a 2008 study, Beck, Demirgüc-Kunt, Laeven, and Levine[10] highlighted another channel through which finance could be linked to growth: removing impediments for small firms. Using cross-industry, cross-country data, they showed that industries which are naturally composed of small firms grow faster in financially developed economies[11]. Their results indicate that improvements in the operation of the financial system can have cross-firm distributional effects, helping small-firms more than large ones. In the light of their findings it can be said that a country's level of financial development exerts a different effect on small firms vs. large ones by removing the growth constraints on small firm industries and accelerating disproportionately the growth of industries that for technological reasons are composed of small firms[12].

Inspired by the literature approaches so far illustrated, the present paper aims to empirically investigate the extent to which the local level of financial development favors small and medium sized enterprises over large ones and in which sectors. The entire analysis is conducted taking into account the SMEs definition presented by the European Commission's in its Recommendation no. 361 from 2003. According to article 2 from the cited Recommendation, "the category of micro, small and medium-sized enterprises (SMEs) is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million. The following table presents the headcount ceiling, the turnover ceiling and the balance sheet ceiling which delineate SMEs by size class[13] :

Table 1: Ceilings for differentiating SMEs by size class

Enterprise category	**Headcount**	**Turnover or Balance sheet total**
medium-sized	< 250	≤ € 50 million ≤ € 43 million
small	< 50	≤ € 10 million ≤ € 10 million
micro	< 10	≤ € 2 million ≤ € 2 million

Source: European Commission, Enterprise and Industry

Besides the staff headcount ceiling, an enterprise can be included in the SMEs category if it meets either the turnover ceiling or the balance sheet ceiling, but not necessarily both.

In caring out our empirical analysis we use the headcount ceiling to differentiate SMEs by size class.

1. Overview of Romanian SMEs and financial sector development

The transition to a market economy triggered by the late 1989 events lead to a steady and continuous transformation of Romania's ownership structure from a predominantly state owned to a predominantly private owned.

Private entities, organized mainly as limited liability companies or joint family associations were among the first to register a constant year on year growth. During 2002-2008 the number of

[10] Beck,Thorsten, Asli Demirgüc-Kunt, Luc Laeven and Ross Levine. "Finance, Firm Size, and Growth." *Journal of Money, Credit, and Banking* vol. 40(2008): 1379-1405

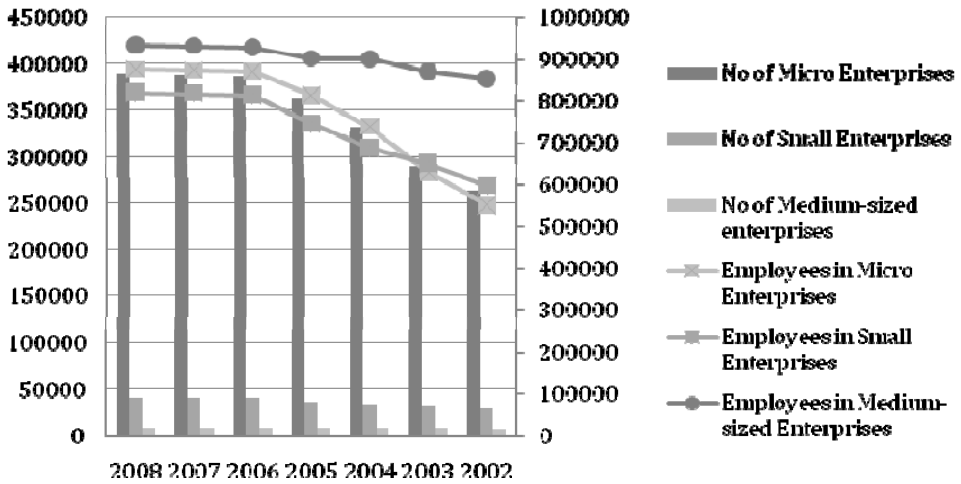
[11] Levine, Ross. "Finance and Growth: Theory and Evidence." *NBER Working Paper Series*, Working Paper 10766, (2004): 74, http://www nber.org/papers/w10766.pdf

[12] IRIS Center, University of Maryland "Micro and Small Enterprises, Dynamic Economic Growth, and Poverty Reduction: A Review of the Conceptual and Empirical Effects of MSES on Development**."** *United States Agency for International Development*, Microreport no 62, (2006): 18. http://www microlinks.org/ev_ en.php?ID=12577_201&ID2=DO_TOPIC

[13] "Small and medium-sized enterprises (SMEs): SME Definition", European Commission, Enterprise and Industry, last modified 31.10 2010, http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/sme-definition/index_en htm

active SMEs by size class increased at a fast pace contributing to the country's employment growth rate.

Chart 1: Romanian SMEs by size class (in number of units and number of employees)

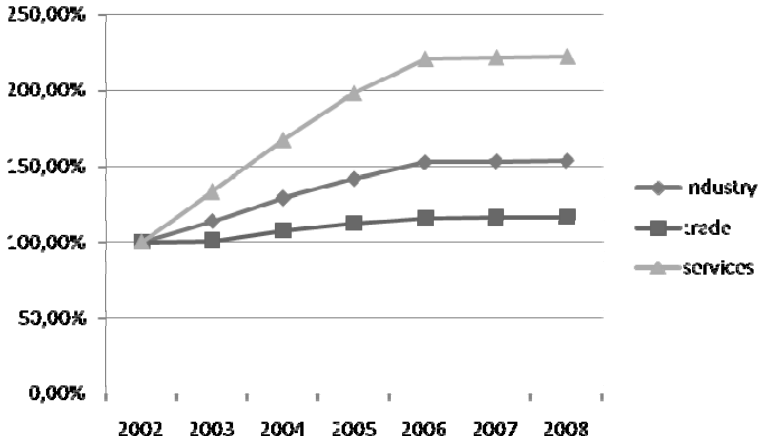


Source: data processed from European Commission, Enterprise and Industry. "Small and medium-sized enterprises (SMEs): SME Performance Review", last modified 07.01.2011, http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/performance-review/index_en htm

By structure size Romanian SMEs are dominated by Micro Enterprises which in 2008 represented 88.48% of all SMEs in terms of number of units, a 1.09% increase from 2002. Looking at the number of persons employed it can be noticed that Medium-Sized Enterprises are the prime providers of employment, followed very closely by Micro Enterprises.

By sectors of activity, the evolution of SMEs is highlighted in the chart below.

Chart 2: Romanian SMEs sector growth index
(2002=100)



Source: data processed from European Commission, Enterprise and Industry. "Small and medium-sized enterprises (SMEs): SME Performance Review", last modified 07.01.2011, http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/performance-review/index_en htm

The most dynamic SMEs in terms of unit growth have been those active in the service sector which registered a huge increase from 2002 to 2008 (122.20%). This is due to the fact that most service related activities require neither high investment in fixed assets nor expensive labor cost. Thus, it can be said that, overall, the entry barriers are quite low.

Regarding the evolution of industry and trade related SMEs, as can be seen; these have registered a constant growth over the analyzed period. Although their number increased in absolute terms they were heavily influenced by the structural changes that took place on the market: the decline in the share of firms active in trade and industry, in favor of companies that provide different types of services to citizens and businesses.

The high growth trend was constant for all sectors especially between 2002 and 2006. Once Romania entered European Union in 2007, SMEs growth rate in terms of units slowed down due to market openness.

Now looking at Romania's level of financial development during the studied period 2002-2008 it can be said that our country trailed behind other EU member States in the region despite the fact that during 2003-2007 the shares of credit institutions and insurance companies in total financial assets diminished, while those of leasing companies and other non-bank financial institutions widened due to looser prudential regime. This was highlighted in the Financial Stability Report conducted by the National Bank of Romania in 2007.

In 2010 our country was included for the first time in the World Economic Forum's Financial Development Report ranking 44 in the chart of the 57 most developed financial markets worldwide, with an overall score of 3.05 on a one-to-seven scale. By structure, Romania's financial development index presented itself as follows:

Table 2: Romania Financial Development Index 2010

Overall index: 3.05, rank 44			
Categories	**Pillars**	**Score**	**Rank**
Factors, policies and institutions	Institutional environment	4.47	26
	Business environment	4.74	26
	Financial stability	3.77	50
Financial intermediation	Banking financial services	2.11	56
	Non-banking financial services	1.44	53
	Financial markets	1.85	40
Financial access	Financial access	3.01	40

Source: World Economic Forum. "The Financial Development Report 2010." USA, third edition, 2010: 12-13. http://www3.weforum.org/docs/WEF_FinancialDevelopmentReport_2010.pdf

Romania received a relatively high score for the overall laws and regulations that govern the financial sector (1th pillar institutional environment) and the availability of human capital, the state of physical and technological infrastructure and costs of doing business for financial intermediaries (2 pillar: business environment). Poor results have been registered in the 3th, 4th and 5th pillar capturing some of Romania's biggest problems: financial instability, poor credit allocation and the lack of non-bank financial intermediaries—such as broker, dealers, traditional asset managers, alternative asset managers and insurance companies.

When it comes to "Financial access", Romania lags behind most countries in terms of financial market sophistication, venture capital availability, financing through local equity market and ease of access to loans. The 3.01 is an important barometer in assessing the availability of financing for enterprises in general and SMEs in particular. Research shows that SMEs are more affected by financing and other institutional obstacles than are large enterprises. From this perspective assessing the extent to which the development of Romania's financial systems has contributed to the development of SMEs by sector will help identify the flows in the allocation of financial resources on the market.

The methodology and data employed are presented below.

1. 2. Methodology and Data

In this paper we study the impact of Romania's financial development on SMEs growth by sector of activity and size class. To asses the extent to which financial development boosts the level of output accounted by small firms active in different sectors we used the following estimation equation:

$$Growth_{i,k} = \sum_{i} \alpha\, Size\ class_i + \sum_{k} \beta Sector_k + \gamma Sector\ Share_{i,k} + \delta(SMEs\ Share_{ik} \times FD_i) + \varepsilon_{i,k}$$

where:

a) $Growth_{i,k}$ is the average annual growth rate of value added, in industry k and firm size i, over the period 2002-2008 and was calculated as $[(\ln y_{ik}^{2008} - \ln y_{ik}^{2002})^{1/6} - 1]$. The data were collected from the database used by the European Commission, DG Enterprise and Industry in producing the findings of the Annual Report on European SMEs in 2009[14].

b) $Size\ class_i$ and $Sector_k$ represent size class SMEs and sector dummies, respectively

c) $Sector\ share_{i,k}$ is the value added of firms by size class and sector in total value added of the country in 2002 and is calculated as $[(\ln y_{ik}^{2002})/(\ln y^{2002})]$. The data are collected from the database used by the European Commission, DG Enterprise and Industry in producing the findings of the Annual Report on European SMEs in 2009. With this variable, we test whether Romania's level of financial development shapes the cross-sectional distribution of sectors and helps increasing the proportion of value added accounted for by different size class enterprises. While we examine *Sector Share*$_{i,k}$, we keep focusing on *Growth*$_{i,k}$ as, many theoretical models (Levine (2006)) predict that a higher level of financial development will induce a faster rate of economic growth, exerting a disproportionately positive effect on the growth rate of particular types of sectors (such as sectors naturally composed of small firms facing high informational asymmetries). The summary statistics are reported in table 3.

Table 3: Summary Statistics Sector Share$_{i,k}$

NACE division	Sector Name	Mean	Std. Dev.	Freq.
ca10	mining of coal and lignite; extraction of peat	0.142	0.165	3
ca11	extraction of crude petroleum and natural gas	0.103	0.129	3
cb14	other mining and quarrying	0.161	0.124	3
da15	manufacture of food products and beverages	0.453	0.138	3
db17	manufacture of textiles	0.351	0.103	3

[14] "Small and medium-sized enterprises (SMEs): SME Performance Review", European Commission, Enterprise and Industry., last modified 07.01.2011, http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/performance-review/index_en htm

db18	manufacture of wearing apparel; dressing; dyeing of fur	0.451	0.087	3
dc19	tanning, dressing of leather; manufacture of luggage	0.353	0.108	3
dd20	manufacture of wood and of products of wood and cork, except furniture	0.407	0.065	3
de21	manufacture of pulp, paper and paper products	0.235	0.146	3
de22	publishing, printing, reproduction of recorded media	0.393	0.071	3
dg24	manufacture of chemicals and chemical products	0.347	0.134	3
dh25	manufacture of rubber and plastic products	0.349	0.072	3
di26	manufacture of other non-metallic mineral products	0.321	0.111	3
dj27	manufacture of basic metals	0.225	0.078	3
dj28	manufacture of fabricated metal products, except machinery and equipment	0.428	0.043	3
dk29	manufacture of machinery and equipment n.e.c.	0.324	0.136	3
dl31	manufacture of electrical machinery and apparatus n.e.c.	0.296	0.094	3
dl32	manufacture of radio, television and communication equipment and apparatus	0.116	0.145	3
dl33	manufacture of medical, precision and optical instruments, watches and clocks	0.243	0.079	3
dm34	manufacture of motor vehicles, trailers and semi-trailers	0.115	0.250	3
dm35	manufacture of other transport equipment	0.200	0.150	3
dn36	manufacture of furniture; manufacturing n.e.c.	0.367	0.107	3
dn37	Recycling	0.239	0.095	3
e40	electricity, gas, steam and hot water supply	0.072	0.170	3
e41	collection, purification and distribution of water	0.072	0.170	3
f45	Construction	0.043	0.267	3
g50	sale, maintenance and repair of motor vehicles	0.562	0.073	3
g51	wholesale trade and commission trade, except of motor vehicles and motorcycles	0.623	0.020	3
g52	retail trade, except of motor vehicles, motorcycles; repair of personal and household goods	0.572	0.043	3
h55	hotels and restaurants	0.399	0.031	3
i60	land transport; transport via pipelines	0.447	0.068	3
i62	air transport	0.058	0.158	3
i63	supporting and auxiliary transport activities; activities of travel agencies	0.386	0.026	3
i64	post and telecommunications	0.312	0.079	3
k70	real estate activities	0.414	0.033	3
k71	renting of machinery and equipment without operator and of personal and household goods	0.256	0.215	3
k72	computer and related activities	0.426	0.011	3
k73	research and development	0.231	0.149	3
k74	other business activities	0.533	0.025	3

d) *SMEs Share*$_k$ is the benchmark share of employment in firms with less than 250 employees in sector *k* in UK in 2002 and is calculated as (ln*emp*$_{ik}^{2002}$)/ (ln*emp*^{2002}). We have chosen United Kingdom as benchmark economy for two reasons. Firstly because of data availability. The database used by the European Commission, DG Enterprise and Industry in producing the findings of the Annual Report on European SMEs in 2009 covers a wide variety of economic indicators for all EU countries which are presented by size class and sector. Thus by using the same database we have eliminated the errors regarding data matching in terms of the data collection methodology (sectors and firm size are comparable between countries). The second reason is the fact that United Kingdom

has been used in literature[15] as alternative benchmark in measuring an industry's technological share of small firms. Following Thorsten Beck, Asli Demirgüc-Kunt, Luc Laeven and Ross Levine (2008) methodology we measure sector-specific characteristics using data on the share of employment by size class and sector in the United Kingdom in 2002.

e) FD_i measures Romania's level of financial development. Due to the fact that there is no direct indicator to reflect the degree to which financial intermediaries support SMEs by size class, in constructing FD_i, we used the following methodology. As shown by Beck, Levine and Loayza (2000)[16], Private Credit by deposit money banks and other financial institutions to GDP (henceforth PvC) is a good proxy for financial development as it provides a broader measure of banking sector development by including all financial institutions, not only deposit money banks and excluding the credits issued by central banks. However this indicator alone cannot reflect the amount of credits channeled to SMEs by financial intermediaries. Therefore in constructing the financial development indicator we interacted PvC with the percentage of investments in tangible goods made by SMEs. The assumption was that investments made by different size class SMEs required credit taking and thus, by interacting the two indicators we could render more accurately the impact of Romania's financial system development on SMEs. In this light we can say that a higher level of FD_i indicates higher level of financial services for enterprises belonging to a certain size class category. The source of the private credit data was the World Development Indicators dataset[17]. The percentages of investments made by SMEs were calculated from the database used by the European Commission, DG Enterprise and Industry in producing the findings of the Annual Report on European SMEs in 2009. The indicator was averaged over the period 2002-2008.

f) $\varepsilon_{i,k}$ represents the error term

The regression analysis is focused on the interaction between FD_i and *SMEs Share*$_k$. To be more specific we study the δ sign. If δ enters positive and significant at 5% level of confidence we can say that financial development exerts a disproportionately positive effect on sectors dominated by small firms relative to large ones. This suggests that the level of financial development eases growth constraints on small firms more than on large firms. A negative and significant δ sign indicates the contrary: Romania's level of financial development favors sectors dominated by large firms over those dominated by small ones.

The dummy variables for sector and firm size control for specific characteristics that might determine SMEs growth patterns by sector.

We included Sector Share to control for convergence effect: sectors with a large share might grow more slowly, suggesting a negative sign on γ. United Kingdom (the benchmark country) was excluded from the regression.

We used Ordinary Least Squares (OLS), which assumes that the error term is uncorrelated across sectors and firm size.

3. Main results and tests performed

The results in figure 1 show that Romania's level of financial development favors the growth of sectors dominated by small firms. The interaction of FD_i with *SMEs Share*$_k$ enters positively and significantly at 5% level. The coefficient on *Sector Share*$_{i,k}$ enters negatively and significantly, suggesting some convergence in the economic sectors composition.

[15] Beck,Thorsten, Asli Demirgüc-Kunt, Luc Laeven and Ross Levine. "Finance, Firm Size, and Growth." *Journal of Money, Credit, and Banking* vol. 40(2008): 1400-1405

[16] Beck, Thorsten, Ross Levine and Norman Loayza. "Finance and the sources of growth." *Journal of Financial Economics* 58 (2000): 267

[17] "Financial Sector", The World Bank, http://siteresources.worldbank.org/INTRES/Resources/ FinStructure_ 2008_v4 xls

```
Fixed-effects (within) regression               Number of obs      =       117
Group variable: SizeClass                       Number of groups   =         3

R-sq:  within  = 0.8517                         Obs per group: min =        39
       between = 0.7687                                        avg =      39.0
       overall = 0.6237                                        max =        39

                                                F(40,74)           =     11.72
corr(u_i, Xb)  = -0.3879                        Prob > F           =    0.0000

                                (Std. Err. adjusted for clustering on SizeClass)
------------------------------------------------------------------------------
             |               Robust
      Growth |      Coef.   Std. Err.      t    P>|t|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
 SectorShare |  -.9895223   .1479897    -6.69   0.000    -1.284398   -.6946465
SMEsShare*FD |   2.567988   .4641443     5.53   0.000     1.643161    3.492816

       _cons |  -1.423381   .2026053    -7.03   0.000    -1.827081   -1.019681
```

Figure 1: Fixed-effects (within regression)

***Regression includes size class and sector dummies, but these are not reported

The data were analyzed using a fixed-effects model which is focused on within-data variation.

The relationship between financial development, a sector's small firm share, and sector growth is not only statistically, but also economically large. To illustrate the effect, we compare the growth of a sector with a relatively large share of small firms and a sector with a relatively low share of small firms across two size class SMEs. The growth difference between sectors at the 25th and 75th percentiles of SMEs share and SMEs at the 25th and 75th percentiles of FD_i is 4.5%. This implies that medium enterprises (which are at 75th percentile of FD_i) operating under NACE division de22: publishing, printing, reproduction of recorded media sector (which is at 75th percentile of SMEs Share) grow 4.5% faster per annum than micro enterprises (25th percentile of FD_i) which operate under NACE division dn37: recycling (25th percentile of SMEs Share).

The panel data were submitted to several test like: heteroskedasticity (modified Wald test), autocorrelation (Wooldridge test), normality (Skewness/Kurtosis tests for residuals) and unit root tests (Im, Pesaran and Shin (2003) and Levin and Lin (1992)).

In order to ensure that statistical inference is valid, we tested our panel data for cross-sectional dependence (Pesaran test). The results rejected the null hypothesis of cross-sectional independence and thus we estimated a robust fixed-effect (within) regression with Driscoll and Kraay standard errors which results "*are well calibrated when the regression residuals are cross-sectionally dependent*"[18].

Table 4 reports the results of the test performed while figure 2 presents the regression with Driscoll-Kraay standard errors.

Table 4: Tests results

Tests	Null Hypothesis	Results
Wooldridge test for autocorrelation in panel data	H0: no first order autocorrelation	F(1, 2) = 4.504 Prob > F = 0.1678
Modified Wald test for groupwise heteroskedasticity	H0: sigma(i)^2 = sigma^2 for all i; heteroskedasticity	chi2 (3) = 2.12 Prob>chi2 = 0.5488
Skewness/Kurtosis tests for	Ho: residuals are normally	Prob>chi2 = 0.3637

[18] Hoechle, Daniel. "Robust Standard Errors for Panel Regressions with Cross-Sectional Dependence.", *The Stata Journal*, Vol. 7, No. 3 (2007): 310

Normality for panel residuals	distributed	
Pesaran's test of cross sectional independence	Ho: cross-sectional independence	Pr = 0.0000
Im, Pesaran and Shin for *Growth*, lags (0)	Ho: all series are non-stationary	-6.688 (P-value= 0.000)
Im, Pesaran and Shin for *Sector Share*, lags (0)	Ho: all series are non-stationary	-5.484 (P-value = 0.000)
Im, Pesaran and Shin for *SMEs Share*FD*, lags(0)	Ho: all series are non-stationary	-4.458 (P-value = 0.000)
Levin and Lin for *Growth*, lags(0)	Ho: unit root	-12.042 (P-value = 0.000)
Levin and Lin for *Sector Share*, lags(0)	Ho: unit root	-9.649 (P-value = 0.0000)
Levin and Lin for *SMEs Share*FD*, lags(0)	Ho: unit root	-7.875 (P-value = 0.0000)

```
Regression with Driscoll-Kraay standard errors   Number of obs     =       117
Method: Pooled OLS                               Number of groups  =         3
Group variable (i): SizeClass                    F( 44,     2)     =     29.99
maximum lag: 3                                   Prob > F          =    0.0328
                                                 R-squared         =    0.8549
                                                 Root MSE          =    0.0737

------------------------------------------------------------------------------
             |               Drisc/Kraay
      Growth |      Coef.   Std. Err.      t    P>|t|     [95% Conf. Interval]
-------------+----------------------------------------------------------------
 SectorShare |  -.9895223   .1018667    -9.71   0.010    -1.427819   -.5512254
SMEsShare*FD |   2.567988   .4704849     5.46   0.032     .5436552    4.592321

       _cons |  -1.345779   .2139934    -6.29   0.024    -2.266518   -.4250394
```

Figure 2: Regression with Driscoll-Kraay standard errors

***Regression includes country and sector dummies, but these are not reported

As can be seen the coefficients remain strongly significant at 5% level of confidence.

Several sensitivity tests were performed by replacing either the benchmark country or the FD_i indicator. In all cases the coefficients entered significantly.

Conclusions

Romania's level of financial development has improved significantly over the last couple of years. Nevertheless SMEs continue to suffer from lack of financing due to financial intermediaries' restrictive guarantee requirements and increased commissions charges.

In this context the paper finds that during 2002-2008 Romania's level of financial development exerted a disproportionate effect on SMEs by sector and size class favoring the growth of medium sized enterprises in manufacturing related sectors. The results are consistent with some author's findings which sustain that under-developed financial systems are particularly detrimental to the growth of firms with less than 20 employees[19].

Although the overall results show that Romania's financial system favors the growth of sectors dominated by small firm looking closely we see that micro and small size enterprises (which in terms of units' number dominate the scene in most sectors) remain affected by the lack of local

[19] Beck ,Thorsten, Asli Demirgüc-Kunt, Luc Laeven and Ross Levine. "Finance, Firm Size, and Growth." *Journal of Money, Credit, and Banking* vol. 40(2008): 1379-1405

financial intermediary development. The results sustain the idea that improvements in the operation of the financial system will lead to cross firm distributional effects, helping SMEs grow regardless their size class. In future work we plan to asses the impact of the instruments used by financial intermediaries to support Romanian SMEs growth by size class.

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THE ANALYSIS OF COUNTRY RISK BY MEANS OF ALTERNATIVE METHODS

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MIHAELA PAPA[**]

Abstract
There are many situations in which the country risk must be considered. Those situations could be when one wants to make an investment in another country; when a loan is given; or, even when a stronger and a more powerful economic union is desired. There are many ways to measure the country risk. These methods are created by central banks, rating agencies and international banking institutions. There is a new method the country risk can be measured, with the help of a financial instrument, derived from lending. This paper presents the bond between country risk and credit default swap. Because of the financial-economic crisis, the values of country risk fluctuated considerably, especially in those countries with a large public debt.

Keywords: *country risk, derivative instruments, country rating, crisis, default*

Introduction

For a better understanding of the concepts, these elements must be explained: country risk, rating agencies or derivative financial instruments. First of all the country risk and its components must be explained. This type of risk is indeed a special risk.

This paper examines the impact of sovereign credit default swap's price over the deterioration or improvement of the country's rating. In the first part of the paper two key concepts are explain. Those concepts are: country risk and the financial derivative instruments known as credit default swap. The country risk is split in three components.

The fact that the global economy is going through some changes must be taken into account. These shocks are of course the effect of the global financial-economic crisis during 2008. There are countries that they manage to survive the crisis, of course with some loss. These ones are the countries with advanced economies. Some countries suffered shocks so big that their economy dropped, along with that, the macroeconomic indicators fallen also. During the actual economic crisis the classification of countries by the gross domestic product changed. And therefore, it is a good opportunity to make the country risk analysis.

In this study it will be given the values of country risk with the help of the sovereign credit default swap's market. This idea is based on the fact that the price is set free on this market, at the intersection of supply and demand. In this type of market the information reaches the recipient in a very short time. This is presented parallel with the country rating calculated by various rating agencies.

The country risk

In a broad sense, country risk is the probability of financial losses in international business, losses generated by certain macroeconomic or politic events of the considered country. Although it is unlikely that a country can go bankrupt, a country can declare its independence in any

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ways and a country cannot be sued in without its consent. In the ’70, during the oil crisis, the country risk played an important role. In those times, countries like Argentina and Mexico almost went into default.

The country risk can be defined in many ways, the uncertainty that arises when there are funds to be transferred abroad, the evaluation of a country’s credibility, especially in terms of external debt payment, the scenario that a country don’t want or cannot honor their commitments to foreign partners or the borrowers from a country cannot pay their debt obligations because of some factors beyond their capacity.

This type of risk could appear in other situations also, the government of a country could suspend the assets of foreign companies; the military conflict could damage the goal of investors or could stop the ongoing operations; the economic difficulties from a country may hold back the repatriation of profit into a powerful currency.

Following, it can create strong relationships between the country risk and its components: political risk, economic risk and social risk. Country risk is divided into three types of risk mentioned above.

The political risk is linked with the country's willingness to meet its external commitments. The political instability can develop certain negative situations for creditors, like the denial of loan contracts; limit or ban foreign investment; the interdiction of the transfer of capital; the cease of payments to abroad partners or the sopping of imports and exports.

The social risk is resulting from exposure to losses in terms of international flows of transactions caused due to social events. These social events could mean: strikes, civil war, conflicts of interest arising from regional political polarization.

The last component of the country risk, the economic risk is represented by the ability of a country to be able to pay its external debt. This type of risk is resulting from a country’s inability to transfer a loan obtained by a public or private entity, although the company may be solvent. The lack of foreign currency reserves is determining insolvency.

Of course, when one wants to determine the risk of a country one must take into consideration the values and the evolution of that country’s macroeconomic indicators.

The country risk analysis is not a reliable answer, the results are estimated. This happens because the measurements have a qualitative feature and they are done with the help of quantitative indicators. These types of analysis are done by specialized organizations. The entities that make the analysis regarding the country risk are divided as follows:

- International financial organizations: B.I.S., I.M.F., B.E.R.D.
- universities
- authorized commercial banks
- specialized rating agencies: Euro money, Institutional Investors, Standard and Poor, Moody’s, Fitch

Credit default swap

The credit default swap (CDS) is a financial instrument derived from lending. Its porpoise is to transfer between two parties the risk of exposure to some financial instruments with fix income (loans, bonds). In some cases, for a better understanding of this type of financial instrument, a CDS could be compared to insurance. The first bank that developed this type of derivative was JP Morgan, in the 1997. The buyer of CDS is protected against the risk of default regarding the financial instrument with fix income, while, the seller of CDS guarantees the credit worthiness of the product.

The risk of default is transferred from the holder of the fixed income security to the seller of the swap. For example, the buyer of a credit swap will be entitled to the par value of the bond by the seller of the swap, should the bond default in its coupon payments.

CDS is like insurance because it offers the buyer protection against the risk to default, downgrade or other negative event affecting the perception of the credit worthiness of the issuer (and thereby the price of bonds issued by it). The contract's seller assumes the credit's risk in exchange of a periodic payment (the spread) which is like insurance. The seller must pay the buyer only if a negative event will occur. As the CDS is not directly related to a particular asset or security, but it only refers to it, the buyer of CDS obtains protection, but also may obtain profit when the issuer does not fulfill its obligations. The payment obligations come to an end when the seller delivers the cash value of bonds or the same type of bonds if this is stipulated in the contract. If a negative event won't occur then the swap's seller will get the periodic payment and he will make a profit.

For a better understanding of this derivative financial instrument's mechanism was chosen the next example: suppose that there is a corporation with the name Corporation of Risk and a commercial bank named First Bank. The bank offers a loan of 10 million euro to the company, for a period of five years. The interest rate of this loan is not relevant with this example.

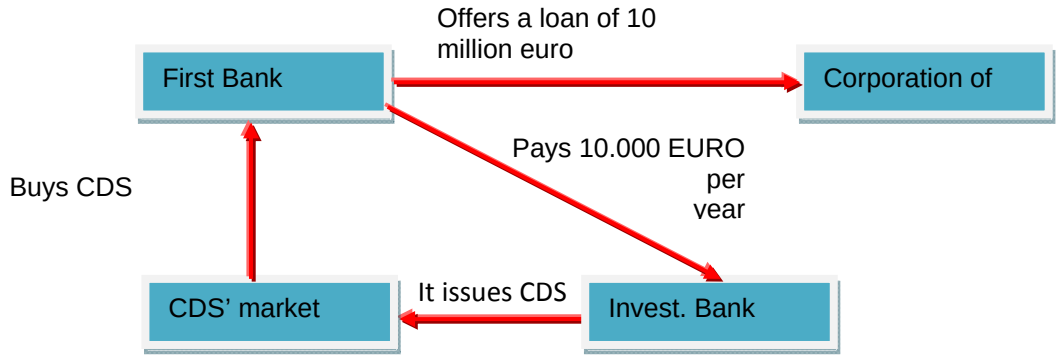

Figure 1 *– The mechanism of CDS with the exposure on a company*

It may happen that the borrower will default on the loan. So, the First Bank won't receive the total amount, the loan and the interest. In this case, a third entity could appear, an investment bank called Invest Bank. This bank issues the CDS with exposure to Corporation of Risk, with a period of five years and a price of 100. To understand better this example we will explain the meaning of the price. In fact, the price of 100 means 100 basis points or 1 per cent (1 basis point = 0.01%). Therefore, First Bank, the one that offered the loan could buy CDS with the exposure to Corporation of Risk from Invest Bank, in the amount of 10 million euro, because this is how much the loan worth. Of course that anyone who is a creditor of Corporation of Risk may buy the CDS issued by Invest Bank.

Because the First Bank acquired 10 million euro worth CDS at the price of 100 basis points, it must pay yearly:

$$0.1\ \% \times 10\ mil.EUR = 10{,}000\ EUR$$

Therefore to protect against the risk of insolvency of the debtor, the First Bank pays 10,000 euro per year. This complex mechanism is presented in Figure 1.

Of course that First Bank will include this default's risk protection cost in the interest rate. So, if a company has a higher risk of default, it must pay more for the borrowed capital.

There is a counterparty risk associated to this type of derivative instrument. The buyer assumes the seller's risk of default. The buyer loses the protection against the bankruptcy of the company if Invest Bank and Corporation of Risk default simultaneously. If the Invest Bank goes bankrupt and Corporation of Risk doesn't then the buyer must replace the previous bought CDS.

On the other hand the seller assumes the risk that the buyer couldn't compliance the contract. This way, the seller won't receive his income regarding the sales of securities. If the buyer doesn't fulfill his part, the seller can immediately sell the CDS on the market. But, it may happen that the transaction will take place at a lower price so the seller will have a loss.

Sovereign credit default swap

When referring to sovereign CDS things are similar. When the price of sovereign CDS goes up, the cost of financing is increased. Basically the more risky a country is the more expensive the cost of financing will be. The price of CDS in the derivatives' market is called spread. The sovereign CDS' spread is often used to indicate a catastrophic situation.

Here are a few countries regionally significant. The data regarding the gross domestic product was taken from annual reports of World Bank.

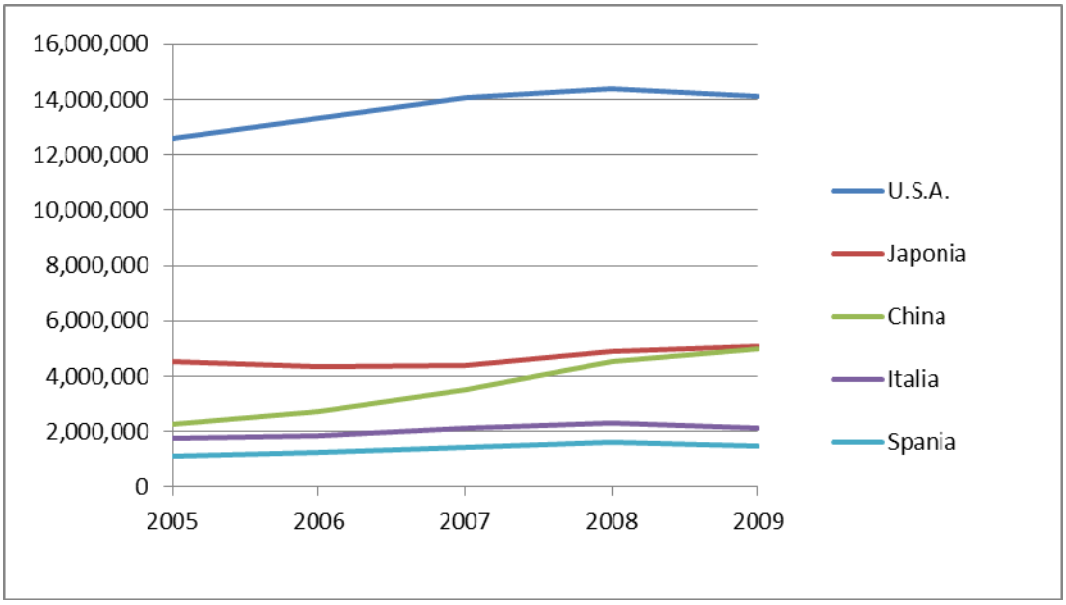

Figure 2 *– The evolution of Gross Domestic Product in previous prices in million USD.*[1]

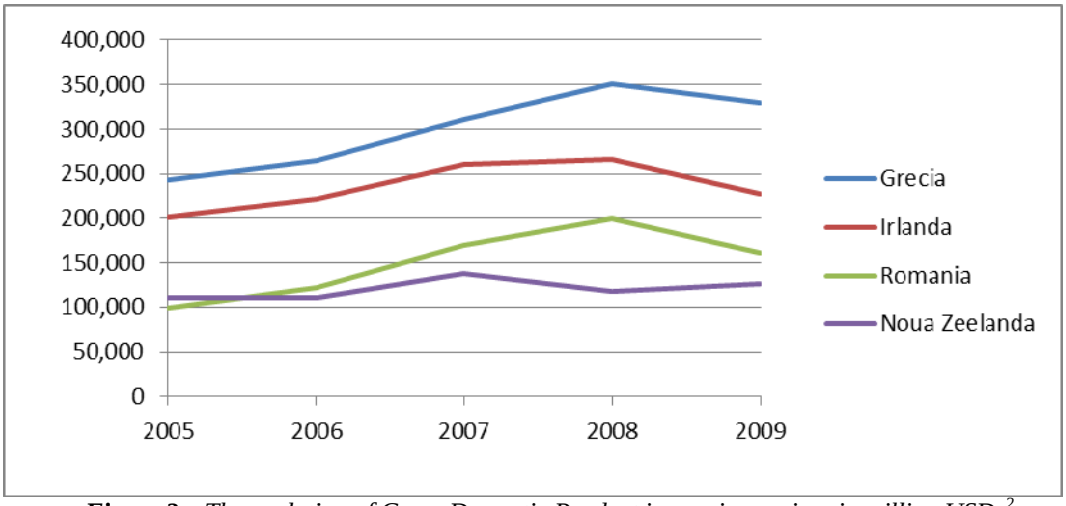

Figure 3 *– The evolution of Gross Domestic Product in previous prices in million USD.*[2]

The countries' evolution regarding the Gross Domestic Product is fully consistent with the global trend. There are countries with powerful economy like U.S.A., Japan and China. These countries had the same trend in the examined period. Most of the values had been grown until 2008, after that period the values dropped, because of the global financial crisis. From economic point of view, there are countries which seem to have benefited due to this turbulent period. Regarding this fact it could be mentioned China (Figure 2) and New Zeeland (Figure 3), first one is one of the great economic powers over the globe and the second one isn't a country of the same rank.

The public debt is another typical indicator which can be used to calculate country risk (Table 1). Due to the high degree of indebtedness of governments, public debt increased. This large public debt will transform itself in the short term into a high financing cost for the countries concerned. The country risk will appear in the price of the treasury bonds and in the spread of the CDS. An economy which has a great need for financing resources will face restricted access to primary markets and high interest rates.

	Gross public debt, percentage of GDP	External public debt, percentage of GDP	External financing rating/ outlook
U.S.A.	92,7	26,7	10/Stable
Japan	225,9	11,5	8/Negative
China	17,5[3]	-	-
Italia	118,4	55,5	7/Stable
Spain	63,5	31,1	9/Negative
Greece	130,2	94,2	0/Negative

[1] Source: World Bank
[2] Source: World Bank
[3] Source: The World Fact book , CIA

Ireland	93,6	54,9	7/Negative
Romania	16,39[4]	41,74[5]	-
New Zeeland	31,0	13,0	9/Negative

Table 1- *Indicators of vulnerability for 2010*[6]

As you can observe in the Figure 2 and Figure 3, most of the countries analyzed had a growth GDP by 2008. At the end of this year the countries had to strengthen their bank sector, due to the economic and financial crisis. This action stopped the deepening of the recession. Those are the causes that drove the rise of countries' public debt. Therefore, most of the countries with advanced economy must sustain equilibrium between fiscal consolidation, on the one hand and rolling risk on the other hand.

Below is the table with countries' ratings provided by the two rating agencies, Fitch, Standard and Poor, and their CDS' prices at the end of 2010.

	Fitch Rating	Standard and Poor Rating	CDS Spread 5 year (basis points)
U.S.A.	AAA	AAA	41
Japan	AA	AA	79
China	A+	AA-	77
Italia	AA+	A+	199
Spain	AA+	AA	301
Greece	BBB-	BB+	1022
Ireland	BBB+	A	574
Romania	BB+	BB+	290
New Zeeland	AA+	AA+	61

Table 2 *- Countries' ratings and sovereign CDS' prices at the end of 2010.*

The investors will demand a higher yield to lend to countries with economies in distress. As it can be seen in Table 2, there are countries that have the same values of rating but the sovereign CDS spread is different.

A very good example is Spain and Italy. Both countries have the same rating given by Fitch, but regarding the price of their sovereign CDS, it is a difference of 102 basis points. This means that Spain is borrowing at an interest rate with one percentage point more expensive than Italy. Although Italy has a higher public debt, than Spain calculated as a percentage of GDP.

Another relevant example is Romania and Spain. Although their country ratings are similar, the sovereign CDS' spreads are very different. The sovereign CDS of Greece have risen at a price of 1022 basis points because of two things. One of them is the massive grown of its external debt and the other is the economic issues that The Hellenic Republic has. The price of Romania's sovereign CDS is 290 basis points.

Further, there are presented a few examples of sovereign CDS' spreads and their evolution in time. The spread of sovereign CDS is a price that forms freely in the market. Like any other price, it is the point of balance between the demand and the supply in the market. We chosen a few countries

[4] Source: National Bank of Romania and National Institute of Statistics, November 2010
[5] Source: National Bank of Romania and National Institute of Statistics, November 2010
[6] Source: Global Financial Stability Report – I.M.F.

that have had economic problems; some of them still have. The evolution of countries' ratings is presented; the ratings are given by an international rating agency.

First example is the sovereign CDS of Greece. The Hellenic Republic is facing with a huge value of country risk, because the country rolled over time its own debts, with the help of derivative instruments. The country is on the age of default. At the beginning of 2009, when it was the peak of the financial and economic crisis, most of the spreads of sovereign CDS had been rising. In that period, the ones with the exposure to Greece's default grown to almost 300 basis points. As it can be seen on Table 3, Greece had an A rating with a negative outlook. On the 22th of October 2009 the rating of Greece dropped, although the value of the price of sovereign CDS was close to 100 basis points. Indeed at the beginning of 2011 the country's rating keeps peace with increased protection to insolvency of the Hellenic Republic. On the 14th January 2011 the rating of Greece dropped to BB+ and the Greece sovereign CDS spreads increased at 1022 basis points.

	Greece		
14 Jan 2011	BB+	**20 Oct 2003**	A+
21 Dec 2010	BBB-	**23 Oct 2002**	A
9 Apr 2010	BBB-	**20 Jun 2001**	A
8 Dec 2009	BBB+	**21 Sep 2000**	A-
22 Oct 2009	A-	**27 Jul 2000**	A-
12 May 2009	A	**13 Mar 2000**	BBB+
20 Oct 2008	A	**25 Oct 1999**	BBB+
5 Mar 2007	A	**10 Aug 1999**	BBB
16 Dec 2004	A	**4 Jun 1997**	BBB
28 Sep 2004	A+	**13 Nov 1995**	BBB-

Table 3 *– The evolution on long term of the Greece's rating*[7]

Regarding Ireland, the facts are the same. In the middle of September 2010 the spread of Ireland sovereign CDS have risen to 433 basis points. The cost of protection against the default of Ireland was 433,000 $ for a 10 million $ debt. The rating of the country has been unchanged until 6th of October 2010. On the 23th November 2010 the prime minister of Ireland didn't get the support of the parliament for the austerity measures. So, on account of this news, the price of Ireland sovereign CDS boosted at 555 basis points. The country's rating dropped at BBB+ on 9th December 2010.

	Ireland		
9 Dec 2010	BBB+	**21 Sep 2000**	AAA

[7] Source: Fitch Ratings

6 Oct 2010	A+	**16 Dec 1998**	AAA
4 Nov 2009	AA-	**14 Jul 1998**	AA+
8 Mar 2009	AA+	**26 Oct 1995**	AA+
6 Mar 2009	AAA	**10 Oct 1994**	AA+

Table 4 *– The evolution on long term of the Ireland's rating* [8]

Ireland reaches in the top of the most risky countries over the globe, because of the problems of the Irish banking sector. But the value of the risk is above the investment grade.

As follows, the evolution of Romania's risk is presented. In late September 2010, Romania was on the first place in the Eastern Europe's emerging economies regarding the price of sovereign CDS. The spread overtook 300 basis points, because the government didn't manage to cut back the budget deficit as mentioned in the I.M.F. stand-by agreement. From all the countries in the region of Eastern Europe the Hungary became the most risky, it overran Romania. The Hungary sovereign CDS exceeded 370 basis points.

	România		
2 Feb 2010	BB+	**14 Jun 2002**	B+
9 Nov 2008	BB+	14 Nov 2001	B
31 Jan 2008	BBB	16 Nov 2000	B
31 Aug 2006	BBB	21 Sep 2000	B-
17 Nov 2004	BBB-	24 Mar 1999	B-
23 Aug 2004	BB	23 Dec 1998	B
18 Dec 2003	BB	23 Sep 1998	BB-
24 Sep 2003	BB-	11 Sep 1997	BB-
30 Oct 2002	BB-	6 Mar 1996	BB-

Table 5 *– The evolution on long term of the Romani's rating* [9]

The Romania's rating has been below of the investment grade since the 31th January 2008. As it can be seen in Table 5 the value of the rating hasn't been changed since the 9th of November 2008. On the other hand the quality has been changed since the 2nd of February 2010, that's way the color isn't red anymore. The outlook of the country risk of Romania has changed from negative to stable.

[8] Sursa: Fitch Ratings
[9] Source: Fitch Ratings

Conclusions

The rating agencies and other international institutions always calculate country risk and they give different notes and ratings. This entities offer precise information. But, as it was demonstrated later, there is another method which indicates the country risk more rapid. This method involves using a derivative instrument. Of course, the market of those derivative financial instruments isn't regulated in all countries. There are economists who said that theses toxic derivative instruments have had an important role in the bursting of the actual financial and economic crisis.

The issue is that not everyone has access to real-time price trends of sovereign CDS, because the costs with this kind o data are expensive. With the help of the sovereign CDS' market it can be anticipated the changes of a country's rating. Although the spread of sovereign CDS was floating, the rating of the country stood still. Or even if the rating changed, that happened over a long period of time. The positive events that could influence the rating can be anticipated faster that the negative ones. When a government is engaged in a stand-by agreement with an international financial institution regarding any type of financing, this is reflected in the CDS spread.

It must be taken into account that sovereign CDS are financial derivative securities, so they can be used for speculative purposes. If panic is created among the investors, due to negative news, this thing will affect almost instantaneously the prices of sovereign CDS. Because of this, the information offered through the spread of CDS' evolution may not always reflect the reality.

We can take the example of a country with economic problems, which is part of a union, like the European Union. In these conditions, the negative events that drove the rising of the country's credit risk could affect other country members in that union. An example is Greece and Ireland.

I think that the sovereign credit default swap must be taken into account when the risk of a country is studied. The correlation must be made carefully, between this type of risk, country risk, and the financial derivative securities mentioned before. It must consider certain things that could affect immediately the price of this derivates, those things can be news, political events and rumors.

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GENERAL RISKS AND UNCERTAINTIES OF REPORTING AND MANAGEMENT REPORTING RISKS

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CAMELIA I. LUNGU[**]

Abstract
Purpose: Highlighting risks and uncertainties reporting based on a literature review research. Objectives: The delimitation of risk management models and uncertainties in fundamental research. Research method: Fundamental research study directed to identify the relevant risks' models presented in entities' financial statements. Uncertainty is one of the fundamental coordinates of our world. As showed J.K. Galbraith (1978), the world now lives under the age of uncertainty. Moreover, we can say that contemporary society development could be achieved by taking decisions under uncertainty, though, risks. Growing concern for the study of uncertainty, its effects and precautions led to the rather recent emergence of a new science, science of hazards (les cindyniques - l.fr.) (Kenvern, 1991). Current analysis of risk are dominated by Beck's (1992) notion that a risk society now exists whereby we have become more concerned about our impact upon nature than the impact of nature upon us. Clearly, risk permeates most aspects of corporate but also of regular life decision-making and few can predict with any precision the future. The risk is almost always a major variable in real-world corporate decision-making, and managers that ignore it are in a real peril. In these circumstances, a possible answer is assuming financial discipline with an appropriate system of incentives.

Keywords: *Risks, Uncertainties, Reporting, Risk Recognition, Risk Management*

Introduction

Our paper is meant to develop an analysis, based on fundamental research, regarding the impact on managerial perception of introduction the economic and financial theory of risk and uncertainties in information reporting process. It is important for economic entities to realise this impact on their day-to day activities in order to help them to progress. The connection between companies' activity and risk presentation impact is supported by managers competencies and skills in evaluateing and managing risks in order to decide the format of their presentation.

In recent years, the concepts of risk and risk management have been the subject of study for many specialists in the field of economics but also in other areas[1]. On the one hand, this may be generated by the significant risk debates taken by sociologists as Beck[2] and Douglas[3], and on the other hand, risk management standards issued by professional organizations have also determined a higher interest for risk management systems' development (for example Association of Insurance and Risk Managers).

An important aspect of the risk debates concerns the presentation of risk information by the entities to shareholders, through the annual financial statements. Schrand and Elliott (1998), at a conference sponsored by the American Accounting Association/Financial Accounting Standards Board (AAA/FASB) in 1997 drew attention to the fact that U.S. companies provided insufficient information about risks in the annual financial statements.

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The Institute of Chartered Accountants in England and Wales (ICAEW) also noted, this lack of information about risks, and issued three drafts (1998, 1999 and 2002), in order to encourage directors of UK companies to report more detailed risk information.

Results of a survey of Great Britain institutional investors (Solomon et al., 2000) support the AAA / FASB and the ICAEW's view. Thus, because a significant number of respondents agreed that entities' directors first have to provide more comprehensive and detailed information about the risks and then to consider publishing risk management policy statements. Investors also approved the importance to assess the risk profile of a company; therefore, relevant and reliable information on risks must be provided[4].

Recent studies on the concept of risk are based on the idea that a risk society exists, because we become more concerned about the human actions' impact on nature than the nature's impact on us. Beck[5] refers to these risks as a "manufactured uncertainty" and notes that it is paradoxical that they appear as we search to reduce risk.

Risk can take various forms ranging from specific risks faced by individual firms (such as financial risk, or risk of a strike among the workers) through the current risks faced by certain industries (such as banking, car manufacturing, or construction) reaching more general economic risks resulting from interest rate or currency fluctuations, and last but not the least, the risk of recession. The concept of risk has often negative connotations, in terms of potential loss, but there also exists the potential for greater returns.

Clearly, the risk is involved in most decision-making aspects, whether in a company or in everyday life, and few can accurately predict future. It is almost always an important variable in the real world of corporate decision making, and managers who ignore it are in real danger.

1. Definition of risk

Etymology and geographical origin of the word risk is controversial. In French, *risque* appears in the early sixteenth century, as in German (*risiko*). *Se risquer* (French language) is attested by 1580, and *riskieren* (German language) only in the seventeenth century. In English, the script *risque* is used in 1661, and the script *risk* in 1741. In Castilian, was used *riesgo* by 1570. It is recognized that all these terms were taken directly or indirectly, from Italian *risco* (later, *rischio*). The ancient Italian certificates don't date previous of thirteenth century, and came from the uperficial Latinized forms *rischium*, *risigus*, *riscus*. They are in expressions like *rischium et fortuna, periculum et risigum* used in various contracts. The Latin's word etymology is also obscure: this may be *rixare* or *resecare* who have a similar meaning. Different from that of danger, hazard or chance, modern sense has emerged in the eighteenth century along with scientific research on risk[6].

As for the definition of risk, there is known a large number of approaches that use different keywords, as shown in the examples below.

T. Hindle et al. (1998), in the *Finance - The Economist Books proposed Guide*[7], define the risk as being the danger to record a loss. Against the risk, investors get a return. In general, the higher the risk is, more substantial the gains will be. About those who maintain the safety line (investing only in government bonds) is said to have risk aversion.

In their study, *Managerial Finances*, Halpern et al. (1998) define asset risk as being the likely variability of future profitability of the asset[8].

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Dictionary of Economics defines risk as an event or process that is uncertain and likely to cause a failure, a loss in operating or economic activity[9].

Dictionary of ergonomics[10] defines risk as the possibility to occur, in the development of an action or task, less known or unknown circumstances, having adverse effects on the possible and planned outcomes arising from a future action subject to the influence of accidental factors.

Complete Dictionary of the Market Economy: A Practical Guide[11] and *Romanian Explanatory Dictionary* (2009) define risk as the possibility of reaching a danger, of having to face a trouble or to incur a loss; a potential threat.

The Investopedia Dictionary defines risk as the possibility that current investments will not achieve the expected return.

In his paper, *Three decades of risk research. Accomplishments and new challenges*, Ortwin Renn[12] identifies four general risk types:

1. Sword of Damocles - the risk is considered a threat which can strike at any moment. There is a sense of insecurity among human subjects;
2. Pandora's Box - the risk is an invisible threat to health and human welfare. It is always a bad thing;
3. Athens balance - the risk is perceived as a possible financial loss as a result of decisions taken;
4. Myth of Hercules - the risk is desired, sought, assumed, and in other words actively exploited.

William F. Sharpe[13] defines risk as the general possibility of a loss or damage.

According to *Lexique d'economie*[14] risk is a random phenomenon corresponding to a situation where the future is not predictable only with certain probability, as opposed to allowing a forecast uncertainty made.

Jaquillat and Solnik[15] in *Marchés financières: gestion de portefeuille et des risques* define the risk as:

- The sacrifice of an immediate advantage or the absence of immediate consumption in exchange of future benefits;
- The loss of a clear and immediate advantage of acquisition and possession or consumption of a real good or a service for an uncertain future advantage through investment in securities;
- The uncertainty about the financial value of assets that will occur at a future moment in time.

Economic and Financial Vocabulary[16] defines risk as a key element of uncertainty that may affect the activity of an economic agent or a transaction.

Dorfman[17] considers the risk to be a random variation of possible outcomes in relation to an event, while Mehr and Hedges[18] link the risk to the losses that can be greater than normal or regular.

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[9] N. Dobrotă et al., *Dicţionar de economie*, (Bucureşti: Economică, 2000).

[10] C. Roşca, *Dicţionar de ergonomie*, (Craiova: Cerți, 1997).

[11] G. Buşe et al., *Dictionarul complet al economiei de piaţă: ghid practic*, (Bucureşti: Secretariatul pentru Mahamudra, 1995)

[12] O. Renn, "Three decades of risk research. Accomplishments and new challenges," *Journal of Risk Research* 1 (1998):49-71.

[13] W.F. Sharpe et al., *Investments* (6th Edition), (Prentice Hall, 1985).

[14] A. Silem et al., *Lexique d'économie (*9e édition), (Dalloz-Sirey,2006).

[15] B. Jaquillat and B. Solnik, *Marchés financières: gestion de portefeuille et des risques*, 3e edition, (Paris: Dunod, 1997).

[16] J. C. Colli and Y. Bernard, *Vocabular economic şi financiar*, translation by Eugenia Theodorof, Ioan Theodorof, (Bucureşti: Humanitas, 1994).

[17] M. S. Dorfman, *Introduction to Risk Managemnt and Insurance*, 8th edition, (Prentice Hall, 2004): 3.

[18] R. I. Mehr and B. A. Hedges, *Risk Management Concepts and Application*, (New York: McGraw-Hill, 1974), 10.

The previous presentation shows that there is no single definition of risk; each activity defined its own definition of the concept of risk. However, the general idea that emerges is that risk is traditionally defined in terms mostly related to uncertainty.

In this context, to formulate the concept of risk becomes a difficult task. We support the general sense, that risk is a future and uncertain event, able to occur but whose appearance is uncertain, as:

- it is a future event because his appearance is related to a future period;
- it is uncertain because no one knows exactly when it appears, emerges or what form it will manifest in;
- its appearance can be measured by appealing to statistical analysis, the science of probability and actuarial calculations.

2. The impact of introduction of risk and uncertainty economic and financial theory

The emergence of risk and uncertainty theory is due to the need of improving models that explain the functioning of modern economies. Since the second decade of last century, we have witnessed the extinction of the certainty premise, and of the economic agents' foresight, while it gained ground the hypothesis of individuals and economic entities' actions in uncertain future conditions and risk situations.

This vision change had valuable effects on the economic research framework and on practical applications. It allowed the approach of difficult to explain phenomenon in terms of certainty, such as the fact that entrepreneurs are not always eager to maximize the profit. It also provided a better understanding of the behaviour of individuals and businesses, where chance plays a crucial role, especially in finance, related to the stock market risk or foreign exchange risk, but also in other areas as natural resource exploitation.

The economic theory of risk and uncertainty is based on a number of fundamental concepts: the utility expectation, assumptions on the attitude towards risk (risk aversion preference or indifference), or exchange rate risk. The criteria based on maximizing the expected utility has been developed by Daniel Bernoulli[19]. The expected utility is a model of behaviour under conditions of uncertainty referring to individuals' decision taken in the presence of risk in order to maximize the hope of winning, as the final function of wealth.

An individual can choose between different decisions of gaining, having uncertain consequences as to play the lottery or not, to buy shares or not, to play or not on the stock market, to ensure or not their activity etc. All these relate to the possibility of earning under uncertainty. The future is known with uncertainty, but this uncertainty is limited. There may appear only two events, opposite and incompatible: the decider either wins or loose on his actions. Such pairs of mutually exclusive events have the probability q, respectively, $1- q$, where q takes values between 0 (when the event is impossible) and 1 (when its production is safe), as the basis in probability theory application.

From each of the mentioned events derives a result which can be positive or negative and is denoted by x, respectively y. Maximizing utility expectation leads to the relation $qx + (1-q) y$. Thus, for an economic entity, if U(x) and U(y) are expected utilities, for x and y types of gains, the proposed utility indicator is $qU(x) + (1-q)U(y)$. expected utility model influences decisions under uncertainty in two ways: first, because of the so-called *St. Petersburg paradox* (a paradox of the probability theory, in which a participant will pay only a small sum of money for an infinite greater expected value as described by J. Fraysse[20] in 1994) and second because of the common sense. The result is that the decision is not determined by the mathematical gain expectation, but by the real one. The holder of a lottery ticket that gives him 50% to win 10.000 lei (meaning 5.000 lei as mathematical gain expectation) has every reason to decide to sell it for a certain amount of 4.000 lei.

[19] D. Bernoulli, "Exposé d'une nouvelle théorie de la mesure du risque," *Risques* 31 (1997): 12.
[20] J. Fraysse, "Esperance d'utilité," *Risques* 17 (1994): 69.

The expected utility model and its applicability in decision making process have their flaws and opponents. Determination of expected utility is based on objective probabilities. A number of authors have shown that individual behaviour in decision-making matters in the situation of *imperfect information*. They emphasized that, faced with the decision-making the individual manifests an *ambiguity aversion. Ellsberg's paradox*[21] show preference for those lotteries experiments in which subjects have more information on the likelihood of various results. According to Ellsberg's paradox, people prefer to bet on a box with 50 red balls and 50 blue balls than on one with 100 balls of unknown number of red or blue balls. The probability of winning is the same in both cases, but people, nevertheless, prefer to bet on a familiar scenario than on unknown one. These observations have led to some reconsideration about the expected utility model and about the alternative concept of *unexpected utility*[22]. This type of study, based on the unexpected utility model recalls the criteria of choice between prevention, self-insurance and insurance[23].

3. Risk recognition

An investigation of Stanton and Stanton's in 2002 on corporate annual reports research identifies a number of disclosure studies published in the period 1990–2000, none of which specifically examine risk disclosures. There have, however, been a number of risk-related papers published on derivative and market risk disclosures aspects. The rationale underlying the development of these studies was that disclosure of market risk information would be useful for shareholders to valuate companies' activity[24].

Linsley and Shrives also suggest that the provision of forward-looking risk information would be especially useful to investors. They refer also to Dietrich et al.'s experiments that provide support for the usefulness of releasing future risk information, concluding that overt risk disclosures lead to improved market efficiency. The two major obstacles to increased risk disclosures that Linsley and Shrives consider are the reluctance of directors to release risk information they deem too commercially sensitive and their reluctance to provide future risk information without safe harbour protection[25].

One of the most extensive risk reporting studies is Beretta and Bozzolan's (2004) analysis of the Management's Discussion and Analysis (MD&A) section of the annual report for a sample of 85 companies listed on the Italian Stock Exchange[26]. A key conclusion is that companies focus upon disclosing information on past and present risks, rather than future risks. Where future risks are disclosed, directors are reluctant to indicate whether the impact is likely to be positive or negative. Additionally, directors have a predisposition to self-justification when reporting on risk; that is they feel compelled to attribute risks with negative outcomes to external events. Ascribing the cause of negative outcomes to factors that are beyond directors' responsibilities suggests that attribution theory may be a factor in risk reporting.

Previous general and environmental disclosure studies have often found that a positive relationship exists between the size of the company and the number of disclosures. For example, Firth (1979) and Beattie et al. (2004) find that a positive size–disclosure relationship exists for

[21] D. Ellsberg, "Risk, Ambiguity and the Savage Axioms," *Quarterly Journal of Economics* 75 (1961).

[22] F. X. Albouy, *"Utilité non esperée," Risques* 17 (1994): 161.

[23] K. Konrad and S Skaperdas, "Self insurance and self protection: a non-expected utility analysis," *Geneva Papers on Risk and Insurance Theory*, 18 (1993): 131-146.

[24] T. J., Linsmeier and N. D. Pearson, "Commentary: Quantitative disclosures of market risk in the SEC release," *Accounting Horizons* 11 (1997): 107–135.

[25] P.M. Linsley and P.J., Shrives, "Risk reporting: a study of risk disclosures in the annual reports of UK companies," 387-404.

[26] S. Beretta and S. Bozzolan, "A framework for the analysis of firm risk communication," *The International Journal of Accounting*, 39 (2004): 289-295.

samples of UK companies and Hossain et al. (1995) find a similar relationship in non-UK company studies.

The ICAEW (1999) have argued that companies disclosing more risk information will find that the marketplace better understands the company's risk position and the company is then deemed to be less risky than before. Therefore, increased risk disclosure could impact upon the perceived level of company risk, although to what extent is unknown.

Previous studies[27] testing for a relationship between leverage, which is a possible measure of risk, and the number of disclosures, have not been decisive. Ahmed and Curtis cited Hossain et al. (1995) that found no association but, also, Malone et al. (1993) that found a positive association. It was found that there was limited reporting of future risk information based upon studies of German, UK and Italian companies, and managers expectation to provide forward-looking risk information on their own initiative and to provide such information in a sufficient and credible manner, is unrealistic in at least two reasons: first, as is shown by Ryan[28] annual reporting purposes is to perform a management function and, therefore, include historical data, and secondly this information is inherently uncertain and company directors fear that the lack of reliability may expose them to losses[29].

4. Risk management

The risk management policy is a document that must clearly provide the essential characteristics of the risks to which the company is exposed. This is how the company defines and measures its activity related risks, identifying the type and source of risks to which they are exposed as well as the exposure limit they can handle. It may be specified the desired degree of diversification as well as the concentration risk tolerance.

Risks identification. Exposure to risks can be easily ignored or forgotten in the light of their excessive familiarity, or in the light of indifference to new risks. For example, many companies do not protect their exposure to exchange rate risk because there are safe methods of assessment or risk reduction. Equally, failure to identify any new risks or unusual combinations of risk can lead to disaster.

It is therefore necessary to have reporting systems in order to identify the risks, which may include advice on:

- Separate description of each financial instrument and the associated liquidity;
- Information about the market: time series of interest rates and exchange rates, price index, historical volatility and correlation charts.

Risk assessment. Considering that risks are treating unexpected gains or losses, their evaluation is reflected in statistical models establishing a set of parameters and assumptions supported by historical events from time to time and trading strategies.

Risk assessment is based on the selection of a limited number of risk factors and a range of models to describe the uncertainty of future values of these factors and the impact on the value of individual financial instruments, and finally the portfolio.

Measuring and managing risk may be done by:

- Methodical appliance of portfolio sensitivity tests in order to estimate the possible economic losses (and their effect on capital), within chosen market conditions including atypical ones. The results of these tests should be discussed with senior managers and should direct their appetite for market risk;

[27] K. Ahmed and J. K. Courtis, "Association between corporate characteristics and disclosure levels in annual reports: A meta analysis", British Accounting Review 31 (1999): 36 – 61.

[28] S.G. Ryan, "A survey of research relating accounting numbers to systematic equity risk, with implications for risk disclosure policy and future research," *Accounting Horizons* 11 (1997): 82–95.

[29] P. Linsley and P. Shrives, "Disclosure of risk information in the banking sector," *Journal of Financial Regulation and Compliance* 13 (2005): 205–214.

- Frequency test patterns generated by the measures of risk management designed to assess their accuracy and to examine the exemption to the established confidence intervals;
- Measuring the extent to which society is exposed to various individual categories of specific risk and global risk;
- Analyzing the effect of new contracts or transactions on the current situation of market risk.

The models tested over the years include:

- Statistical models (probability) that describe the uncertainty about the future values of market factors (eg. GARCH models and stochastic volatility models);
- Pricing models that relate specific instruments to prices and market factors (eg. Black-Scholes-Merton formula);
- Aggregation of risk models that assess the corresponding uncertainty of future values of financial instruments portfolio (VaR models using simplified estimates in order to establish a probability distribution over future values of a static portfolio in a chosen period of time).

Monitoring risk. The risks themselves cannot be monitored (but can be revalued more often), instead, the results, procedures and exposure can be monitored by specialists and presented in various reports. At the company level some reports contain information and comments related to different risks faced by an entity, market development and the maximum concentration areas subunits, type of asset, etc. Others refer to the risk limits or sub-type of activities related to VaR analysis. Thus, the updating and reporting relevant information may be assured.

All these reports should be as complete as possible and should provide accurate and in time information on risks in order to ensure the opportunity of any remedial action required. Certification of the monitoring process may be done to determine its consistency with both current market conditions and risk tolerance of the company.

Risk Control. The control must be viewed in the sense of obtaining a balance between risks and benefits, given the dynamic ways to manage risks, different than some rigid templates of control. There is a general rule but the following formula may be addressed:

- Establish a structure to limit the risk by addressing the key factors of risk issuing correlated to the size and complexity of the company;
- Setting limits on gross and net positions of risk concentrations and on the maximum loss acceptable;
- Setting alert signals when the limits are exceeded, requiring review and remedial actions.

Although well understood, company's risk is still undetectable in many cases and its evaluation may be based on a number of scenarios. It relates to the less liquid assets and liabilities that cannot be assessed objectively and reasonably. Fortunately, the adoption of international financial reporting standards that favour fair values of assets, liabilities and owner's equity, without affecting the reporting of company's profit may encourage managers to pay more attention on communicating risk information.

Conclusions

Implementation of risk strategy hardly depends on business, environment, culture, organization and objectives of individual companies, the task of risk management applied to company's risk including the four well-known themes, namely: identification, assessment, monitoring and control. Qualitative conceptual understanding of this topic for discussion is essential as long as the purpose remains the strengthening of stability while maintaining a reasonably competitive environment.

However, the adoption and development of companies' improved risk policies should be an important objective beyond the requirements of authorities. Establishing a prudent goal (setting a limit to the risk of insolvency) or economic objectives such as balancing the risks with the benefits should aim to broaden the spectrum of risk management activities.

Both the accounting literature and the main international accounting organisations recognize the need to complement the information currently supplied by companies with reports on the levels of risk they assume, in order to serve the purposes of users in their decision making processes. For future research we intend to draft a formal framework, that has still not been established, within which companies can operate when it comes to deciding which risks they should report, how these risks should be quantified and where they should be presented.

Acknowledgements

This work was supported by CNCSIS – UEFISCSU, project number PN II – IDEI 1819/2008, *Research regarding reassessment of financial reporting in the light of risks and uncertainties generated by contingent social and environmental factors.*

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THE IMPACT OF PENSIONS SAVING AND EDUCATION DEFICIT ON THE LIVING STANDARDS IN ROMANIA, IN THE POST-ACTIVITY PERIOD

SANDRA TEODORESCU *

Abstract
The present paper starts with the study on the annual pension deficit in the EU member states, elaborated by AVIVA and DELOITTE companies in 2010. The paper analyzes the impact of pensions saving and education deficit on the living standards in Romania, in the post-activity period. It comprises the following sections: an introduction to the analysis, several definitions and the calculation method employed in the above-mentioned study, comparisons between Romania and other EU members states, focusing on the pension deficit, as well as a brief overview on the pension systems in Romania.
In the end of the paper, we propose a debate on good financial planning that can make the difference between poverty and a decent standard of living at the time of retirement.

Keywords: *saving deficit, pension, private pensions, financial planning, and calculation methods.*

1. General aspects

The history of pensions begins in Germany, under the leadership of Chancellor Bismarck, more than 120 years ago. The empire centered around the Hohenzollern dynasty, strongly supported by the aristocratic and bourgeois political elites, was attempting to establish a new state. Nevertheless, the working class and its Social Democratic representatives opposed the respective initiative from the very beginning. However, the leadership brutally repressed them and banned hostile organizations, without getting the expected results. During the same period (the 1880s) a new economic crisis emerged, and the social unrest convinced Bismarck that the integration of the working class into society was the only way to overcome the respective deadlock. Therefore, *three insurance laws* were adopted, for the first time: *the sickness insurance law* – on June 15, 1883, *the accident insurance law* – on July 6, 1884, and *the insurance against old age* – on June 22, 1889. The last one is extremely interesting, because it paved the way for the current state-run pension system initially adopted by the Austro – Hungarian Empire, later – by Benelux countries and, finally, by the whole Europe. Its beneficiaries had made payments for at least 30 years, receiving their pension at the age of 65 or more. The pension fund came from taxpayers, as well as company owners and the state, the second category being also involved in the financial resource management.

Although in a Europe dominated by liberal policies, the social legislation promoted by the German Chancellor seemed to be a long term failure, it was validated and, gradually, the elites became aware of the fact that social protection was compatible with economic growth and that the integration of the working class into society could not harm capitalism.

Basically, the state-run pension system has always required contributions from a sufficient working class which paid money to the pension fund, during periods characterized by stability and economic growth. The respective system has been applied in Romania, too, especially during Communism. Even today, there are talks about the capitalization of important resources during that period, which could guarantee the long term and very long term stability of the pension fund. The respective hypothesis is not entirely correct, because we cannot consider that the economically active

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age depositors create intangible funds, benefiting from them at the time of retirement. The pension is a property gradually built up as the main source of effective contribution. However, it does not mean that, for example, if the depositor has accumulated 300 million lei in 30 years, he or she will benefit from the same amount from the state-run pension fund, each month, for the rest of his or hers life - 5 or 10 years (taking into account the average life expectancy).

First of all, it happens because there is a history of money, specific to the respective period, during the depositor's economically active life. Let us assume, again, that we are talking about a person who has contributed to the pension fund since 1966 through 2008. During 42 years, our depositor has witnessed two political regimes, two economic regimes (a centralized economy and a market one), triggering different financial regimes, exchange rates (under Communism, the dollar exchange rate was established through state decrees), devastating inflations, not to mention the demographic growth (especially after 1966) and, later, its increasingly sharp decline, the liquidation or privatization of state properties or the significant decrease in the number of public employees and in the demographic ratio of economically active population and pensioners, subsequently reversed. In addition, many still believe that, in the 1990s, the pension fund was used for other purposes, a move with negative consequences. To conclude, no contributor can benefit from the entire amount of the deposit, which, well capitalized upon, may earn him or her at least a decent living, at the age of retirement. And that happens because the (extremely inconstant) ability of the national financial institutions to cover payments based on the available resources at the respective moment is relevant for the state-run insurance system.

Therefore, the state cannot afford to pay more than it possesses at a certain moment. As a result, it can only establish rigorous criteria to calculate pensions based on contributions and their length, hierarchizing beneficiaries, applying a very simple rule: the person who has contributed large amounts for a long period of time may enjoy more benefits than a person who has contributed smaller amounts for a short period of time.

Although since mid-1990s, there have been numerous signals about the fact that the state will no longer have the ability to pay, amid the uncontrolled increase in the number of pensioners below retirement age limit or sick and the accelerated decline in the number of economically active people. However, although thorough calculations indicated that the pension funds were no longer self-sustaining, being financed from the state budget, the political elite remained indifferent. Moreover, the leadership of law enforcement institutions (the Ministry of Interior, the Ministry of Defense, and the Ministry of Justice) promoted special laws in the Parliament, according to which their employees would receive pensions equivalent to 80% of the last salary (including abusively increased benefits). Thus, an abnormal situation was created, and people who had long been retired benefited from pensions that exceeded the highest salary earned by a public employee. During that period, many people belonging to the respective social category justified their privileged pensions invoking their former positions within law institutions (such as the judiciary, considered to be the third power) or military structures, disregarding the other professions. The decline has accelerated, as the politicians have constantly promoted the myth of increased pensions, to win the support of a major part of the electorate represented by pensioners. As a result, during the 2005-2008 boom years, the pensions were constantly increased, however justified, but without the necessary economic support, completely neglecting the fact that once increased, the new pension fund should further be financed. However, finally, the political elites could no longer deny reality, admitting that the current state-run pension system faced collapse, ratifying the private pension system and the compulsory pensions - comprehensively approached in the following section - that could improve our future.

In 2009, when Romania faced the economic crisis overnight, the only solution to balance the situation was to ask for the IMF, the EU and the WB support. The conditions imposed during the respective negotiations focused mainly on cutting the budget deficit. Thus, in order to balance it, a series of laws were adopted, including revised pension rules, taking into account the state's economic and financial situation, instead of people's needs. Thus, the solid base of the new law was established

by adjusting pensions according to the minimum average wage, contributions, and the retirement age - 63 for women and 65 for men. In addition, the incorporation and recalculation of special pensions, according to the contributions paid, has led to massive protests. However, it is obvious that further measures will be adopted, and that the reform will continue to adjust pensions, either increasing or decreasing them. Unsurprisingly, after the political leadership's announcement that Romania overcame the crisis and that the economic recovery was visible, the pensions for people working under hard labor conditions increased. However, as far as future developments are concerned, the present paper offers a potential solution, based on AVIVA and DeLoitte reports on the savings deficit in the EU member states and Romania.

2. Basic definitions and calculation methods

The above discussion was meant to prove that pension funds had always faced deficits, due to various reasons, and the respective situation would not change in the future.

The word "deficit" comes from French, being defined in the encyclopedic dictionary "Larousse" as something that lacks, triggering disequilibrium between earnings and spending; and the resulting state of affairs. The Romanian dictionary "Dex" and other dictionaries as well, including the recent Romanian illustrated dictionary [12] nuance the term, defining it as expenditures that exceed earnings or lack of money for 'inventory' or during the audit period.

I have highlighted the respective definitions in order to stress that the deficit is always identified by examination (inventory or audit), revealing events that have occurred. The present paper assesses the pension deficit nowadays (for the recent past) and for the future, through prognosis based on potential scenarios. To that end, the paper analyzes three types of deficits: *the annual retirement income gap* – denoted by X, *the capital shortfall at retirement* –Y, and *the annual pensions savings gap* - T.

The annual retirement income gap - X represents the shortfall between required income and forest income in retirement.

The capital shortfall at retirement –Y represents the capital required at retirement that, when annuitised, would produce sufficient income to close the annual retirement income gap.

The annual pensions savings gap – T represents the additional annual savings required to meet the capital shortfall at retirement.

The three definitions highlight the difference between the savings accumulated during the time when people were economically active and the spending at the age of retirement, in order to enjoy a decent living standard. In mathematical terms, the three definitions are the following:

1. We have the next formula of the *annual retirement income gap* – X:

$$X = Y - Z$$

where Y represent *required income at the age of retirement and* Z represent the forest income *at the age of retirement.*

We also have the next formula of Y:

$$Y = A \times B$$

where A represent the *salary at retirement* and B represent *the replacement rate* (for example 70%),

and the formula of Z:

$$Z = C + D + E$$

where C represent *the state pension income*, D - *the private pension income* and E – *net non-pensions income.*

2. The formula of *the capital shortfall at retirement* – W is:

$$W = X \times a$$

where *a* represent the annuity factor.

3. The formula of *the annual pensions savings gap* – T is:

$$T = f(W; p\%; n)$$

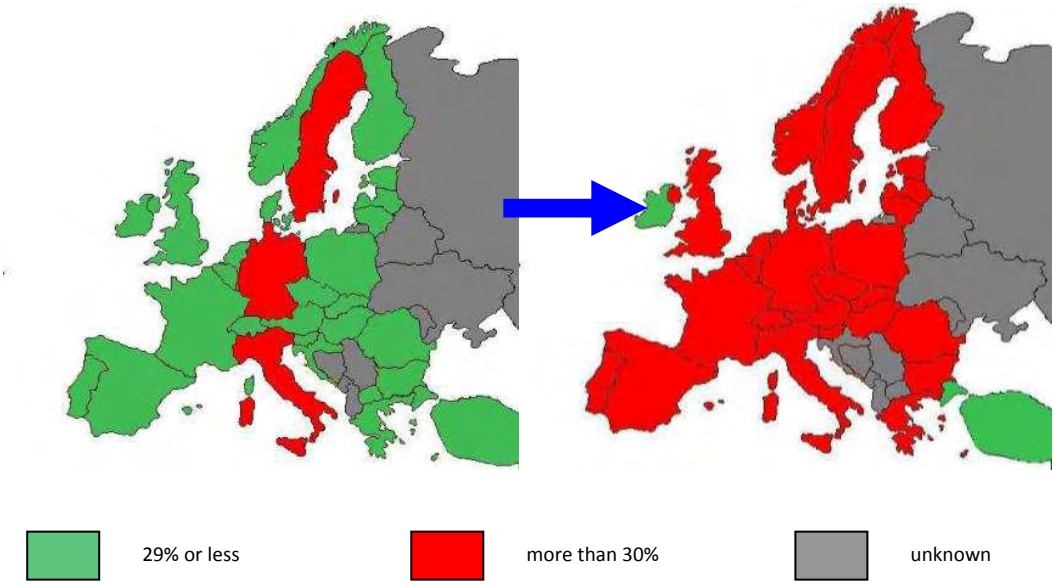
where p% represent *the interest rate* and n represent *the number of years remains until the age of retirement.*

3. Efforts to balance the savings deficit in Romania and other European countries

Providers of pension and life insurance products are increasingly aware that the pressure over the European pension system will grow, as a result of the rise in the average age of retirement and the modification of the balance between economically active and inactive persons, amid the constant growth in the number of pensioners. The graphic below clearly shows that if in 2008 pensioners accounted for 30% of the population from several geographic regions, such as Norway, Germany or Italy, in the next 40 years, the respective percentage would emerge in Western Central Europe states, such as Finland, the Baltic states, Romania, Bulgaria and Greece. After another 10 year period, the economically active population is expected to decrease by 12%, and the respective percentage of pensioners will generalize to the whole Europe.

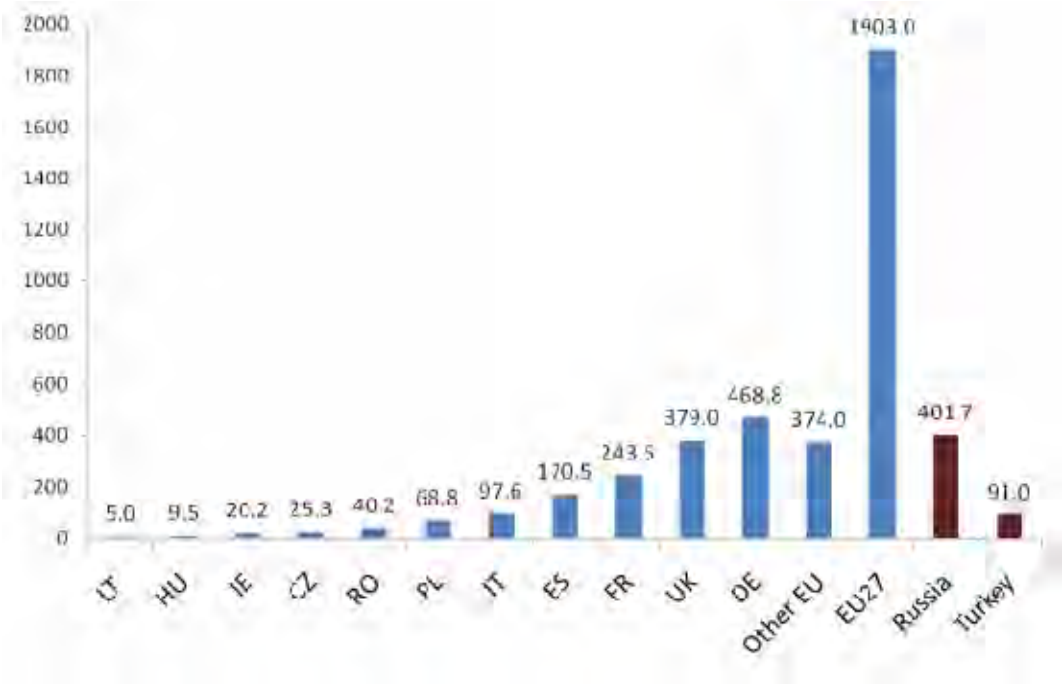
The report pensioners/total population

2008 **2050**



There are two relevant AVIVA tables. The first one illustrates the savings deficit in 11 EU member states, as well as in Russia and Turkey.

The pensions gap for different states from EU, Russia and Turkey

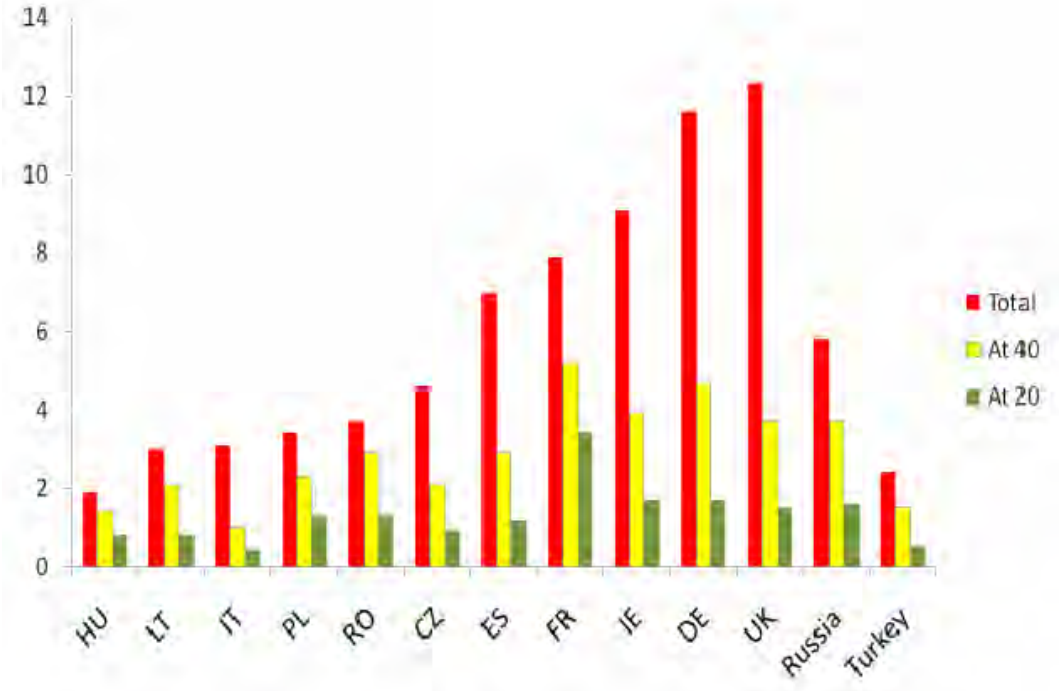


Romania should save 40.2 billion euros each year, four times more money than Hungary (9.5 million euros, and half of Romania's population) and approximately less than half of Poland's savings (68.8 million euros, and a significantly larger population). The deficit is higher in developed countries, where the population has high wages and pensions (for example 97.6 in Italy, 170.5 in Spain, 243.5 in France, and, the highest of all - 468.8, in Germany).

The total deficit reaches 1,900 billion euros in the 27 EU member states and 91 billion euros, namely twice as big as in Romania, in non-EU countries such as Turkey or Russia – 401.7, a smaller amount than in Germany. The good news is that the prediction model enables us to calculate the savings necessary to enjoy a decent living standard at the age of retirement, in the next 50 years. The bad news is that we might need more money to cover the deficit.

The second table shows the data on the savings deficit per capita, establishing the average deficit, denoted by *k euros/year*. Of course, the proportion is not different from the global one. Therefore, it is obvious that a Romanian citizen will have to save less than a Spanish resident and more than a Hungarian one, according to the average age and the demographic growth rate.

The pensions gap for individuals (k euros/year)



The table also shows the contributions paid since the age of 20 years and, respectively, 40 years, as well as the global contributions, highlighting the levels reached in Spain, which occupies the middle position. Here, the contribution should represent 1.2 K/per year for people aged 20, 2.9 k/per year for those aged 40, the global contribution reaching 7 k/per year. Thus, people could enjoy a decent living standard at the age of retirement. It is also important to mention that one should start paying the respective contribution as early as possible.

According to AVIVA report, the savings deficit should reach 1,900 billion euros, in 2011-2051, namely 40.2 billion euros in Romania, accounting for one third of our country's GDP or 3,700 euros per capita. Signaling that, „AVIVA Europe" recommends the following four measures:

1. Establishing the budget of the pension system of each country, per GDP, for each pillar. That target would encourage national governments to facilitate the development of the culture of saving.
2. Creating the European Quality Standard for Pensions, enabling thus providers to guarantee the quality of their products, increasing at the same time clients' confidence.
3. Issuing a pension declaration, encouraging consumers to consider the state-run pension system as part of the mixed strategy for providing for their future, and to act in order to obtain additional benefits.
4. Reviewing the National Plan to boost personal savings, taking into account the efficiency of the current incentive programs, their impact and visibility, as well as their ability to change consumer behavior, encouraging them to save more money.

The AVIVA report reveals that the state-run pension system still plays a vital role in the EU member states, amid the increasing presence of private pensions. Thus, the respective pension systems were introduced in 1994 in the Czech Republic, as non-compulsory pensions, in 1998 – in Hungary, and in 1999 – in Poland. The additional contributions and the compulsory pensions were introduced in Romania in 2007 and in the non-EU countries in 2001, for example in Turkey (the

additional pensions) and in Russia – in 2002, through state decree. Thus, in all European countries surveyed, the state-run pension system and different compulsory and non-compulsory pension schemes have been adopted, providing the beneficiaries the opportunity to save money and to enjoy more benefits at the age of retirement. At the same time, the coverage of private pension systems is gradually extending, tending to replace the state-run one. However, in the future, the value of state pension funds will further decrease, amid a drop in the number of economically active persons and an increase in the number of pensioners. In Romania, the respective ratio has exceeded the critical value (1). Moreover, according to forecasts, more than half of the working population will retire in the next 40 years. Unfortunately, there are fairly few global solutions: to save more money, to use non-passive assets, to retire at an older age or to accept lower living standards when retired.

There are two tables that show us the saving rate for persons aged 20-50, in 2010, and, respectively, the detailed situation, based on a scenario for the same category, briefly reviewing three types of contributions, gradually providing wage replacement rates (70%, 60%, and 50%), the savings efficiency, the 10% lower or higher state pension, the increase in the pension age limits – by 5 or 10 years, as well as the savings efficiency at the age of retirement.

	The age in 2010			
All pensioners in 2011-2051 aged up to 65 years old	50 years old	40 years old	30 years old	20 years old
3700 EUR/year	4800 EUR/year	2900 EUR/year	1700 EUR/year	1300 EUR/year

The best scenario is the following: a 20 year-old person in 2010, who will work 5 years longer than currently stipulated and who can save only 300 euros per year, and the worst scenario – a 50 year old person, in 2010-2011, who wants to benefit from 70% of his or hers wage, having thus to save 5,700 euros per year.

The average annual savings gap for pensioners in 2011-2051 according to age (thousand euros)

The scenario	The average annual savings gap for all pensioners in 2011-2051	The average annual savings gap for a 60 year-old person in 2010	The average annual savings gap for a 50 year-old person in 2010	The average annual savings gap for a 40 year-old person in 2010	The average annual savings gap for a 30 year-old person in 2010	The average annual savings gap for a 20 year-old person in 2010
The reference case	3,7	unavailable	4,8	2,9	1,7	1,3
Replacement rate 70%	4,6	unavailable	5,7	3,4	2,0	1,3
Replacement rate 60%	3,0	unavailable	4,2	2,5	1,4	1,1
Replacement rate 50%	1,5	unavailable	2,7	1,6	0,8	0,6
The interest rate 8%	2,9	unavailable	4,0	1,9	0,9	0,5
The interest rate 3%	4,3	unavailable	5,5	3,7	2,4	2,1
The state pension: -10%	4,2	unavailable	5,3	3,1	1,9	1,4
The state pension: +10%	3,1	unavailable	4,4	2,6	1,5	1,1
The age at retirement: +5 ani	2,8	4,4	3,1	1,6	1,2	0,9

The age at retirement: +10 ani	2,2	3,2	1,9	1,0	0,7	0,6
The interest rate 8% The age at retirement: +5 ani	2,3	4,0	2,3	1,0	0,6	0,3

The authors of the study start from the premise that in Romania, the salary will represent 80% of the average European one, by 2023. The middle class will face the most pressure on revenues, as beneficiaries have enough assets to enjoy a decent living standard at the age of retirement, while poor people are protected by the state through social protection programs.

To cover the 40.2 billion euro deficit, each category should save money. Thus, people aged 30 should save 1,300 euros each year, the segment aged 30-40 – 1,700 euros each year, and those aged 50-65 – 4,800 euros per year. That means 80 euros monthly (for the young people), 142 euros (for those aged 30-40), and 400 euros (for the third category).

However, what else can we do? First, the 20th century *mentality* should change. According to it, the state should take care of its citizens, who should not be preoccupied with their needs. As I have said, the state pensions cannot be increased, and the state will be forced to borrow more and more money to make the respective payments. Subsequently, the state will be unable to pay debts, being thus compelled to cut pensions. According to the worst scenario, in the future decades, pensions paid by state will be only 10% - 15% of the average wage, and respectively, 20% - 25%, in the developed European countries, insufficient for a decent living standard at the age of retirement.

Private pension funds (Pillar II and III) may represent a solution, being already adopted by many European countries. However, the state will temporarily nationalize them, if the budget deficit exceeds the limit (as it happened in Hungary, where a scandal has recently broken out), endangering thus the future of pension funds. Unfortunately, all those warning signs are usually neglected. It is still a hot summer day, and a bright blue sky. One could hardly spot a few clouds in the distance. Who can anticipate the looming tempest? However, despite inflation problems, the waste of public resources, the crisis and its negative impact, the state has paid pensions up to date, with sacrifices known only by the financial elite. Moreover, the political leaders competing in a never-ending election campaign, being aware of the needs of pensioners, have promised and will further promise a major increase in pensions, despite the collapsing system, endangering our country's future.

Therefore, we should learn to save money after years of wasting money, heavy consumption and destruction. Who will teach us? The young people, aged 20 – 30, are oriented towards present, instead of future. To convince them to save money in order to enjoy a decent living standard at the age of retirement, after 40 years, seems impossible. But it can be done, telling them over and over again that their contribution is small at the respective age, and that they can stop spending on expensive things, such as vacancies abroad or luxury items, to gather 1,300 euros, each year.

The age group of 30- to 40-year-olds or the 40 – 50 year-olds, is usually married, with children, having a stable job. They also got bank loans (for houses, cars and other necessary assets). Although enjoying a decent living standard, they are responsible and willing to save money in order to enjoy the same living standard at the age of retirement. Thus, they can be easily convinced to save 1,700 euros per year, with sacrifices, of course.

The other category, soon to retire, can be hardly influenced, and not only because their contribution should be greater. They are experienced enough and their personality is well-shaped. Many of them have been taught to save money and they have already done that, so, they can be easily convinced. However, others rely on state pensions, even though knowing that they may not enjoy a decent living standard at the age of retirement. Some of them believe that they could do

something else, if healthy and experienced enough to get a part-time job, in order to preserve the same living standard at the age of retirement.

What else could we do? The insurance companies strongly recommend us to make investment choices, such as bank deposits, state bounds or houses, whose value increases, as time passes. For example, they can rent one of their flats, to earn more money, exceeding sales price. Thus, efficient investments may represent a solution for you to enjoy a decent living standard at the age of retirement.

For those who cannot do it, the companies recommend measures already implemented in various European countries, such as increasing the age limit or working part-time in retirement. Although contested (for example, a new wave of pension protests has hit France, nevertheless failing to change the leadership's decision), the first solution will be gradually adopted by every country. One thing is sure: raising the state pension age by 5 years may reduce the budget deficit by one third. In the past 10 years, in Romania, the age limit was raised from 57 to 60 years for women, until 2015, and, in the next 20 years, it will probably rise to 63, until 2030.

A small change to the state pension age was also adopted for men, namely from 60 to 62 years, and later, to 65, until 2015, raising, in the next 20 years, to the same level.

For example, the new education law and the future status of teachers stipulate the same age limit for pre-university teachers (eliminating the opportunity to work for three years more, after retirement) and university professors (who could work until they were 70, if approved by the faculty leadership). But let's not deplore their fate, as their experience and expertise is still needed after retirement (they could offer consultations, teach pupils at home, getting paid by hour, publish their works abroad or in our country, attend conferences, and so on).

The same applies to experts in various fields, who can offer their services without obstructing the young people's access to top-level positions, where they are preferred, offering them instead best and valuable services, based on their expertise. For example, the Romanian-Austrian engineer Emil Prager (1888 - 1985), who built many representative buildings, such as the Royal Palace, the Ministry of Interior Palace, the Military Academy or the Elias Hospital, in Bucharest, as well as in other Romanian cities. In 1950, at the age of 62, he became advisor to the then Energy Minister. Until the age of 90, he helped the Ministry to build dams, thermal plants, hydro plants, under the Communist regime. His example has been recently vehiculated by the Romanian media outlets.

1.4. The public pension schemes in Romania

As most beneficiaries nowadays rely on state pension alone, it is important to briefly present the three-pillar architecture of our country's retirement income systems, which, altogether, could provide a decent living standard at the age of retirement.

- The first pillar (or state pension) is a distributed system, the compulsory contributions being paid each month by the employees (10.5%) and the employers (20.8% - 30.8%), in accordance with the Labor Standards Act;

- The second pillar (compulsory private pension) is financed from the contributions paid by the employees, amounting to 2%, in 2008-2009, expected to increase up to 6%, by 2016. It is mandatory for people aged under 35 to join it, while the 35-40-age segment, benefiting from state pension funds, may not;

- The third pillar (additional voluntary private pension) is based on the same principles. Contributions amount up to 15% of gross earning, paid each month by the employees or the employers (tax-free up to an amount of 400 euros), since 2009. It is not mandatory.

According to 2010 estimates, the average pension in Romania reaches 736 RON a month, namely 51% of the average wage of 1,436 RON, while in Europe the average pension reaches 85%.

The paper will present the third pillar (additional voluntary private pension), preferred by many social categories, including public employees, budgetaries, businessmen, liberal professionals and farmers.

Below, I will present two such products, namely the ING Classic and ING Optim, provided by ING. The two products have the same structure, but different deposit guarantee schemes. They are based on investment tools whose risks and opportunities are worthy of, such as bonds issued by the Romanian state or public companies, as well as by other EU or SEE countries, as Explicit Government Guarantee Bonds.

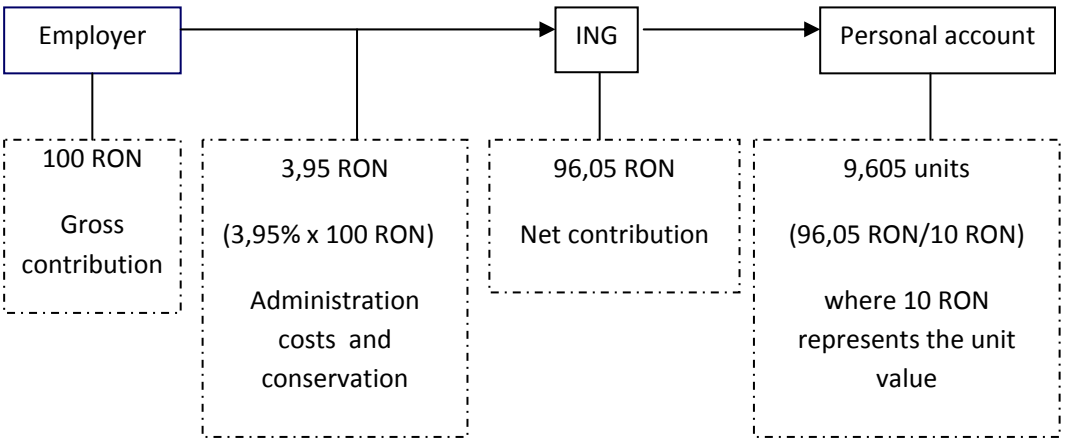
The first product offers relative guarantees on the market (achieving a greater efficiency rating than other additional pension schemes, calculated by the Private Pension System Supervisory Commission which controls the assets and transactions operated by the funds).

The second product is based on Deposit Guarantee Schemes (the payment of at least the value of gross contribution, in addition to the value of transferred assets).

The table below illustrates the tax expenditure by type and level:

	Value	**Mentions**
ING Clasic Fund		
Monthly administrative costs and conservation	3,95%	Deducted monthly from the total contribution paid Legal maximum level – 5%
Annual administrative costs and conservation	1,24%	Deducted monthly from the funds total net asset Legal maximum level – 2,4%
Transfer costs	5%	Charged when the transfer occurs within the first two years after accession No charge is made if the transfer to another ING fund
ING Optim Fund		
Monthly administrative costs and conservation	3,95%	Deducted monthly from the total contribution paid Legal maximum level – 5%
Annual administrative costs and conservation	1,36%	Deducted monthly from the funds total net asset Legal maximum level – 2,4%
Transfer costs	5%	Charged when the transfer occurs within the first two years after accession No charge is made if the transfer to another ING fund

It includes two fee adjustments for monthly administrative costs and conservation, covered by the participant and the managers of the fund, namely an adjustment from 3.95 to 4.85 (ING Classic and ING Optim), and, respectively, from 1.24 or 1.36, up to 1.95. The latter has already been approved by the Commission, entering into force since September 23, 2010.



During the contract period, the specific transactions take into account the modification of the contribution limit, the suspension, cessation or resumption of payments, the change of employer and transfers from or to other funds.

As far as benefits are concerned, they can be received by the 60 year-old beneficiary who has paid 90 monthly contributions, the value of personal assets being subsequently established. The participant will then receive the respective amount. If the two pre-conditions are not met, the amount will be paid off as a lump sum or annuity over a 5-year period. The same strategy is to be applied if the participant gets sick and is unable to hold a job. If the beneficiary dies, there are two methods: if he or she dies before submitting the necessary request, the deposit amount will be paid to his or hers heirs, under succession or, if he or she dies after submitting the written request, the amount will be paid to the designated person.

As far as deductions are concerned, the tax free employee or employer contribution is shown below.

The employee's annual contribution	Over 400 EUR	The employee pays: - CAS (9,5% + 5,5% + 1%) for this amount because it is part of salary - income tax (16%) for this amount
	400 EUR	The employee pays: - CAS (9,5% + 5,5% + 0,5%) for this amount, which is basically an amount withheld from the salary - NO income tax (16%) for this amount
The employer's annual contribution	Over 400 EUR	- The employer pays CAS (19,5%/24,5/29,5 + 5,5% + 1% + etc) for this amount - NO profit tax (16%) because this amount is considered an advantage in cash
	400 EUR	The employer does NOT pay - CAS (19,5%/24,5/29,5 + 5,5% + 1% + etc) for this amount - NO profit tax (16%) for this amount

The second table illustrates several scenarios, according to the periodic payments over a fixed period of time.

Scenarios			
Annual contribution (EUR)	Monthly contribution (EUR)	Contribution period (years)	Monthly pension (EUR)
200[1]	16,7	10	14
		30	57
400	33,4	10	27
		30	114
800	66,7	10	54
		30	228

[1] 200 euros represent the limit of the deductible amount per fiscal year

Alternative scenario:

A female person (*x* years old) contracts a voluntary private pension. For this, she contributes for *n* years (up to 63 years) with 66,7 euros/month (800 euros/year). It is considered that the interest rate paid by the credit institution (the fund's average annual interest rate) is 5% per year. To determine the monthly pension that a person will receive from the retirement age is using the formula:

$$\text{Monthly pension}=\frac{\text{Annual contribution}}{12\times(\text{life expectancy -retirement age})}\times\frac{N_x-N_{x+n}}{N_{x+r}}$$

where N_x represent a switching number and it can be found in the switching table, *x* represent the person's age, *n* represent the contribution period and r is the time after the person begins to receive the pension.

Thus,

$$\text{Monthly pension}=\frac{800}{12\times(73{,}5\text{ -}63)}\times\frac{N_{37}-N_{63}}{N_{63}}$$

As a recap, we can say that whatever type of voluntary pension chosen by the participant, its advantages are consistent. Thus, besides increasing the pension is not paid tax on contributions (the amount to be contributed is deducted from the income tax, maximum 400 euros per fiscal year), the money will be protected in all circumstances including permanent disability or death, freedom of movement (the participant decides: the period that is willing to contribute, the contribution level, the pension fund type).

In conclusion, regardless of the pension system joined by the participant, the *benefits* are significant, including important retirement benefits, tax-exempt contribution amounts (representing the equivalent of 400 lei in a fiscal year for each participant), protected funds, no matter what happens with the beneficiary, including in the case of his or hers death or permanent disability, encouraging at the same time the freedom of movement (the beneficiary establishes the contribution period, the amount paid, the pension fund).

Conclusions

In the end, it is important to highlight that the employees are free to choose either one big basket of eggs or just one egg in a small basket. The amount of state pension could be increased if joining a private pension fund, including the voluntary one, which, along with other benefits (a bank deposit, share holding, life insurance policy, and gold or real estate investments) might provide you with the opportunity to enjoy a decent standard of living at the age of retirement.

The issue of *pensions* is extremely important at the global level, especially in Europe, the old continent where people enjoy the world's best living standards and the longest life expectancy. But money is needed to further enjoy it at the age of retirement.

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CONTROVERSIES IN USING DERIVATIVES IN THE CONTEXT OF THE FINANCIAL CRISIS

ALEXANDRU OLTEANU[*]

Abstract
As a phenomenon, risk is specific for any human activity. Following this logic, we can say that this concept is a constituent element in the definition given to the financial sector, investments and market competition. The questions that the whole range of operators (governments, regulation bodies, financial institutions, companies and shareholders) must answer are:
Which type of risk should one assume within an economic entity and to what extent should that risk be taken?
If risk is materialized, to what extent will the financial consequences affect the involved parties?
By enforcing laws that might eliminate economic risk, regulation bodies attempt to create an ideal regime in which the concept of"bankruptcy" does not exist. Thus, financial institutions and companies which hold a key position in the different economic sectors are prevented from performing actions that might lead to their bankruptcy. The positive effects of the regulation are doubled by less appreciated effects, such as the limitation of the investment potential. Working in this environment, the financial and economic agents' behaviour has significantly modified, i.e. it has mitigated the degree of risk aversion.
The solution for this is establishing more flexible regulation lines that do not have as a main objective the elimination of failure, but rather the reduction of frequency with which such incidents occur and to manage the individual investors'/consumers' losses.
One must preserve a balance between the need for facilitating risk internalization and the efficient use of capital (a fundamental operation for maintaining competitiveness and innovation spirit), on the one hand, and maintaining a certain protection level for the investor/client, on the other hand.
For regulation bodies any of the two options will be a priority, since it is obviously in the commercial interest of any company (and, certainly, of the suppliers, customers and associates) to efficiently manage risks that derive from its activity and, for this purpose, to take into consideration the use of derivatives. Recent financial collapses have illustrated the consequences generated by the improper application of the basic risk management principles and of the efficient implementation strategies for derivatives.

Keywords: *risk internalization, derivatives, CDOS (Collateralised debt obligation), CDS (Credit default swap), financial transaction taxes, Paul Volker's financial theories, the Tobin tax.*

Introduction

The use of derivatives – an innovation of the second half of the XXth century – has imposed itself thanks to the **advantages** it offers:

1.Despite the controversies that exist as to the use of derivatives, they remain the best financial instruments for market risk/credit management, as well as for other forms of risk. Both on the stock market and OTC (non regulated market), derivatives have three highly appreciated characteristics: geographical area coverage (derivatives exist on most important financial markets in the world); diversity (derivatives cover the range of all monetary instruments); liquidity (usually, any position may be occupied, diversified or cancelled at low costs).

2.When derivatives are transacted on a stock exchange market, the company benefits of certain advantages:

a. on this completely regulated market, transactions are guaranteed by compensation houses, significantly mitigating credit/counterparty risk;

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b.due to the standardized form of contracts, positions may be closed without the least inconvenience. As to OTC, the advantages are: direct choice of counterparty and flexibility of the form of the contract.

3. By using these markets, debtors and creditors can fix the cost of money; importers and exporters may be protected from currency fluctuations; companies can avoid unexpected price rises for raw materials. The way insurance contracts are used by companies to protect their fixed assets is similar with the way derivatives are used for insuring liquid assets. In both cases a premium/its equivalent is paid for purchasing such a means of protection.

In spite of the"pro-derivatives" arguments, **doubt is cast upon derivatives** when managers conceive risk management strategy.

Literature Review

A. The role of derivatives in risk management and their speculative use.

Historical data concerning risk management strategy reveal cases of operators that have recorded significant losses. For a risk manager, giving up derivatives as an efficient means for covering risk is not a solution. The surest solution is to understand the causes that lie behind these wrong movements which lead to important losses. However, discovering these causes is not simple, for they are a constituent part of human behaviour which sometimes does not take into consideration econometric models and results of simulation software. Besides the role they play in risk management, **derivatives are** also **used in a speculative way**. This is not surprising at all. Companies and speculative operators share a different opinion on derivatives. Derivatives have inner characteristics that, in case of minimum investments, allow companies to manage a series of risks. However, speculators perceive derivatives as a potential source of substantial profits and, thus, speculators choose to adopt a position and wait for a market evolution that might bring profits.

Despite operations initiated by speculators who amplify the endogenous market risk, in reality: most treasury and investment funds departments use these instruments for successfully managing market and commercial risks. Consequently, managers cannot ignore the potential of derivatives in managing a significant number of risks to which companies are exposed, except for the case in which one chooses to internalize risk and potential losses.

If the few enumerated arguments have consolidated the decision to pay the necessary attention to derivatives when evaluating risk management for a company, then afterwards one must regulate procedures for managing risks that derive from the use of derivatives. We consider that the following directions are essential for efficiently implementing risk management by means of derivatives:

1. Strategy Compliance. Human Capital

Running financial and banking institutions must maintain compliance between risk management policy by means of derivatives and the company's strategy, economic objectives, financial situation and its attitude as regards risk. To accomplish this function, managers must identify those risks to which a company is exposed (e.g. market risk, credit risk, operational risk, legal risk), establish what is the role of transacting derivatives for the company (a potential profit source or simple hedging operations) and ensure efficiency for the internal control system of transaction operations. In this respect, the appointment of professionals with a proper level of knowledge as to derivatives transaction is absolutely necessary and compulsory.

2. Organizational structure. Internal Control

The manager should establish an organizational structure and an independent control frame for transacting derivatives. This structure should comply with the principles of efficiency and facilitate risk management. The functions of this structure are: identifying, measuring, managing, monitoring, mitigating and reporting present and provisioned risks. This frame should monitor report

transmission, usages for sent/received document, the proper accounting of sent/received documents, the competence of transaction department members, responsibility assignment and procedures provided for unpredictable situations.

3. Managing risks associated with derivatives transaction

The most important risk categories – which one must take into consideration when laying the foundation of the derivatives transaction department – are: market risk, credit/counterparty risk, operational and legal (regulatory) risk.

An efficient risk management associated with derivatives transactions implies efficient procedures and work techniques for every type of risk, namely:

- Market risk – may be generated by unpredictable prices for shares, securities, merchandise, currencies, other market indices, or by their volatility. Market risk policies refer to approval, execution, confirmation, as well as recording, measuring, monitoring and reporting transactions and they set forth procedures for establishing relationships with the authorities in the field, adopting limit positions and evaluating exposures.
- Credit/counterparty risk – we appreciate this risk can be reduced by a collateral guarantee of credits and by techniques that increase loan capacity. Besides the credit/counterparty risk, the risk manager must take into account: third party risk, country risk and risk regulation. The risk manager's functions must include: differentiation of risk profiles for the stock exchange and the OTC market, assessing the advantages and disadvantages of portfolio diversification, the proper use of collateral guarantees for mitigating credit risk and establishing an action plan in case unpredictable changes appear (a partner's position or the position of a broker who faces financial difficulties).
- Operational risk, including the technological one – may be managed by identifying the impact - generated by the new products, partners and clients, the modification of the transaction methods, of the IT services sources or any inconsistency that might occur in running the business - upon risk management.
- Legal (regulation) risk has certain important particularities. Compliance with the legal frame is absolutely necessary for the operational capacity to make transactional operations and the basic principles that set up its functioning. Documentation must refer to the relationship between trader, the own bank and brokers, and it must observe the legal principles according to which the market functions.

It is obvious that these general directions are neither an insurance policy for companies which adopt them, nor an immunization treatment to risks deriving from transacting derivatives; even if followed, these directions cannot cover the different circumstances in which individual operators might be placed. Anyway, the above mentioned directions are a landmark for identifying, managing, assessing and mitigating risks deriving from derivatives transactions. If carefully used and properly controlled, derivatives play and might play an important part in risk management strategies.

B. The origins of the present international financial crisis and directions for regulating the financial market.

Such a leitmotiv used for explaining the present international financial crisis refers to the complexity of the new financial products, the so-called "synthetic" products, which are issued by important banks by means of the "originate and distribute" process. In fact this leitmotiv is used as a self-justification and it avoids tackling the problem.

However, complexity can be defined differently; one can mention an inner not dangerous complexity if the cognitive limits do not generate fatal errors. And there is a human made complexity, which, for example, consists in risky individual actions and precarious control mechanisms.

There are opinions according to which the financial products occupying a central place in the present crisis (CDOS/Collateralized Debt Obligations, CDS/credit default swap) should not be criticized. In our opinion, the problem is that a part of the bank securization activity (titrization) – transformation of loans and more and more sophisticated securities – contains fundamental vices.

Let us explain what is perceived as a "congenital" flaw of the "originate and distribution" pattern. We admit that in the simple transaction involving the lender and the borrower risk is one and it is illustrated by the borrower's reliability. This transactional (counterparty) risk can be checked by means of credit conditions on the market.

However, when loans are transformed into securities or other derivatives, the individual transactional risk starts to increase; the longer the chain of transactions is, the more complex is the securization (titrization) operation (by security "synthesis"); what appears to be more dispersed and smaller as an individual risk becomes more threatening for the system. This effect appears because markets are less and less transparent; some financial products are neither transacted on the effective markets nor do they benefit of credible evaluations (prices). At a certain moment, the cost of identifying risk is overwhelming and the market is blocked, a situation which in fact has already occurred.

The big rating agencies which used quantitative methods (patterns) have been caught in this chain of flaws. These agencies have major vices as to evaluating risk for the new securities.

For banks securization has appeared as a very profitable business to the extent to which they have managed to apparently eliminate risk. Banks used to sell securities to investors or to place them in special derivatives, taking them out of their own balance sheet. However, what appeared as a convenient dissemination of individual risk in the entire financial economic system led to increasing risk in the system. It is naive to state that banks (or at least the ones who were responsible for ensuring securization) did not understand the dangers of the pattern they used. In fact, all banks specialists realised that this was a dangerous attempt. Anyway, these specialists benefited of enormous amounts of money by means of compensation schemes that encouraged risk instead of a cautious attitude.

The collapse that the financial system has experienced in the economically advanced world – especially in the USA – obliges us to reconsider the existing financial markets regulations and surveillance mechanisms.

In the USA reforms are approached from two different positions. Both positions have common points, such as: imposing limits for leverage; more transparency; compulsory transactions of derivatives at specialized exchange offices; regulation of operations performed by all financial entities which generate systemic risk (including risk funds and hedge funds, as well as private equity funds); eliminating (as much as possible) interest conflicts; regulating rating agencies activities; modifications in paying bankers; consolidating surveillance mechanisms; paying more attention to systemic risks.

There are important differences between the position adopted by Paul Volcker (former FED Governor more than 20 years ago and at present counsellor of President Obama) and the position adopted by Lawrence Summers (former Treasurer and at present one of the main counsellors of President Obama). Volcker, together with other specialists in finance - Alexandre Lamfalussy in 2001, Paul Krugman in 1999, Nouriel Roubini in several deep studies, Warren Buffett in his studies on International Bank Regulations and the Bank of England etc. - have warned about the great dangers existing in the financial system and the financial derivative innovations used by important banks, as well as about the imminent financial collapse. In this context, Volcker considers that it would be wrong not to tackle the dimension of certain financial institutions which can hostage a system (see the collapse of the Lehman Brothers investment bank and the USA Government intervention to avoid the collapse of the AIG Insurance Company – which, ironically, acted as a gigantic risk fund).

Volcker and others who share his view suggest that commercial banks should no longer make "proprietary trading" operations, which are operations made in one's own interest. In this way, risky operations are reduced for financial institutions which encourage and use deposits riskily.

The measures announced by President Obama in February 2010 – measures which follow Paul Volcker's ideas – represent a new key step taken in building a new regulation system for supervising financial markets.

For example, let us consider the measure adopted for taxing financial transactions. Such a measure was proposed by the American economist James Token for discouraging speculative transactions on currency markets in order to mitigate their volatility. Today this idea is embraced by specialists in London, Paris, Berlin, in international financial institutions (FMI) with a view to reduce the volume of financial transactions and obtain incomes that might help states intervene in case of systemic risks. Actually, there are countries (Australia, Switzerland, Greece, Hong Kong, India etc.) which tax some security, shares and derivatives transactions. Recently, Brazil has imposed takes on the entrance of speculative capital.

There are opinions according to which taxes on financial transactions should not be imposed with a view to collect fiscal incomes (i.e. Tobin tax, differently from Pigon taxes, which would attempt to collect negative externalities generated by market flaws). This reasoning is supported by envisaging financial mediation as an intermediary production (see P. Diamond's and J. Mirrlees' study), respectively the taxing of intermediary (not final) production would introduce dissensions in the production chain, reducing efficiency.

Conclusions

The conclusion is that the present financial crisis is basically generated not by the complexity of the new financial products, but by a financial innovation pattern and the characteristics of financial products (e.g. CDOS, CDS) which have disrupted the good functioning of markets: **transparency** and **trust**.

Besides proposals for fundamentally reconsidering the existing regulations and surveillance market mechanisms, imposing a tax on financial transactions is not senseless since: it is necessary to register fiscal incomings that would allow necessary interventions to be taken; this would mean imposing a tax on an activity which represents a bad allocation of resources.

Consequently, it is desirable that the financial system should lose a considerable part of its speculative nature. In the USA, in European countries (e.g. Great Britain), the financial system is now over dimensioned and if we take into account the volume of profits obtained in relationship to the total profits obtained (e.g. the USA received 40% of the total profits, though its GDP is a lot inferior to this percentage), one can appreciate that certain states obtain an incorrect revenue. In time this has led to a distorted allocation of resources and it has also generated unacceptable systemic risks.

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"REINVENTING" ROMANIAN ECONOMIC HIGHER EDUCATION, A CHALLENGE OF THE KNOWLEDGE SOCIETY

NELUȚA MITEA[*]

Abstract

The revival of Romanian economy could be reached by changing mentalities and by inventing new economic, political, legal and social actions. The Knowledge Society brings many challenges for Romanian people. One of these challenges consists in reinventing Romanian Economic Higher Education, beginning with the increasing of learning process attractiveness, diversifying teaching methods and practices, encouraging the research and the innovation.

The present paper aims to present specific regulations concerning the academic education, in order to identify the most effective applicable system in the current conditions of economic development. In a Knowledge Society, we need a well-trained workforce, highly qualified, able to use efficiently new informational technologies. Universities are held to cultivate the entrepreneurial spirit among their students, that of competitiveness and success in the profession and, therefore, they must encourage performance and excellence.

The research was conducted by using the information furnished on the one hand by Romanian legislation on education, on research and development, on SMEs, on structural funds. On the other hand, the research approach was based on the study of the literature in the field, including reference items such as works of applied and fundamental research. The originality of this paper consists in proposing to the Romanian Economic Higher Education to achieve the real needs of business environment.

***Key words**: Knowledge Society, knowledge management, research, innovation, excellence*

Introduction

We are witnessing the last decades a number of phenomena that characterize the evolution of human society. They show that we are living in a period of deep changes defining the transition from the industrial society to the new type of society: that of knowledge. The most obvious feature of this new society consists in the speed regarding the introduction, the dissemination and the utilization of ICTs (Informational and Communication Technologies). At this point we should consider the speed with which knowledge is renewed, so that its volume doubles every five years. Knowledge is not just a component of the modern economy, but it becomes a basic organizational principle of human existence. Therefore, informational techniques will be considered during this study in relation to their role in knowledge's production and dissemination.

Romanian society could not exist any more outside of Europe. The evolutions taking place at the international level do represent a real chance for Romanian people during our transition from the industrial society to that of knowledge. As well as the rest of Europe, Romania has to manifest an increased interest in research and innovation. The state is required to assume a primary responsibility for financing scientific research as it is shown that scientific and technological discoveries do make possible the economic progress. The revival of Romanian economy could be made by changing the mentalities and by inventing new actions at the economic, political, social and legal levels. For this we should aim to modify people's behavior. An innovative behavior is linked to special measures on learning and professional training, on research and development. The reform of the educational system seems the only solution to our economic recovery.

The purpose of this paper consists in highlighting the challenges and implications of the knowledge society for Romanian Economic Higher Education. This study aims to provide the

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specific regulations concerning the academic education, in order to identify the most effective applicable system in the current conditions of economic development. In a Knowledge Society, we need a well-trained workforce, highly qualified, able to use efficiently new informational technologies. Universities are held to cultivate the entrepreneurial spirit among their students, that of competitiveness and success in the profession and, therefore, they must encourage performance and excellence.

The research was conducted by using the information furnished on the one hand by Romanian legislation on education, on research and development, on SMEs, on structural funds. On the other hand, the research approach was based on the study of the literature in the field, including reference items such as works of applied and fundamental research. The originality of this paper consists in proposing to the Romanian Economic Higher Education to be projected in relation to new realities of the labor market's supply regarded at the national level as well as at the European and even global ones. In order to achieve the objectives of this paper, at the beginning, I identified the need for cooperation between business community and that of education and research. I also respected during this study the conditions imposed by a knowledge-based economy. The paper also outlines some specific proposals for reinventing the Romanian economic higher education. These proposals are related to: the increase of learning attractiveness; the diversification of teaching methods and practices; the encouragement of research and innovation; the increase of actors' involvement in educational process; the improvement of the academic management that has to pursue the achievement of excellence and performance.

1. Challenges of Knowledge Society for Romanian people

Change does represent one of the fundamental laws of the society's evolution and to know the change's process could lead to competitiveness in a true competitive environment. In the new economy, named also *the knowledge economy*, main resources are not represented by the material resources or money, but by knowledge itself. This concerns the human and social capital. Knowledge assures the equitable distribution of resources but also the mobility of labor factor. This change supposes a complex process which follows: to reinvent the behaviors, actions and objectives; to generalize IT&C utilization at global level; to reform the higher education system; to create a new status for scientific research with focus on innovation and fundamental research. Informational revolution offers to developing countries possessing intellectual capital a unique chance to skip over traditional stages of the evolution process. By their policies, governments should support IT&C domain through some special measures meant to encourage the development of information society. We all know that passing to an information society is not a simple and common process. This supposes a true revolution: on the one hand, we think of a technical revolution and, on the other hand, of a mental one because "navigation tools upset our way of thinking and our reasoning"[1]. Observing the changes produced by the industrial and managerial revolution, Peter Drucker arrives to consider that "what we mean now by knowledge is effectively information in action, information orientated to results"[2]. He also thinks that „we are living nowadays in a society whose primary resource consists in knowledge"[3]. Information does represent a valuable good, but its value concerns its capability to be transformed into knowledge. Informational technologies associated to knowledge and to communication modify both the production process and even the society, leading to a sustainable economic growth. It is the moment for the Government to encourage research and innovation: it is the way to obtain the competitive advantage. At this point we take into discussion

[1] Musso, P., 2002. L'économie symbolique de la société d'information, *Revue européenne des sciences sociales, Cahiers Vilfredo Pareto*, XL (123), pp. 91-113, http://ress revues.org/618

[2] Drucker, P.F., 1999. *Societatea post-capitalistă*, Bucureşti: Ed. Image

[3] Idem 3

"the spectacular changes in technical and economic paradigm"[4], by which we could modify the production style, the effectiveness and the quality and also the management style that will use very performing technological tools. Therefore, we could not choose between computers and telecommunications: computers assure information's processing and telecommunications its transmission. They both form "the central nervous system of the XXI century's economy and they contribute to the future growth and well-being"[5].

Internet has become a communication tool and it is also the source of information knowing the greatest expansion in the entire human civilization. Informational economy's convergence by the means of IT&C, of Internet and of electronic trade gets important values. International economic landscape is changing and organizational structures are reconfigured at all levels. In such a complex world, full of uncertainties, change could not respond only to material needs; goods representing change's objectives become true informational flows. It is the moment for projecting mutations for classical organizations to partnerships based on research-development-innovation (RDI). Information technology denotes the convergence of standards, hardware, software, telecommunications, Internet, electronics and technologies resulted[6]. As a consequence, it is necessary to change the deployment of affairs and this change will become a true challenge for academic and business environments. We could not develop in Romania a competitive knowledge-based economy unless we solve the problem of the cooperation between business community and that of research and innovation. We should reinvent our economic higher education system; otherwise we will wait for a long time positive results in our economy. General culture has to be doubled by a practical culture, specialized, an entrepreneurial one. Creating a relay higher education with excellence centers should become the basis for the reinvention process of education.

Unfortunately, progress in Romania could not be compared to scientific and technical phenomenon because of the lack of perception and comprehension concerning the importance of ethics and innovation for politicians. The promotion of Romanian business environment has to be oriented to the innovative SMEs. In this respect, we should stimulate the creativity by highlighting the new technologies' role in consolidating the commercial and production activities. We should also encourage the cooperation in order to improve the databases necessary to facilitate the SMEs' access to the results of scientific research. It is imperative to create business partnerships which follow an effective technological transfer. The present paper proposes a free transfer towards interested enterprises in researches' results obtained during R&D programs by the means of public funds. The economic activity must be realized with high-trained, educated and well-informed employees. In the current conditions it is necessary for people to beneficiate of lifelong learning. Reinventing educational system supposes *a new learning paradigm*[7] considering technology a true investment. Among the features of this paradigm there are the following ones: university is seen like a real social partner; university has to provide market value; educational system must be centered on market and on business needs; universities have to be financed by the market; we are supposed to pass to a multidisciplinary approach[8]. Knowledge society involves a series of changes at the academic level too; universities are held to change their services, furnishing learning in a way adapted to the newest needs. This new type of learning must take into consideration the acquisition of some skills like:

[4] Freeman, Ch., Soete, L., 1997. *The Economics of Industrial Innovation,* 3rd ed., Abingdon, Oxon: Routledge, pp. 295-366

[5] Hall, P., Preston, P., 1988. *The Carrier Wave: New Information Technology and the Geography of Innovation 1846-2003,* London: Unwin Hyman

[6] Ruiz-Mercader, J., Mereno-Cerdan, A.L., Sabater-Sanchez, R., 2006. Information Technology and Learning: Their Relationship and Impact on Organizational Performance in Small Business, *International Journal of Information Management,* 26 (1), pp. 16-29

[7] Heydenrych, J., 2002. Global Change and the Online Learning Community, *TechKnowLogia,* aprilie-iunie, Knowledge Enterprise, Inc., http://www.techknowlogia.org/TKL_Articles/PDF/381.pdf

[8] Idem 8

communication skills, lifelong learning, leader and team spirit, critical reasoning, the ability to adapt to changes and also a responsible attitude[9]. It is the moment for the academic environment not only to receive information, but "to build knowledge"[10]. In this respect we could appreciate that the organizations encouraging knowledge and technology will have spectacular results in their economy. Used by the enterprises, the researches' results could become in the future true commercial opportunities. Companies activating in business environment have all the reasons to use educational institutions in order to develop new models of thinking and of management which they will apply in their current activity. Tools like: *Porter's five forces, the Balance Scorecard, the Black-Scholes equation* were developed by the academic environment and after that, they were successfully implemented in business. Thus, beginning with these examples, we could hope that the partnerships between academic environment and enterprises could represent the lever to the revival of Romanian economy.

2. The perspectives of Romanian Economic Higher Education

In the context of a knowledge society, Romania needs a highly qualified workforce, able to use the new technologies. Higher education is responsible of learning and training. But, among the universities, even the companies have to manifest interest in training their employees in order to survive in the information society. The cooperation between educational system and business environment will create the premise of the competitive advantage. The concept of competitive advantage could not be taken into account by ignoring that of quality. The latter represents a true successful factor for all the levels. The educational quality system refers to the mechanism by which universities provide trust to their internal clients (employees, students) and to external clients, too. This system supposes a series of policies and processes focused on maintaining and on increasing the educational services' quality. In this regard, in Romania we foresee the need of creation "a quality culture"[11]. In our country, the legal framework of quality assurance in higher education services is provided by Law no 87/2006 that approved the Government Ordinance no 75/12.07.2005. In the same time, this framework is also furnished by Order no 3928 dating from 21.05.2005 issued by the Ministry of Education and Research, by the External Evaluation Methodology, by reference standards of Romanian Agency for Quality Assurance in Higher Education (ARACIS). The latter provides the list of performance indicators which constitutes the basis for universities' assessment.

In spite of all these, until now, we have encountered a lot of difficulties in the definition of the concept concerning *the culture of educational services quality*. We agree that the concept promotes *excellence* as a determining factor of competitiveness for the institutions providing educational services. Experts believe that we should take into account a certain behavior related to the quality, a focus on the benefits of educational services which are held to be understood through their role in producing training as well as a result consisting in their quality of future partner. Educational services will intervene directly in the economic life and contribute to its evolution as a whole[12]. Achieving excellence in all the university's activity will influence the sustainable relation between economy-academic and business environments. Knowledge society brings to the forefront the informational and communication technologies. They influence all areas of activities: economic activity, educational activity, private and public administration etc. Therefore, the higher education system must be adapted to the IT&C and also to the needs of knowledge society.

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[9] Rowley, D.J., Lujan, H.D., Dolence, M.G., 1998. *Strategic choices for the academy: How demand for lifelong learning will recreate higher education*, San Francisco, California: Jossey-Bass Publishers

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[12] Idem 12

Unfortunately, in spite of the Bologna Process adoption, in our country there is not an optimum education system whose focus would be on practice and that respond to the market's real needs. Romanian higher education is a faithful mirror of the entire society. Therefore, it is mandatory to correct the deficiencies making difficult the alignment of Romanian educational system to the efficient European systems. This study presents also the differences between the existing specializations and professional careers in Romanian and international socio-economic environment. As Romania's economy is shrinking every day, the European labor market maintains its vitality in order to attract teenagers who are not able to find a job in their country. The lack of an adequate education environment, the lack of a lifelong learning and the lack of research possibilities, of material incentives, all these justify *the brain drain phenomenon* so developed in Romania. This artificial intelligence would have brought to Romania's development a more important added value. The contemporary knowledge economy requires the capitalization of these talents; this is the lesson given to us by the Western developed countries.

It is also imperative to link Romanian higher education to European careers in order to prevent the allocation of funds to some specializations that are no longer on the market. Another major weakness manifested is the poor financing in terms of research or even the absence of it. If we consider the American universities, the Japanese ones and the greatest European universities, we will observe that their budgets are build on important contributions from private companies. It would be ideal to have in Romania a few research centers funded by multinational companies. The results obtained would be used by enterprises in order to bring to Romanian economy the competitive advantage in the struggle on the European and global markets. Especially now, in such conditions of crisis, Romania reveals its deep economic problems. Many international companies have used the local area for the cheap labor and also for our legislative possibilities to export quickly their profits.

Another issue treated during this paper consists in the research fragmentation. After 1990, the greatest part of Romanian research institutes had taken off universities in order to pass to Romanian Academy. At present, they complain of funds' absence which prevent them doing research and, especially, attracting young researchers with studies and works within the greatest Western universities. Some of the threats of this system consist in imposing formal barriers by the management of universities or colleges. At this point we should take into account an assessment of all the existent research centers in order to make the inventory of their resources, both human and material ones, and of their collaborations with the European and international research institutes, of papers and magazines published. The present paper proposes a solution consisting in the creation of some private research centers having legal status allowing them an easier access to the European funds for their own projects. This proposal could help research institutes to participate successfully at the European scientific competition.

A competitive educational system furnishing lifelong learning would be able to develop human resources by its contribution to the increase of skills, of creativity, of initiative and of value spirit. We could not ignore the fact that, besides the well-trained workforce, the European labor market requires high standards of mobility, flexibility and professional retraining. By analyzing the statistics in the field, up to now, we noticed that no university from Romanian space succeeded in entering the Shanghai Top of the 500th most performing universities in the world. Czech Republic, Poland and Hungary are presented in this top while Romania remains completely excluded. Among the differences that separate Romanian universities from those in Shanghai Top, there are the following ones: the innovation capacity of our economy is at least one third of the European average (according to the annual European Innovation Scoreboard), our incapacity to capitalize the intellectual property; the persistence of serious problems connected to the financing of education, to poor quality of education, to the absence of an effective management, centered on performance and excellence. In the meantime, the state does not assume his responsibility for setting as national priorities the allowance of funds according to different skills and to market's needs. Therefore, the involvement of business environment and of local communities is absolutely vital for starting the

projects concerning the reform of the educational system. But the results will be visible on the long term and they suppose a radical change in the mentality and behavior of each individual. Romanian economic higher education needs a transformation at the level of *quality (teaching, learning, research),* of *financing* and of *management.* The mechanisms which assure the quality in education and the development of a performing quality management should be considered as areas of major interest promoting the competitiveness of Romanian education. In this respect, we should have some main directions of actions like: the correlation of Romanian higher education with the European systems; the increase of public and private funds granted to the research institutes and their distribution according to their specific potential and to national development priorities; the introduction of an effective evaluation system of researches' results with focus on concrete results. An institutional innovation specific to knowledge society giving relevance to higher education and to scientific research consists in the creation of some *heterogeneous networks of cooperation.* The fundamental idea of these networks supposes to joint their resources in order to achieve the added value. In Europe, these groups called *Innovation Relay Centers* aim to disseminate rapidly the innovations, particularly in countries with limited research opportunities. The objective of such cooperation is to promote innovations in business. It is desirable to achieve in Europe the networking of excellence centers in research and to join scientific communities, companies and researchers from other areas. The use of Internet has already facilitated the development of an *online learning community* in Romania, too. In general, online systems could improve learning process because students are exposed directly to a lot of case studies. In the meantime, they are connected to distance partners enjoying communication and collaboration. A method like this encourages the expression of their views about the topics discussed, so that reasoning and critical thinking are activated[13]. The implementation of new technologies in universities is more than just buying computers or creating web-sites. The successful use of these technologies for teaching and learning process supposes major changes in organizational culture. New technologies are designed to increase the flexibility of learning process and to improve students' skills, students being regarded as future specialists. However, new technologies could increase even the pedagogic effectiveness and also the profitability[14]. Therefore, Romanian universities require an adequate technological infrastructure which satisfies academic and administrative needs. This infrastructure should allow an optimum space to innovation. In order to achieve their objectives, universities must understand exactly the cost of new technologies. For this purpose, they are held to make transparent the expected cost according to it they will appeal to serious funding from the business environment.

3. Romanian academic management based on knowledge

The organizations' capacity to adapt to economic requirements depends on the development of a new type of management centered on knowledge's values and those of scientific creation. A major challenge of this century, *the knowledge-based management* appears like a result of knowledge's progress. This new system of management develops only in the knowledge-based organizations named as "collectivities of workers charged with the work of conception, interconnected by the means of a technological infrastructure"[15]. As I have already shown during this study, to get performance is not possible without new knowledge, without the permanent involvement of scientific research which represents the basis support for the new type of management brought into discussion. In one of his papers, Ovidiu Nicolescu sustains that the knowledge-based management consists in "studying the managerial process and the relations based on knowledge, in discovering the laws governing them and in creating new systems, methods and

[13] Ibidem 11

[14] Bates, A.W., 2000. *Managing Technological Change: Strategies for College and University leaders,* San Francisco, California: Jossey-Bass Publishers

[15] Holsapple, C.W., Whinston, A.B., 1987. Knowledge-based organization, *Information Society*

techniques in order to increase the performances and the functioning of organizations, by valorizing the greatest values of knowledge"[16].

Romanian organizational environment could not make exception from the global orientation of the contemporary society towards knowledge and advanced technologies. At the level of debates, the concepts of economy, organization or knowledge-based management have penetrated Romanian higher education. The research projects designed to this field know a significant presence within the themes of fundamental and applicative researches issued by the institutes in our country. In Romania, there is no an institutionalized system of initial or continuous formation of managers from the academic environment. Therefore, we feel an acute need to improve mechanisms within the managerial structures as well as to reorganize the managerial system in order to assure the increase of consistency and effectiveness at the decisional level. By the means of strong scientific research projects, of sustainable actions for the dissemination of researches' results, all the institutions involved should find solutions in order to surpass their organizational limits. Scientific research represents the guarantee of Romanian economic progress on the medium and long term.

After the resolution of problem concerning the academic management, new favorable opportunities will appear for Romanian economic higher education. As a consequence, the projects and partnerships developed in the academic area and also in the business one could make from Romania, in the future, a *true spiritual leader* and also one of the most credible international suppliers of leadership. A series of projects in different stages of evolution succeed in joining prestigious education and research institutions, huge intellectual resources that have the power to move ideas modeling the future of education and the dynamic of innovation[17].

Conclusions

The present paper highlights the challenges of knowledge society with its implications for Romanian economic higher education. One of these challenges consists in reinventing the Romanian economic higher education beginning with the increasing of learning process attractiveness, diversifying teaching methods and practices, encouraging research and innovation. This paper focuses on the fact that, on a long time, knowledge society's success depends on the interest manifested towards the research, particularly the interest coming from the higher education level which has an essential role in the training and development of entrepreneurships and of leaders. The analyses I made for this paper and, especially, the reality lived lead us to conclude that education in Romania is deficient. The economic higher education can not respond to the needs of business environment, both the internal and the international ones. Knowledge society involves a lot of changes in the mentality and behavior of individuals and of institutions too. In business environment we need excellent skills at which we could arrive only by the means of the active intervention of educational institutions. The state itself must participate at this process by encouraging research and innovation, by allowing the necessary resources according to the national priorities and also by reforming the educational system. We could not ignore the fact that, in the future, the research activity would have a significant weight in universities' assessment. This evaluation would be developed during the internationalization process of Romanian higher education. There are some weaknesses which should be corrected like: the educational politics without continuity (the destabilization of national educational strategy); the unfavorable legal framework for the academic

[16] Nicolescu, O., Plumb, I., Vasilescu, I., Verboncu, I., 2004. *Abordări moderne în managementul şi economia organizaţiei,* Bucureşti: Ed. Economică

[17] Batali, A., 2010. România lărgeşte frontierele cunoaşterii prin proiecte educaţionale de anvergură, *Market Watch,* iulie-august, nr. 127, http://www marketwatch ro/articol/6991/Romania_largeste_frontierele_cunoasterii_prin_proiecte_educationale_de_anvergura/

autonomy; the absence of a homogeneous and structured academic supply; the insufficient resources and space for the development of academic activities; a cognitive training against a formative one.

However, the current context offers a series of advantages for Romanian economic higher education like: a multitude of information opportunities at a high level; financing opportunities especially by the means of structural funds; the possibility to achieve strategic partnerships between universities and multinational companies and also partnerships between universities and business environment by the means of SMEs. Romanian higher education should achieve the performance of generating economic results which would be transferred to companies for their own use. The conclusions of this paper highlight the idea that information, as well as the participative business organization and the implementation of a knowledge-based management would influence the revival of Romanian economy. In the meantime, this paper aims to develop some directions for future researches. One of them proposes to find the possibility of accessing more effectively the European funds designed to research and innovation projects. Another direction proposes to study the application in practice by the business environment of the researches' results as a premise of the competitive advantage.

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A COMPARATIVE OVERVIEW OF REGULATION OF ACCOUNTING IN KOSOVO COMPARED WITH REGULATION ACCORDING WITH IAS/IFRS

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Abstract
Kosovo already is in an important stage, because we have just lying the foundations of the formation of the new state. Therefore, it is very important to our country to open it's doors to the developed European countries and beyond.. To achieve this we must work hard and sacrifice by all, while as in order to reflect an economic and social development in all areas, it's very important among the development of the accountancy profession, which provide opportunity for a quality financial reporting and acceptable to all. A weak financial reporting and limited, has an effect on the making economic decisions with low quality by decision makers, reduces the possibility of foreign investment and capital spilling. As result, the universal language of the financial report that is understood by all users of accounting information, no matter where they are not used.In addition it is important to note that if we remain limited in the construction of financial statements under accounting rules inherited from the past than opportunities for global development of the economy as a very important pillar for the development of a country are closed, the needs for capital are not fulfilled , foreign investors reluctant to do investments etc.
These components are defined and discussed in the paper, while a law on accounting and finantial statement which could define better and more closed the main directions of accounting regulatory authorities are proposed as necessary.

Key words: *accounting**,** accounting developments, accounting information, finantial statements, accounting standards.*

Introduction

A real presentation of finantial statements according to international standards gives priority to economic content over the legal form of transactions. In Kosovo before regulation of accounting according to international standards was manadory submission of balance sheet and statement of income and expenditure. Furthermore, other statements by international standards were absent and not prepared at all. These facts justify the need for new accounting developments in Kosovo. This paper seeks to explore and justify that finantial reporting according international accounting standards play a major role for the thrift of accounting and realistic presentation of finantial statements. The study proved that a law on accounting and finantial statement is necessary.

The study also gives recommendations how to successfully strandardize accounting in Kosovo with EU standards of accounting.

1. Last regulation of accounting in Kosovo and regulation under IAS/IFRS

The accounting regulation in Kosovo is not providing a basis regulatory, single and complete. Although its importance is to large when it comes to same basis of reporting, which could be only achieved with the implementation of international accounting standards, where are determined more widely unique rules of recognition of financial statements elements, the criteria for classification of these elements, and other qualitative features of the construction of financial statements.

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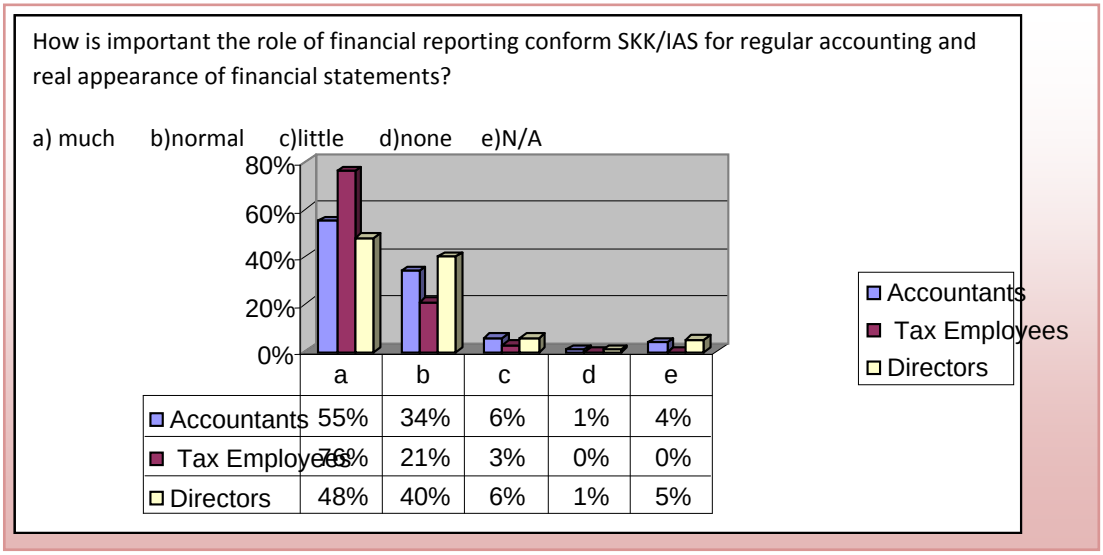
Further, it is very important a real presentation of financial statements, where according to international standards given priority are given to economic content over the legal form of transaction, while as early in accounting regulation were absent such a thing and one element in accounting was recognized only under the legal control.

Before regulation of accounting according to international standards mandatory was submission of the only balance sheet and statement of income and expenditure, whereas two other statements necessary to provide by international standards were are not prepared at all. These and many other facts justify the need for a new accounting development in Kosovo, which should be drawn up according to international accounting standards, as a unique regulator which is not focused simply on the legal obligations of accountability, but also in determining of main rules of establishment of financial statements.

A novelty is that compliance with international standards which makes quite a lot to increase the flexibility of accounting regulation compared with inflexible regulation prescribed by the previous laws of the accounting. According to reserchs the financial reporting in accordance with international accounting standards play a major role and is very important for accounting and realistic presentation of financial statements. Such a fact is fully understood and assessed, when it reached the highest level of implementation of these standards, whereas in the development where we are, such issues has been started to be understood positively by accountants and with development opportunities in the future. This can be understood also by comparing data from accountant respondents, employees of tax administration and directors of companies. Analyses presented in this paper gives us the opportunity to get closely at what level we are currently when is the question of the real possibility of presenting financial statements in accordance with international standards.

On the question how important is the role of financial reporting in conformity with international accounting standards for regular accounting and for presenting real financial statements[1], the data from the categories surveyed (accountants, tax employees and directors of companies) show that: 89% accountants, including those independent and those employed in business stated that such reporting plays a major role an has an effect in real presenting of financial statements, while only 6% of them stated that such role is smaller. Also, 97% of tax employees have positive opinion and 88% of the directors of companies believe that finantial reporting in confirmity with international accounting standards has positive impact (see diagram 1).

[1] 400 people were surveyed: Selected campon: 212 employed in trade (75.5%), servise (8%), manufacturing (1.9%), post (1.6%), banks (9.9%), insurance companies (0.9%), L.L.C.(1.9%). Except them are also interviewed 59 independent accounting and auditing , 35 employees in tax administration, 8 employees in the Chamber of Commerce, and 86 directors in small, medium and large (73.2%) , in the bank (12.7%),insurance companies (9.3%), post (4.6%).



	a	b	c	d	e
Accountants	55%	34%	6%	1%	4%
Tax Employees	76%	21%	3%	0%	0%
Directors	48%	40%	6%	1%	5%

Diagram 1.

The data compared between accountants, tax administration employees and directors, shows that each category surveyed has positive thoughts and approximately the same percentage of thinking about financial reporting, which helps thrift and realistic presentation of financial statements.

We should to emphasize that international standardization of accounting today is the need of global economic developments, and the basis for globalization of the economy, increases the effectiveness on qualitative decision-making as well as to increase the transparency and security of information that investors receive from financial reporting.

Standardization of accounting in Kosovo is an immediate need and demand especially because the Republic of Kosovo wants to be a part of European Union and NATO. New accounting requirements in Kosovo are and will be an excellent step forward developing a modern financial system.

2. Current developments towards the application of IAS/IFRS in the accounting field

Standardization of accounting in Kosovo appears as a necessary process, since the same and the unique language of financial reporting and high transparency would increase the values of decision-making and would make more efficient the Kosovo market. In this direction the regulation of accounting profession would affect the establishment and strengthen operation of professional organism by increasing their role in providing of independent accountants, who will be able to provide quality services, protect the public interest and provide the financial statements quality and highly reliable.

New accounting requirements in Kosovo represent a great step forward for the development of the financial system and controller. This is important because financial reporting in Kosovo will be comparable to financial reporting in developed countries. For this reason are drawn international accounting standards, which provide rules approved by international organism of accounting, which accurately treat accounting facts that are object of accounting. The existence of these standards enables the investors and all users of accounting information to understand the language of financial reporting regardless of where they operate.

The application of international accounting standards in Kosovo presents a challenge. Some of the peak points of the current developments in terms of their application are:

Firstly, the adoption of financial reporting in Kosovo with international accounting standards, should be done step by step and harmonized with needs and capacities of Kosovo. The process of finalizing of such case be adapted to financial reporting, especially of small and medium size enterprises.

The presentation of accounting standards shows the desire to accounting changes, but we should still work to resolve existing deficiencies. Also, it is very necessary to strengthen institutional and professional capacity, especially human capital which covers this area that is so important for standards monitoring and their implementation and preparation of financial statements as well. Furthermore, expansion of the financial reporting requirements should be done in parallel with the strengthening of institutional and professional capacities in order to finally provide a reliable financial reporting .

Secondly, in order to adopt finantial reporting we should be able to made developments to the application of accounting standards by strengthening the statutory framework governing accounting and overall financial reporting basis in Kosovo. Then we should establish the mechanisms for systematic monitoring, through establishing a modern legal framework with such program, which had to revised accounting and auditing standards, control quality of work on their implementation and finally have the opportunity to provide more accurate information about financial reporting to all its users. Furthermore, we must establish and organize the system of public oversight to certify auditors and accountants, which system should provide legal capacity to investigate auditors and then take the necessary steps. Such a system should be very transparent with the publication of its work programs in order to ensure the implementation of standards, by taking necessary steps and direct action.

Obviosly, should be even the expansion of the current authorities of adopting standards, to include so wider degree of interested parties for the implementation of international standards, and by adjusting the field for their implementation. These would help to solve the problem of relatively level unsatisfactory of recognition and implementation of international accounting standards. The regulators of banks and insurance companies should be engaged in international meetings and seminars in order to filter the overall goal of preparing of financial statements in accordance with the standards and thus to assess the advantages if implemention of such report. As a result that this would solve the banking regulatory concern that the implementation of international standards will bring instability in financial reporting as a result of the commitment not to ignore them properly.

In Kosovo also should be improved legislation with the aim to clearly define the authority that will encourage the full implementation of international accounting standards. Then to develop the quality of system control for ensuring a high reliability of financial information and to protect third parties as beneficiaries of this information, such as shareholders, investors, creditors, etc. The establishment of an efficient system for investigation and sanction to correct and to prevent factors with negative impact in reporting and full implementation of standards. This can be accomplished through establishing a system of fines efficient prevention culminating developments towards the application of international accounting standards would improve the quality of work of professionals and accountants.

This could be achived with education and qualification of people who would be capable for preparing of quality of financial statements. The lack of human resources would be a serious obstacle to the implementation of international standards. The financial reporting of high quality contributes to the strengthening the financial structure of our country, reduce the risk of crisis in the financial market, contributes to stimulate foreign investment, facilitates the work of taking and lending in the banking sector etc. It further, presents strong basis for stakeholders and public at large scale to evaluate the management of the business community in Kosovo.

Such financial reporting will contribute to the strengthening of financial discipline and financial system in general. Kosovo is in stage of radical reform accounting, therefore we need to further strength the application of existing standards, their continuous updating and development and application of new standards where is necessary. Kosovo Accounting Standards naturally should be consistent and coherent with international accounting standards, and still working in raising the level of recognition and implementation of them, always with the main motive of cultivation of genuine culture of reporting also in Kosovo.

We think that we should have consider drafting and approval of international standards of financial reporting for small and medium enterprises by the Board for International Accounting Standards (IABS), which are anticipated to appear in 2009, and then to see the possibility of translation on their implementation in Kosovo. In this direction should be determined correctly the classification criteria of small and medium enterprises, as a very necessary condition to determine the group of those economic units that will implement international accounting standards for units of small and medium enterprises, by distinct from those that will implement international standards of accounting/ to financial reporting in complete.

These criteria should refer to the criteria of the European Union for this purpose, but considering the characteristics of this purpose and considering the characteristics of the economy and businesses in Kosovo, accounting regulation should not leave out attention to SME and micro enterprises, which should be provided an accounting and simplified financial statements. It should also pay attention to cooperation and coordination of authorities of regulatory accounting with that fiscal in order to ensure a harmonized presentation of financial statements for the general findings publishable with reports for fiscal purposes. The calculation of the tax results should be based on accounting reporting according accounting standards in Kosovo, or international accounting standards/ financial reporting, and then to make necessary adjustments according to policies and fiscal rules. This would ensure a more consistent reporting, a control and inventory of the respective obligation more precisely.

Conclusions

Standardization of accounting in Kosovo with EU standards of accounting is an imperative the application of IAS enables the unification of financial reporting and transparency to all users of accounting information. It is recommended that in the future should be done more work in strengthening the statutory framework governing accounting and financial reporting, strengthening the structure drafting of accounting quality standards, establishing monitoring mechanisms for implementing further the implementation of standards, increased numbers of professionals skilled accountants to prepare quality financial statements etc.

Also, it would be of special interest to have a specific law on accounting and financial statements, which would define better and more clearly the main directions of accounting regulatory authorities. So development should be done by strengthening the statutory framework governing accounting and in general kosovar basis of financial reporting, the establishment of a modern legal framework with such program, which had the revised accounting and auditing standards, quality control work on their implementation.

The formation and organization of the system of public oversight to auditors and accountants, who must be very transparent with the publication of its work programs to ensure implementation of standards. To ensure a stability and efficiency in accounting developments in Kosovo recommend drafting a strategy and action plan, at least for 3 year period the development of accounting and accounting- based professions. This play will include issues that will be resolved during this period, responsible organisms and necessary financial resources.

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INCOME TAX SHIFTS – CAUSES AND EFFECTS ON ROMANIAN ENTERPRISES

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Abstract
This paper aims to make a point in what the fiscal environment has been and is about in Romania. In 2008, the crisis was obvious to our authorities, who before declared with nonchalance that our system is way back from Europe's and the crisis will pass near us. This didn't happened and here we are, in front of it. The financial crisis has reduced the state budget incomes in a drastic manner, making the authorities to do what they knew better – put more fiscal weight in taxpayer's burden. In this paper we will approach the minimum income tax amount, tax amount which has been the cap for more than 25% of the Romanian enterprises.
The government took the easy way, more tax, no analysis on what the side effects of this tax over the economy will be on short-medium term. As you guessed, the only good that came from this measure was more money at the budget, but only for a couple of months because, as previously said, 25% of the enterprises closed their activity, meaning no more income tax payments, no more social and health contributions, no more wages paid etc. The budget has got a big hole because now, beside the fact that it didn't cashed in from the closed enterprises, has to pay unemployment help for those who worked in those firms. As the crisis goes deeper, the government removed at the end of 2010 the minimum income tax amount, declaring with "drums and trumpets" that these measures are in order to revive the economy and the enterprises activity. We shall see about that.

Keywords*: SMe, income tax, level of taxation, Romanian legislation, global crisis.*

Introduction

After the communist regime has fallen, a sort of market economy has been installed. Since then, a proper fiscal legislation has not been conceived. As Ovidiu Nicolescu (the vice-president of the Worldwide SMes Organization) said: "Sudden decline of economic and political institutions of the old system, institutions that provided leadership through orders received from the center, along with emergence of democratic political institutions has created an incompatibility between various components of the socio-economic mechanism. The hybrid institutional and economic system reform cannot be achieved only by corrections and by adjustments, it also requires making some structural changes in its substance. This process should not be allowed to run as a "natural" process, it must be based on decisions arising from a political will, materialized through strategies and programs, meant to reduce the duration of the transition and to achieve a viable system within a reasonable amount of time. Abrupt canceling of strictly centralized planning system without replacing it with other institutions to take over, at least in part its functions has generated a huge gap in the functioning economic system, fact which led to strong disruption of the entire mechanism of social production. At that time it has been intervened with corrective measures - price liberalization (01/11/1990). It has been tried in this way a removal of distortions and existing inconsistencies in the system of command economy and settlement of the prices on natural principles, related to costs and demand/supply. It has been "hoped" that in this institution, of market economy - the price could replace the central planning, by taking (by the price system) the mechanism for allocating resources, without a real competition in the economy, dominated by producers of "monopoly", the price liberalization has not had the desired effect, but generated a abusive economic behavior of monopoly operators function in the economy"

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The legislation in function is meant to put weight on taxpayers, the reason there were more taxes than in any European Union state, an worldwide behind only Belarus, Uzbekistan and Ukraine[1]. The effective taxation percent was at 57,2%. Since the EU accession, Directives have been given to implement. There were many effective systems to copy and implement but no such things have been done yet, only a small reduction of the total taxation percent, which is actually at 44,9%, and overall, the Romanian government has been taken very few action in order to simplify the tax system and ease the taxpayer's fiscal burden.

During the past years, the government has introduced fiscal measures aimed at helping to achieve budget deficit targets. This measures include the minimum income tax, increase in the VAT rate from 19% to 24%, along with the introduction of additional VAT compliance measures[2]; an increase in local taxes (e.g. taxes on the issue of building certificates, higher vehicle taxes, advertising taxes); and the introduction of a new late-payment penalty system.

Local legislation matters

The government has approved a series of austerity measures due the financial crisis, without a proper analysis of medium and long term effects over economy and population. One of the measures was the instatement of the minimum income tax that each firm had to pay no matter the profit or loss it had obtained during the financial exercise.

This measure, which had no reasoning but the desperation of bringing more money at the state budget, did not took into consideration the diminution of the absurd expenses the state system employees are making with no verification and accountability (and we do not refer to the 25% diminution of wages).

Analyzing the down effects of this measure, we infer that all was in vain. It did not do anything but to put more weight that a microenterprise or SMe can handle. In Romania worked about 1.2 million enterprises, from which approximately 320,000 have vanished as an effect of those measures, meaning 25%. Because of this fact the state loss massive, in the sense that this enterprises paid contributions at the social security budgets and at the special budgets, paid income tax, mostly paid VAT and the most important, it paid wages. Now, the state does not cash in from their account and furthermore it pays unemployment help for their former employees.

In all strong working economies, the state is helping the small and medium enterprises, which generate over 90% of GDP and hires over 95% of the occupied work force[3]. In Romania everything seems backwards. In the present, 70 percent of Romanian's GDP is produced by small and medium enterprises. It, also provide in our country about 70% of overall jobs.

Furthermore, info on the European Union states:

Country	% SMe's in overall enterprises	% SMe's in GDP	% SMe's in overall employers
Austria	99.60	50.86	65.50
Belgium	99.80	64.49	68.90
Denmark	99.70	58.75	68.74
Finland	99.75	44.33	59.15
France	99.79	45.76	66.86
Germany	99.63	60.17	59.85
Greece	99.95	82.87	86.68
Ireland	99.59	33.02	69.59
Italy	99.94	71.38	80.34
Luxembourg	99.62	74.20	72.32

[1] According to a report prepared by PWC and the World Bank on 178 states – *Paying taxes 2008*.
[2] Raluca Rizea, Radu Filip, *Codul fiscal 2011 cu Norme medodologice de aplicare, 2010, Ed. Indaco*
[3] Ovidiu Nicolescu, *Intreprenoriatul si Managementul IMM*, 2008, Ed. Economica

Holland	99.56	56.06	62.47
Portugal	99.87	66.80	78.87
Spain	99.89	55.30	79.45
Sweden	99.67	51.51	61.37
Great Britain	99.80	38.40	55.30
EU - 15	99.81	51.69	66.32

(source: The white cart of SMe's in Romania)[4]

In Denmark for instance, small and medium enterprises are characterized by a high level of specialization. The particularity is the fact that the enterprise did not develop such sensitivity at global market changes, like the counties that have their industry specialized in just a few sectors. The unique tax percentage is 28% and, from 1976 an avoidance convention for double taxation was signed with Romania, which impose a reduced tax income of 15%.[5]

France has the standard rate at 33,33%. Small enterprises (the enterprises in which less than ¾ of the shares are owned directly or indirectly by individuals or companies that declare business less than 7,7 million Euro) are taxed with 15% for the less than 40k (approximately) Euro taxable income, or at standard rate for what exceeds this amount. The reduced tax amount is applied to industrial royalties also. The latest news in the taxes domain is that France wishes to harmonize it's tax system to Germany.

This harmonization is intended primarily for the elimination of the differences and to create a more stable environment(and here we refer to the global crisis). One of the first measures was that France has dropped the wealth tax.[6]

In Great Britain there are a series of encouragement policies for small and medium enterprises from which we only mention the reduction of income tax from 20% to 19%. The income tax for the first year of activity is reduced from 10 to 0%. This also applies to companies that does not exceed 10,000 Pounds profit (the equivalent of almost 12,000 Euro – at a 1,18 EUR/GBP rate)

One of the strongest European economies is the Austrian. Most of the companies are small and medium, about 80% of these have least than 100 employees and only 1% over 1,000 employees. The state charges with a minimum 1,600 Euro minimum income tax from limited liabilities companies (GmbH) and 3,200 Euro from share companies (AG). But, the state sustains the companies with lots of coaching programs, funding, cooperation with R&D institutes etc. The state also subsidizes 25 to 35% from research and development expenses, until 20% of personnel training expenses etc.

In Germany the economy works with the same types of companies as in Austria. The most common type is the limited liability enterprise (GmbH). This implies a minimum capital of 25,000 Euro. One or more individuals or companies, domestic or foreign can associate trough a society agreement that must be signed by all owners and authenticated at the notary. In the situation that one of the associates could not assist personally, he can be represented by another, but only with a notarized authorization. The registering form must be submitted at the Commerce Registry of the local territorial administration.[7]

The state is also protecting the small and medium enterprises, the competition is strongly shielded and globally promoted. Another particularity is that in Germany, the big companies, like the machines one, do not produce the components, they lend this activity to small and medium enterprises, only dealing with the installation and assembly.

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[4] Prof.Dr. Ovidiu Nicolescu, *CARTA ALBA A IMM-urilor din ROMANIA*, ed. CNIPRMM

[5] Harm Gustav Schroeter, *The European enterprise: historical investigation into a future species*

[6] Kevin Keasey, R. S. Thompson, Mike Wrig, *Corporate governance: accountability, enterprise and international comparisons*

[7] Russell A. Miller, Peer Zumbansen, *Annual of German & European law, Volumes 2-3*, 2006

Czech republic is a country with lots of foreign capital in it's economy. In present there are over 1,600 foreign companies, the foreign investments providing during 1990-2004 about 350,000 work places and saving another about 600,000. Trough personnel reconversion, in 2002, 23,000 new work places were created on an direct foreign investment in amount of 9,1 billion Euro. A qualified analysis revealed that about 65-70% of the export production belong to foreign investment companies. The taxation system contains income taxation (for individuals and companies), VAT, excise (on fuel and lubricant, distilled and alcoholic beverages, beer, tobacco and tobacco products, alcoholized wines, sparkling wine and champagne), the real estate property tax, road tax, tax on inheritances and donations and real estate transfer tax

Next to Ireland, Luxembourg has the lowest taxation level of EU, the global tax reaches 30,38% (from which 16% retirement fund – 8% paid by the employer and 8% by the employee, health insurance 7,5% - 2,6% paid by the employer and 4,9% paid by the employee, unemployment fund of 4% etc), tax income is 22% and local taxes about 7,5%. VAT in Luxembourg is applied in the following percentages: 3% for food and base necessity goods), 6%, 12% (as intermediary VAT) and the general tax of 15%

In Romania, since September 2010, when the negative effects of the minimum income tax were finally obvious for the government, it was removed by GEO 87/2010, measure that is supposed to sustain and re-launch the economy, and I quote from it:

"[...] *In the context of maintaining the current financial and economic crisis that affected Romania and still affects the business environment;*

considering that this crisis affects the cash flow of economic operators, which in his part generates major negative effects like financial blockages, insolvency, with influence over the survival of economic operators and loss of many jobs;

premises in order to create economic recovery by reducing the tax burden of the taxpayer [...]"[8]

Following this measure, 2010 has two financial exercises. It is an unprecedented situation that has puzzled all accounting professionals that will have to fill two income tax statements. The problem it's not here, it's in the fact that just like any article of law issued by the Romanian authorities, this one is incomplete and does not refer to the situation in practice. The problem in practice is who will fill two statements?

The majority, including the representatives of the Ministry of Finance, consider that all contributors, except for those who were founded during 2010, must fill in two income statements. I consider that the law in force is clear enough in this matter:

Article18, paragraph 2 of the Fiscal Code, as amended by Ordinance 34/2009 states:

"(2) taxpayers, except those provided in paragraph (1), art. 13 letter. c)-e), Art. 15 and 38, where their tax is less than minimum corresponding to their income amount, under par. (3), are obliged to pay tax at minimum amount."

Article 34, paragraph 16 of the Fiscal Code, introduced by GEO 87/2010 states:

(16) Taxpayers who, until September 30th 2010 inclusive, had to pay the minimum tax, the income tax due calculation for the fiscal year 2010, will comply with the following rules:

a) for the period between January 1st and September 30th, 2010:

calculation of the profit tax for that period and the effectuation of the comparison with the minimum annual tax amount, as provided by art. 18 paragraph (3), recalculated accordingly for the period January 1st to September 30th, 2010, by dividing the annual minimum tax to 12 and multiplying the number of months in that period, in order to establish the income tax due[9];

[8] GEO 87/2010

[9] Raluca Rizea; Radu Filip *Ordinul MFP 3055 pe 2009. Reglementări contabile*

By exception from the provision of paragraph (1),(5) and (11) and Article 35 paragraph (1),submission of income tax statement for the period January 1st to September 30th, 2010 and income tax due payment from the completion of taxation, is to be made until February 25th, 2011;

b) for the period between October 1st and December 31st, 2010: taxpayers submit the tax statement and pay income tax due under paragraph (1), (5) and (11)and Article 35. Paragraph(1)."

We interpret that, in the prementioned context, the statements in the two periods only draw those who were forced to pay the minimum tax, those who had, between January and September 2010 period, the income tax lower than the minimum tax amount. The opinion according to which all taxpayers (with few exceptions) were required to pay minimum tax, which on those who are of the opinion that all taxpayers must fill the two statements we believe it is not correct and does not comply with the law in force.

The entities who registered income tax (not minimum income tax) do not apply the provisions of paragraph 16, so, will only fill a single income tax statement for the fiscal year of 2010.

Article (18) tax loss recorded in this two periods for the year 2010 shall be recovered according to Art. 26, each fiscal year period being considered as a fiscal year meaning of 5 to 7 years. "

As you can see, there is no distinction between taxpayers nor any reference to an article that makes this distinction.

Currently, as the articles of the Fiscal Code are, the problem is only for interpretation. The application rules cannot modify the law, they should only bring more light in understanding it and more details. The phrase "have been forced to pay the minimum income tax" can be changed only by amending the law.

The comparison between calculated and minimum income tax (for the verification that the calculated income tax is greater than the minimum one) can be based on the Register of Fiscal records at a tax audit.

This change in Art. (18)" tax loss recorded in the two periods for the year 2010 shall be recovered according to Art. 26, each period being considered as one fiscal period meaning 5 to 7 years. "is the only one from which we can conclude that in the year 2010 there are two financial exercises.

Conclusions

Since the accession in EU, the total tax rate has been reduced, mainly as a result of falling labor tax rates for social security, health insurance, and unemployment contributions. In the most recent years, the Romanian government has taken several measures to help and support the business environment during the economic recession, very few being truly helpful. Taxpayers have been granted social security exemption during periods of temporary inactivity, and also the potential to defer tax liabilities under certain conditions. These measures, however, didn't improve the economy and as we actually see, 2011 is going to be the toughest year since the crisis.

In 2010, due to economy recession the minimum income tax has been introduced. This desperate measure battered the economy and closed about 25% of the total number of companies. After realizing this measure was not bringing any benefits, the government approved its removal, as stimulation for both the economy and enterprises. The true effects on this minimum income tax amount have been presented in the upper pages, along with the accounting practice problems.

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STATEMENT OF CASH FLOWS - A MEASURE OF OPERATIONAL PERFORMANCE ON AN ACCRUAL BASIS

GHEORGHE LEPĂDATU*

Abstract
Statement of cash flows presents useful information about changing the company's financial position, allowing to assess the enterprise's ability to generate future cash flows and cash equivalents in the operating, investing and financing activities and their appropriate use. Treasury of an economic entity can be considered its strong point. The manner in which they manage money and financial flows, the final outcome will depend on the respective entity. Treasury is also an essential and main restriction of the financial management of the enterprise. Treasury embodies the results of operations and how to achieve financial balance of compliance. Not always an entity that ends year with benefits, has a positive cash (cash at bank and in availability). And this, because the gap between the recording and accounting of revenue and expenditure receipts and payments as they fall due, that gap can be decisive for the fate of the enterprise. This is a major requirement of the accrual. Therefore, an efficient management of the economic entity comprises both the asset management flows (revenues / expenses) and cash management, i.e. the flows of receipts and payments. The statistical evidence shows that most of the failures are due to weaknesses in treasury management.

Keywords*: treasury, cash flows, accrual, IAS/IFRS.*

Introduction

The variety and complexity of the issues of good treasury management entity creates a wide field of analysis and debate, because most of the users of accounting information are interested in the work flow of an entity and in particular its ability to secure a rotational adequate liquidity. In this way, it is necessary to exploit the accounting information, to know that cash flows, with immediate impact on liquidity. In the literature of our country, the concept refers to all cash means of financing in the form of cash and short-term loans available to a trader to cope with its payments. Other authors define the treasury like the image of cash and short-term money investments at a business level, arising from changes in current receipts and payments, or from investment of the excess.

Cash flow situation has become mandatory in the late 1980s in the United States and immediately afterwards in Britain, with an approach that largely reflect American standard, although there is a refinement of classification. The American model is more flexible, leading eventually to a national and international consensus regarding the need for a picture of cash flows is a financial situation. The benefits of presenting a statement of cash flows together with a statement of financial position (balance sheet) and a statement of the entity's performance (profit and loss) were outlined by IAS 7 as:

6. providing an image on the company's financial structure (including liquidity and solvency) and the ability to influence the amount and timing of cash flows appearance,

7. providing additional information to users of financial statements to evaluate changes in the assets, liabilities and equity of an entity,

8. increasing reporting comparability of operating results between different entities, because they eliminate the effects of using different accounting treatments for the same transactions and events.

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A Treasury trader can be regarded as its strong point. The manner in which they manage money and financial flows, the final outcome will depend on the trader.

More intense concerns treasury management are motivated by some economic instability phenomena both micro and macro: rising inflation, interest rates and lower rates of return and degree of self-financing.

Both positive and negative treasury leads management costs (of opportunity by omission the surplus cash; and financing costs of the cash deficit through new loans). The main objective of treasury management is to avoid a negative structural treasuries (avoidance of what is usual names in the Romanian economy ”financial blockage”, a situation characterized by the inability of the company to meet payments). Through careful cash management, and payment instruments and financing, the secondary objective is achieved profitability, which minimizes, on the one hand, cost and financing volumes and optimize the placement of surplus cash on short time.

Other objectives of cash management include:

- avoid losses at the bank receipts and payments of the enterprise, in the days of settlement
- increasing the efficiency collection company claims, without affecting the policy to customers,
- balanced and relaxed staggering maturity of the liabilities of companies.

1. Financial Risk Management

A not at all negligible size of treasury management is the management of financial risks, which involves the use of instruments of speculation and when financial markets are very volatile, in other words, where exchange rates and interest rates fluctuate greatly in short intervals time. Financial risk management problem becomes even more important today, when Romanian companies are under pressure of high interest rates because of the persistence of high rates of inflation and an economic slowdown, not to mention that in some sectors activity in our country is facing a ”negative growth”.

One of the most popular treasury management policies throughout the world, is ”Treasury zero”. It is to maintain as close to zero balances in order to reduce the treasury management costs (includes avoiding financing costs and opportunity through actions such as: preserving the least possible spare cash, using forms of credit at least costly, in amounts as small and as short a period, etc.). Management of ”zero treasury” faces a number of difficulties, especially for companies with numerous financial flows adjusted by checks, because the date of presentation to the bank can not be accurately represented.

In fact, cash management involves establishing a balance between cost means of financing and cash from investment income. In addition, an effective treasury management requires that the entity to have sufficient capacity to meet the close out at the time wanted. To do so, it is necessary to provide the size and date of chargeability and instant availability resulting from enterprise operation. It therefore needs a firm cash management estimate by budget provided.

All these coordinates are derived from treasury management overall objective of the finance company, the increase of capitalization value.

Before resorting to loans to cover the forecast deficit of the balance, some measures will be required to be taken, arising from the natural logic of treasury management. First is acting for the advancement of revenues (by reducing the volume and / or duration of trade credit to customers or by request in advance of sales receipt) and delay (in legal terms) of payment (extended supplier credits). Secondly, it tries to surrender, for the time, to incurred expenditure (investments, dividends, etc.). Finally, are necessary exceptional revenue (sale of fixed assets or assets available etc.).

Balance deficit, resulting from these measures, should to be covered by new loans and discount treasury, whose selection and dosing belongs to the ”art” of the Treasurer of optimizing the size of their actual cost.

They act as shock absorbers between the increased or reduced need for capital assets and reduce or increase their sources of capital assets, and attracted. These oscillations are reflected in the size of the balance of bank loans. Compared to the previous period, the balance of credits may be decreased by cash surplus released within that period or may be increased to cover (through new loans) resulting cash deficit at the end of the previous period.

The growth of bank credit balance can be made up to a certain limit i.e. the ceiling of a bank credit in its relations with the enterprise.

To achieve its objectives, the decision to finance the operating cycle will make an arbitrage between cash loans and discount loans which can be mobilized from banks, to cover the cash deficit. Selection of one or another will be based on the analysis of their actual cost.

2. Cognitive value of cash flow statement. Theoretical and Practical Aspects

Statement of cash flows presents useful information about changing the company's financial position, allowing to assess the enterprises ability to generate future cash flows and cash equivalents in the operating, investing and financing activities.

The cash flows generated by operating activities are primarily the consequence of the main revenue-producing activities of the enterprise. There are following types of cash flows arising from operating activities:

6. Cash receipts from selling goods and services,
7. cash receipts from royalties, fees, commissions and other income,
8. payments to vendors of goods and services
9. payments to behalf of employees
10. payment of taxes and payments
11. tax payments or tax refunds, they can not be specifically identified with financing and investing activities.

The size of those flows expresses the extent to which the business has generated enough cash and cash equivalents to repay loans and finance lease rates, to pay dividends to shareholders, to maintain the operating capability of enterprise and to make new investments without recourse to external funding sources.

The cash flows generated by investment activities are related to the purchase and sale operations of fixed assets (tangible and intangible) or participations in other companies. We list the following categories of cash flows from investing activities:

- Cash receipts from sale of tangible and intangible assets, sale of equities or debt of other companies, repayment of advances and loans to other parties, interest and dividends;
- Cash payments for: the acquisition of tangible and intangible assets, acquisition of equity instruments or other instruments of companies and cash advances and loans to other parties

These types of flows provides information about how the organization ensures its development, reflecting the extent to which payments were made for the purchase of assets by means which will generate income and cash flows in future.

Cash flows from financing activities are related to those activities which involve changes in size and structure equity and debt business, such as:

- Cash receipts from: the issue of shares or other equity instruments, the issuance of debt securities, loans, unsecured debts, obligations, mortgages and other short-or long-term loans;
- cash payment to shareholders for the purchase or redemption of company shares, repayment of amounts borrowed cash, cash dividend payments to shareholders and related obligations of the lessee for the reduction of finance leases.

Cash flow statement is drawn up according to one of the models set out in IAS 7 "Cash Flow Statements", as exemplified and accounting regulations harmonized with the 4th Directive of the European Economic Community and the International Accounting Standards, in two ways:

a) direct method - which are presenting major classes of gross cash receipts and payments. Information for payments and receipts are taken from records or by adjusting the profit with changes in stocks, receivables and payables during the period.

Table nr. 1
Cash-flow statement (direct method)

Cash flows
Cash flows from operating activities +cash receipts from the sale of goods and services +cash receipts from royalties, fees, commissions and other income -cash payments to suppliers for goods and services -cash payments by and on behalf of employees -cash payments by and on behalf of employees, cash payments or tax refunds (if not directly attributable to investment activities and financial)
Cash flows from investing activities *-cash payments for acquisition of land and fixed assets, intangibles and other long-term assets* *+cash proceeds from the sale of land, buildings, equipment, intangible assets and other long-term payments* *-cash payment for purchase of equity instruments and debt of other companies* *+cash proceeds from the sale of equity instruments and debt of other companies* *-cash advances and loans made to thirds* *+cash proceeds from the repayment of advances in cash and loans made to thirds*
Cash flows from financing activities +cash income from the issue of shares and other equity instruments, -cash payments to shareholders to purchase or redeem their shares + cash income from the issue of bonds, loans, mortgages and other loans -cash repayments of amounts borrowed cash payments to financial leasing
Total cash flows
Cash at the beginning of the period
Cash at the end of the period

b) indirect method - based on the profit / net loss, adjusted for transactions such as money, the liabilities, income and expense items associated with cash flows from investing or financing. Net flows from operating activities can be determined by showing the revenues and expenses disclosed in the income statement and the changes during the period of inventory, receivables, operating obligations.

Table nr. 2
Cash-flow statement (indirect method)

Cash flows
Cash flows generated by operating activities
Profit before income tax and extraordinary items
Adjustments for non-cash items and other non-operating activities. a. Elimination of income and expenditure without affecting cash:

+Depreciation and provisions -Revenue reserves. b. Remove non-operating income and expenses: +Interest expense -Income from interest and dividends, -income re-investment subsidies
Operating result before changes in working capital requirements
-Changes in working capital requirements -Stocks Change -Change in inventories accounts receivable from customers and other service providers +Change in accounts payables and other operating income +Change in cumulative debt accounts
Receipts and payments on associated with operating -Interest payments -Profit tax Payments +Net cash from extraordinary activities (difference between receipts and payments from extraordinary activities)
Flows arising from investing activities
+Proceeds from sale of tangible and intangible assets
+Proceeds from sale of equity or debt instruments of other companies
+Proceeds from repayment of cash advances and loans to other parties
+Proceeds from interest and dividends
-Cash payments for acquisition of tangible and intangible
-Cash payments to acquire equity or debt instruments of other companies
-Cash advances and loans to other parties
Flows generated by financing activities
+Cash proceeds from issuing shares or other equity instruments
+Cash Proceeds from issuance of debt securities, loans, unsecured debts, obligations, mortgages and other short or long term loans
-Cash payments made to business owners to buy back shares
-Payments of dividends to shareholders
-Cash repayments of amounts borrowed
-Cash payments made by the lessee for the reduction obligations under finance leases
Effects of changes in currency exchange rates and cash equivalents
Total flows of cash and cash equivalents (increase / decrease in net cash and cash equivalents)
Cash and cash equivalents at beginning of period
Cash and cash equivalents at end of period

Further, for example, we present cash flow analysis prepared for SC Neptun SA Campina, the direct method.

Table nr. 3

Cash-flow statement (SC Neptun SA) - direct method

	2005	**2006**	**2007**	**2008**	**2009**
I. CASH FLOWS FROM OPERATING ACTIVITIES					
Proceeds from sale of goods and services	96.536.773	122.043.448	137.207.264	132.015.614	164.292.419
Cash receipts from royalties, fees, commissions and other income	20.444	168.676	5.081.669	1.468 242	156.419
Cash payments to suppliers of goods and	(59 596.538)	(72.523.469)	(78.252.582)	(81.471.434)	(84.089.838)

services					
Cash payments to and on behalf of employees, payments made by the employer in relation to staff	(23.683.787)	(35.578.460)	(38.706.156)	(42.986.957)	(54.253.522)
Value added tax payable	(3.740.534)	(701.971)	(675.658)	(370 546)	(2.583.438)
Other taxes, fees and payments paid	(416.445)	(4.242.496)	(3.830.853)	(3 987.584)	(3.356.599)
Cash generated from operations	9.091.867	9.165.728	20.823.685	4.667 335	20.165.441
Interest received	22.682	108.945	22.404	36.607	26.457
Interest paid	(817 252)	(809.822)	(1.302.652)	(1.785.976)	(2.350.911)
Income tax paid	(289.892)	(5.452.825)	(5.095.243)	(4.611.750)	(5.198.888)
Net cash flows from operating activities	***8.035.450***	***3.012.026***	***14.448.194***	***(1.693.784)***	***12.642.099***
II. CASH FLOWS FROM INVESTING ACTIVITIES					
Cash receipts from the sale of land and buildings, plant and equipment, intangibles and other long term assets	310.847	-	-	-	-
Receipts and payments in cash from other investing activities	2.000.000	4.141.920	1.103.844	1.329.840	955.511
Cash payments for purchase of land and fixed assets, intangibles and other long term assets	(8.883.840)	(11.425.430)	(16.966.396)	(10.110.424)	(12.161.519)
Dividends received	146.209	62.100	89.100	-	-
Net cash flows from investing activities	***(6.426.782)***	***(7.221.410)***	***(15.773.452)***	***(8.780.584)***	***(11.206.008)***
III. CASH FLOWS FROM FINANCING ACTIVITIES					
Proceeds from long term borrowings / repayments	(851 231)	(1.749.912)	(1.875.537)	(267.096)	(905.691)
Proceeds from short-term borrowings / repayments	4.388.055	2.066.648	6.495.982	11.697.833	10.557.381
Payments for finance leases	(180 100)	(380 516)	(717.015)	(664.918)	(1.258.664)
Dividends paid	(331.696)	(1.359.967)	(1.757.399)	(3 372.600)	(10.333.686)
Net cash flows from financing activities	***3.025.027***	***(1.423.748)***	***5.897.104***	***7.393.220***	***(1.940.661)***
Effects of changes in currency exchange rates and cash equivalents	(182.478)	2.099.195	(325.937)	306.044	-
Cash flow – TOTAL	***4.451.217***	***(3.533.937)***	***4.245.909***	***(2.775.105)***	***(504.570)***
Cash and cash equivalents at beginning of period	273.998	4.725.216	1.191.279	5.437 188	2.662.083
Cash and cash equivalents at end of period	4.725.216	1.191.279	5.437.188	2.662.083	2.157.514

Net cash flow from operating activity is positive throughout the period under review, except for 2008. The company recorded an increase in the cash flow, 8.035.450 lei in 2005, 12.642.099 lei in 2009 as a result of the cost carried.

Taking into account the direct method, it is noted that the biggest positive influence they had cash receipts from the sale of goods and services and the most significant were the payments to suppliers for goods and services, staff and obligation wages paid and income taxes and interest paid. Cash flows from investment operations highlights an increasing need for cash, 6.426.782 lei in 2005, 11.206.008 lei in 2009, generated by investments made by the enterprise for acquisition of land and fixed assets, intangibles and other long term assets.

To boost investor confidence, the company come to us short-term bank loans, and repay a portion of long-term loans, that net flows are negative long-term loans, while net flows of short-term loans remain positive throughout the period analyzed. Simultaneously make payments for finance leases and paid dividends to shareholders.

Following the company's ability to generate cash, it is found to obtain the total net negative cash flows for the years 2006, 2008 and 2009. Between 2005 and 2007 there is a better financial situation that is getting a net positive cash flow 4.451.217 lei in 2005 and 4.245.909 lei in 2007. The results are encouraging in the last year of analysis the situation is improving although it achieved a net negative cash flow, increasing it from the previous year (from -2.775.105 lei in 2008 to -504.570 lei in 2009).

Conclusions

Due to the structure and methodology for drawing up, cash flow enables users of financial statements:

- to assess the enterprise's ability to release cash from operating activities in particular,
- to determine the liquidity needs,
- to provide maturity and risk,
- to provide future earnings,
- to compare results enterprise, eliminating the effects of using different accounting methods.

Limits of cash flows are related to the definition and role of the treasury function, operating content and method of calculation of the associated flows, performance evaluation through cash flow and its failure to assess and predict the evolution of long-term financial position of the entity.

Also, certain complex combinations of events that relate to business combinations, segment reporting activity, acquisitions that will increase the reporting entity's assets during the period, without any connection to its customers, can not be understood without other information and will reach erroneous interpretations in the absence of cash flows presentation. Explanatory notes on the balance may be an important source of information necessary for external users and privileged users who are primarily owners / investors / shareholders. Therefore the complete set of financial statements represent the cornerstone in financial analysis of the economic entity.

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CORRUPTION AND TAX EVASION IN ROMANIA

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Abstract
Tax evasion has become a ubiquitous phenomenon in economic and social. Extent it has taken a tax evasion is worrying because the lack of control measures may close in the future stability of national economy. To combat tax evasion is not necessary to impose some severe penalties, but should be made an effective fiscal control, a viable legal system.

***Keywords**: evasion, fraud, corruption, tax system, fiscal record*

1. Preventing and combating tax evasion in Romania

For the prevention and combating tax evasion in Romania will act all measures that are prescribed in regulations came into force. The first step, in this purpose, is the organization of the fiscal record, as a means to record and track the financial discipline and to strengthen administration of taxes owed. Fiscal record is held by the Ministry of Public Finance at the central level and the general public finance departments of counties and Bucharest, electronic forms. In the fiscal record are listed individuals and legal entities and associates, shareholders and legal representatives of legal entities, which are actively works, sanctioned by financial laws, customs, and those relating to financial discipline. These penalties may be included in fiscal record if they have become final and irrevocable. The certificate of fiscal record is mandatory to be presented in the following cases:

- the establishment by parent company, shareholders and legal representatives appointed
- the establishment of associations and foundations by their founding members
- the authorization to exercise independent by applicants.

Since 2003 were established a number of very important measures that will impact favorably towards firm combating tax evasion phenomenon. On this line, is made public the list of contributors (except micro-companies), who recorded outstanding obligations owed to one or another of public budgets, accounting for taxes, contributions and other revenues. This list and the information it contains is made aware of the public on its Internet page of each of the institutions and public authorities responsible for implementation of respective budgets. Updating outstanding debtors and their obligations is made quarterly. Publication of this list has become a practice. New details of the scope of tax evasion made by Law. 161/2003 - which amends the Law. 87/1994 on combating tax evasion - in that it includes waiving the payment of taxes, contributions and other amounts owed to the state, thus having the same connotation as to circumvent the tax taxable matter, we believe that will impact positive to combat tax evasion (publication of the list of taxpayers with outstanding obligations with those who evade the tax, prompting some debtor to pay the arrears before the list is made public).

The Law nr. 161/2003 - which amends the Law nr. 87/1994 on combating tax evasion - includes favourable conditions in this respect. It provides for taxpayers who receive income from trading activities or provide services to the population that are required to show where work, operating authorization and certificate of registration. Is important and necessary point that taxpayers are required to use only primary documents and work accountancy established by law, to be purchased only from the units established by legal rules. At the same time are more clearly defined

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and delineated acts and deeds that constitute crimes, making the presentation according to gravity and severity of sanctions that apply.

2. Competent bodies in combating tax evasion

Lack of a well organized control and properly skilled staff can lead to large-scale forms of tax evasion. For the organization and functioning of financial control and the Financial Guard, on 22 March 1991 was adopted the Law No. 30, published in Official Gazette nr. 64 of 27 March 1991. In accordance with Article. 1 of Law 30/1991, Ministry of Finance, on behalf of the state, made control and managing of the specialized funds of central and local state administration and state institutions and monitor compliance with financial accounting regulations in the work of by autonomous, companies and other operators in connection with fulfilling their obligations to the state. The second paragraph of that article states that the specialized unit of the Ministry of Finance acting for the prevention and combating fraud, violations and offenses to the taxation, customs and prices and taking measures under the law. In Article 4 states that financial control of the state is organized and operated in the Ministry of Finance and is performed by General Directorate of State Financial Control and Financial Guard.

By law, the powers conferred to the General Directorate of State Financial Control and its subordinate units are:

• control the management and use of funds provided from the budget for running costs and maintenance of central and local government and financed by the budget units,

• monitor the use of funds for state investment interest, activities and products and subsidies for other purposes provided by law;

• check the use of endowment funds and funds and accounts in compliance autonomous activity and state-owned companies;

• verify the accuracy and reality of entries in records required by law and the provisions of incorporation of companies and other businesses, seeking the correct and complete and timely fulfillment of all financial and tax obligations to the state;

• control and also perform other duties established by law in charge of the Ministry of Finance.

Are also covered the Financial Guard duties:

• implementation and enforcement of tax laws and customs regulations, aiming to prevent any embezzlements or evasion of payment of taxes

• trade compliance, seeking to prevent smuggling activities and any procedures banned by law

• verify the existence and authenticity of documents during transport, as well as places of production activities, services, acts and deeds of trade, when there is evidence of evasion of tax obligations or of establishing procedures prohibited by law

• verify the records or any other documents resulting tax obligations

• to find violations and apply appropriate sanctions

• to bring prosecution in connection with the crime found in the exercise of duties.

Following the findings of financial control, Ministry of Finance is entitled in accordance with the provisions of Article. 7 of Law No. 30/1991 should:

- take measures to eliminate and prevent irregularities in business accounts of central and local administrations, autonomous and

- correcting and expanding the balance sheets and paying the taxes and other budget revenues legally owed the state

- application for law enforcement measures in prices and tariffs

- suspension of measures contrary to financial regulations and accounting.

Failure, unperforming the provisions within the document control data entered into the financial-fiscal body is, according to the Law System. 87/1994, offense and punishable as such. Tax evasion has become a ubiquitous phenomenon in economic and social. Extent it has taken a tax

evasion is worrying because the lack of control measures may close in the future stability of national economy. The economic situation of balanced state budget would lead to macroeconomic balance and ensuring economic development conditions. To combat tax evasion is not necessary to impose some severe penalties, but should be made an effective fiscal control, a viable legal system may first fiscal education of citizens. Tax laws should be simple, clear, accurate and relatively stable, to make a distinction between cases where laws are violated intentionally violated when fraud or negligence, negligence, or causes beyond the control of the taxpayer. It is necessary to reorganize and control the tax checks, to be developed by The National Bank of Romania clear rules on the conditions to be met and documents to be submitted by individuals. Our country had one of the best tax procedure code, which was repealed by the dictatorial regime established after the Second World War. As measures already initiated or being implemented, with direct impact on preventing and reducing tax evasion can be:

12. strengthening the tax system by harmonizing the tax return with the requirements of Directives of the European Union, promoting measures for its gradual decline (in particular If direct tax), to stimulate the transfer of activities of the informal economy visible in the economy, implementing a simplified taxation system for small businesses, eliminating the effects of inflation
13. the strengthening and adaptation of economic accounting system by applying accounting rules harmonized with European Union directives and International Accounting Standards approved by Ministerial Order No. 3055/2009, for commercial companies and other publicly traded company representative to establish a simple filing system for small and medium enterprises;
14. elimination of firms in economic losses, irrecoverable;
15. approval of the draft Law exemplary management of commercial companies;
16. completing the legislative framework for control of resident associations and joint owners by local councils;
17. mandatory implementation of the acceptance of debit-credit card businesses with a business volume over a certain level and population ;
18. establish a well organized system of principles for tax record for better management of the prevention and combating tax evasion.

As measures to prevent international tax evasion, Prof. Ph.D. Dan Saguna proposes the following measures ”tax heaven”[1]:

19. exchange control
20. steps towards citizenship taxpayer
21. taxation even the income
22. taxation of gains from foreign made not by Legal way
23. using theory of law abuse
24. the refusal to allow access to the courts of foreign organizations deemed suspicious.

Finally, we can say that without a detailed and systematic analysis of internal mechanisms with the international tax evasion is difficult to trigger tools and measures conducive to combating and preventing tax evasion.

3. Tax evasion and corruption

In a world confronted with complex issues, the activities of corruption and of obtaining money by illegal ways are more frequent. History of human society reveals that crime and corruption in all forms of manifestation (embezzlement, trafficking in influence, giving and taking bribes, tax evasion, receiving undue benefits) and drove there with varying intensity of the oldest times. European officials have converging views regarding accession of 10 new member states, due to

[1] Saguna D, *Evaziunea fiscală pe înţelesul tuturor*, Editura Oscar Print, Bucureşti, 1995, pag. 83

alarming issue: corruption in these country could be transferred to the Community market. Corrupt judicial system, which evolves slowly, worried European Union authorities because of the need to actually apply the directives and regulations to be adopted rapidly. From the perspective of EU integration, tackling corruption is needed to materialize unequivocal commitment of the Romanian society as a whole, to take and fulfill membership criteria. Corruption has always been regarded as one of the most serious behavioral misconduct that distorts the administration of public affairs for private order. From a sociological perspective, corruption - as social pathology - concerns a group of immoral and illegal activities conducted by individuals not only functions or exercising a public role, but also by various groups and organizations (public and private) to obtain material benefits or moral, or a higher social status, using forms of coercion, blackmail, deception, bribery, buying, intimidation. In essence, corruption is an abuse of power in order to obtain material advantages or other benefits (honors, titles, advertising exemption from liability, etc.). Most times, it is only ”a trivial contract ” (illegal – that is right), acting under the Roman law principle *do ut des* (I give you to give me) negotiated and placed in underground conditions and privacy.

Conclusions

The corruption has much more varied forms, some of them - like: favoritism, or interference in the work of civil servants, that form the traditional ”intervention” - is considered, if not daily acts, at least minor deviations which can not be criminally sanctioned.

Also included other manifestations of corruption, widely practiced, arising from the influence of money in politics, more publicized, combined with local power decentralization, rapid urbanization and internationalization of economic relations. Corruption are identified with those acts which are committed in the exercise of functions or duties of office, which is the violation of duties, following - in all cases - a profit. Evolution of the phenomenon, reflected in ancient law, shows that bribery is an abuse of office in order to obtain material benefits, goods or other benefits.

Corruption can be considered an economic activity based on the following assumptions:

- corruption is based on limited resources
- has an operational process: support, facilitation, opportunity
- has a specific funding - to satisfy some need
- pursue profits.

Creation of company ”tick”, that thrive in the near moribund state enterprises

In this case fiscal dimension of corruption is localized in the registration of oversize charges (most times even unrealistic), thus narrowing the legal basis of taxation of profits and hence and related income tax due the general consolidated budget. Profitable by outsourcing activities by companies from interest groups, it fails these enterprises after privatization are ”suddenly” extremely profitable.

Trade and transactions entered into evidence - and used as the basis for recording financial records and accounting - does not reflect an actual state of affairs therefore covered by Law No.. 241/2005 on preventing and combating tax evasion as a crime criminalizing evidence of fictitious transactions.

Fraudulent privatizations

Essentially, by means of fraudulent privatizations parasitic capitalism was encouraged at the expense of large privatizations, which could lead to multiple benefits for our country. Many of the companies acquired are dismantled and sold for scrap, the staff is fired and the products made by new investors fail to penetrate the market. The purpose of these investors is not only immediate profit.

Robbing banks

There are interest groups - beneficiaries of bad loans - which were identified in the banking sector favorite target of their criminal activity by providing preferential loans, favorable terms, the

client base. As the banking sector has undergone a privatization process effective and efficient, the phenomenon of illegal or preferred-financing shrank sharply.

Spoliation of the state budget by the tolerance by the public authority in unpaid tax liabilities owed by some companies and illegal VAT refunds

According to Law. 241/2005, VAT refunds have been expressly criminalized acts of tax evasion. This amounts fraudulently diverted money from the state budget lead to distortions and even undermine state functions formal economy, contributing to ”welfare” of public officials who have contributed to the smooth functioning of this mechanism crime. Size corruption tax imposed directly on the public financial resources by returning (illegal!) Significant amounts of money from the consolidated general government accounts of private firms as a result of unrealistic sizing tax liability (in case of VAT).

There are other manifestations of corruption, among which may be mentioned: the smuggling of excise goods, embezzlement of EU funds provided through the Phare program type, with a grant, procurement rigging.

In all cases above, the funds used in criminal transactions intended to create ”break through in the system” and, in substance, to cause weakness manifested in the smooth functioning of state institutions, which - in this context - can be locked and become inoperative. Prevention and eradication of corruption requires measures of social, economic, political, legal and administrative development to prevent and limit the extent and severity of the phenomenon, identifying and neutralizing the risk factors. If eradicate corruption and organized crime is a financial and economic utopia for the foreseeable future to prevent this phenomenon to dictate laws, values and politics of states and international bodies is a current requirement. Between tax evasion and corruption there is a parallel, the similarities and differences (both with devastating effect on ”health” of a society as a whole)[2].

Key considerations stemming from this analysis include:

- tax evasion may be a unilateral act, while corruption requires always at least two parties (usually the one party is a public sector decision-maker)
- tax evasion does not, automatically, further recourse to corruption, while corruption acts and financing is secured, in particular, of pecuniary resources evaded tax
- tax evasion occurs, mainly the underground sector of the economy (being part of it), while corruption found ”fertile ground” in area economy in the world of so-called ”white collars” (although this does not exclude that the intention and the forces that resort to corruption come mainly from the economy underground);
- while corruption is intended, often, access to public resources for personal gain increased (by corruption of people who manage those resources), tax evasion can be equated with an act which would protect the “desires” realized against state (obviously, in substance, a phenomenon also illegal in most cases)
- while evading the tax evasion from tax a certain amount of personal gain, corruption is used to help public servants to get a win as more
- avoidance can sometimes be only a unilateral act, while corruption is always a bilateral or multilateral measure
- corruption always involves recourse to tax evasion, while tax evasion is not achieved with the use of corruption;

Eliminating corruption is the primary element in improving fiscal control as part of combating tax evasion. Along with corruption, another factor which leads to increased tax evasion is incompetence, between the two there is a directly proportional relationship. Action taken against corruption must create legal and institutional prerequisites needed to control the phenomenon. Introducing a comprehensive legislative framework and appropriate the acquis communautaire

[2] Hoanță, N., *Economie și finanțe publice*, Editura Polirom, Iași, 2000, pag. 281

(control wealth of dignitaries and public officials, regulatory incompatibilities with public functions, significant legislative progress in areas related to corruption - money laundering, tax evasion, procurement, etc.), creating the institutional framework for action against corruption at the top, by reorganizing the judiciary. The extent to which Romanian society will be able to manage the further dimension of corruption will depend on the expected positive response from external partners for the economy.

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HISTORICAL COST AND FAIR VALUE WITHIN THE CONTEXT OF FINANCIAL CRISIS

DIANA ELENA BRÎNZĂ*

Abstract
Financial crisis determined the fast extension of global financial bankruptcy upon the world, representing at the same time the first crisis of the accounting term of "fair value", under the shade of which subsists a number of standards which request to the institutions to estimate at the market value much of the assets they possess. The Council for International Standards in Accountancy (IASB) revised the rules regarding the accountancy at the fair value, as a reaction before the critics which sustains that the accountancy rules at the fair value were the basis of volatility of financial market. The alternative for "fair value" – the historical cost of assets – has little admirers within the financial crisis. In the pages of the present article, we will try to achieve an incursion through specialized literature while analysing the two methods of valuation within the context of financial crisis.

Keywords: *valuation in accountancy, historical cost, fair value.*

Introduction

The end of 2008 and the beginning of 2009 were marked by a historical event: the global economy was affected by the most serious crisis amplified by a dangerous collapse of developed financial markets, the United States of America being in the epicentre of the global storm. The nucleus of our article is represented by the analyse of two methods of valuation (historical cost and just value) in the context of financial crisis.

Valuation represents the process through which are quantified and expressed in monetary units the assets, debts and elements of own capitals as well as the economic and financial operations with the modifications intervened upon these elements. The monetary unit is identified with money, Leu (RON) being the measure unit of economic value in Romania. The value established after the valuation is the value of assets, debts and own capitals presented in financial situations. This value has to be as real as possible and correctly established, because on the basis of information presented in the financial situations, there are taken the most important decisions at the level of economic entity. Therefore, the presentation of false values of assets, debts and own capitals in financial situations will lead to wrong decisions, with repercussions on long term upon the trading company.

In order to find solutions at the present moment, it is important to analyse the causes and not the symptoms of crisis, which created an unprecedented situation, undermining the thrust in free markets. In this context, there are necessary also unprecedented measures, with a more systematic and global character than those applied till present. Financial crisis was the first big test for European Central Bank and it was the first crisis of the accounting term of "fair value", under the shade of which subsists a number of standards which request to the institutions to estimate at the market value much of the assets they possess. The Council for International Accounting Standards Board (IASB) revised the rules regarding the accountancy at fair value, as a reaction to the criticism which sustains that the rules of accountancy at fair value were at the basis of volatility of financial market.

In the pages of this article, we shall make an incursion into the specialized literature, trying to find some answers regarding the advantages and disadvantages of a valuation at fair value or of the historical cost in the present economic environment.

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Paper content

Opinions of different authors regarding the causes of financial crisis.

The financial shock produced by the bankruptcy of mortgage market (underestimated rate of mortgage credit - subprime mortgage market collapse) in United States in August 2007, led to the slowing down of global economic growth in alarming rhythms (reduction with 6.3% in the last trimester of 2008, as compared to the growth of 4% in the previous year). In fact, it is the first global economic contraction after the Second World War (World Economic Outlook, April 2009, pp.49; . IMF Tweaks Loan Program in Bid to Attract Borrowers, by Bob Davis, March 20, 2009). The global financial bankruptcy extended rapidly in the world.

It is important to examine the sources of financial system crisis which gathered cumulatively over the last decades (Ceslav Ciobanu, December 2009). Martin Wolf, analyst at Financial Times newspaper, published in 2008 the book "Fixing Global Finance" where he characterizes the crisis as a result of a series of "obvious bankruptcies" to understand and estimate at fair value(Martin Wolf, 2008, pp. 8-9):

- The inherent risks of liberalized financial markets and of decisions of the respective market institutions;
- The increased risks given the terms that cash flows cross the frontiers, especially for fragile economies of future markets (as it is the case of Romania)
- The inherent risks of loans in foreign currency of debtor countries and the importance of an increased monetary and financial discipline;
- The connected risks of the exchange rate assumed not only by creditors but also by debtors in a world of liberalized circulation of capital;
- The risks of the activity given the terms of instability of exchange rate in the multi-currency exchange world;
- The importance of modernization of global institutions according to the demands of present time.

The credits'crisis appeared in 2007 was the cause of the loss of jobs for many financial managers, but also of the bankruptcy or sale of many financial institutions. After a time, two big problems proved to be at the root of this crisis. One of them is represented by the patterns used in the determination of fair value of those instruments for which there were used entry data of 3rd level, patterns too narrow to have the capacity to connect the modifications appeared in the price of buildings at the values of those financial instruments which were their active support through a structure more or less complex. The second problem consists in the lack to provide information that should be known by investors, lack which would have stopped even the best technique of valuation from generating a significative level of accuracy (Deventer, 2008).

Other sources from specialized literature consider that at the root of present financial crisis there is also the high level accepted in the last years by the mortgage credit market for an indicator specific to the domain of the mortgage credit, that is the value of credit weighted in the value of mortgage property (eng. *Loan-to-Value - LTV*). This indicator represents in fact a lever similar to the one used for entities, determining the weight of loan (mortgage credit) in the total value of the asset (property value), and as for entities, a growth of this lever determins a growth of the risk associated to mortgage credit. Thus, the growing number of beneficiaries of credits who don't cope with payments is directly associated to a higher level accepted for this lever (Matiș, Bonaci, 2009).

Given this situation, one can state that the present financial crisis is due to the relaxation of the process through which it should have been estimated the probability that those granted mortgage credits to be refunded (eng. *underwriting process*) and to a lever too high accepted in the last years for mortgage credits granted on the market (Wallace, 2008).

Many analysts dissaprove of the concept of "fair value" as a cause of credits' crisis in USA, arguing that this can determin a descending spiral of prices, by encouraging institutions to sell the

assets quickly, obliging them at the same time to register in accountancy at "fair"lower prices their principal assets.

The fact that "the fair value" was accused of being so dangerous reflects yet the complexity of products, as well as the present situation of the market. In any conditions, it's difficult to establish a price for derivative products which were repeatedly "repacked, collateralized and structured". "The price of four thousand parts that compose a Porsche is more difficult to estimate than the entire Porsche, and the sum of parts is not equal with the whole," shows Bill Michael adviser at KPMG.

Obviously, some banks underestimated the risk of liquidity. The reports coming from the financial-banking domain indicate that institutions which showed prudence developed since long time ago internal patterns of valuation, using them even when the prices from the market could be estimated very clearly; those which didn't use such instruments, hurried up then to appeal to such patterns when the market came " up ", but losing a series of opportunities. Many banks overlooked the opportunity to transform the lack of liquidity in costs of financing.

It is certain that at the present, the effects of crisis succeeded to propagate even at the level of some economies which tended to present optimistic scenarios, hoping that a certain drawback of little developed national capital markets will constitute this time an advantage, the lack of efficiency representing theoretically an obstacle in transmiting the information at the level of market.

IFRS (International Financial Reporting Standards) pointed out rapidly the problems of valuation arised by this situation of financial crisis**.**

In these conditions, some lessons should be forgotten. The use of market value can transform an unfavourable momentary evolution in a real collapse, prices being more difficult to establish because of the lack of liquidity, and the valuations more liable to be influenced by psychological factors. This fact underlines the volatility and determines the managers to calculate the risks more attentively. If prices decrease very much, investors can become interested to buy those assets.

But beyond the concept of fair value itself, it should be tackled yet the aspect of implementation, often underestimated even at the level of Europe (Veron, 2008). The quality and consistency at international level regarding the implementation of an accounting referential are vital for the ensuring of a financial stability, as the Banking Supervision Committee from Eurosystem showed even before the first signs of manifestation of crisis (European System of Central Banks - Banking Supervision Committee, 2006).

The present financial crisis was of use, if we can say this about such a phenomenon with many negative implications, in bringing the financial instruments and especially their fair value in the searchlight, taking of our shoulders the charge to try to convince the readers about the importance of this theme. Even if at present the financial instruments are called toxic assets and the fair value received more criticism on this occasion than it would have received in the absence of such events which did nothing but favour misinterpretations, let's look at the full part of the glass, since in fact and after all the negative publicity is also publicity (Matiş, Bonaci, 2009).

Another important aspect underlined by specialized literature is the fact that such a serious crisis as the present one is not and cannot be caused by a single involved part, but implies the incapacity of the entire ecosystem which failed to estimate the risks connected to the fast growth of structured risks of mortgages, the other side of the coin in the growth of buildings'prices and an unprecedented lack of market liquidity (Ryan, 2008). There were all these factors that brought on the surface an inadequate character from the part of investors and from those who borrow or are borrowed, making them ignore what the common sense would have showed them, that is never forget to valuate at fair value the real implied risk.

At present, more than ever because of the global economic crisis, the fair value must be correctly interpreted. This was accused of being one of the important causes of crisis, contributing to the global writedowns. Gottdiener presents four keys for ensuring a superior valuation of assets (Gottdiener N., 2008):

- Establishing of some complex valuation hypothesis and of high technical level;

- Precise settling down of objectives and valuation goal;
- Realization of an objective and independent analysis;
- Ensuring of transparency by the clear presentation of the valuation methodology;

In all these stages, it is presumed the contribution of professional and ethic standards of valuation, especially the global ones of IVSC.

The support offered to the concept of fair value is not even far resulted from considering that this is a perfect one, being aware of the existence of a series of amendments to present standards that will be realized in the future, as the IASB president itself suggested not long ago (Tweedie, 2008). Despite of all these, the goal assigned to the fair value accountancy and valuations based on market, it doesn't seem an exagerated one if we integrate it in the picture which represents the characteristics of financial markets in a world in full development , picture reflecting also the lessons learned from anterior crisis. A restrictioning of fair value not only will it cure the wounds of present financial crisis, but on the contrary, it would risk to make them worse, diminishing the level of thrust that investors, and not only them, have in financial situations of financial institutions (Veron, 2008).

In the opinion of an expert evaluator, one of the positive aspects of present financial crisis is that to have made light during debates regarding the concept of fair value from the point of view of two key aspects, stimulating us to give up to a certain accounting utopia which tends to install in present environment and to come back to the financial reality (Rérolle, 2008). The first aspect to which Rérolle makes reference (2008) is the fact that from a conceptual point of view, the drawing up of a balance sheet which have the capacity or should offer a real image of the entity's market value, is an imposing ideal in the context in which the market is much too complex to be surprised by some accounting system.

The second aspect is that the valuation process implies a high degree of subjectivism, and the framing of this process in a series of accounting rules can be dangerous. At the same time it is to appreciate the fact that restrictions imposed to expert evaluators practicians were fortunately relaxed (Rérolle, 2008). As a result, the single administration of ascending doses more and more powerful of fair value within accounting literature didn't necessarily generate an image more realistic upon entities, being necessary the conscientiousness not only of limits inherent to accountancy by its nature itself, but also the complexity of economic reality whose reflection it proposes to realize.

The specialized literature mentions some alternatives regarding the valuation at just value occasionally, but the arguments are not enough convincing. The historical cost would offer a degree significantly low of the information's comparability and relevance, being obviously rejected by the users of this information, especially by financial investors. Other sources make reference to the use of some notional prices established by public authorities, these representing the fundamental accounting principle of economies of collectivistic type, but these enjoy of more reduced credibility, at least among the majority of economists and participants within capital market.

The alternative for "fair value" – historical cost of assets – has little admirers within financial crisis. "Is it better to keep hidden the losses and not to present the situation to shareholders?" asks John Smith from International Accounting Standards Board (IASB).

Conclusions

The use at present of the fair value as valuation basis doesn't make but to impose to banks to recognize the existence of some real problems earlier, making thus possible also the taking of measures to solve them, because they will not disappear without saying, no matter what the deferral period. Even more, these problems not being recognized, the mechanism could have continued, involving also other naive investors.

In the present context there were formulated pro and con arguments regarding the fair value.

Pro arguments:

- It is the only basis of valuation which surprises the derived instruments;

- It comprises the present information;
- It limits the marking practices of gains through the discretionary sale of assets;
- Better an unprecise system but transparent and based on fair value than a precise historical cost but irrelevant;
- The inexistence of active markets doesn't justify the renunciation of fair value but the development of valuation methodologies;
- The fair value hasn't generate the financial crisis and its renunciation will not solve the problems generated by this crisis;
- Renunciation at fair value when markets are in decrease would deprive investors of useful information and affect the neutrality of accountancy and the independence of the normalization organism.

Con arguments:

- The fair value cannot ensure the precision of historical cost;
- The lack of active and liquid markets makes subjective the fair value;
- It doesn't reflect the intention of the management to keep the asset but just to sell it;
- The goal of accountancy is not to valuate the entity;
- At the market decrease, the valuation at fair value can determine the non-fulfillment of criteria to maintain the capital;
- The fair value is procyclical in the sense that accelerates the market decrease by encouraging sales in order to accomplish the capital conditions.

According to an analysis realized by GfK group, Romanian consumers together with the Greek ones, felt the effects of financial crisis and the high level of debt of countries of origin the most intensely of Europeans last year. At the opposite pole, there are the citizens of Germany. Gfk group, present also on the Romanian market, is one of the biggest organizations of market research in the world. The company develops its activity in over 100 countries.

The present crisis is the most serious challenge for the stability and perspectives of future markets, but at the same time it is also an opportunity to restructure them, to bring to a normal state their existing unbalances and weaknesses. The worst thing for these markets is the assumption that "what it has been worse it consumed". At the same time, it is important not to fall out into another extreme – deglobalization with edification of new "Berlin walls" of protectionism, which would separate the developed economies from the becoming ones.

No matter what the modifications that would interfere in accounting standards as a result of the financial crisis, IFRS must remain further on an accounting language at the basis of which there are some principles of high quality, which support the prevention or attenuation of its effects, meant to sustain the difficult mission of accounting domain in the terms of which it is considered the principal culprit in cause.

Nobody knows for sure what will happen in the future, as nobody knows exactly in what stage of the crisis we are or how long will it last and it's enough to look at the past to find the answer. The only certain thing is that recession gives rise to opportunities.

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THE INDONESIAN STOCK MARKET PERFORMANCE DURING ASIAN ECONOMIC CRISIS AND GLOBAL FINANCIAL CRISIS

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Abstract
Volatility in the stock market had strongly affected by the movement of publicly or even inside information. The movements of this information will generate the perspectives and expectations of investors in decision-making. How strong is the level of market efficiency in determining the movement of stock market, especially to achieve stability in the stock market during the economic crisis? How effective are the policies of central banks in controlling the movement of the stock market? This study aims to measure the factors that influence changes in the movement of stock price in Indonesian stock market in terms of market efficiency hypothesis. This research also aims to investigate the effectiveness of central bank policy in controlling and stabilizing the movement of stocks in Indonesia. The research will focus on the economic crisis in 1997 and the global crisis in 2008 as case studies. Thepaperutilizesthe vector error-correction model, impulse responses and variance decomposition in measuring the contribution of the factors that affect the movement of stock and determine the effectiveness of central bank policy. The findings are beneficialto central banks, governments, companies and investors in strengthening the Indonesian Stock Market particularly in facing the threat of financial crisis.

Keywords: *efficient market hypothesis, monetary policy, stock market, vector error correction, variance decomposition.*

Introduction

The current global financial crisis has affected the economies of countries worldwide, including Indonesia. During the ongoing global economic crisis, it is reported that Asian growth fallen sharply to 1.3 percent in 2009 from 5.1 percent on 2008. (IMF Survey online May 6, 2009). According to the IMF report, that the impact of the global financial crisis particularly on Asia region has been deeper compare to the other region. The most possible reason is many countries in Asia are very dependence on the other region's economy in terms of their economic integration on export and import activities. Increasingly, it will affect to completely macroeconomic stability in such country, including Indonesia. Therefore, the International Monetary and Financial Committee (IMFC) board was emphasizes on the central role of the Fund in order to help the growth restoration and monitoring the government's policies that might be taken to solve the crisis. Nowadays, the governments and international organizations are still debating on how national framework on financial and economic stability should change, including the regulation and supervision of financial institution.

Indonesia faced the fallout from the crisis towards the end of 2008, which started on the third quarter. The economic growth was still above 6% with a good performance particular on financial sector. There were some indicators that supported this condition; such as a stable exchange rate, upward moving on stock index, and the declining yield on government securities. Nevertheless, the global financial turbulence started to bear down the Indonesian economy on fourth quarter in 2008. The weakening of exports had pressure the stability on balance of payments and resulted turmoil on the money market as well. The balance of payments began to accumulate a high deficit and depreciation on exchange rate in terms of external side. On the financial markets, there was a rising perception and expectation particular on the country risk because of the global liquidity condition. According to the Indonesian Economic Report (Bank Indonesia, 2008), the Indonesian Stock Market

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and Government Securities prices were fall sharply. The risk spread on Indonesian securities was consider widening and led the foreign capital outflow from the stock market particular in terms of Bank Indonesia Certificates and government securities.

The impact of global crisis was continuing affected Indonesian economy during 2009. Bank Indonesia projects a drop in economic growth around 4.0% along with downside risks if the global economic downturn is greater than expected during 2009. Therefore, the Central Bank of Indonesia (Bank Indonesia) and the Government were concerned to mitigate the impact of this global financial crisis through optimizing monetary and fiscal policies in terms of money sectors and real sectors. It means that the government and Bank Indonesia should have an effective and efficient in coordination and cooperation in order to solve the macroeconomic problems that caused by the global crisis. The following table (Table 1), represents the differences condition in such main macroeconomic indicators between the 1997's crisis and the current global crisis in terms of Indonesian economy.

Table 1

Indonesia Macroeconomic Condition: Asian Crisis (1997) and Global Crisis (2008)

	1997	**2008**
GDP	4.70%	6.10%
Inflation	11.05%	11.06%
External		
- Current Account (% of GDP)	-2.30%	0.10%
- International Reserve (billions of USD)	21.40	51.60
- (Month of Imports and Official Foreign Debt Repayment)	5.50	4.00
- Foreign Debt (% of GDP)	62.20%	29.00%
Fiscal		
- Fiscal Balance (% PDB)	2.20%	0.10%
- Public Debt (% PDB)	62.20%	32%
Banking		
- LDR (%)	111.10%	77.20%
- CAR (%)	9.19%	16.20%
- NPL (5)	8.15%	3.80%

Source: Bank Indonesia, 2008

As we can see from Table 1, there were significant differences between the impact of 1997 and 2008's crisis on Indonesian economy. The most powerful indicator to give evidence of Indonesia's economy falling is GDP. It was 4.7% on 1997 compare with 2008, which is 6.10%. Indonesia's GDP has gradually declined from 4.7% on 1997 to the lowest level that is -13.7% on 1998 and -10.3% on 1999. This condition was the worst performance on GDP. It was automatically followed by all the main sectors as seen on Table 1. As stated in Yearly Economic Report (1998/1999) by the Central Bank, the pressures on GDP performance occurred when there was a contraction both in aggregate supply and in aggregate demand. On supply side, when the exchange rate was depreciated, therefore the prices of many imported resources in terms of national

production, increased sharply. This condition pushed up the cost of production as well. Meanwhile, on demand side, the contraction happened when the domestic demand was decrease as well. The main part was on the household consumptions. The decrease on household consumption was caused by the decrease on real income and the level of wealth as well. These are the main impacts of economic crisis on particular period. Similarly, the international reserve indicator had been significantly different between 1997 and 2008. In 1997, it was only 21.4 billions of USD, which had not exceeded than 50% compare to 2008. It was sharply decline because of the high foreign debt and the decline of capital flow as well in the balance of payment. The high percentage of GDP in foreign debt was 62.2% on 1997, while it is only 29% of GDP in 2008. When the economic crisis had happened on 1997, Indonesia was one of the most countries with high debt on particular world organization, such as IMF and World Bank. In 2008, the indicators of external vulnerability in relation to foreign debt showed further improvement, in keeping with the still positive performance of exports.

In stock market, movements of the LQ45 Index and Jakarta Composite Index (JCI) are similar. This means investors also attempt to invest and re-arrange their financial portfolio on Jakarta Composite Index and LQ45 Index in the same manner. The movements in the JCI Index and LQ45 Index had a similar direction but different in the market capitalization. It also implied that investors preferred to invest on the JCI than LQ45 because the JCI moved more actively. During 2003, there was an increase in the price index, volume of trading in the stock market, bond market, and mutual funds. According to Economic Report on Indonesia (2003), this was due to the decline in the interest rate. Moreover, several factors boosted a positive performance on the Indonesian capital market. There were relatively low bank interest rate, improved foreign investors' perception on Indonesian capital market and relatively stable macroeconomic indicators.[1] These were reflected through the increase in Jakarta Composite Index (JCI) in response to the increased stock trading by both domestic and foreign investors. The stock market performance remained bullish in 2004.[2] The bullish domestic stock market resulted from continuously improving fundamentals, both in macro and micro contexts, as well as market optimism over the new government. However, the JCI index started to fluctuate, but still generated a positive gain. Internal factors were driving negative sentiment on the stock market including the upward trend in domestic interest rates in consequence to the tight bias monetary policy stance adopted to reduce inflation and depreciation on rupiah. Eventually, the fluctuation on stock market continued until mid of 2008 when the global financial crisis happened.Therefore, this paper will emphasize on investigating whether the monetary policy can have a significant effect on stock market through the monetary policy transmission mechanisms and its indicators.

1. Review of related literature and studies

Efficient market theory is the application of rational expectations to the pricing of securities in financial markets. Current security prices will fully reflect all available information because in an efficient market, all unexploited profit opportunities are eliminated. However, the evidence on efficient markets theory such as market overreaction, excessive volatility on stock prices, and mean reversion condition suggests that the theory may not always be entirely correct. The evidence seems to suggest that efficient markets theory may be a reasonable starting point for evaluating behavior in financial markets but may not be generalizable to all behavior in financial markets. Capital Market plays an important role in the economy of a country because it serves two functions all at once. First, Capital Market serves as an alternative for a company's capital resources. The capital gained from the

[1] Based on Monetary Policy Transmission Evaluation of Bank Indonesia, Economic Report on Indonesia, 2003, p.67

[2] Based on Stock Market Evaluation of Indonesian Capital Market and Financial Institution Supervisory Agency , 2004, p.68

public offering can be used for the company's business development, expansion, and so on. Second, Capital Market serves as an alternative for public investment. People could invest their money according to their preferred returns and risk characteristics of each instrument (Indonesian Stock Exchange Report, 2009). According to Ross (1997); Blanchard, Ariccia, and Mauro (2010), the study empirically proved the existence of a positive relationship between the development of financial systems to economic growth. There are empirical studies that focus on the relationship between monetary policy and financial markets particularly on stock market. Lee (1992) investigated causal relations and dynamic interactions among assets returns, real activity, and inflation in the postwar United States. Major findings are (1) stock returns found to have causality and help explain real activity; (2) stock returns explain little variation in inflation, although interest rates explain a substantial fraction of the variation in inflation; and (3) inflation explains little variation in real activity. Based on these findings, many researchers developed new research and studies in terms of financial markets, particularly on monetary policy effect toward the financial market [e.g. Thorbecke (1997), Rigobon and Sack (2003), and Gupta (2006)]. Thorbecke (1997) examined how stock return data respond to monetary policy shocks. The evidence states that monetary policy exerts large effects on ex-ante and ex-post stock returns. The macroeconomic indicators can affect the stock price movement. Similarly, Rigobon and Sack (2003) investigated the relationship between monetary policy and financial market. In addition, they proved that movements in the stock market can have a significant impact on the macro-economy and are therefore likely to be an important factor in the determination of monetary policy. The results suggest that stock market movements have a significant impact on short-terms interest rates, driving them in the same direction as the change in stock prices. Similarly, Bernanke &Gertler (2000) concluded that in order to explore the issue of how monetary policy should respond to variability in asset prices particularly in stock market, the paper incorporated non-fundamental movements in asset prices into a dynamic macroeconomic framework. It is necessary for monetary policy to respond to changes in asset prices.

There are several empirical evidences that utilized the vector error correction approach in examining the effect of monetary policy to macroeconomic indicators and stock market. Granger (1986); Johansen and Juselius (1990) examined the existence of long term equilibrium among selected variables by utilizing the cointegration analysis. A cointegration happened when a set of time series data were found to be stationary or they had a same order in linear combination. This linear combination shows that they have a long-term relationship between the variables. The main advantage of cointegration analysis is that through an error correction model (ECM), the dynamic co-movement among variables and the adjustment process toward long-term equilibrium can be examined (Maysami, 2004). Mukherjee and Naka (1995) examined the relationship between Japanese Stock Market and exchange rate, inflation, money supply, real economic activity, long-term government bond rate, and call money rate. They applied VECM to test a cointegration. The results found that there is a cointegrating relationship and stock prices had contributed to the variables. Maysami and Koh (2000) applied the similar topic and methodology in Singapore. Meanwhile, the VEC approach is employed to examine the impact and relationship between stock returns and macroeconomic variables in Hong Kong and Singapore (Maysami and Sim, 2002b), Malaysia and Thailand (Maysami and Sim, 2001a), and Japan and Korea (Maysami and Sim, 2001b). Vuyyuri (2005) used similar methodology to investigate the cointegrating and causality between the financial and the real sectors of the Indian economy from 1992 to 2002 in monthly data. Therefore, this study will extend the literatures through utilizing Johansen's (1988) results to investigate the relationship between monetary variables and stock market indices in the long-run equilibrium.

2. Research hypothesis and methodology

This paper utilizes weekly data, which is from 1997 to 2009. The data mainly as a secondary data and collected from International Financial Statistic (IFS)-IMF, CEIC Database and Bank Indonesia as well. The variables that are used in this paper are Bank Indonesia (BI) Rate, Jakarta

Composite Index (JCI), and LQ45 Index. Nevertheless, in order to get additional data to sharpen the analysis, this paper also optimizes the Central Bank Annual Reports, The IMF Reports, World Economic Outlook Database by IMF, and other sources of data.

Co-integration states that if the time series data are not stationary or has a unit root, the combination of two or more of time series variable will form a linear combination that contain a co-movement, assuming there is no deviation in the long term. The paper utilizes the Johansen Cointegration Test to check whether the variables have cointegrating relationship if the variables are found to be non-stationary or I(1), I(2). This cointegrating analysis represents a short-term dynamics of the variables. Impulse responses serve to test the response of each variable in the current period and in the future by assuming that the error of other variables is zero (Stock & Watson, 2007). Stock & Watson (2007) defined that forecast error decomposition is the percentage of the variance of the error made in forecasting a variable due to a specific shock at a given horizon. According to Enders (2004), the forecast error variance decomposition tells us the proportion of the movements in a sequence due to its "own" shocks versus shocks to the other variable. The following are the models:

$$BI_t = \alpha_1 + \sum_{j=1}^{k} \beta_{1j} BI_{t-j} + \sum_{j=1}^{k} \gamma_{1j} JCI_{t-j} + \sum_{j=1}^{k} \delta_{1j} LQ45_{t-j} + e_{1t} \quad (1)$$

$$JCI_t = \alpha_2 + \sum_{j=1}^{k} \gamma_{2j} JCI_{t-j} + \sum_{j=1}^{k} \delta_{2j} LQ45_{t-j} + \sum_{j=1}^{k} \beta_{2j} BI_{t-j} + e_{2t} \quad (2)$$

$$LQ45_t = \alpha_3 + \sum_{j=1}^{k} \delta_{3j} LQ45_{t-j} + \sum_{j=1}^{k} \beta_{3j} BI_{t-j} + \sum_{j=1}^{k} \gamma_{3j} JCI_{t-j} + e_{3t} \quad (3)$$

Where JCI is the Jakarta Composite Index at time t; LQ45 is the most forty-five liquid stocks in Indonesia Stock Exchange at time t; BI is the Bank Indonesia Rate at time t; α is a constant and ε_t is an error term. Time t is in quarterly and j is lagged values that are chosen by the best estimation.

3. Results and analysis

The paper found that for the BI rate, since the computed ADF test statistics (-2.028922) was greater than the critical values (-3.474265, -2.880722 and -2.577077 at 1%, 5% and 10% significant level, respectively), the result could not conclude to reject null hypothesis (H_0). That means the BI rate series has a unit root problem. It means the BI rate series is a non stationary series. Similar results were also found for Jakarta Composite Index (JCI) and LQ45. All these variables are non stationary at level I(0). Therefore, the paper attempted to transform the time series data from non-stationary to stationary, since the estimation required a stationary time series data. All the variables were transformed into first difference or I(1). The paper found that for the BI rate, the absolute computed ADF test statistic (-6.120027) is smaller than the critical values (-3.474265, -2.880722 and -2.577077)and the result concluded that the null hypothesis (H_0) was rejected. That means the BI rate does not have a unit root problem and the BI rate series is stationary at first difference. Similar results also happened to the Jakarta Composite Index (JCI) and LQ45. In general, the paper concludes that all six variables are stationary at first difference or I(1). Thus, this requires the cointegration method to be conducted.

The autoregressive model assumes that all variables might be endogenous variables or exogenous variables. It is likely different from the structural model, which assumes that the variables are exactly precise as the endogenous or exogenous variables, which are supported by economic

theory. Nevertheless, this model is restricted to the dynamic changes that might be occurring on the observation. Hence, the Granger Causality is employed to test the predictability among variables. Table 2 presents several variables that are statistically significant at various levels, which are 1%, 5%, and 10%. The results confirmed that Jakarta Composite Index (JCI) and LQ45could help in predicting the movement in the BI rate. Meanwhile, the Jakarta Composite Index (JCI) could help in predicting LQ45. The following is the summary result of Granger Causality Test:

Table 2

Pairwise Granger Causality Tests

Null Hypothesis:	Obs	F-Statistic	Probability
LN_JCI does not Granger Cause LN_BI_RATE	150	4.28362	0.01558
LN_BI_RATE does not Granger Cause LN_JCI		1.68583	0.18890
LN_LQ45 does not Granger Cause LN_BI_RATE	150	3.81558	0.02427
LN_BI_RATE does not Granger Cause LN_LQ45		1.24940	0.28974
LN_LQ45 does not Granger Cause LN_JCI	150	0.15893	0.85320
LN_JCI does not Granger Cause LN_LQ45		8.83723	0.00024

Table 3provides the Johansen Co-integration summary results.The model without intercept and trends is the best assumption chosen by the lowest value of AIC criterion. The minimum requirement for at least one co-integration was confirmed based on the result. Table 4 presents the max-eigenvalue test which provides one cointegrating equation at 0.05 levels. Thus, it may be concluded that there isonecointegrating vectors found in the series of variables at 0.05 confidence level.

Table 3
Johansen Cointegration Test Summary

Selected (0.05 level*) Number of Cointegrating Relations by Model

Data Trend:	None	None	Linear	Linear	Quadratic
Test Type	No Intercept No Trend	Intercept No Trend	Intercept No Trend	Intercept Trend	Intercept Trend
Trace	0	0	1	1	3
Max-Eig	0	1	1	0	1

Data Trend:	None	None	Linear	Linear	Quadratic
Rank or No. of CEs	No Intercept No Trend	Intercept No Trend	Intercept No Trend	Intercept Trend	Intercept Trend
Akaike Information Criteria by Rank (rows) and Model (columns)					
0	-7.591407	-7.591407	-7.559457	-7.559457	-7.536691
1	-7.578519	-7.666454*	-7.644918	-7.633843	-7.620386
2	-7.544486	-7.624621	-7.615652	-7.644503	-7.638784
3	-7.469651	-7.537513	-7.537513	-7.587101	-7.587101

Table 4
Johansen Cointegration Test

Unrestricted Cointegration Rank Test (Maximum Eigenvalue)

Hypothesized No. of CE(s)	Eigenvalue	Max-Eigen Statistic	0.05 Critical Value	Prob.**
None *	0.154967	25.25701	22.29962	0.0187
At most 1	0.050197	7.725045	15.89210	0.5808
At most 2	0.006206	0.933791	9.164546	0.9596

Max-eigenvalue test indicates 1 cointegratingeqn(s) at the 0.05 level

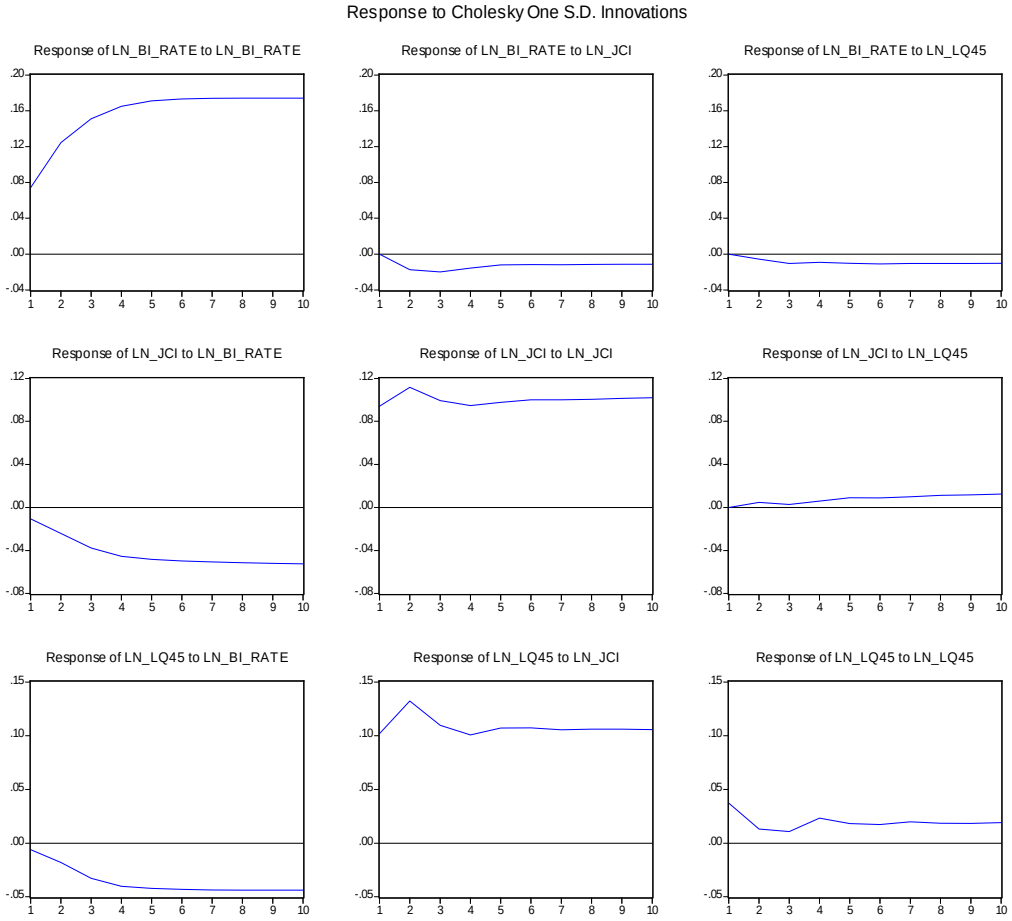
Table 5
Speed of Adjustment Parameter of the Error Correction Term (ECT)

Standard errors in ( ) & t-statistics in [ ]

Error Correction:	D(LN_BI_RATE)	D(LN_JCI)	D(LN_LQ45)
CointEq1	-0.000833	0.003010	0.019855
	(0.00600)	(0.00766)	(0.00893)
	[-0.13883]	[0.39283]	[2.22363]

According to the first ECT (CointEq1), LQ45 is statistically significant at 5% level. The speed of adjustment toward the equilibrium per weekis1.98 percent. The following figure presents the graphical representation of impulse responses. It shows the response due to the shocks among variables. First is the response of Jakarta Composite Index (JCI). The shocks of BI rate bring a negative response to the Jakarta Composite Index (JCI). Second is the response of LQ45. The shocks of BI rate affect LQ45 negatively. Last is the response of LQ45. The shocks of JCI affect LQ45 positively. Therefore, the results confirmed that if the BI rate tends to decrease, the JCI and LQ45 tend to increase. While, there is a positive relationship between JCI and LQ45.

Figure 6
Impulse Responses



,

Figure 7
Variance Decmposition

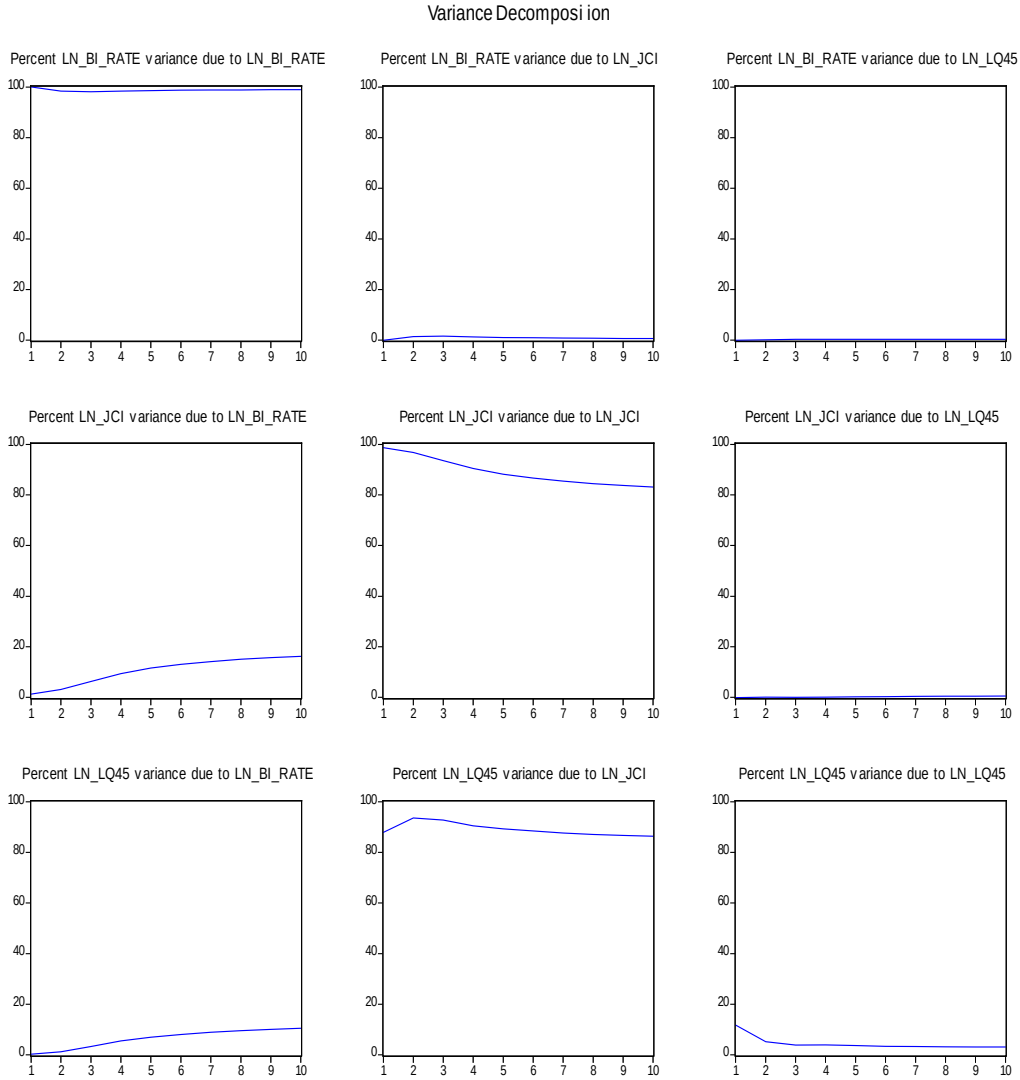


Table 8
Variance Decomposition

Variance Decomposition of LN_BI_RATE:				
Period	S.E.	LN_BI_RATE	LN_JCI	LN_LQ45
1	0.074965	100	0	0
2	0.141444	98.72968	1.262846	0.00747
3	0.20487	97.5873	2.408508	0.004191

4	0.26338	96.8602	3.13702	0.002777
5	0.316776	96.40912	3.586235	0.004645
6	0.365464	96.13138	3.859255	0.009361
7	0.410045	95.95829	4.025496	0.016218
8	0.451116	95.8498	4.125889	0.024306
9	0.48921	95.78143	4.185613	0.032961
10	0.52478	95.73835	4.219972	0.041673
Average	**0.324205**	**96.904555**	**3.0810834**	**0.0143602**
Variance Decomposition of LN_JCI:				
Period	S.E.	LN_BI_RATE	LN_JCI	LN_LQ45
1	0.095784	1.695133	98.30487	0
2	0.14836	3.593436	96.40608	0.000482
3	0.19057	5.29633	94.69188	0.011792
4	0.226333	6.68833	93.28129	0.030378
5	0.257787	7.784221	92.15754	0.058239
6	0.285989	8.642386	91.26849	0.089125
7	0.311682	9.316735	90.56161	0.12166
8	0.335363	9.852105	89.99419	0.153704
9	0.357409	10.28221	89.53338	0.18441
10	0.378098	10.6323	89.15456	0.213137
Average	**0.2587375**	**7.3783186**	**92.535389**	**0.0862927**
Variance Decomposition of LN_LQ45:				
Period	S.E.	LN_BI_RATE	LN_JCI	LN_LQ45
1	0.111613	0.424571	86.53372	13.04171
2	0.17369	1.559146	92.33948	6.101375
3	0.217048	2.696856	92.87756	4.42558
4	0.252922	3.682911	92.98074	3.336348
5	0.282976	4.495369	92.81698	2.687655
6	0.309396	5.143824	92.60772	2.248453
7	0.332985	5.661842	92.3943	1.94386
8	0.354488	6.076156	92.19799	1.725851
9	0.374338	6.411111	92.02339	1.565496
10	0.392878	6.684782	91.87029	1.444927
Average	**0.2802334**	**4.2836568**	**91.864217**	**3.8521255**

Table 8 provides the variance decomposition. The first result confirms that the variance of BI rate is mostly affected by the past performance of the variable, which is 96.9045 percent on average, in terms of lagged values,while the JCI contributes 3.081 percent to BI rate, and 0.0143 percent from LQ45. The second findings are the variances of JCI, which is influenced by its lagged

values by 92.5353 percent, 7.3783 percent of BI rate, and 0.0862 percent of LQ45. Third is the variance of LQ45 which is mainly affected by its lagged values of 3.8521 percent, followed by 4.2836 percent of BI rate, and 91.8642 percent from JCI.

Conclusions

The paper concludes that monetary policy is effective in achieving the financial markets stability through each indicator. Findings are consistent with the hypothesis that the monetary instruments have a significant effect in achieving the improvement particularly on stock market index. Bank Indonesia had utilized all the monetary instruments effectively through the monetary policy transmission mechanisms. The effectiveness of monetary instruments, that is Bank Indonesia rate generates market expectations toward the credibility of the policy makers. In addition, there is a positive expectation of investors and firms toward the macroeconomic performance. Therefore, Bank Indonesia as the monetary authority played an important role in straightening up the linkage between financial and monetary policy. The paper recommends Bank Indonesia to use the overnight interbank money market rate as the monetary policy operational target. The evidence proved that 1-month BI rate is effective in affecting the JCI by 7.3783 percent.Meanwhile,1-month BI rate is effective in affecting LQ45 by 4.2836 percent.

Moreover, the paper also recommends Bank Indonesia in reducing the lag effect, which is two quarter particularly in the stock market. By reducing the lag effect, it can reduce the overreaction of the investors. Thus, Bank Indonesia would be effective in controlling the stock market movement. Bank Indonesia should encourage investors to invest in real sectors. Buying stocks of real sector companies such as manufacturing can generate high capital inflows toward the industries. Thus, it can lead to high production capacity and aggregate output. The objective of the monetary policy is to control and boost up the foreign investment through stock market.

Thus, it will achieve a steady economic growth. In order to generate a high economic growth through the changes in monetary policy instruments such as money supply and the interest rates, Bank Indonesia should respond carefully, regarding the trade-off phenomenon between price stability and economic growth.

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REVALUATION OF TANGIBLE ASSETS FROM ACCOUNTING AND FISCAL PERSPECTIVES

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Abstract
Acknowledged by the accounting regulations conform to the European directives inside the alternative assessment norms, the revaluation of tangible assets is also accepted by the International Accounting Standards as an allowed alternative treatment. As there is a real interaction between accountancy and taxation, the present study aims to analyze the fiscal vision on the revaluation, the manner in which the above mentioned accepts the revaluation of tangible assets.
It is a known fact that the accounting information is used by the taxation as an object and a support in order to determine and to settle the assessments, the taxes and the contributions.
Still, the taxation authority reserves the rights to punctually impose some financial treatments distinct to the accounting rules. This also happens with the revaluation of tangible assets, and this is exactly what we emphasize in the present paper.

Keywords: *fair value, revaluation, historical cost, alternative evaluation rules, fiscal treatment of revaluation*

Introduction

Starting from the evidence that valuation represents an element of divergence between tax and accounting rules, we shall emphasize in the present work the differences regarding the approach to revaluation from a fiscal and accounting point of view, as well as the way in which taxation deals with the positive or negative results that appear as a result of revaluation of tangible assets.

The study is intended to be important through the pointing out of behavior contradictions of taxation, related to the recognition of accounting treatment regarding the revaluation of tangible assets.

In order to support the above-mentioned affirmations, we shall exemplify the accounting and fiscal treatment of revaluation through a case study.

In the first part of the work we shall try to justify the need to use the fair value in order to express the value of tangible assets in the context in which the accounting regulations corresponding to European Directives present as a criterion of recognition of fixed assets, the condition that these shall be used during a period greater than an year.[1]

The Fiscal Code stipulates also the same criterion of recognition[2] for tangible assets, for which it uses the notion of „physical capital".

In the second part of the work, we shall present the point of view of accountancy regarding the revaluation and in the third part, the revaluation seen through the light of taxation as well as the fact that taxation promotes contradictory rules in its steps to achieve the goal consisting in the calculation, collecting, setting up, payment tracking of taxes, rates and social contributions due by economic units to the State.

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[1] Order 3.055/2009 for approval of Accounting Regulations corresponding to European Directives, pct 92.
[2] Fiscal Code, Art. 24 alin (2), pct. c).

Historical cost versus fair value

The task of financial accountancy is related to the drawing up, presentation and publication of financial statements which offer information regarding the true and fair view of the analyzed entity. Due to its characteristics (relevance, simplicity, availability, intelligibility and unity), the monetary unit is the most efficient means through which can be presented economic information to users but also for taking rational decisions.

The monetary quantification of phenomena and accounting operations presents also drawbacks, since the currency is a means of exchange which "expresses a general buying power, given by the quantity of goods and services that can be bought at a given moment."[3] The buying power is yet different depending on the economic, political and social conditions of a country. What can we say about the true image of the financial situation of a company if this has fixed assets (lands for example) bought in 1995, in 1999, in 2007 and in 2010. Can their accounting value be cumulated without affecting the true image of accounting information?

In the above-mentioned work, prof. Feleaga sustains that "the currency doesn't represent a stable measure in time, as for example the meter" and "the simplification brought by monetary nominalism is recommended in the periods of stability of prices because it is objective and incontestable".

Nowadays, the buying power which reflects the value of currency varies over time. After many economies confronted in the last decade with high increases of prices, in the last period these have considerably decreased.

Being part of the category of alternative valuation rules, the valuation of tangible assets is one of the methods of attenuation of monetary nominalism drawbacks through the replacement of historical cost with fair value. Even if this cannot render a certain solution from the point of view of objectivity and neutrality, the fair value seems to allow the elaboration of financial situations which confer better information on the present and future performances of the enterprise.

The principle of historical costs consists in preserving at the level of balance sheet structure, the corrected entry values, if necessary, with the cumulated amortizations or adjustments for depreciation. This reflects the nominal value of the currency without taking into consideration the variations of its buying power.

The fair value, a value more often used in the accounting language and controversial in the terms of present economic crisis, is considered by prof. M. Ristea „ a hope, if not a panacea, to surpass the limits of other valuation bases used for drawing up of financial situations"[4].

As it is defined by the Accounting Regulations corresponding to European Directives, the fair value represents the sum for which the asset could be changed of one's own will between parts with the same knowledge in a transaction with an objective determinant price and is determined, as a rule, on the basis of market evidence data.

Accounting Treatment of Revaluation

Being part of the group of alternative evaluation rules, the revaluation of tangible assets is accepted by accounting regulations according to the European directives approved by the order of Ministry of Public Finances No 3055/29.10.2009, applicable by the date of 1st January 2010, according to which economical entities can choose the model based on the fair value, proceeding to the revaluation of tangible assets at the end of the financial exercise, so the revalued value is reflecting in the financial situations prepared for this exercise.

[3] Feleaga, Nicolae, Feleaga, Liliana, Valuation Patterns and Rules in Financial Accountancy, in "Theoretic and Applied Economy"review

[4] Ristea, Mihai, A*ccounting Business*, Economic Tribune, Bucuresti, 2006, pag 55

According to this model, the initial accounting value is substituted by the revaluation value represented by:

- Fair value revaluation
- any previously accumulated amortization
- any cumulated loss of depreciation

= revaluated value

Revaluated value is a value based on market price.

Use of revaluation relay

Revaluation reserves based on the surplus of revaluation is capitalized through direct transfer, when this surplus represents an accomplished gain, using 1065 account "Reserves representing the surplus developed by revaluation reserves".

No part of the revaluation reserves cannot be distributed, neither direct nor indirect, **except for the case in which the revalued active has been valorificated**, situation in which the surplus of revaluation represents an effective realised earnings. It is understood that not only the sums reflected in 1065 account "Reserves representing the surplus developed by revaluation reserves", afferent to the sold or scrapped assets cam be distributed, **according to fiscal rules.**

Earnings are considered accomplished at emphasizing the active for which the revaluation reserve was developed. Part of the earnings can be accomplished when the active is used by the entity, case in which the value of the transferred reserve is:

- calculated amortization on the basis of revaluated accounting value
- calculated amortization on the basis of initial cost of active

= relay value transferred to relay.

Amortization after revaluation

In case the revaluation of an active is made, the resulted value of revaluation will replace the cost of acquisition/production or any other value attributed before the active. Amortization rules will apply to the active considering its value determined as a consequence for revaluation.

Fiscal Treatment of Revaluation

The Romanian taxation is characterized by instability and a great number of normative acts that regulate the economic activities and abounds in position changes from an accounting period to another or even during a fiscal year. The same hesitation is noticed also regarding the position of taxation as confronted to revaluation.

The Fiscal Code makes reference to revaluation in many sections. The first reference to revaluation of tangible assets is found in the definition that the Fiscal Code gives for **fiscal value**.

The Fiscal Code defines the **fiscal value** for amortizable fixed means and lands as being the entry cost, used for the calculus of fiscal amortization. In the **fiscal value are included also the accounting revaluations** made according to law. In case there are made revaluations of amortizable fixed assets, that determine a decrease of their value under the entry cost, the fiscal value of tangible amortizable assets remaining unamortized is recalculated **till the level of the one established on the basis of entry cost**. In the situation of revaluation of lands which determine a decrease of their value under the entry cost, the fiscal value is the entry cost.

The entry cost is represented by the **„**acquisition, production cost or the market value of fixed means obtained free of charge or constituted as contribution of capital at the date of entry in the tax payer's patrimony"[5] .

[5] Law no. 571 regarding Fiscal Code, approved of at 22nd of December 2003, with ulterior completions and modifications

In time, taxation had different positions as regards the revaluation of tangible assets. We shall present in the below table the perspective modifications of taxation regarding the revaluation:

Period	Fiscal treatment	Observations
Till 01.04.2004	Expenses with amortization related to reserves from revaluation were considered **deductible**	
Between 01.01.2004 and 31.12.2006	Expenses with amortization related to reserves from revaluation were considered **non- deductible**	Yet, expenses related to reserves from revaluation made before 01.01.2004 left **deductible.**
Between 01.01.2007 and 30.04.2009	Expenses with amortization related to reserves from revaluation were considered **deductible**	The fiscal value includes: - revaluations made before 01.01.2004; - revaluations made after 31.12.2006; - part left non-amortizable, made evident in the balance at 31.12.2006 for revaluations made during the period 01.01.2004 – 31.12.2006
From 01.01.2008	Expenses representing the value of depreciations of fixed assets in case in which it is registered a diminution of their value as a result of effectuation of a revaluation, are **non-deductible**	As a result, the extra value obtained after an ulterior revaluation, registered at incomes to compensate the previous depreciation is considered non-taxable income.
From 01.05.2009	Expenses with amortization related to reserves from revaluation were considered **deductible**	Reserves from revaluation related to revaluations made after 01.01.2004 are considered **taxable incomes (**this aspect is detailed further on**).**

The Directive no. 34/2009 introduces the next rule regarding the use of the reserve from revaluation, beginning with 01.05.2009:

The surplus from corporate fixed assets revaluation, which was previously deductible, is taxable at the moment of:

- Modification of reserve destination,
- Distribution of reserve by participants under any form,
- Liquidation, splitting, merger of tax payer or
- For any other reason, *inclusive when it is use for covering of accounting losses.*

For the calculus of taxable profit, these sums are elements similar to incomes. The registering and holding in own capitals, respectively reserve accounts or reported result, distinct analytics of reserves from revaluation is not considered modification of destination or distribution.

With the exception of:

Reserves from revaluation made after 1st of January 2004, which are deductible at the calculus of taxable profit through the fiscal amortization (or of expenses regarding the ceded and/or cancelled assets), **are taxable at the same time as the deduction of fiscal amortization (**at the moment of derecognizing of these tangible assets). *Rule introduced from 01.05.2009.*

This rule is not applied for:

*- Reserves representing the surplus realized from reserves from the revaluation of fixed assets, including lands, made after 1st of January 2004, **existing in balance in the account «1065»** at 30th of April 2009 inclusively, which were deductible at the calculus of taxable profit. These reserves are taxable at the modification of destination.*

*- Part from reserve from the revaluation made after 1st of January 2004, deductible at the calculus of taxable profit through fiscal amortization **till 30.04.2009**, and which wasn't capitalized. These reserves are taxable at the modification of destination.*

-

Example:

A business corporation has in the book keeping a building bought in December 2002, with an entry value of 300.000 lei and a period of amortization of 20 years (with an accounting and fiscal purpose).

The corporation has revaluated the building as follows:

-on 31.12.2004 the revaluated value was of 288.000 lei;

-on 31.12.2007 at the fair value of 247.500 lei;

-on 31.12.2010 at the fair value of 168.000 lei.

At the end of June 2011, the corporation sells the building at the sale price of 155.000 lei

From an accounting point of view:

1. Book entries at:

Acquisition on December 2002:

212 = 404 300.000 lei

Amortization on year 2003 (300.000lei / 20 years = 15.000 lei/year):

681 = 281 15.000 lei

Amortization on year 2004 (300.000lei / 20 years = 15.000 lei/year):

681 = 281 15.000 lei

2. On 31.12.2004 the situation of asset is the following:

a) Before revaluation:

Entry value (accounting value) 300.000 lei

Amortization (2 years) 2003-2004 30.000 lei

Net accounting value before revaluation 270.000 lei

b) Revaluation booking from 31.12.2004 is made through the valuation based on net values, through the elimination of amortization previously registered:

Fair value on 31.12.2004 288.000 lei

Net accounting value 270.000 lei

Difference from revaluation 18.000 lei

Book entries:

Elimination of amortization:

281 = 212 30.000 lei

Registering of differences from revaluation:

212 = 105 18.000 lei

Registering of amortization for 2005, 2006, 2007 (288.000 lei / 18 years = 16.000 lei/year)

681 = 281 16.000 lei

3. On 31.12.2007 the situation of asset is the following:

a) Before revaluation:

Entry value (accounting value) 288.000 lei

Amortization (3 years) 2005-2007 48.000 lei

Net accounting value before revaluation 240.000 lei

b) Revaluation booking from 31.12.2007 is made through the valuation based on net values, through the elimination of amortization previously registered:

Fair value on 31.12.2007 247.500 lei

Net accounting value 240.000 lei

Difference from revaluation 7.500 lei

Book entries:

Elimination of amortization:
281 = 212 48.000 lei
Registering of differences from revaluation:
212 = 105 7.500 lei
Registering of amortization for 2008, 2009, 2010 (247.500 lei / 15 years = 16.500 lei/year)
681 = 281 16.500 lei

4. On 31.12.2010 the situation of asset is the following:
a) Before revaluation:
Accounting value 247.500 lei
Amortization (3 years) 2008-2010 49.500 lei
Net accounting value before revaluation 198.000 lei
b) Revaluation booking from 31.12.2010 is made through the valuation based on net values, through the elimination of amortization previously registered:
Fair value on 31.12.2010 168.000 lei
Net accounting value 198.000 lei
Difference from revaluation -30.000 lei
Book entries:
Elimination of amortization:
281 = 212 49.500 lei
Registering of differences from revaluation:
105 = 212 25.500 lei
681 = 212 4.500 lei
Registering of amortization for 2011 (168.000 lei / 12 years = 14.000 lei/year : 6 months = 7.000 lei/ month)
681 = 281 7.000 lei
Building salles
461 = 7583 155.000 lei
Downloading of the bookkeeping:

7000 281 = 212 168.000
161.000 6583

Accounts 212, 281 and 105

212 „Constructions"		
Explanations	**Debit**	**Credit**
Acquisition December 2002	300.000	
Cancel the amortization to 31.12.2004		30.000
Revaluation difference to 31.12.2004	18.000	
Balance to 31.12.2004	**288.000**	
Cancel the amortizations to 31.12.2007		48.000
Revaluation difference to 31.12.2007	7.500	
Balance to 31.12.2007	**247.500**	
Cancel the amortizations to 31.12.2010		49.500
Revaluation difference to 31.12.2010		30.000
Balance to 31.12.2010	**168.000**	
281" Depreciation of tangible assets**"**		
Explanations	**Debit**	**Credit**

Accumulated amortization until 31.12.2004		30.000
Cancel the amortizations to 31.12.2004	30.000	
Accumulated amortization until 31.12.2007		48.000
Cancel the amortizations to 31.12.2007	48.000	
Accumulated amortization until 31.12.2010		49.500
Cancel the amortizations to 31.12.2010	49.500	

105"Revaluation reserves"

Explanations	**Debit**	**Credit**
Revaluation to 31.12.2004		18.000
Revaluation to 31.12.2007		7.500
Balance to 31.12.2007		**25.500**
Revaluation to 31.12.2010	25.500	
Balance to 31.12.2010		**0**

Fiscal treatment of amortization:

- for 2003 and 2004 the amortization is entirely deductible: 15.000 lei x 2 years = 30.000 lei
- for 2005, 2006: - the amortization is deductible without taking into consideration the revaluation: 15.000 lei x 2 years = 30.000 lei;

- non-deductible amortization = (16.000 – 15.000) x 2 years = 2.000 lei

- for 2007 the amortization is entirely deductible: 16.000 lei x 1 year = 16.000 lei;
- for 2008, 2009, 2010 the amortization is entirely deductible: 16.500 lei x 3 years = 49.500 lei;
- after 01.05.2009 the reserve from revaluation becomes taxable and is taxable during the left period of life of the asset (13 years and 8 months) thus:

- for the reserve related to revaluation made on 31.12.04, in amount of 16.000 lei (18.000 – 1.000 x 2 years; part from amortization which was non-deductible), the sum of 1170 lei will be taxable every year (16.000 lei / (13 x 12 + 8 months) x 12 months);

- for the revaluation made on 31.12.2007 the reserve from revaluation in amount of 7.500 lei will be taxable at the modification of destination of the reserve;

-for 2011 the amortization is deductible at the entry value (15.000 lei), and the expenses representing the value of depreciations are non-deductible (4.500 lei).

Fiscal Treatment of the Reserve from Revaluation:

If the building were sold on 31.12.2010, the reserve from revaluation would be in amount of 25.500 lei:

At the sale of the building, the reserve from revaluation will be conveyed to reserves from the reserves surplus from revaluation (1065). **It is not taxable.** If the destination of surplus from revaluation is modified subsequently (it will be used at the loss covering, for example), it will be considered income and will be taxable, less the amortization which wasn't deductible, respectively 2.000 lei:

23.500 lei x 16% = 3.760 lei

At the title IX, „Local Rates and Taxes", the taxation recognizes the revaluation and punishes the legal entities, which do not proceed to the revaluation of buildings, through the application of a superior tax rate. Thus, if the building tax due by legal entities is established within a rate comprised between 1,25% and 1,50%, this increases to a rate comprised between 5% and 10% applied at the inventory value of the building for legal entities which haven't made the revaluation in the last 3 years previous to the fiscal year of reference. From a fiscal point of view, the inventory value is represented by the entry value of the building in patrimony, registered in the accountancy of the owner.

Conclusions

The subject of the study joins the multitude of scientific approaches regarding the controversial fair value. As we showed at the beginning of the work, taking into consideration that tangible assets are possessed for a period that exceeds a year, to support the carrying out of the goal of financial situations, that is to present a true image of the financial position, performance and modification of financial position, we consider necessary the use of fair value in view of presentation in financial situations of tangible assets.

Taxation, which as a rule, doesn't know the fair value, makes an exception in case of revaluation, although in time, its position related to revaluation has often changed depending on fiscal interests.

Fiscal authority has perceived revaluation as a disadvantage for the State and tried to limit the fiscal consequences through the introduction of some restrictions. In this sense, the first normative acts in domain allow only for revaluation of lands and buildings, on the following reasons:

- it is allowed the revaluation of lands because these are not amortizable. Thus, the costs will not comprise a greater value regarding amortization and the value of fiscal result will not be reduced;

- at the revaluation of buildings, the effect of revaluation is dispersed on many fiscal periods, these having a greater period of amortization. On the other hand, the new accounting value constitutes a basis of calculus for the buildings tax, which makes that the eventual amortization rise which would diminish the profit tax, be compensated for additional resources obtained from local budgets.

The present accounting regulations allow for the revaluation of all categories of tangible assets as well as taxation. Although, economic entities proceed to the evaluation of buildings and lands but very seldom to the revaluation of other categories of tangible assets.

The taxation behavior regarding revaluation, sometimes having a character of fiscal facility, has been in a continuous change and it will not stop here. Through this behavior, the taxation accepts not only the fair value but, also the accounting principle of prudence.

The subject of this paper is very complex and it is not exhausted by the present work. We believe that the revaluation of tangible assets is interesting from other points of views too, such as the call to creative accounting in the economic entity's interest. Another track of research may be the way in which revaluation adjustments influence dividend policy.

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ACCOUNTANT'S WARNING REGARDING THE LACK OF MANAGEMENT INTEGRITY

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Abstract
This article highlights the challenges faced by accountants when they find that the integrity of company management is poor. The main problem is in relation with the accountants' fear, mostly: suffering some repercussions from the disclosure of such information. Also, this article aims to emphasize the danger brought by covering and concealing incriminating information against the management; but also, how accountants could expose this information in such a way that they would not suffer, under no circumstances from such disclosures.

Keywords*: accountant, whistleblowing, whistleblower, management integrity.*

Introduction

Almost every sector of our society faces so called fights against the fraudulent practices. Deviant top management behavior can induce huge economic, social and emotional costs for innocent stakeholders and the corporate failure of the last decade have provided examples of this on a grand scale. (Richardson & Richardson 2005). For exemple managers are trying to put company's money into their own pockets through creative or illegal accounting (Yin 2003). Economic fraud destroys shareholders' value, threatens enterprises development, endangers employment opportunities and undermines good corporate governance. (ICC 2008)

The first person to notice the threat of misconduct, mismanagement and corruption within a public or private organization will usually be someone who works in or closely with the organization. While employees are the people best placed to raise any concerns they are also the ones who have the most to lose by disclosing sensitive information. (Hüttl & Léderer 2002)

At the fist view it could be said that every whistleblowing from the inside of an entity is without ethics and that the company's employees should be loyal to that organization. But as an contra argument we could name the moral and juridical obligation of the company to take action into the community purpose. From the moment in which the corporations have an immoral behavior the society has the right to punished it. The companies' employees represent the best instrument for underlying their mistakes. (Yin 2003)

The accountants have privileged position within the society, and due to this position they have access to much information; in the case of appearing some irregularities in the society, they are the first ones who can notice it (Richardson and Richardson 2005).

When accountants identify inappropriate behavior by management, those accountants licensed by Professional Organizations have the responsibility to maintain the interest of the general public in the company (Lauren 2010). This being the case, the guidelines for potential whistle-blowers accountants are set down by professional accounting bodies. They should reflect and support this important potential but unfortunately does not offer any professional body such as guidelines on whistleblower latent and therefore, the accountants will choose to remain silent (Richardson and

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Richardson 2005). But what should not be overlooked is the fact that the support may come from elsewhere. Thus, the most important support can be found in specific protective measures offered by each state for whistleblowers.

In this way, each accountant must understand that it is a social duty and moral obligation to make any disclosures of fraudulent practices. He must be aware of the consequences of silence, because it will be subjected to ongoing emotional stress and the management organization will continue to practice illegal actions until the organization would collapse, which will bring huge social consequences.

In order to avoid all these, the accountant needs to act. The first step he should make is informing about the solutions which are available, to overcome all the obstacles encountered when he decided to make revelations about the illegal practices of management.

The whistleblower concept

"The sense of whistleblowing is common ever since the first whistleblower laws have been adopted: promptly reporting instances of suspected misconduct. The first law that can be regarded a whistleblowing law, was the Federal False Claims Act (1863) adopted during the Civil War in the United States. It was enacted in part because unscrupulous tradesman sold ill mules, faulty rifles and ammunition, and rancid rations and provisions to the Union Army". (Hüttl & Léderer 2002)

"A whistleblower is generally defined as an employee who discloses potentially damaging information about their employer to an authority figure, such as their boss, the media, or a government official" (Krancher 2006 p. 80 cited by Evans 2008).

"Whistle blowing is a deliberate non-obligatory act of disclosure, which gets onto public record and is made by a person who has or had privileged access to data or information of an organization, about non-trivial illegality or other wrongdoing whether actual suspected are anticipated which implicates and is under control of that organization, to an external entity having potential to rectify the wrongdoing". (Peter B. 1999 cited by Richardson & Richardson 2005)

As an interpretation of the definitions given above we believe that a whistleblower is a person of integrity who took knowledge about various irregularities in the organization. Once he acknowledged these irregularities he also must be willing to disclose them. Disclosures may be made both inside and outside the establishment. There are several type of disclosures such as corruption, fraud or other wrongdoing.

Regarding the status of whistleblowers there is a paradox. For some (Stonefrost 1990, Vinten 1994) the warning about the integrity of management is an act of treason brought to the organization while for others, it is an act of morality and therefore it is their duty to make such disclosures. (Richardson & Richardson). Jackson (1992) argued that the disclosure of sensitive information is putting out the man who made these revelations in a thankless situation; the disclosures relating to management integrity, without using the internal procedures recommended in such cases, will be considered more likely to be irresponsible. If they still decide to use internal procedures and the problems inside the company remains unresolved, any act of disclosure will be considered further outwards as wicked. (Richardson & Richardson 2005).

On the other hand the supporters of whistleblowers bring the argument that any disclosure of information is an act of honor that protects the organization (Stanford 1990). Other author (David Banisar 2006) considers that disclosure of information is critical to the public, referring to the Enron scandal, where if they would have been made disclosure of fraudulent practices coming from leadership, they would have not be reached the economic and social disaster that took place.

We believe that any disclosure of information about management's integrity cannot be considered an act of betrayal at all, quite the contrary. Hence, like any entity to function properly, needs all its component parts, for it to achieve this status, so the entity has all the components needed to work towards a 'healthy functioning". So when one of the components (management in this case) is against the proper functioning, it is up to the other existing party to remove the existing evil. It is

not considered an act of treason, but rather an act of great loyalty, but of course the main condition being that this is being made in good faith.

According to a survey conducted by Transparency International, the means for making referrals to crime may be internal or external. In general, we can distinguish three different levels: the internal ways can be the counselors of ethics or the hotlines provided by the organization, but which are managed externally; the means provided by regulatory bodies such as police or the institution ' people Advocate "or other external means such as media or civil society organizations. (Alternative to silence: Whistleblower Protection in 10 European countries, p.11, 2009). The controversies that have arisen are the choice of where to make the revelations of information: inside or outside the organization

(Maarten De Schepper 2009) considers that public interest overrides the interest of the company when it comes to fraudulent practices of the company and any fraudulent practices disclosure should be made public.

In our opinion, the differentiation made by sectors would be the most appropriate. Thus, the public sector which provides public services that we are paying for should make the information public. Regarding the private sector, we believe that as long as a company has a well-founded ethical code with clear provisions, there is a certainty that they will take all the necessary internal measures against reported fraud and the problem remains within the organization.

Obstacles faced by the whistleblowers

The accountants, when they decide to make disclosure of information relating to fraudulent practices, they encounter a series of obstacles that lead them most often to stop the act. Whistleblowing often opens up a more difficult life and if one did not expect one's efforts to lead to any discernable outcome; it would not be worth (A. J. Evans 2008).

We divided these barriers into five categories, as follows:

a) Fear of reprisals

Fear of reprisals is a concern. The reprisals made over the employees are often indirect and subtle, very hard to prove to the authorities, the latest being mostly in the inability to take protective measures. (Schepper 2009). Glazer and Migdal say "most whistleblower-protection statutes do not provide remedies for retaliatory actions that fall short of dismissal - such as demotions, unwanted geographical transfers, failure to consider an employee for promotion, freezing an employee out of a decision-making role consonant with level of seniority, inordinate scrutiny and surveillance in and outside the workplace, and psychological pressures" (Hawse & Daniels 1995). Following a survey conducted in 2009 by Transparency International Romania we could see the following fact: even if legal protections are available, often there are limited mechanisms and the implementation of them is too weak to protect whistleblowers. For example, despite the fact that Romania has a very strong law with reference to the protection of whistleblowers from the public sector 40% of whistleblowers have suffered repercussions in one form or another as they have made the notification to the competent authorities.

Some common practices are listed by the US Project on Government Oversight:

- Take away job duties so that employee is marginalized;
- Take away on employee's national security clearance so that he or she is effectively fired;
- Blacklist an employee so that he or she is unable to find gainful employment;
- Conduct retaliatory investigations in order to divert attention from the waste, fraud or abuse the whistleblower is trying to expos;
- Question a whistleblower's mental health, professional competence or honesty;
- Set the whistleblowers by giving impossible assignment or seeking to entrop him or her;
- Reassign an employee geographically so he or she is unable to the job.(Banisar 2006)

"Reprisals can also take more subtle forms that may affect employment opportunities and working environment, such as awkward rosters, request for excessive documentation, petty harassment, harsh treatment by other employees and other forms of mobbing". (Marie Chêne, 2009)

To all this, we would add some more serious repercussions such as threats, physical violence and even murder. The level of crime in each country is a decisive factor. Thereby, in countries with high level of crime the probability that an accountant to make disclosure is very low. "An example for the most brutal retaliation a whistleblower can receive is the story of Milan Vukelic, a civil servant who publicly accused officials in Bosnia-Herzegovina's Republika Srpska of corruption. He was killed on November 7, 2007 when his car exploded. Milan Vukelic, a town planner for Banja Luka's municipal authority, accused both his boss of corruption and the police of threatening him". (*Léderer & Hüttl 2002)*

b) Revenue loss

Here we can include the fear of losing their job and thus the income, wage cuts, the costs that are relating to the legal proceedings which are arising from the processes that follow, the loss of invested capital due to depreciation of any shares (Schepper, 2009). If the entire family's income will depend on the accounting, it is very likely that the accountant does not make any disclosure.

Also, another obstacle is large gains an accountant may have. In order not to risk losing gains, he will choose not to make any disclosure.

c) Culture

The culture of each person is influencing a lot its own behavior. "Beyond legal obligations, this is also significant cultural opposition to whistleblower in many cultures that needs to be overcome. Whistleblowers are seen negatively as ","neaks", "narks", "informers" or "dobbess". (David Banisar 2006). Un bun exemplu este România, țară cu trecut comunist, unde de cele mai multe ori, avertizorii de integritate sunt percepuți ca fiind informatori. A good example is Romania, a country under communist passed regime, where most of the times, whistleblowers were perceived to be informers[1]. "It is likely that many people do not even consider blowing the whistle, not only because of fear of retaliation, but also because of fear of losing their relationships at work and outside work". (*Léderer & Hüttl 2002)*

Anonymous informants were used to maintain power over schemes such as the Inquisition, Nazi occupation, Soviet Union, era apartheid in South Africa. (Banisar 2006)

Another example, more topical this time, would be China where "whistleblowing may be deemed as undesirable and unethical behavior by any Chinese model employee. This is because it disturbs the relationship between employees and employers, particularly since loyalty is a significant factor in this relationship" (Stefen şi alți, 2006).

"In Venezuela, many internal auditors believe that discovering fraud is not only career-limiting, but probably career-ending. If the subject of whistle-blowing came up in a discussion, the perspectives were neither positive nor negative. Some who had done whistle blowing were resentful about the outcome" (Stefen and others, 2006).

d) Legislation

The laws in each country leave their mark on whistleblowers. In many countries, there are laws which refer to the privacy of information, while the laws relating to whistleblowers are inadequate or nonexistent. Thus in many countries there are laws that provide duty of loyalty to the

[1]*Alternativa la tacere: Protectia avertizorilor de integritate în 10 state europene este un studiu realizat de catre* Transparency International România in anul 2009. Transparency International Romania/Asociația Română pentru Transparență (TI-RO) este o organizație neguvernamentală care are ca prim obiectiv prevenirea şi combaterea fenomenului corupției, la nivel național şi internațional, în special prin activități de cercetare, documentare, informare, educare şi sensibilizare a opiniei publice

employer, secret documents, Libelle end Defamation, other law (Banisar 2006). "A breach of contract is very likely as many contracts include confidentiality clauses and "***all*** *contracts of employment involve an* ***implied*** *"duty of fidelity" which requires honest, loyal and faithful service and forbids competition with the employer*" (Maarten De Schepper, 2009). In Romania, we ca give as an example the obligation of expert accountants to maintain confidentiality of data they have access[2].

Another issue is the anonymity of notifications. The anonymity offers a feeling of safety, but unfortunately many legislations do not take into account these kind of anonymous notifications "Most legislations exclude anonymous disclosures while providing for the protection of the whistleblower's identity" (Marie Chêne 2009). Romania is a good example; it is a country that does not take into account anonymous disclosures.

e) Psychological

"Personality is assumed to be one reason why some employees are more inclined than others to engage in whistleblowing behaviour and initiate actions aimed at solving organizational challenges" (Miceu, 2004, cited in Brita Bjorkelo şi alții, 2010).

"Personality in the form of high extraversion, low agreeableness, and high domineering in interpersonal interaction predicts whistleblowing. Together, these findings paint a picture of the role of personality in relation to proactive behaviour in the form of whistleblowing". (Bjorkelo şi alți, 2010)

Solutions for overpassing the obstacles

a. Legislative measures

One of the handiest legislative measures is considered to be the adoption of specific legislation to protect whistleblowers. So as to remove these barriers and to encourage whistleblowers there have been globally and continentally concluded a series of treaties. In this article we will stop on two of them: the UN Convention against Corruption and Civil Law Convention adopted by the Council of Europe at the European level. Thus, Article 33 of UN Convention against Corruption says: "Each State shall consider incorporating into the legal system appropriate measures in order to provide protection against any unjustified treatment for any person who in its reports submitted information to the competent authorities of the various deficiencies noted in the organization based on reasonable grounds. (Léderer & Hüttl 2002)

At European level, the Council of Europe adopted the Civil Law Convention on Corruption which says that: "Each Member State shall provide in its internal law an appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and reporting in good faith their suspicion to responsible persons or authorities. (Lederer & Hüttl 2002)

Of an utmost importance are also the laws passed nationwide. On this respect, Romania adopted the Law no. 571/2004 with regards to the protection of personnel from public authorities, public institutions and other units which reports violations of the law. In Article 7 of this law is set out clearly how this law protects whistleblowers, but unfortunately those assumptions are applicable only to the public sector personnel. For those in the private sector it is helpful the Labour Code which prohibits unjustified dismissals.

"Best practice should protect whistleblowers from civil and criminal liability if they make a protected disclosure. In particular, this includes relieving whistleblowers from civil liability for defamation or breach of confidentiality and statutory secrecy provisions. Some WPL3 provide absolute privilege to whistleblowers against defamation but not all of them override the duty of confidentiality. Whistleblowers should also be protected against sanction for misguided reporting". (Marie Chêne, 2009)

[2] Rule 35/2000, issued by CECCAR

[3] Whistleblower Protect Law

Another solution always could be the maintenance of confidentiality and anonymity for those who make disclosure of information, in this way ensuring a sense of security for the persons who make the complaint.

The term "anonymous" should be seen as being associated with an observation made through out a channel that cannot betray in any way the person who provides the information: a file containing the information sent with no return address, an untraceable call from a direct phone line, an email sent from o secure account, IT systems which ensure anonymity and prevent subsequent contacting, etc.. (Alternative to silence: Whistleblower Protection in 10 European countries, p.12, 2009). “By contrast, a confidential disclosure is where the recipient knows the identity of the person but agrees not to disclose it if and when the information is used” (Dehn and Calland 2004).

b. Providing compensations

Another encouraging measure is to offer compensations to whistleblowers. Compensation may be granted in case of immediate loss of salary, to cover the costs of civil proceedings and also for the stress on which the whistleblowers are being placed to (Maarten De Schepper 2009).

"Compensation is a protection that is given as a top-down compensation for job loss - which means the system failed to protect employees and the problem is classified as a work conflict. Often, these compensations are provided in the Labor Codes of each country. In Romania compensation consist of a return to work, pay compensation, restituo in full. "(Alternative to silence: Whistleblower Protection in 10 European countries, p.17, 2009)

In the UK, an award of £ 278.000 was given to a 56-years-old man who successfully argued that he would not be able to find another job (Banisar 2006)

c. Offering rewards

Offering rewards to encourage whistleblowers is rather a controversial issue even if it is a commonly way put in practice. Offering rewards for whistleblowers may have an undesirable effect. Under the impetus of the rewards offered employees can expedite the disclosure of information which may lead to erroneous views, which have no solid basis. Also, we must not forget that firstly, the warning regarding management's integrity should be primarily an act of loyalty. (Howse & Daniels, 1995). A number of Asian jurisdictions offer huge rewards to those who reveal corruption. As an example here we could give South Korea, where anti-corruption law allows for individuals who reveal corruption to receive up to 20% of the amount recovered as a result of denunciations made. (Lederer & Hüttl 2002)

Hawse & Daniels (1995) highlighted very well the problem of rewards. When there is a disclosure of information on illegal practices within the company, the person in discussion is taking high risks, as follows: once the case reached the courts and there is not sufficient evidence, the whistleblower’s reputation will have to suffer. A counterargument made by Hawse & Daniels (1995) themselves is that usually awards are made as a percentage of the amount recovered thus the new problem is as follows: although the employee has acknowledged the illegality, he will not report it but will wait for the amount of the irregularities to grow until the rewards will be the greatest. The same authors point out that any delay in reporting may cause destruction of evidence or some other integrity warning to take it forward and thus collect the rewards. Surprisingly accountants are unlikely to blow the whistle for a cash reward and, furthermore, are unlikely to whistleblower externally. (Shawver & Clements 2008

In our opinion offering rewards is not a healthy practice for the organization because there is a risk that a whistleblower will turn into an informant and the informant’s only goal is to obtain rewards. Any disclosures of fraudulent practice should be done under the impetus of the feelings of morality and loyalty to the organization where the employee belongs. Yes, the whistleblower is facing some risks but given the example shown above, about the risk of there not being available sufficient evidence for a trial, the lack of reward in the middle will lead to the conviction of whistleblowers and his only fault will be he’s just having a highly developed sense of moral. But if

there is a reward in the middle, he will be accused of being a bounty hunter which will bring him even a greater fall into disfavor.

d. Other measures

Steven H. and others give us some recommendations to overcome the obstacles which a warning of integrity might encounter. Recommendations include encouraging employees to communicate their concerns about ethics within the organization by giving them the assurance that they will be heard and will not suffer any reprisals. (Appelbaum and others, 2006)

Protecting the employee's status - the warnings usually have several implications for the integrity and the professional losses may be large. "Whistleblowers should be protected from dismissals, suspensions, disciplinary and other forms of workplace sanctions and discriminations. Protection should be broad enough to cover any retaliation means, including more subtle forms of discriminations and petty harassment". (Marie Chêne, 2009)

Another solution is to encourage private companies to adopt codes of conduct and ethics so as to provide tools and procedures for the employee when he finds some illegal practices in order to encourage disclosures of fraudulent practice.

Conclusions

Many accountants are very reticent regarding the disclosure of information. Most reasons are related to fear of suffering reprisals both in professional and personal life. They should, however, overcome these prejudices and to recognize the importance of disclosure. The reasons for accountants should reassess whistleblowing are:

- Consumers, shareholders and communities are left at risk with neither the information nor the opportunity to protect their own interests;
- Unscrupulous managers or employees are given a reason to believe that 'anything goes';
- Those in charge are denied the chance to look into concerns about wrongdoing and to avert real problems;
- Debates and reforms tend to focus on ways to improve the system, rather than on the conduct of the humans who have to make it work. (Dehn and Calland 2004)

Shawver & Clements (2008) argue that the accountant's inclination is to make revelations related to illegal practices within the organization. The biggest obstacle in making this disclosure is the fear of being fired. If they were guaranteed that they will not be dismissed or that they will preserve their identity anonymous, the accountants would be willing to make disclosures. As a result, the organizations which really want to support them should take steps in this direction by which accountants might not suffer any reprisals. The measures may include codes of ethics within the company, creating a hotline or e-mail throughout there could be made any anonymous complaints.

As we all have seen until now, for every obstacle there is a solution and behind all the obstacles, there is a person. We are the people standing behind them; therefore the change must come from each of us. We need to know and understand this practice before giving a verdict. It is to our benefit.

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**Codul Muncii, actualizat în 2011, prin Legea 49/2010, Legea 49/2010 a fost publicată în Monitorul Oficial nr. 195 din 29 martie 2010

***Norma profesională 35/2000 emisă de CE*CCAR; (http://www.ceccar.ro/_b/ro/st_35.pdf*

MANAGING CHANGE: THE PRIVATE UNIVERSITY SECTOR IN CYPRUS, OPERATIONS WITHIN THE EUROPEAN CONTEXT. A CASE STUDY

SIMONA MIHAI YIANNAKI*

Abstract

Our case study attempts to show the manner by which change has been introduced and dealt within the Business School of a private Cypriot University, the European University Cyprus. Then it tries to demonstrate if the success of the change process has its roots in the history of the organization and its representative strategies as per the theoretical framework of the literature review. Out of the main study results it emerges that it is the trust placed on the organization by the management, the staff and the student body that can bring high standards of education to the change process along with the acceptance for process and embedded innovation. At the other end, there are still strong drawbacks that hider change management to its full positive results. These reside mostly the inequalities, the social contract issues and keeping promises.

Keywords: *Change Management, Business Administration, Higher Education, Case Study*

Introduction

Organizations worldwide are confronting with more turbulent, more demanding times and shareholders, less time to act and more astute "customers", hence many are restructuring their business to meet at least these challenges. The only question mark is on how much time and change dependent are such requirements and which is the sustainable effect foreseen on the education industry as a whole.

Sustainable growth in private business has always relayed on the restructuring of the business strategies utilized and on the recovery of the investment and consumption markets. As this latest crisis was an over-consumption- overspending- overleveraging related one, the way to tackle such sustainable growth requires focused socio-economic and financial skills, but in essence, the long term indirect engine is the continuous adaptation to change in all sectors of the economy and now more then ever, in the education system reformation.

In this perspective, the private Universities sector in Cyprus is now operating within a very competitive and highly regulated European environment. The existing private Universities have acted under a much simpler college type organizational structure and have had to face the inevitable changes brought about by a new economic environment. The fact that since 2004 Cyprus has become a member of the European Union has changed the general setup of the problem, since nowadays more then 53% of students study in the EU. (Cyrpus in the EU Scale, 2008.)

Within this general context, private Universities had to develop and adapt to the new demanding regulations that govern the operations of a university teaching and research type institution and continue to be self reliant and economically viable. At the same time, change was inevitable, while circumstances continue to produce new challenges.

In the our case study of the oldest private Universities in Cyprus, the European University Cyprus (EUC) the human resources seem to have beene re-developed, sound personnel policies adopted, proper manpower planning implemented and assessment and a conscious policy revised to improve work and management at all levels. These have been important factors that have contributed to its success story. However, the effects of change are still affecting everyone in their daily activities. Therefore proper change management skills are imperative, if all mismanaged it could

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have disastrous effects. Also, since change becomes pertaining, mangers in this industry need to strive to find new ways to understand it and act in an optimum way.

Our case study attempts to show the manner by which change has been introduced and dealt with and then to demonstrate that the success of the change process has its roots in the history of the organization and its manpower. It is the trust placed on the organization by the management, the staff and the student body that can bring high standards of education to the change process.

The paper is drawn under a case study and event study methodology combined with exploratory research since the moment of the accreditation of EUC in 2008 till 2011. We plan through this study to capture and integrate people's perceptions, behaviour, cognition or knowledge and creative ideas in the way they have faced change in their environment and then propose a pattern for dealing with concrete change management problems and actions to prevent potential activity disruptions.

Altogether, our study also tries to collect and present information related to the way EUC has dealt so far with current change management issues, especially value changes at its strategic level. Additionally, the study wants to raise the need to know how to handle appropriate ways of correct and wrong application of change management in the industry.

Last but not least, the study aims at redesigning a conceptual framework encompassing strategic and practical aspects emerged from the data analysis that can help managers of other European Private Universities deal in a better and sustainable way with such phenomena.

1. Literature review and the research theoretical framework- responding to the power of change

Be it a large or small organization of any particular industry, the first thing one must understand about dealing with change is that it is a continuous process rather then a status quo. Change implementation difficulty relates mostly its communicating vessels effect. Blaise Pascal proved in the seventeenth century that the pressure exerted on a molecule of a liquid is transmitted in full and with the same intensity in all directions. Meaning, if you change something in one area, it affects other areas triggering thus changes in those areas too. This is to say that change is a continuous process, mostly cyclical (Lawrence *et al.*, 2006), that needs adjustment at any of its phases and various types of leadership control, strategies and behaviour.

Also, no matter the organization, change may be applied at different levels, which have different power to force change themselves. These levels are considered in our research to include the most important 4P's:

1.The people at work, first, as they are the main trigger for change due to their changing nature, second due to their active role in implementing. Changing people offers the least amount of change leverage, due to its actual "impossible task" character to be achieved in a certain timeframe. Bureaucratic systems are designed to work in the way they do, not considering who does the job. One needs to change the culture of those people, but this is a long, slow process that seldom pulls change back through the system.

2.The *processes of work* determines how work is performed. Changing work processes is important, but it won't force change anywhere else-in fact, it is hard to change work processes without changing the organizational structure and administrative systems of an institution.

3.The *power of system* within which the organization functions, including the support system or the administrative one. If you change the education system, you can force change in every institution within it. Systems control their organizations through their administrative systems-budgeting, personnel, procurement, accounting, auditing and the like. Hence changing these administrative systems also creates remarkable leverage.

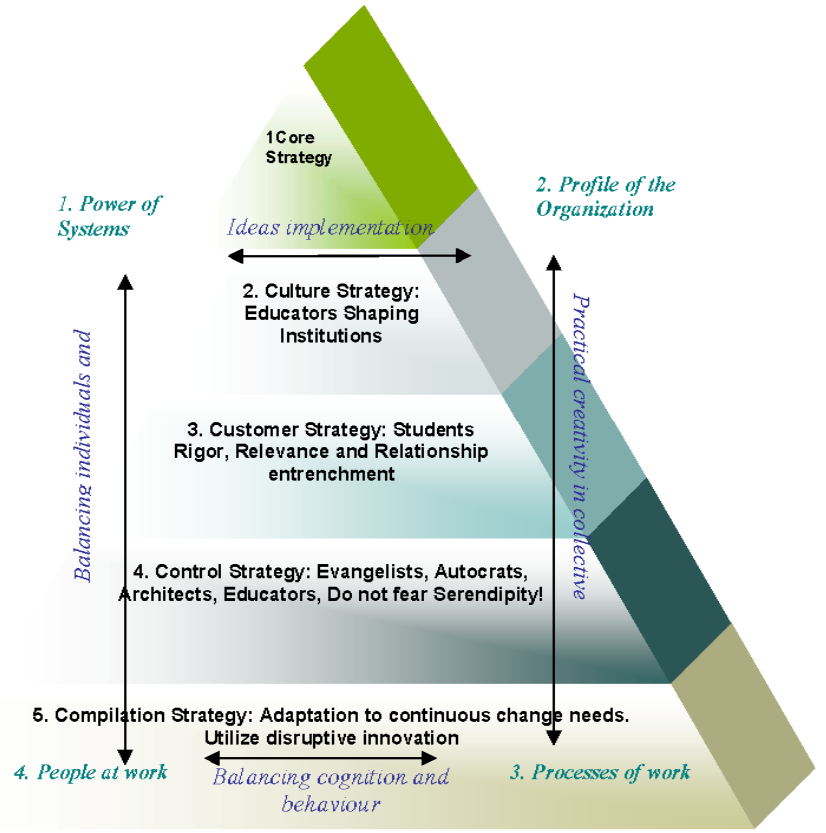
4.The *profile of the organization* level. Learning organizations have been described in reverential terms like employees' paradises, good management practices, socialistic models and workplace democracies etc These organizations provide working environments where the employees

and management together reflect on all decisions, resolve all differences, if any, through mutual dialogue, and open communication systems resulting in high levels of *trust*, *co-operation and commitmen*t on the part of the employees which enables generation of learning. (Akella, 2008). Universities are close to be this type of organization that is however still constrained by the system's rules and incentives, as well as its administrative systems. One can change much within an organization, mostly if one can put up some flexibility from the administrative systems. But, clearly one has little influence to force change in all Schools within the University, due to the diverse panoply of needs.

Either public or private education institutions, due to their publicly originated system in certain countries, have some basic building blocks of organizational structure. This structure must relocate itself from a bureaucratic to a more entrepreneurial model. Such a model would include five basic strategies that have power over change implementation. We have named them as the "five C's.":

1. The Core Strategy. Creating clarity of purpose for University reform.
2. The Culture Strategy. Changing employees' habits, modus operandi, hearts and minds.
3. The Customer Strategy. Making Universities accountable to their customers.
4. The Control Strategy. Pushing control down from the top and out from the center. Do not fear serendipity though.
5. The Compilation Strategy. Creating a set of actions for performance measurement and responsibilities.

Fig. 1. The Research Theoretical Framework (Source: Authors' research)



Our theoretical framework creates under a 5Cs format of strategies, a pyramidal non-vertical relationship concept that is supported by the interactions among the 4Ps presented above. In our framework, the bonder between the 5Cs and the 4Ps resides in:

- Ideas implementation, (when it comes to implementing the system's requirements into the profile of the organization)
- Practical creativity in collective behaviour is necessary both ways when designing the University profile to match the underlying processes of work, as well as restructuring these processes in order to redefine a new organizational image.
- Balancing cognition and behaviour at both individual and group level is know-how and skills related double way of accommodating people in the new processes of work, as well as tailoring such processes for the people's needs.
- Balancing individuals and systems (when trying to fit systems in for people and when accommodating people's need into the system).

To be strategic in restructuring such institutions one must get leverage as high in the system as possible and one must change as many of the fundamental construction blocks (the 5C's) as possible.

By creating a clear purpose and decentralizing power are major changes, for example-but without compilation for performance they are barely sufficient. If the five 5C's represent the central levers for restructuring, then how do they work?

1.1. The Core Strategy

The core strategy focuses on steering, not rowing-making policy and setting direction rather than producing services. It involves three basic approaches.

The first is removing what does not add to the purpose of the University-by abandoning it. This move offers to the decision makers the clarity of purpose they need to manage effectively.

A second approach is uncoupling steering from rowing and compliance from service functions. Separating these roles into distinct organizational units with separate missions can enhance the quality and effectiveness of both steering and rowing. The British and New Zealanders, which are relatively far from the Cypriot education system, have done this systematically, at both the national and local levels. It has helped these two countries achieve enormous improvements in the efficiency and effectiveness of their educational systems.

A third core approach is to clarify the aim by creating new steering mechanisms. This is a specific move in the American educational system. In Cyprus, steering functions tend to be concentrated in the hands of a few people rather than in elective bodies. But elected bodies like the Academic Senate, the Board of Directors, have great difficulty thinking and acting strategically.

There are, however, ways to get around this. When adopting long-term outcome goals of the University, then these are translated into medium- and short-term outcome goals, which then translates into output targets for other Schools and departments. EUC has created a highly visible body representative of stakeholder groups in the community, under the new EUC brand name. It has set long-term goals, which may act as benchmarks, and it measures progress and reports to the all stakeholders including to the community.

While all educators must play key roles in changing mentalities, the burden is even greater for those in leadership positions. Leaders must respond to change appropriately and show others the way. They must take University staff on challenging journeys that the staff often would not take on their own by creating room for creativity and innovation and releasing any other constraints in their activities.

By nature, researching and teaching is a creative work and a liberal individualistic one. Those who try imposing systems in this industry will not perform well at all. Besides, people like to feel

comfortable and do not want to disturb authorities for the sake of being themselves protected. In such case, no development is possible.

1.2. The Culture Strategy

This strategy is the weakest of the five C's in terms of implementation and transparency. However, it is a key component of the pyramid that must be fine tuned when implementing change. The other C's will coerce changes in the culture-but they will not always create exactly the culture reformers want. At some point in the change process, all successful implementers discover that they must deliberately work to change their employees' habits, modus operandi, hearts, and minds.

One approach that creates the most leverage is to change what people do. If one creates new experiences and new behaviour, new thinking will come in. Available tools include interactive strategic planning, job and role rotation, internships and externships, cross-walking and cross-talking (e.g., interdepartmental or inter-schools task forces), and contests.

Dealing with people's emotions has leverage because emotions are far more powerful than ideas. You can do this by celebrating successes in outcomes, processes and initiatives and honoring failures; creating new symbols; setting up new rituals; team building; and investing in your employees and their physical and virtual work space.

The final approach to working the culture lever is what we call “charming minds”.

Some leaders develop new mental models by involving their staff in the creation of mission statements, in the vision processes, and in articulating their beliefs, values, and assumptions. Others use systems models to create familiar understanding of the way things work and how changes will be successful.

Frequent barriers with these strategic levers are related to:

- elected authorities/managers who play politics when leadership is needed;
- resources that are stuck in narrow line items;
- staff rules that eliminate the flexibility employees need to produce changes;
- unions that see their role not as asserting employee's welfare and principles, but as maximizing their connections;
- the intricate array of stakeholders in the existing system.

For sure, there are ways around these various barriers to better serve stakeholders’ needs, but they are not easy, they need to be "worked-out."

1.3. The Customer Strategy

The first best way to change private higher education institutions is to make it accountable to its customers. In terms of customers we have considered students, academic and administrative staff.

When we talk about “customer needs” and stakeholders in education, we come across a lack of consensus for the student as customer concept (see Eagle and Brennan, 2007 vs. Svensson and Wook, 2007). Trying to advance our theoretical framework, we utilize concepts from relational theories, acknowledging that higher education is largely a private good and this essentially “makes the student the customer in the higher education process” (Eagle and Brennan, 2007, p.48).

Related to the internal customers, the academic staff, several countries in the EU including Sweden, Australia and the UK have gone as far as considering compulsory teacher training for lecturers. Some countries, (eg Norway), are currently implementing such a policy. We are not suggesting a similar policy but the acknowledgement that, if you ‘train higher education teachers to teach, they will do a better job than untrained ones’ (Trowler and Bamber, 2005: 80). Also if you train key leaders in change management and use teaching staff from the field from various organizations that used to be exposed to high pace of change, it proves more effective and less time consuming rather then doing it otherwise.

In most public or highly stratified organizations, accountability flows up the chain of command. The most prevailing way to achieve goals that are important to the customer is by creating customer choice. If customers can choose the service providers they prefer-the flow of money follows their choices-then the institution that serves them must be accountable for satisfying their needs.

The second approach is quality assurance. One can set "customer" service standards and require Universities to meet them or offer their customers some form of redress.

However, in order to use the customer strategy, one has to listen to the both internal and external customers, using surveys, focus groups, interviews, rating systems, complaint tracking systems, etc. Although necessary, this is not sufficient to enforce change. The University management may find out what the customer wants, but it may not be willing to go through the pain of the changes required to carry it through for the sake of "push" rather than "pull" and avoiding serendipity (Hagel *et al*., 2010).

In terms of the change application for Universities at their most "visible customer" level (i.e. the student) the Rigor/Relevance Framework further presented in Fig. 2.below (Jones, 2008) may prove an interesting view point knowledge-related. It uses four quadrants that represent levels of learning.

On the Knowledge axis, the framework defines low rigor as Quadrants A and B and high rigor as Quadrants C and D. On the Knowledge axis, Quadrant A represents a basic understanding of knowledge per se. Quadrant A is named "Acquisition" because students gather and store parts of knowledge and information.

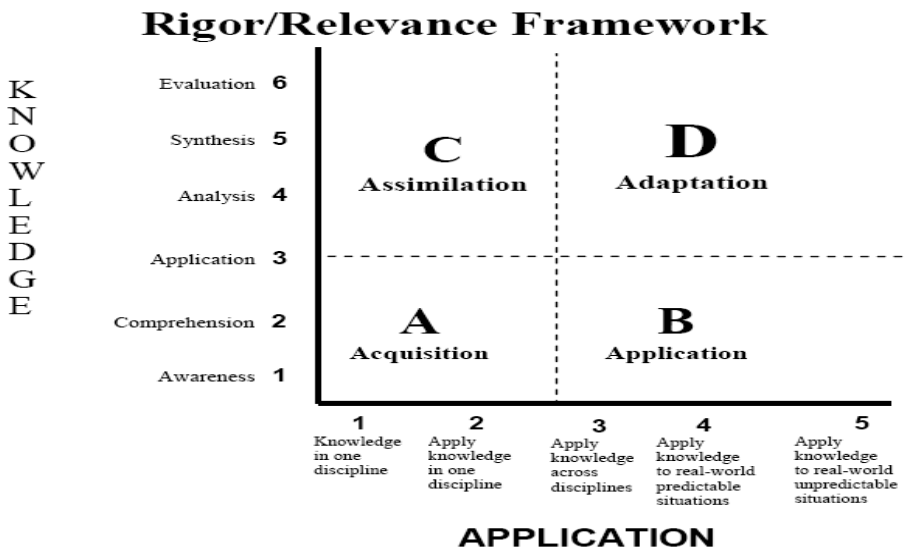
Quadrant C, "Assimilation," represents more difficult thinking, yet still knowledge for its own sake. In Quadrant C, students extend and refine their acquired knowledge to be able to use it automatically and routinely to analyze and solve problems and to create unique solutions.

Quadrants B and D represent actions or high degrees of application. In Quadrant B, "Application," students use asked to solve problems, find solutions, and finalize work.

In Quadrant D, "Adaptation," students have the competence to think in complex ways as they apply knowledge and skills they have acquired to new and unpredictable situations. Students create solutions and take actions that further develop their skills and knowledge.

Knowing that students need a rigorous and relevant curriculum taught in a climate of positive relationships is an important step in school reform (Jones, 2008, pp 7), while the same way of thinking can be applied to other "customers "of the University.

Fig. 2. Rigor/ Relevance framework Source (Jones, 2008, pp 5)



However, Jones (2008) matrix misses a control unit and measure and constant rethinking of the necessary double loops and feedback types necessary in learning and managing the process of learning and change, issues that we further discuss.

1.4. The Control Strategy

The control strategy pushes considerable decision-making power down through the hierarchy and at times out to the community. It transfers the form of control from detailed rules and hierarchical instructions to shared missions and systems that generate accountability for performance. But what is performance for Universities: knowledge towards students, developing life-long learning skills, creating employability, generating academic knowledge, developing a great name worldwide, increasing shareholder's value no matter what?

We have suggested three approaches in tackling this strategy:

- Organizational empowerment moves control down to organizations by loosening the grip of the central administrative structures, such as budget, personnel and procurement systems that are run under equalitarian terms.
- Organizations then use employee empowerment to push decision-making authority down to those with front-line knowledge. Finally, some re-inventers use a third approach, called community empowerment.
- They shift control from the University towards the community, empowering community members and other organizations to solve their own problems and take responsibility of their actions.

In terms of control tools, Private University managers and academia are open relatively reluctant in using the Internet, in the sense of not letting it change exclusive knowledge management practices.

Implementation of Internet had been adjusted to acceptance of intranet and fostering communication among personnel for academic, managerial and supporting roles. It wants to exploit the advantages of online communication without letting such communication challenge its expertise model. But one cannot have it both ways. One cannot participate in a medium fundamentally developed around the concept of ingenuousness if one insists on a closed model of know-how and knowledge control, such as the above mentioned frame: the intranet.

In terms of managerial control over the teachers Unions and vice versa, one cannot act towards major changes unless it offers that "little something" gradually. Teachers' Union negotiations with the management should not be "over the bush", but transparent and with advancements based on concrete propositions and adjusted upon European benchmarks and accomplishments. In this respect, control pressure from the Union should be made from a third party/ consultant involved both in the negotiations process as well in drafting terms and conditions. The Union is always a tool for auditing and maintaining University regulations and system of work down to people.

1.5. The Compilation Strategy

Creating a compilation of strategies and using consequences for performance is probably the most powerful lever in the reformation tool kit.

There are three approaches to working this lever:

- When appropriate, the greatest impact of this strategy can be achieved by using enterprise management: putting the University in a competitive market, making it dependent on its "customers" for its revenue, and letting it sink or swim based on how well it serves its customers. There is nothing like competition to force rapid change. This approach is only appropriate for services that should be paid for directly by their customers, but not for the academic and research work, where competition should come in terms of services and stimuli offered to "internal customers".
- A second approach is called controlled competition. If you cannot put the University in a market you can often create competition through competitive contracting, by using "market testing" approach. As a paradox though, when a British University introduced a certain innovative programme, another American University won the funds in their own country on the same idea. The same thing can happen internally in Cyprus, when private universities compete in coping each others programmes instead of being innovative, searching for blended learning techniques, become innovative and focused on developing student's creativity (MihaiYiannaki and Savvides, 2010) and diversity both in curricula development and in course delivery. Eventually, utilize disruptive innovation, a term of art coined by Clayton Christensen (2010), that can be introduced as a process whereby simple application of creativity related programs and change management for the bottom of a market can then relentlessly moves 'up market', eventually displacing established competitors.
- The third approach is performance management. If you cannot use competition, you can measure results and create incentives or rewards for those who accomplish them. You can use tools such as performance awards, performance pay, performance-based budgets, and gain-sharing to create incentives for high performance at both students and staff members' levels.

2. Research methodology

The qualitative approach has been chosen by the research team as it provides an inventory of in-depth data with higher information content that cannot always be anticipated at the outset of the research process.

The significance, in particular, of qualitative methodology is also in the fact that it enables a contextual and social placement of gathered information, includes the process, causal and related nature of phenomena, and does not study and acquire, respectively, the data separately from other accompanying phenomena. Similarly, it allows for the acquisition of the so called "concealed" contents, which can easily escape the classical positivistic approach. Finally quantitative research often restricts experiences that are so crucial to 'attitudes/opinions' which is the focus of this research.

As the moderator can challenge and probe for the most truthful responses, supporters claim, qualitative research can yield a more in-depth analysis than that produced by formal quantitative methods.' (Mariampolski, 1984).

These interviews contain standardized instruments that emerge from the literature review and the research theoretical framework grouped primarily on the categories of 5C;s and 4Ps.

Also the purpose of the interviews was to discuss the importance of enhancing change adaptation, change behaviour, response to change and acceptance of change within the University/ Business School. Upon the obtained results, the paper has identified the main barriers and constraints related to change introduction in the Business School as well as has improved the research framework.

The main data collection instrument, the semi-structured interview was initiated with 4 of the members of the University and Business School authorities, managers and chair persons. Analysis has been conducted in the spirit of the Miles and Huberman's (1994) approach, manually and mechanically. The manual part has included traditional analytical methods such as introducing marginal remarks and memos within the transcripts and then producing a one-page summary with key points for each semi structured-interview. At this stage, analysis was conducted in search of relationships and patterns.

Coding, for both instruments, was a combination of pre-coding and open coding. The pre-assigned codes were derived from the literature and the study's objectives. Open coding was carried out during analysis, both at the manual and mechanical level.

Following the culmination of the above procedures, the research team was able to describe the current situation and isolate the knowledge, training, coaching and attitude deficiencies which needed to be addressed and included within change management recommendations part. However the results of the project provide an excellent opportunity for the future expansion of the topic idea at European and International level.

2.1. Research Results Interpretation

Table 1. The Pathologies of Changes and EUC management response:

Organisational Imbalance	Change Pathology	Management responses
Over-reliance on individuals: • too many evangelistic and autocrats • few architects and educators	Creativity without learning	-No creative culture implemented, nor efforts in this way undergone till the settlement of change.
Over-reliance on systems: • too many architects and educators • few evangelistic and autocrats	Institutionalisation without creativity	-Overreliance on MIS, without understanding its role in the general strategy, fear of regulators, but positive feedback from them.
Over-reliance on thinking: • too many evangelistic and educators • few autocrats and architects	Ideas without implementation	-No initiative follow up, despite medium to high level of novelty acceptance, advertising is seen in a heterogeneous way.
Over-reliance on doing: • too many architects and autocrats • few evangelists and educators	Change without strategy	-Strong focus on customer strategy without innovation, but based on diversification, which may lead to control, quality and time management issues.

Source: (Lawrence *et al*., 2006, pp.65, and research results)

Table 2. The Research Framework synthetic results

Strategy Analysis	Research Results
1. The Core Strategy. Creating clarity of purpose for University reform.	Clarity recognized at managerial level in both form and content, but the strategy of change is very diversely seen.
1. The Culture Strategy. Changing employees' habits, modus operandi, hearts and minds.	Culture is not identifiable yet at managerial level. Initial stage of shaping organizational culture due to lack of specialized continuous training and human resources allocation. All is based on trust and on existing people's capabilities.
2. The Customer Strategy. Making Universities accountable to their customers.	Very diverse opinions on customer strategy, approach and education, as well as regarding supporting issues and processes.
3. The Control Strategy. Pushing control down from the top and out from the center. Do not fear serendipity though.	Very tall organization, with limited power of action at bottom level, lacking serendipity support and liberty of action regarding investments in people, systems and processes.
4. The Compilation Strategy. Creating a set of actions for performance measurement and responsibilities.	Balanced compilation strategy, yet with missing parts affecting the overall change results, especially linked to management of resource allocation and lack of HRM transparent policies.

Source: Respondent's results based on author's semi structured interview as in Appendix 2.

3. Emerging recommendations for how to change in business schools

The following eight components have been identify the more specific actions that schools must take to achieve rigor, relevance, and relationships. These eight are not sequential, but all must be addressed if schools are to prepare students adequately for their future. The aspects of the living system model should be reflected through each of these components.

1. Be guided by a Common Vision and Goals through the Rigor, Relevance, and Relationships framework. Everyone must be committed to shared goals to measure success, and personnel must have the same viewpoint as to what it the main goal of the University.

2. Be ready to avoid the pathologies of change in the University, by knowing well its imbalance, where is the vision and mission and the next following steps.

3. Give power to Leadership Teams to Take Action and Innovate. Leadership does not reside in a single position, but reflects the aptitudes and attitudes of all personnel, as role models, who take action and improve through effective learning communities.

4. Notify decisions through MIS and budgetary liberty. The entire University reform is a continuous process guided by a well-developed data structure based on several measures of student learning. There is a need for quality data to make fast decisions about curriculum, instruction materials and methods as well as assessment. But , there is a need for separation of budgetary issues for better providing incentives to staff development, trust, commitment and bonding.

5. Adopt effective Instructional Practices for lifelong learning. More than excellent marks, successful instructional practices include having a broad range of strategies and tools to meet the needs of diverse learners in all disciplines and grade levels.

6. Make Clear Student Learning Expectations, letting though in innovation and creativity. When clarity takes place in explaining students what they are expected to learn, they meet with success in improving student realization, but also if creative incentives and modus operandi are enforced.

7. Address Managerial Structures and Processes. Managerial structure should be determined by instructional needs. Only after a comprehensive review of instructional practices should schools begin to address managerial issues such as school schedules, use of time, unique learning opportunities, school calendars etc.

8. Monitor Progress/Improve Support Systems. Highly successful programs recognize the need to monitor student progress on a regular basis. Successful higher education institutions use formative assessments in an organized, deliberate, and ongoing way to monitor student advancement. More, they use this data immediately to adjust instructional methods and adapt to meet student needs.

9. Redefine and reinvent process on an ongoing basis and assure quality without copying models, but basing them on ethical standards and organizational culture. High-performing schools realize that success is a continuing and ever-changing course of action. This step in the process, in fact, should refresh the process and cause University/ Business School leaders to consider new challenges and search potential solutions and successful practices internationally, find benchmarks and assure quality.

3.1. Deliverables from managing change in our research and case study

The following three form the core still pending deliverables of our managing change framework at Universities/ Business School level:

(1). Aim for rigor, relevance, and relationships, inspiring trust,

(2) Begin with the end in mind, and look at the open non-vertical pyramidal cluster of strategies, allowing open innovation and creativity in process, content and form.

(3) Consider Universities an organism that links the above strategies with the 4Ps through its 4 bonders.

Conclusions

This research has produced a theoretical framework backed by a case study where change management was interpreted in terms of semi-structured interviews and event methodology results for the European University Cyprus for the period of 2008-2011. We can conclude that this framework proves to be valid in the conditions and that a series of 10 principles result as conclusions to our research study.

These principles give improved detail to the practices that one needs to focus on when implementing certain changes at in higher education institutions:

1. Decide with data, not intuitions. True data-driven achievement involves much more than simply reacting to “low-test” scores. The choice of what and how much to change must be based on data that shows what the world beyond the Business School expects graduates to know and be able to do, but also what is ethical to know and do.

2. Enlist passionate people who glimpse opportunities. Leadership is one of the keys to success. That leadership is started and designed by a main leader, but is not restricted to a single individual. Successful Universities thrive with models of team and shared leadership.

3. Develop staff through professional and personal learning, training in managing change, and conflict. A staff team that functions as a professional learning community comes together for learning within a supportive community. At the same time conflict, which in times of change is inherent, should not be a threat to cooperation, nor needed to be resolved rapidly and permanently (Huczynski and Buchanan, 2001), but rather in a correct and just manner.

4. Inspire innovative instruction and engagement. Just as standards and tests do not constitute a curriculum, high-performing Business Schools recognize that curriculum is not instruction. The idea is to play the game on the uniqueness of each student and become a student centered organization. Prioritize the curriculum, as less is more. Teachers need to engage in a clear way to help differentiate among curriculum topics that are essential for all students and those that are only nice to know.

5. Make good use with the community to form true partnerships based on keeping the promise and thus enhancing trust. Community and business partners bring many benefits to a University and especially to Business Schools in terms of learning, teaching, sharing, financial support and not least employability.

6. Hold teams accountable for learning results. Good leaders not only set powerful visions and high expectations, but also follow up to make sure staff implement approved practices.

7. Know your "customers", know your strengths. Business Schools need to find ways to customize instruction by fully understanding the culture, prior experiences, learning styles, backgrounds, and interests of its all "customers". At the same time they have to offer various success paths without distorting the most performing ones who are already implemented and have proven unbeaten. Rather than holding instructional approaches constant and putting up with different results in student accomplishment, multiple pathways create different alternatives for students to acquire the same learning.

8. Measure learning by know-how. Many Business Schools need to reexamine grading policies both at the school and classroom levels to ensure that student achievement measurement results in students being graded on proficiency rather than seat time.

9. Compel to high expectations. Business Schools that establish high expectations for all students and provide the support necessary to achieve these expectations have high rates of academic success. High expectations have to be a way of life and drive daily behaviors and actions.

10. Foster positive relationships to close the loop rigor/ relevance/ relationship. Strong relationships based on trust and commitments are decisive in students carrying out thorough work. Students are more likely to make a personal vow to engage in rigorous learning when they know teachers, parents, and other students actually care about how well they do.

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APPENDIX 1. RESEARCH SEMI STRUCTURED INTERVIEW BASE

The Interview questions are valid for the period 2008 to 2010.

The questions "how much" have been scaled from 1 to 5. (Where: 1. is very little, 2. little, 3. some, 4. significant and 5. very much.)

1. What is your opinion about change at University level in general?
2. How much has the education environment changed for the past two years?
3. Which are the areas of change needed in the University? (Name at least 3 areas).
4. Where do you see your University coping best with change?
5. What are the most difficult tasks in this respect?
6. What are the three things you would change first now?
7. Have you benefit of training in change management?
8. How can the University improve service to its stakeholders?

A. Students; B. academic staff; C. administrative staff; D. the community

9. How much does money help you in managing change?
10. What financial aids you consider in implementing change?
11. Would a specific strategy that is known to everyone help you in implementing changes? Which is this one?
12. How much uncertainty you think is acceptable when implementing change, if any from a scale of 1 to 5?
13. How much planning do you use when implementing change in general and how much you use for this case?
14. Do you involve your team in implementing change?

a. Yes, why? To what level/ which areas? And how many of all your team members? Do you allocate extra members for this?

b. No, why?

15. How much of change do you consider in your core strategy?
16. How much change you allow in controlling the business?
17. How much have you changed in your department/ area?
18. How much budgeting do you do when implementing change?
19. What are three budget items you consider necessary but had not really thought about prior to this year's change and where would you cut this budget for this year?
20. How much you want to change the believes of your personnel? If so how much you think you have changed their believes?
21. How much you want to change the believes of your students? If so how much you think you have changed their believes?
22. How much creativity from your staff do you allow when implementing change?

23. Do you consider change at advertising level and publicity of your University and by which means?

24. Do you consider change in the pricing, what prices would you use for students fees (promotional, skimming, etc)?

25. Do you consider change in the type of customer niche and which would be this one?

26. Do you consider change in the offerings of products? And to what degree of diversification?

27. Do you consider change in the relationship with your partners (business ones) and other organization? How do you think this would this affect your future business?(How do you keep them happy?

28. How much importance you give for free interchange of ideas?

29. How much leadership you think is required in times of change for your University?

30. How much novelty do you think is acceptable for your University?

31. Do you think is good to follow the market or follow your own strategy?

32. Have you reconsidered changing the goals set up two years ago?

33. What are you most important performance indicator for your Institution?

34. The human resources have had to be re-developed, sound personnel policies adopted, proper manpower planning implemented and assessment and a conscious policy adopted to improve management at all levels. How did you achieve this in your area?

35. Regarding research / (your department) area what was the biggest change you (want to be) implemented?

36. Are you satisfied with the achieved change strategies implemented at your University?

APPENDIX 2. RESEARCH SEMI STRUCTURED INTERVIEW RESPONSES

Question	No. 1	No. 2	No. 3	No. 4
1	change is inevitable, represents a continuos process, we have to learn from it, available to all academics and the society	very important, especially in the light of changes in the EU in higher education of the Bologna process framework.	under the factor of change as a positive promotor regarding the transformation from college to university status ther was a need for rapid change.	it is a fulfillment of the strategy of the Ministry of Education of Cyprus, one of the axis of the strategy of Cyprus for education and health for the next 5 years
2	very significant in the private university area, less in public ones, in order to comform to legislation, internal procedures	in the private higher education yes a lot, nut much in education in general	It has changed subsequently for more than 2 years. It has been expressed in process and procedures to be a university relevant and pertinent to the University status.	The university environment has changed a lot. Level 4 to accommodate students at each stage of the strategy.
3	teaching, research, administration, strategic development, change of burocratic procedures	quality assurance, development and implementaion of international qualitfications frameworks with 3 cycles, lifelong learning	overal university culture, autonomy, the research factor	culture of the people and instructors, systems and procedures, infrastrucutre (MIS)
4	teaching, because research is at its early stage and so is administration	quality assurance and ECTS	in research and cooperation with other universities or established academic networks	procedures we start coping with problems at MIS, infrastructure
5	assessment, find out new changes in the teaching methods, quality is very difficult to assess, aws you assess only students' evaluationa, faculty assessment is dificult and is done subjectively by students, peer review being done only during the first year and not later on.	got everyone involved	the adaptaion of university culture in both administration and academic personnel	culture is very difficult to change due to resistence to change and systems
6	Schedule, too many things to do at the same time for the requirements of others, the system that we have, reducing the teaching load, changing mentalities, which is a long term process	more development of quality assurance, lifelong-learning, social inclusion, social responsibility in the community, capturing older graduate in catching up with their studying	comply with the University Charter, as the operations of schools and departmetns, mentalities	It is very difficult to change things, try to change the attitude of instructors to see themselves as faculty members for 24 hours in this job, to do continuous research oriented institution and in teaching in class
7	Only during my studies it was part of my subjects	Continuously, due to the evolvement in various areas in the Higher Education.	yes, when this trainig is not instrumental oriented services	very difficult to convince and get accepted
8	a). reorganising the advising service, hire professional people just for that,b). by not overloading them, c). should reorganise their MIS, d). increasing contacts with them	a.further enhancement of students Centre approach, b. more opportunities for development, c. more opportunities for development, d. give also programmes that serve university employees, private and public, municipalities.	a. by establishing a constant and perpetual feedback process and procedures. B. establish proven respect of academic outcomes, c. by providing regularly training and management and university oriented culture issues, d. Be again in constant and perpetual communication with community, an open locus for disscussion and activities, collaborative type of activities and synergies in new projects that are of paramount importance for the community	a. see students as clients, adapt all services to be student oriented, to care, continuous monitoring and academic feedback of students, b. developing academic staff, give them opportunities to undertake research and more time for doing that.c. trining and developing career paths, proper proceudres, d. create research centres to solve problems of communities, respond to community needs through expertise and faculty members
9	4	4	5	2
10	they are rare for private universities, just funds from private enterprises	grants from outside society, state budget, in research ang infrastructure	by allocating special budget for managing change oriented culture	money in terms of training and required research, not so important, but needed in bringing MIS, infrastructure supports
11	Change has to be small and continuous, because it can upset people, it should be planed and agreed, no change without asking them and complete buy in.	the SMART objectives we developes every year	interactive communication based on reciprocity	should be comunicated to everybody. But people have resistence to change and it is set by law anyway and the University Charter
12	3	3	3	3
13	5,5	5,5	5,5	4,4
14	a. Yes, allover, programmes, courses, ECTS,. It depends on the time, only all or anly coorinators, administrative staff also. Yes in some cases.	a.Yes, all areas, No allocation of extra staff.	a. research. It depends on the project. The whole university	a. 4,5, all, yes people from outside the school
15	4	3	4	3
16	2	4	4	2
17	4	3	4	2
18	4	3	3	nothing
19	exceptional items, conferencesm research , publications. I cut publications off	add more development advantages and introducing new motivation.	very centralised, it cannot work this way	nothing
20	4, 2	3,3	4,4	5,2
21	4, 2	3,3	4,4	2,2
22	3	4	5	5
23	essentially it has to increase, improve, consider more possibilities, mainly media and organisation events, conferences organised by the university and abroad.	toward academic nature	yes, this is done through needs and oriented culture advertising	I do not believe in advertising here, only in word of mouth and given results of students and to community
24	In new courses, promotional price for new courses makes sense	they are ok	no idea.	no, just promotional pricing for new programmes.
25	It is not feasable, the target market is given	give them more attention to some countires that were not before in	no idea.	yes, professional experience, executives
26	3/ new programs, adult learning seminars and professional studies	it is Ok. It is not fully controlled. Thre are significant changes in the programmes made.	accommodate balance	yes, high diversification
27	relationships are evolving, intensify networking, studying their needs, satisfy their needs for graduate training and senior staff trainig.	satisfy their needs as well	I consider the community perceptions towards out university is higher, and we got to serve it, this affects positively and forms of our synergism.	they are the final customers eventually, respond to their needs and to the community's needs
28	5	4	5	5
29	5	4	5	5
30	4	3	4	3
31	follow ther strategies that follows market strategy	follow the market	what is to follow the market. No. we serve community needs not the market	follow the market is the boss
32	yes	no, but further enhance them	yes, definitely in order to adjust processes and regulations	yes
33	students retention, no of new students	service to the students in their activity and the overal image of the University	service to the community, students ans state of art research	number of students, research of faculty members
34	to praise the employees achievements, no material items though	involvement of the people and encouraging initiatives	not applicable	2, did not achieve , just a little
35	1. encourage colleagues to carry out research and meeting . 2. provide the time to do that.	get more faculty members involved in the research and teaching. Attracting more grants and financial support for the university	A new research policy that will affect the whole operation of the university and codification of all research performances.	involve faculty members more
36	moderately, not fully, it has to be recognised the need for investment, yet the university is not yet ready to invest in research, teaching and MIS	yes, so far so good. Significant level 4.	to an extended part yes	not really, level 2

IMPACT OF THE FINANCIAL CRISIS UPON EASTERN EUROPE COUNTRIES: STILL A PROBLEM FOR THE ECONOMY OF THE REGION?

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Abstract
The paper looks at the impact of the global economic and financial crisis on a number of central, eastern and south-eastern European countries. The global crisis can be viewed as three interdependent and mutually reinforcing crises: a financial crisis, a liquidity crisis, and a crisis in the real economy. The financial crises that have emerged and developed in the recent decades have been characterized, mostly of an international dimension, with shocks quickly propagating through capital markets, through the international banking activities and, through the money markets.East Europe was hit first by the global liquidity crisis, then by declines in capital inflows and plunging demand for their exports.Before the crisis, the Eastern region was experiencing an economic boom with rapid GDP and credit growth, but in the future East European countries will have to rely relatively more on internally-generated sources of productivity growth.

Keywords: *financial crisis; capital flows; Central and Eastern Europe; crisis; EU; EE; recession, causes, policies, remedial measures.*

Introduction

The crisis has not stopped to the U.S. economy, but also propagated to Europe as well, the first country affected by events in the U.S. being the UK, with problems of Northern Rock, which caused a panic among bank depositors. In an overview, we can say that the current crisis has initially propagated only to developed countries, particularly through the acquisition by European banks of derivative products backed by subprime mortgages, as well as through the increasing market for securities backed by assets. Initially emerging countries have avoided a crisis, maybe due precautions taken following the Asian crisis. But, when the crisis began to affect the real sector, emerging countries have also started to be affected through the trade links with developed economies. Also, through the presence of international financial institutions in these countries, the problems suffered by it in the parent country have passed on to the activities in emerging countries.The EU wants the establishment of a centralized financial supervision; while officials from several countries require the application of more effective and accurate risk management practices. Implementing a more robust set of regulations regarding capital adequacy, strengthening liquidity management practices, improving the standards of risk classification and protection against them and, last but not least, creating a new global financial system, now represent, beyond any doubt, unquestioned needs.[1]

The impact of the crisis in Eastern Europe

Until fall 2008, the Eastern European countries had enjoyed a wonderful decade, with an average growth rate for the whole region of 7–8 percent a year thanks to three factors. First, in the 1990's these countries had undergone a successful transition to market economies, with deregulation,

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[1] DubravkoMihaljek, "The spread of the financial crisis to central and eastern Europe: evidence from the BIS data", 2009

privatization, and financial stabilization. Second, they benefited from vast underutilized real and human capital. Third, their exports drove growth through international integration and a global boom.

Eastern Europe was making one classical policy mistake. Many countries had fixed exchange rates, notably Estonia, Latvia, Lithuania, Belarus, Russia, Ukraine, and Bulgaria. The illusory safety of the pegged exchange rate attracted large inflows of short-term lending from European banks. The currency inflows boosted the money supply, and inflation surged with money supply growth from 2006. The inflation was worst in Ukraine.

The temptation for international banks was irresistible. They could lend to consumers in Ukraine for 50 percent per annum with minimal financing costs. But this was a dangerous speculative scheme. The foreign exchange inflows accelerated imports and boosted balance of payments deficits. High inflation priced countries with fixed exchange rates out of the market.

The unprecedented global boom had left the IMF dormant, but it quickly woke up and agreed on new stand-by agreements for Ukraine, Hungary, and Latvia. Other countries with new IMF agreements are Georgia, Belarus, Serbia, and Romania.

The Eastern European financial crisis of 2008–09 resembles the East Asian crisis of 1997–98. The fundamental problem then and now was excessive inflows of short-term bank credits, enticed by pegged exchange rates, leading to large private foreign debt. Public finances, by contrast, were mostly in excellent shape with the exceptions of Hungary and Romania, which had significant budget deficits, but only Hungary had a worrisome public debt.

The domestic vulnerabilities were aggravated by the worst financial panic of our lifetime. Capital fled to the perceived safe havens: gold, the dollar, the euro, the yen, and the Swiss Franc. Even the British pound and the Swedish krona plummeted. A financial panic is a market failure that needs to be cured by the state, and internationally the IMF is supposed to provide countervailing financial flows.

The IMF acted fast and well. In the East Asian crisis, the IMF was perceived as excessively intrusive, adding many demands for structural reforms to its traditional agenda. This time, the IMF returned to the more elementary Washington Consensus cure of the early 1990s. Essentially, the IMF posed three demands: a budget close to balance, a realistic exchange rate policy, and bank restructuring with recapitalization. In return for the fulfillment of these conditions, the IMF offered far larger loans than previously.Exchange rate policy has become the bone of contention in the new stabilization programs. If a country devalues, its banks could be squeezed on all sides. The local cost of the loans the banks had taken abroad would sharply rise, and many would default. Their domestic customers that had taken loans in foreign currency would also be unable to repay them with revenues in the devalued currency.[2]

Hungary and Romania had floating exchange rates, which plunged along with the floating rates of other currencies not facing a crisis, such as Poland and the Czech Republic. The IMF forced Ukraine to float and Belarus to devalue, but the Baltic states offered a stumbling block. They have long tied their currencies to the euro, in hopes of adopting the euro as early as 2006 hopes that were frustrated by the rising inflation rates that took hold during 2007–08. As Latvia still aspires to join the euro in 2012, it opposes any devaluation.

The European Union's decision earlier not to provide a massive, 180 billion euro bailout to Eastern European banks made headlines around the world. But that doesn't mean the richer nations of the Eurozone have abandoned their poorer neighbors to the east. Instead of handing over billions to bankers who made terribly poor decisions, as the U.S. Treasury has done in America, each bailout will be considered on a case-by-case basis, and each will be subject to strict "conditionalities" similar to those imposed in any IMF agreement. Next, the graphics that I will present will show us the growth of GVA by sector at the European level in order to show us the importance of financial

[2] See Peter Haiss, Andreas Paulhart and Wolfgang Rainer, “Do foreign banks drive foreign currency lending in Central and Eastern Europe?”, 2009

fluctuation in the European economy, moreover we will also be able to see the impact of the crisis on GDP growth and GDP per capital on each country that has our interest in the analyses that has been proposed.

Nevertheless, during recession in 2008/2009 the contribution of households to value added growth fell, and in fact turned negative from the final quarter of 2008. While positive growth rates were recorded each and every quarter until the middle of 2008, the negative growth rates in the final quarter of 2008 and the first quarter of 2009 were greater in magnitude than any of the growth rates recorded in earlier years, underlying the severity of the recession. In fact these were the first negative rates of change since the series began in 1995 and it is widely acknowledged that this is the worst global recession since the 1930's.[3]

More detailed insights on trends affecting different types of economic agents during the recession can be gained from the sector accounts. Figures indicate the contribution of the institutional sectors to changes in value added, capital formation, and lending/borrowing. Non-financial corporations generally deliver the largest contribution to value added (and GDP) growth, but their contribution is quite volatile. The contribution of households normally fluctuates less, partly because of the stabilishing influence of the imputed rent on owner occupied dwellings.

REGIONAL INDICATORS

South Eastern Europe Indicators	2008	2009	2010f	2011f
GDP, US$bn [1,3]	990	855	983	1,122
Real GDP growth, % [2,3]	1.7	-4.6	5.0	4.3
Inflation, eop, % [2,3]	9.9	5.3	7.9	7.4
Exports, US$bn [1,3]	231.5	177.1	183.2	198.6
Imports, US$bn [1,3]	343.3	237.6	260.2	288.1
Trade balance, US$bn [1,3]	-111.8	-60.6	-77.0	-89.4
Current account, US$bn [1,3]	-77.5	-26.5	-42.8	-54.3
Current account, % of regional GDP [1,3]	-7.8	-3.1	-4.4	-4.8

Source: http://www.emergingeuropemonitor.com

This regional indicators show us on a horizont of time how the inflation,exports, imports or trade balance influenced the south-eastern Europe, this is to say that between 2008-2011 this economic indicators show us the fact that a slight amelioration can be seen at the average of this perioud but compared to other western countries, shown also by the table of content 16, the south eastern region of europe couped more difficult with the crisis, its negative effect can be evalued also during 2010 and 2011 when the real GDP growth is seemingly come to arises.With baby steps the eastern economy begins to recover.This does not mean Europe is now being divided between east and west along old lines. On the contrary, countries like the Czech Republic, Slovenia and Slovakia, which have pursued sane and sober economic policies, are just as opposed as Germany to bailing out the likes of profligate Hungary, Latvia, Romania and the Baltic states. Key EU leaders were simply not prepared to provide a blanket handout to those EU countries that got themselves into deep trouble through the siren call of excessive credit. As a result, 50% of household debt is now in foreign currency in Hungary; 30%-40% in Poland and Romania; and over 70% in the Baltic states.There's little doubt that Eastern Europe's credit crunch will ricochet back into Western Europe. Most Eastern Europe banking systems are dominated by Western European banks. Austria is most vulnerable,

[3] http://epp.eurostat.ec.europa.eu/portal/page/portal/product_details/publication?p_product_code=KS-CD-10-220

since the Eastern European exposure of its banks is about 80% of the country's GDP. Losses for Austrian banks could run as high as 10% of GDP, or over 25% of Austrian bank capital.[4]

On the other side of the imbalances were European banks from Swedbankin the Baltics to Erste Bank, Raiffeisen, Unicredit and KBC in the rest of Europe economies. Interestingly, for EE economies such high level of internationalization meant both that prior to the crisis the building up of the fragility in the system was very fast and, on the other hand, with the crisis actually happening, the high share of foreign ownership in EE banking sector played a stabilizing factor via stemming the reversal of cross-border financial flows. In fact, the latter aspect seems to have saved most EE economies, notably the Baltic countries, from outright default and run to the banks and currencies. However, it can be argued that both the increase in domestic foreign currency borrowing and development of the banking sector in 2000's represented in essence a massive carry trade with EE households and companies receiving both interest rate and currency risks in form of long term debt.

This mix created economic environment that is automatically both very procyclical and somewhat allergic to governments meddling with the markets at the same time. Accordingly, the response to the crisis has been relatively slow in Eastern Europe economies. Yet, as the built-up and cumulative imbalances cannot simply vanish, they are being transformed into other forms of risks and imbalances: either increasing public debt or unemployment, or both. EE economies with floating exchange rates regimes have experienced devaluation of their currencies, the Baltic economies on the other hand are crippled by rapid drops in real wages (more than -5% in 2009).Without the money transfers of International Monetary Found almost all EE countries would face public deficits (or much worse unemployment figures) close to double digits, that is very much like Greece with its 12-13% public deficit in 2009 (Greece receives EU transfers as well). In essence, the EU fiscal transfers allow EE countries, in particularly those with most massive imbalances, export some of the accumulated imbalances back into the EU and in addition attempt to free-ride on stimulus packages enacted in rest of the EU.[5]

In order to resume what happened to the Eastern Europe economy during the crisis and the main features of this one for the eastern economic level I will point out three important characteristics of the crisis taking into account some affinities with the Asian crisis of the years '98. First, while EE and other key developing countries experienced an exhilarating rise in FDI and exports, there is a stunningly obvious divergence in income growth between Asian economies, on the one hand, and economies on the other hand.Eastern Europe economies have struggled throughout the last decades to stay above the 1980 level.second, rapid deindustrialization and primitivization of industrial enterprises or even the outright destruction of many previously well-known and successful companies.

Second, rapid deindustrialization and primitivization of industrial enterprises or even the outright destruction of many previously well-known and successful companies. This happened because of the way Soviet industrial companies, and the industry in general, were built up and ran in a complex cluster-like web of planning and competition. A sudden opening of the markets and abolition of capital controls made these industrial companies extremely vulnerable. The partially extreme vertical integration that was the norm in such companies meant that if one part of the value chain ran into problems due to the rapid liberalization, it easily brought down the entire chain. However, foreign companies seeking to privatize plants were almost always interested in only part of the value-chain.

Third, such a drastic change made it relatively easy to actually replace Soviet industry: with the macroeconomic stability and liberalization of markets, followed by a rapid drop in wages, many former Soviet economies became increasingly attractive as privatization targets and outsourcing of

[4] http://www.ecb.europa.eu/pub/pdf/scpops/ecbocp114.pdf

[5] "Financial Crisis in Central and Eastern Europe"-Reiner Katel, Tallin University of Technology, Estonia,2010

production. Indeed, one of the most fundamental characteristics of Eastern Europe industry since 1990 has been that the majority of companies have actually engaged in process innovation.

In the end of this paper I would want to conclude something about the measures or iniatives that the eastern Europe has had until now in order to diminish the impact of the economic crisis upon their national economies. Nevertheless,it is interesting to be seen if this measures can be upholded and sustained by all Eastern European countries but this could be the subject of an another heated debate because the differences between the eastern European countries is an interesting subject.The policy response to the crisis in the EE countries focused on standard and non-standard monetary policy action as well as fiscal measures. Standard monetary policy remained very cautious in most countries until the end of 2008 when the severity of the recession became clear and most EE countries embarked on a process of monetary easing. In most EE countries, however, policy rates remain at higher levels than in major industrialised economies. Fiscal policy responses to the crisis varied within the region and were mainly determined by the fiscal situation at the beginning of the crisis. Overall, the various national and international support measures appear to have helped to cushion the impact of the global economic and financial crisis on the EE countries.

Conclusions

The global economic and financial crisis affected the EE region through various channels of transmission. Although the schematic depiction below is not exhaustive and there might be overlaps and feedback loops between the various channels, it provides a good starting point for analysing the spillovers of the global crisis to EE. In addition, one should bear in mind possible second-round effects of spillovers from affected emerging economies to developed countries and/or spillovers among emerging economies. In general, there are three financial transmission channels through which the global crisis may affect the EE region: direct and indirect channels, as well as second-round effects. The direct channel works mainly via changes in the prices of toxic assets in the portfolios of financial institutions. The indirect financial channels, which become important once there is a deterioration of foreign investor sentiment towards emerging markets, relate to asset prices, money and debt markets as well as capital flows. In this regard, the first two channels explain price effects, while the third one refers to volume effects. Looking in more detail at the indirect financial transmission channels, a loss of investor confidence can hit the EE region first via foreign exchange, stock and real estate. The policy response to the crisis focused in the EE countries on standard and non-standardmonetary policy action, as well as fiscal measures. In countries with flexible exchange rates, key interest rates were lowered as from the end of 2008 when the severity of the recession became clear.

Thus, it should not come as a great surprise that EE countries became the epicenter for the global financial crisis. On the contrary, EE experiences in the last two decades seem to epitomize the problems created during these years globally. On the one hand, there is the fast and furious industrial restructuring driven by massive inflow of FDI; the rise of modularity in production means that large parts of restructured industry are oriented towards lower value added activities with low domestic linkages. On the other hand, equally transformative change in the banking sector essentially breaks the ties with domestic productive sector only to marry with help of enormous inflow of cross-border lending with domestic consumers. This led to loss of competitiveness through low productivity growth and through currency appreciations. All of this is accompanied by fragmented and hollowed out policy arena incapable of creating structural and innovation policies to further productivity growth. Fiscal transfers from the EU are to remain highly important for all EE economies, yet without significant enhancement in policy capacity, EE economies will simply free-ride on EU transfers and stimulus programs and postpone much needed industrial policies even further into the future. This way, however, EE threatens to become a real burden on EU's competitiveness.

Fiscal policy responses to the crisis varied within the region and were mainly determined by the fiscal situation at the beginning of the crisis. Overall, the various national and international support measures appear to have helped to cushion the impact of the global economic and financial crisis on the EE countries and the region's integration into European banking networks turned out to be, on balance, an asset during the crisis (although it also played a role in fuelling the boom before the crisis). The EU anchor also provides a functioning institutional and regulatory framework forEE countries that promotes the convergence process and is expected to prevent extreme policy slippages.

The disruptions in domestic and international financial markets, together with the real transmission channels such as the plunge in global trade flows, had a pronounced effect on real economic developments since late 2008, ultimately resulting in severe recessions in most countries in the region. Future domestic demand will dependinteraliaon the success of private debt restructuring and the willingness of the financial sector to continue lending. This is to say that the financial crisis hit hard the Eastern Europe countries because their developing economy and financial instability, on the other hand their dependence on outside financial incomes has increased their budgetary balance and during this following years will see how the return of this debt will affect or not their future development. Needless to say that the effect of crisis in the eastern Europe has had different effects on the countries in this region, more effected being the south-east countries as Greece, Bulgaria, Ukcraine and Romania were the economic collapse and the ending of crisis has had a more large horizont of time and the governamental measures were more severe due to the lack of financial stability and also due to the fact that competitiveness of governments is still a subject open to argue about.

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NEW CONCEPTS REGARDING THE FUNCTIONING OF FINANCIAL SYSTEMS

MĂDĂLINA ANTOANETA RĂDOI*

Abstract
On the financial market, the last three decades have gained the status of a real "revolution" as a consequence of the amplitude, transformation and restructuring of financial services and competing processes. The importance that should be paid to the transformations of financial systems is also given by their impact both at micro and macro level over economy as a whole.

***Keywords**: consolidated financial regulations, special regulations, surveillance of objectives, financial conglomerates, unique market of financial services etc.*

Introduction

Over the last decades the evolution of financial markets has indicated the fact that national financial markets are opened towards private financing due to the necessity to attract international capital resources, a situation which has led to an increase of competition. A series of phenomena has generated this situation: the increasing number of budgetary deficits and the payment deficits incurred by many OECD countries or emerging countries, the chaotic development of credit systems and the use of unregulated financial instruments. These have contributed to the appearance of financial crises which still exist at international level, including in the Euro zone.

Increasing the efficiency of financial markets implies restructuring actions including for the regulation structures of these markets – these issues being frequently tackled during the last two years both within the G7 and G20 countries and especially within European financial and banking bodies – ECOFIN (Economic and Financial Affairs Council), ESCB (European System of Central Banks) and ECB (European Central Bank).

Literature Review

1. Regulation systems for financial markets

Over the last 5 years, the evolution of the European financial systems has become convergent with the American one. These convergent movements had as former matrices the adoption of the unique Euro currency and the globalization of financial markets. The European model continues to be different from the American one because it emphasizes solidarity and consensus, thanks to its more thorough regulation of financial markets. However, the evolution of financial markets is characterized by convergence.

Present developments within the financial regulation systems both worldwide and within the European zone are based on two principles: consolidated regulation and special regulation.

Economies of scale and several political advantages are favorable to consolidated regulations; this kind of regulations is more adapted to the tendencies of forming Financial Conglomerations and it offers a whole set of services and financial products. ,

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Arguments for:	
a unique financial regulation authority	**a financial regulation authority**
- one-spet undertaking for authorization	- more facile organizing
- expertise concentration and economies of scale (e.g., by conglomerating authority positions)	- more clearly defined powers
- lower surveillance costs	- closer to regulation activities
- more adapted to the evolution of the financial sector towards financial conglomerates	- more adapted to the differences regarding risk and financial activities, a clearer insistence on objectives and regulation motivation
- cooperation ensured between surveillance forms: a coordinator for conglomerate surveillance	- better approach to regulation activities
- no arbitration required for regulation problems	- more discrete presence
- more transparent form for the consumer	- more inclined towards objective accomplishment surveillance

1) Source: Karel Lannoo

According to European Commission directives, financial systems regulations refer to three categories of financial institutions: credit institutions, investment services suppliers and insurance companies. Credit institutions include commercial banks, building and loan associations, mutual and co-operative banks and mortgage banks (or building societies). Investment services are enumerated in the annex to the identically named Directive and are linked to the use of the mentioned instruments; performing institutions are investment banks (or merchant banks or banques d'affaires) or stockbrokers for one, more or the whole set of services. Insurances include societies that are authorized to issue life or goods insurances.

The basic problem is the information exchange between the different surveillance structures seen especially in the context of the appearance of financial conglomerates that are active at international level and as a necessity to establish a (national) coordinator for the surveillance.

Surveillance performed on the basis of objectives. A method to adapt to the conglomerate formation is creating a more objective oriented surveillance and directing surveillance towards separate issues such as:

- stability, creditworthiness;
- business deontology: information and transparency, practice based on correctness and honesty, equality between market participants.

The agency for stability would concentrate on systemic problems and the deontology agency would concentrate on behavior – protection of depositors/investors. Thus, a model that combines functional surveillance with the objective oriented surveillance would result. For banks/investment services, surveillance could be based on objectives, and for banks insurance could remain fundamental, because of the difference between products and the inverted structure of risk.

Such a surveillance structures exists in Italy. D'Italia Bank supervises financial institutes in order to ensure financial stability, while COMSOB deals with banking and stockbrokers' deontology. Objective-oriented surveillance can be increased within the wholesaling and retailing areas of activity, considering that information asymmetry and market failure are more frequent within the retailing areas of activity, this fact increasing the need for consumer protection. This formula that is supported by France has the advantage of reducing contamination risk between the two sectors.

2. The Problem of EU Financial Regulation

Creating a unique market for financial services is based on three pillars:

- a minimum of homogeneity for the various national markets – an effect of EU directive implementation within the areas of banking, investment services and insurance which are meant to ensure a mutual acknowledgement of the financial instruments, services and services suppliers;

- the principle of the "unique passport", that is the authority granted in one country for establishing branches in any other member country or for providing trans-border services;
- the responsibility of the host country to act as a supervisor.

Directives were introduced late and quite differently in the member countries so that the actual setting up of the unique market for financial services recorded important delays.

The Commission reacted taking into account the reluctance manifested by the member countries, but this let to the creation of a quite insignificant Forum of the EU Stockbrokers' Commission (FESCO – a British abbreviation), whose mission is to promote cooperation between regulating authorities for the stockbroker markets.

FESCO lacks an official status, it works on the basis of consensus and it cannot make compulsory recommendations. That is why, as soon as EURO currency was issued, EU leaders adopted – during the March 2004 Lisbon Summit – the Financial Services Action Plan (FSAP), at the Commission's initiative.

France considered it necessary to go further and faster; thus, during the second semester of 2000, when this country held the Presidency for The Council of Ministers, Laurent Fabius (The Minister of Economy and Finance) asked for the creation of a small work group that had to study the possibility of creating a more daring plan, including the creation of a Pan-European Regulation Forum, located in Paris. England opposed the idea and tried to block it. The group was nevertheless created and it included a British official, Sir Migel Wicks, and its president is Alexandru Lamfalussy, former President of European Monetary Institute. Reports were presented in November 2000 and Februrary 2001 to the group.

At present, the points of view are the following ones:

Most of the member states support the idea of having a unique regulation forum, e.g. France, and an integrated but dual system. The idea of a Pan-European regulation forum is regarded as a solution for the present chaos in this field. Germany supports the idea of a unique Pan-European authority. England opposes it.

Other countries continue to prefer the system of national authorities and concurrence between the existing different jurisdictions.

The Lamfalussy Group does not intend to propose a Pan-European regulation authority although the creation of a Stockbrockers Committee has the role to accelerate this process, which is seen by a few as the beginning of creating a SEC (an American regulation body known as the Securities and Exchange Commission).

The group identified the numerous and important gaps existing in the EU legislation and proposed the following priority measures, which were adopted and applied by the end of 2003:

- a unique prospect for issuers, with a unique preliminary registration system;
- modernizing quota registration requirements and introducing a clear distinction between quota admission and transaction admission;
- generalizing the mutual recognition principle for wholesaling markets, including a clear definition of the professional investor;
- modernizing and developing investment rules for investment funds and pension funds;
- adopting IAS (International Accounting Standards);
- unique passport for recognized stock markets and applying the principles that surveillance is ensured by the host country.

Lamfalussy Group noticed that within the EU there are about 40 public bodies that deal with regulating and supervising stockbrokers' markets. Competence and responsibilities are different. "At European Level the result is fragmentation and, often, confusion."

The main point that the Group aims to attain is represented by the measures that are meant to accelerate the decision process within the EU and to ensure a more thorough control over directive

implementation by the member states. In this respect, a four stage approach was proposed for the decision and implementation process.

3. Unifying financial services regulation and surveillance in Romania

Taking into account the tendencies generated by the financial revolution and especially by the increase of capital market importance in financing firms and setting up financial conglomerates and supermarkets, as well as the dominating opinion expressed by most EU states, the re-consideration of regulation and surveillance structures is regarded as an opportunity in Romania, this process leading to a concentration of the existing structures in a unique authority.

Distinction between wholesaling and retailing markets, which is supported by France and applied in Italy, is regarded as fertile and it could be taken into account in a later development stage on the Romanian markets, if the case may be. For the moment, however, our country should follow the way opened by the UK and embraced by Hungary. The conceiving and application of unitary standards might create better conditions for the development of financial services and the accomplishment of a more efficient surveillance.

The development of self-regulating bodies is not a way to be followed (see the problems tackled by ANSVM – which, after years, was granted this right by the CNVM).

Conclusions

Tendencies regarding the transformation and restructuring of the financial system that manifest at international and European level will continue to exist, including in Romania.

Information exchange and collaboration between regulation and surveillance institutions, if well organized, have chances to generate positive results.

We do not believe that, at present, there are many persons who support the idea of setting up a surveillance authority, but such persons exist in all the three sector of financial services in our country (the banking system, the capital market and the insurance market).

The public debate could contribute to clarifying points of view and the choice of a regulation and surveillance system that could correspond both to the need for a normal development in this area and to the tendencies that exist in Europe.

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FIXED INCOME INSTRUMENTS IN THE CAPITAL MARKET IN ROMANIA

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Abstract
The presence of government bonds on the Bucharest Stock Exchange has changed the behavior of institutional investors on capital market and revenues from these titles made them more attractive than those with variable income, such as shares. In this paper is presented results of research on fixed income instruments in the capital market in Romania. In conclusion, are presented some opinions about the possibility of diversification of fixed income instruments and aspects of their use in portfolio management.

Keywords: *fixed income securities, stock exchange indicators, index, trading volume, rate of liquidity*

Introduction

In the current global economy, based increasingly on consumer debt and spending of anticipated future expected revenues, the role of fixed income instruments is more important, both for investors and for those who attract investment by such means. Further evidence was provided by the financial crisis over the 2007-2009 that the friction on financial market caused an economic blockade and a change in the behavior of buyers of goods and services.

Institutional investors such as pension funds, need adequate liquidity for investment instruments and any financial market can only succeed through a market with strong fixed-income instruments.

In the 15 years since the reinstatement of the stock exchange in Romania bull periods have managed to reduce the negative impact of the corrections from time to time, but given that most investments were made in shares. The existence of very few fixed-income instruments on the capital market has made very few international investors to be present here.

First is presented an analysis of the dynamics of capital market during the representative, in terms of structure, liquidity and the main indexes. The paper continues with the development of fixed income securities market, and the third is illustrated by some aspects of investment behavior in recent years. A representative picture of the dynamics of this behavior, the feeling of trust and loss aversion is given by the evolution of investment funds in diversified portfolios structure.

1. Capital markets dynamics

From 1996 until now, the evolution of exchange transactions in Romania and investor confidence in capital markets is linked to a number of factors such as the yield obtained by placing the amount available in the financial instruments, the state economy, local exchange rate, integration at the European Union and other financial information or less financial, national, regional or global.

Romania's capital market still fails to fulfill the primary role of attracting the funds available in the economy, and most investments are made without any recourse to stock system. After four years of appreciation in share prices between 2003 and 2007, the global recession of 2008 demonstrated that emerging capital markets are more vulnerable to large capital inflows. At the same time prove the foreign investment often speculative and conjectural elements to produce a short-term impact of high volatility, which is not specific to long-term capital.

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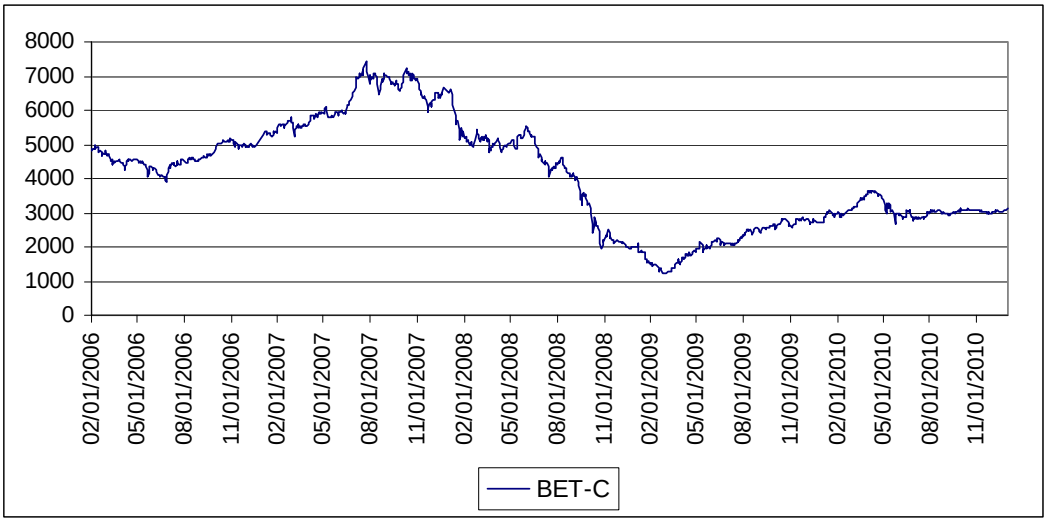
Because of possible distortions in the BET analysis, from Bucharest Stock Exchange, caused by changing composition of the index in terms of the 10 companies included in the index, we considered more relevant BET-C index, which covers all listed companies. Even in those circumstances there could be a problem given the extremely low liquidity of shares, but this is partially solved by free-float factor included in the formula for calculating the index.

BET-C had the highest value on July 24, 2007 to 7432.63 points. February 25, 2009 was 1231.05 points recorded minimum, representing a decrease of 83.44%. (Fig.1)

BET-C index value has made a comeback in 2009 and the last trading session of December there were 2714.77 points, with 120.5% more than the minimum in February of that year. But 2010 was a year of stagnation, the year that ended BET-C index was 3111.17 points, up only 14.6% over the previous year. Note there are two moments in 2010, the minimum registered on 25 May of 2658.23 points, after the peak of 3655.27 points recorded on April 4.

Fig.1 The composite index of the Bucharest Stock Exchange, BET-C, during Feb.2006-Dec.2010



Source: *Bucharest Stock Exchange (BSE), data series on the website: http://www.bvb.ro/*

The stock exchange market in Romania is a heterogeneous, but with a reduced number of issuers, which belong to different economic sectors. Unfortunately the structure of capital market capitalization, by industry sector, does not reflect the structure of GDP. In some sectors the number of listed companies is much less to be representative of that area. An example is given by the service sector and information technology, each represented by a single issuer.

Table.1 Number of companies listed on the BSE, during the period 1995-feb.2011

`95	`96	`97	`98	`99	`00	`01	`02	`03	`04	`05	`06	`07	`08	`09	`10	`11
9	17	76	126	127	114	65	65	62	60	64	58	59	67	71	70	75

Source: *BSE, annual reports, 2000-2009 and public information on www.bvb.ro, feb.2011*

Bucharest Stock Exchange showed good performance between 2000 and 2007, with a significant increase in the amount of equity, from 15 billion Euro in 2005 to over 24 billion Euro in 2007 (Table 2). Basically, the most important years of stock exchange, from its foundation until now,

have been 2004-2007. The financial crisis has brought the market capitalization value of the years 2004-2005, with a return in 2009 and strengthened in 2010.

Table.2 BSE capitalization in the period 2000-2010
- million Euro -

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
BVB Capit.	450	1.361	2.646	2.991	8.819	15.311	21.415	24.601	11.630	19.053	23.892
Relative growth	-	202%	94%	13%	195%	74%	40%	15%	- 53%	64%	25%

Source: *BSE data after the last trading session in the respective years*

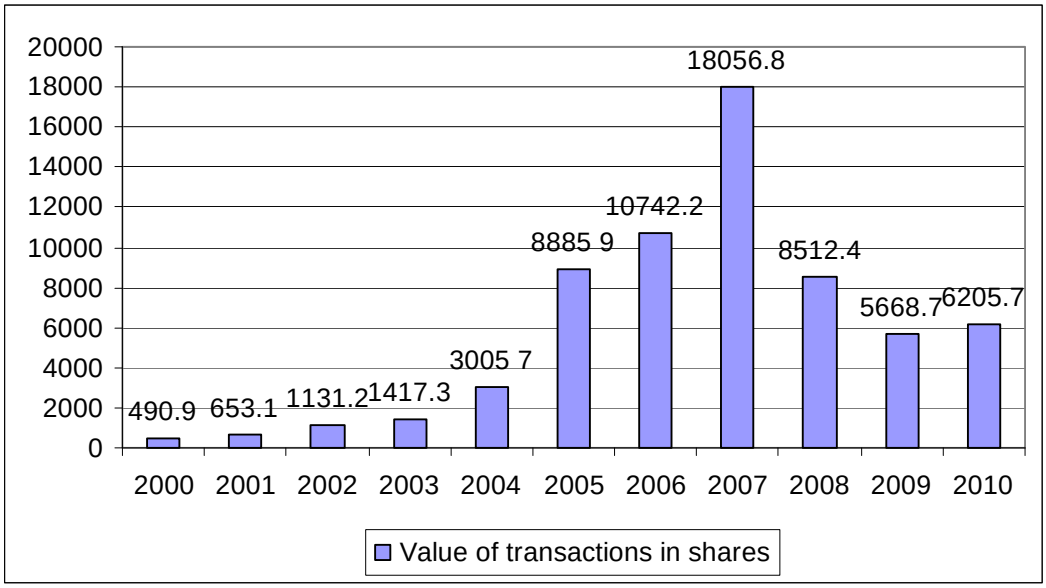
The BSE capitalization fell by 53% dec.2008 months, because in 2009 to recover 64% from year-end 2008.

Similar to the U.S. stock market, the depreciation recorded in October 2008 was approximately 40 percent, but some companies have registered over 90% discount to the values recorded in November 2007. Historical average decline on a global scale, the stock price is 55.9 percent, with a recession of about 3.4 years. (Reinhart, 2009: pp.226).

In absolute values, the value of transactions in shares of listed companies increased from U.S. $ 8.89 billion in 2005 to 18.06 billion USD in 2007. A 68% increase in the volume of transactions was recorded in 2007 compared with 2006, due to both several initial public offerings, but also by price increases.

In 2008, the global financial crisis, most notably the withdrawal of foreign investors on BSE was made a modest volume of transactions under the 2005 level of 36%.

Fig.2 Evolution of the value of transactions in shares on the BSE during 2000-2010, million RON



Source: *BSE data after the last trading session in the respective years*

Liquidity ratio, calculated as the ratio of annual turnover and market capitalization, declined from 16.4% at the end of 2007 to just 5.5% in 2010.

$$L = \frac{\text{Turnover value}}{\text{Market Capitalization}}(\%)$$

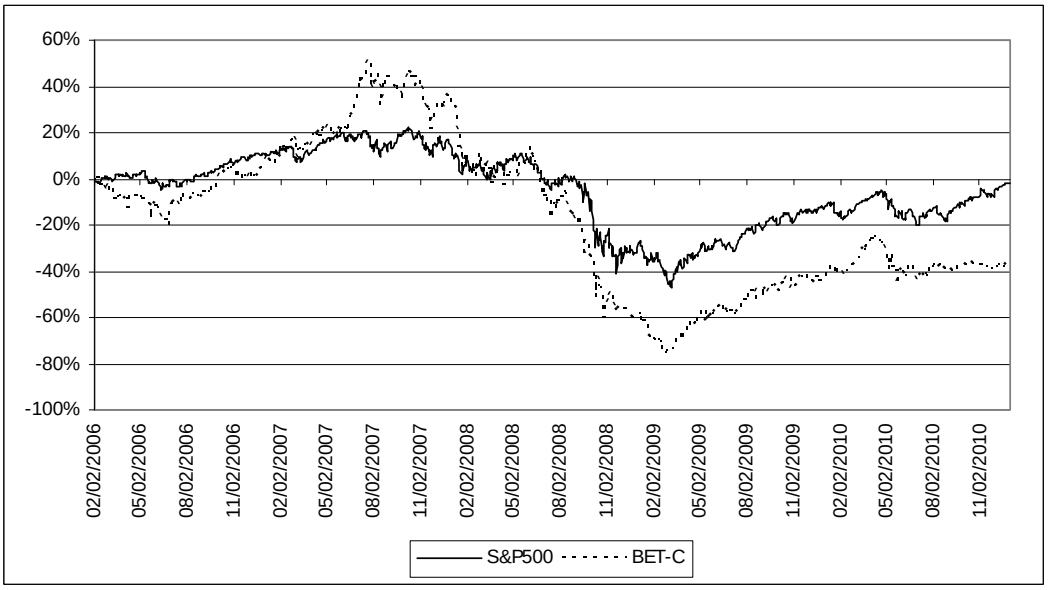
Table.3 Evolution of capitalization and turnover value in the period 2000-2009
- million RON -

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Turnover value (TV)	491	653	1,131	1,417	3,006	8,886	10,742	18,057	8,512	5,669	6,206
Capitalization (CAP)	3,180	7,226	15,265	20,106	42,141	64,273	84,049	110,372	57,801	92,420	113,275
%TV/CAP	15.4%	9.0%	7.4%	7.0%	7.1%	13.8%	12.8%	16.4%	14.7%	6.1%	5.5%

Source: *BSE+RASDAQ data series in the respective years*

Even if the amplitude of which varied with the BET-C was significantly higher than S & P500, however, values were correlated to August 2010. From this month there is a mismatch due to continued stagnation in the capital market in Romania, while the U.S. to continue its growth in 2010 (Fig.3).

Fig.3 Changes in BET-C index and S & P500 over the period 2006-2010



Source: *BSE, NYSE, the daily data series at the end of trading session*

In 2011 it is possible to register some higher assessments on BSE, and this could lead to a further recovery and correlation with the market in Romania in the U.S.. The assessments are possible in light of new and attractive listings from the state, particularly in energy, utilities and telecommunications.

2. Fixed Income Securities Market

The first fixed-income securities traded on the Bucharest Stock Exchange were municipal bonds since 2001. Until 2004, due to very low trading volume relative to the value of all capital markets in Romania, we can say that the bond market was insignificant. Under these conditions, no bonds were among the preferences of investors, while municipal bond yields have been consistently above the interest paid on bank deposits.

Because, if fixed-income securities, the number of transactions is not relevant, as in market shares, we will use in this study the volume of transactions in these securities. From this point of view, the 2006 bond issue was important for the International Bank for Reconstruction and Development, worth RON 525 million. At the same time, it also marked the first issue of securities made by an international body on the Bucharest Stock Exchange.

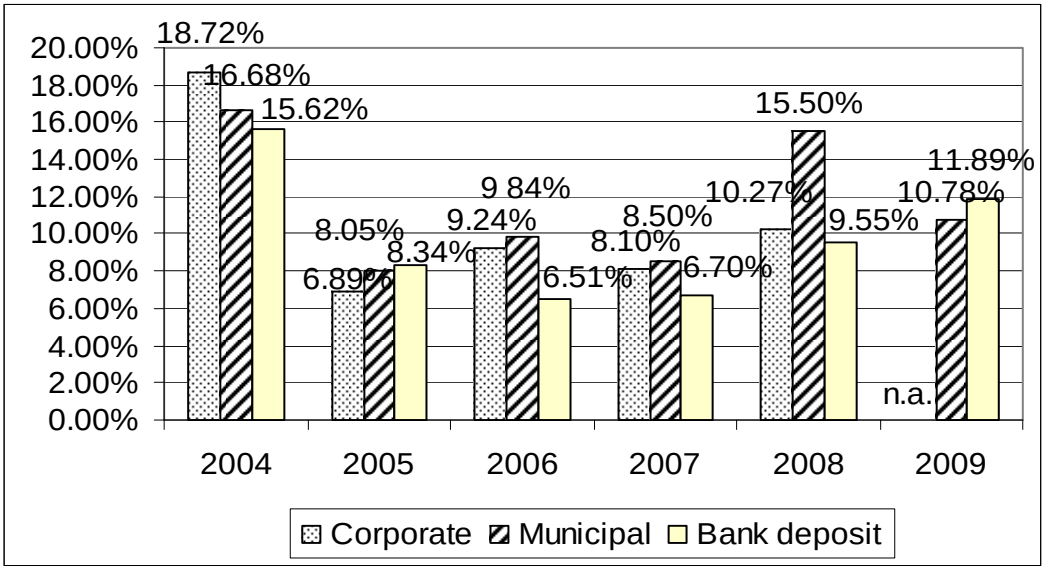
Year 2006 was a good year for corporate bond segment, and has contributed to these results definitely favor the International Bank for Reconstruction and Development. Launching a public issue of bonds, in September 2006, amounting to 525 million, doubled the value of fixed income securities markets at that time. The operation has a greater importance, since it is the first issue of international financial institutions through capital market in Romania and more, is the first on such a scale. Credibility assessment of the issuer and the AAA rate was the listing in October to be a success. Overwriting 21% of the issue, by a total of 635,948 bonds, compared to 525,000 allocated is still a positive factor in considering this issue as a success. Among domestic bond issues are made by the Romanian Commercial Bank, the important value of 200 million and approximately 21.5% by overwriting.

Volume and number of these issues in 2006 ranked first in the bond transactions, the creation of the stock exchange until 2008. Total value of transactions in bonds, of 281.67 million euros, close to the threshold of 10% of transactions in shares, but also far enough away from the practice of recognized exchanges encountered. At this time mention the existence of only two types of fixed-income instruments on the BSE, municipal and corporate bonds.

To assess the efficiency of such investments is provided taking into account three key elements. First, the risk associated with these instruments, and discusses the risk of bonds is given by the indebtedness of the issuer. Secondly interest loan offered by the issuer of that bond, and thirdly return correlation with the risk associated with each fixed income instrument.

The average interest rate corporate bonds in lei, at the end of 2006 was 9.24%, up from 6.89% at the end of 2005. The average municipal bond interest was the end of 9.84%, up from 8.05% in 2005. It may be noted an unusual situation with developed capital markets, higher interest granted by the municipal bonds from the corporate, but have a lower risk than the latter. One explanation is that sometimes the biggest bank in the country, as is the BCR, may have greater credibility than a municipality, which allocated funds and sometimes depends on the state budget.

Fig.3 Average interest rates for the corporate bonds, municipal bonds and the bank deposit, from 2004 to 2009



Source: *www.intercapital.ro (values for the month of December), not available interest rates for corporate bonds in 2009*

The average interest rate for corporate bonds at the end of 2007 was 8.1%. The average interest rate for municipal bonds was 8.5% (compared with 9.8% in 2008 and 8.1% in 2005).

The relationship between specific data and household savings stock market is not very close, but can be a strong interest in reducing individuals to stocks in 2006, a period when household savings, volume compared to the population registered a slight increase, caused by investment in real estate.

In 2008, recorded the first issuance of state bonds, first due in 2007 and the existence of private pension funds, which are required by law in Romania to a prudent asset allocation, most of the funds must be invested in securities issued by state.

In 2010, as recorded on the stock market stagnation, there were no new issues of corporate bonds. For municipal bonds have been recorded four IPO, and traded a total of 35 bonds in 2010, compared with 31 in 2009, 20 in 2008, 16 in 2007 and 11 in 2006.

The average annual interest rate for municipal bonds has fallen from 10.78% at end 2009 to 7.43% at the end of 2010, virtually the values recorded before the financial crisis.

On the stock fund development stagnation in 2010, the total value of fixed income instruments registered a value of 620 million euros, an increase of 104% compared to 2009, when he recorded a value of 303 million euros. This historic high was supported by state securities representing an attractive low risk high in both, but especially by balancing the portfolios of private pension funds, which have an increasingly important presence in this market.

3. The balanced funds

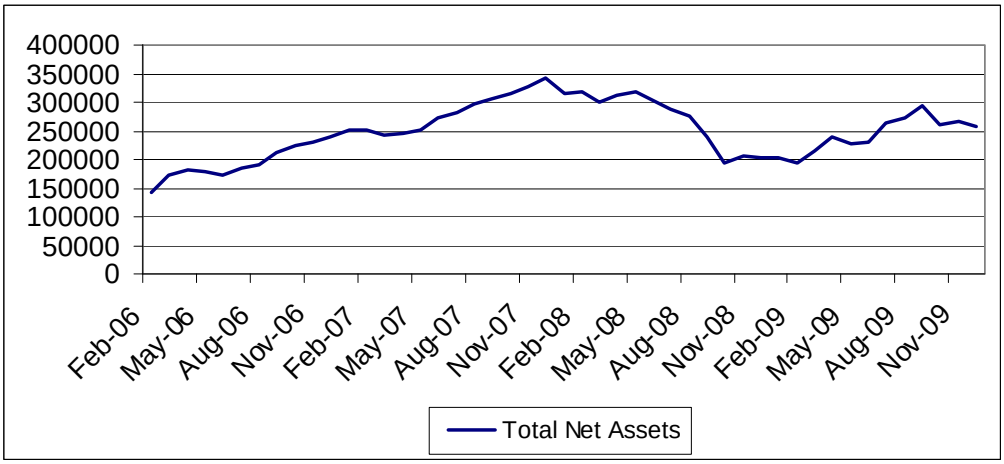
If loss aversion can be explained by reducing the number of investors, it is not sufficient to determine the low participation (Barberis, Huang and Thaler (2006)).

Maximum total net assets of the diversified investment funds was reached in December 2007, RON 343.57 million, about 95.17 million euros, 40% more than in February 2006. During this

period, total net assets trend was correlated with the number of investors and BET-C evolution and shows that loss aversion is important for investors on BSE.

During this period, total net assets trend was correlated with the number of investors and BET-C evolution and shows that loss aversion is important for investors on BSE (Fig. 4).

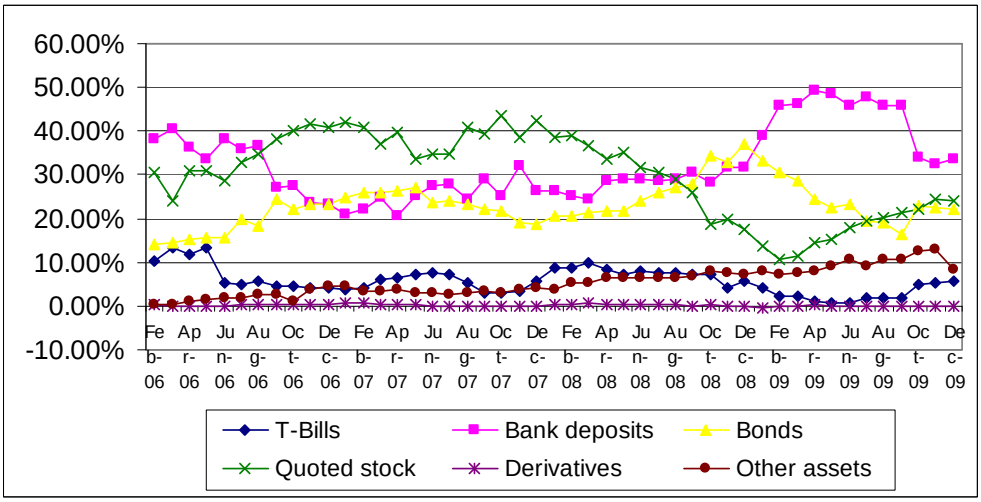
Fig.4 Total net assets from balanced funds (thousand RON), from Feb., 2006 to Dec., 2009



Source: *Romanian Association of Asset Managers, series of data from web site: http://www.aaf.ro/index.php?option=com_content&task=section&id=4&Itemid=35*

Dynamic performance of shares is reflected in investor sentiment, as shown in Figure No. 5. With the reduction in average interest rate on bank deposits, bonds, interest rate stability and good results of stocks, investments are changing from August 2006 to bank deposits for stocks. A change of trend is observed in July 2008 when institutional investors have turned to bank deposits. Evolution and other assets for government securities was not significant.

Fig.5 Portfolio structure of balanced funds, from feb, 2006 to dec, 2009



Source: *Romanian Association of Asset Managers, series of data from web site: http://www.aaf.ro/index.php?option=com_content&task=section&id=4&Itemid=35*

If institutional investors, like those analyzed in this study, loss aversion and "tools" to preserve much of the profit, other investors have no faith that the stock market can be an alternative for their investments.

Conclusions

Fixed income instruments market has grown much less than that of the stocks and is represented by a small number of issuers. As a diversified bond market in Romania can be compared with the U.S. more than the '60s, because it consists solely of government bonds, municipal bonds and some corporate bonds. Moreover, these bonds are characterized by a fixed maturity, a principal and coupon interest rate fixed or anchored to the average interbank interest rate at three or six months. Another feature of this market is almost non-existent secondary market because most buyers keep the bonds until maturity, because of low maturity, but also due to low offers, without the variations of interest.

The private pension funds will have larger amounts available to be placed on the capital market, fixed income instruments are known as greater liquidity, but also possible that more issuers to use this form to attract sources of investment money.

With the spot bond market development will be considered derivatives and structured to provide portfolio management capabilities found on all dedicated capital markets.

Not least of the market surveillance authorities must take an active role to prevent any slippage in this area, and the dynamics of the sector will require adaptation of specific tools to the requirements of investors and issuers.

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CURRENT ACCOUNTING DEVELOPMENTS IN KOSOVO

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MIHANE BERISHA-NAMANI**

Abstract
For the study of the developments in accounting in Kosovo and its prospects, it is necessary to review the current situation of the developments in accounting, the recognition and acceptance of accounting standards. It is clear that the actual and perspective development level in an affected by many factors, such as social, cultural, etc. Therefore, the main aim of the research work in this study is to give an overview of the current developments of accounting in Kosovo. To obtain the required information, 400 respondents have been chosen through a questionnaire designed for this purpose[1]. The respondents operate in different branches, they work in small, medium and large enterprises, insurance companies, banks, and while some of them are independent accountants and employees in the tax authorities. The data obtained are processed and analyzed from two aspects: the aspect of descriptive statistics reflected through histograms, and econometric aspect of reflecting through econometric models.

Key words: *accounting requirements, international accounting standards, econometric models, logit model and probit model.*

Introduction

In actually Kosovo has begun to fulfill the financial reporting requirements in accordance with accounting standards, because accounting standards has multiple importance for us, firstly because represents a model of high quality in regards to the manner of accounting regulations and secondly accounting informations are important for decision making.

Proper accounting helps Kosovo to fulfill its vital interests and for its active participation in the European Union. Currently Kosovo is implementing international accounting standards (IAS), particularly in entities with public interest financial statements is seen as of quite large importance, because they serve as the main source of information that serves as the basis for decision making of a wide range of users. Furthermore, containing elements of business financial statements are the basis for the production of accounting information, which further serves the financial needs.

2. Characteristics of businesses and implementation of IAS: Empirical analysis throught econometric models with discrete variables

In this study, a regressive analysis is done a through ordered logit model and ordered probit model on the probability of implementation of IAS by the business community in Kosovo. Regression or regression analysis in this study indicate the dependence of a variable or characteristic that is called a dependent variable or some other variables (explanatory). In order to predict or assess an average value of the first variable based on values known or fixed (by choosing repeatedly) last.

[1] The data collected reflect to the situation, belong to a three year time period 2008, 2009 and 2010.

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3. Methodology

According to the questionnaire drawn up, looked at the empirical aspects, a functional depending probability is found between the questions in the questionnaire, which in our case we have treated as the dependent variables, and characteristics of businesses which we treated as variable independent variables. Taking into consideration the responses of respondents and characteristics of businesses, which had not quantitative value but qualitative value, in order to find the functional dependence multiple regression is used with additional variables (dummy variables).

Furthermore, given the responses of the respondents in five levels, with quality characteristics of which we have coded with discrete values listed (ordered). The ordered logit model and ordered probit model are used with the help of which we counted regression the parameters through the Stata program and depending on the significances of the relevant parameters, we have given comments from the results achieved. After the ordered logit model and ordered probit model we have given approximately the same results and they differ only in the distribution at the edge. We conclude that both models are working regardless of which of them is taken and we have the same results.

4. Data

As dependent variables the questions are taken from the questionnaire designed for this purpose, which are marked with Yi as dependent variables, where i=1,2,… n, whereas Xi are independent variables, where i=1,2,3,…..,7.[2]

5. Results

A functional depending probability is found between the level of implementation of accounting standards in Kosovo and characteristics of businesses from the aspect of size and sectors they belong to. Also, a functional dependence between Yi, (where i=1,2,…5[3]), and Xi, (where i=1,2,3,….7), is realized through ordered logit and probit models, and counted in the Stata program. The results are presented in four cases, as follow:

Case I

Functional dependence between dependent variables Yi (where i=1,2,…5), and the independent variables Xi (where i=1,2,3), which means that we take only enterprises based on size, where X1= small enterprise, X2=medium enterprise, X3= large enterprise taken as a basis.

In this case, according the ordered logit model and ordered probit model, we have results as follow:

Table1.1[4]

Y / X	Small	Medium	…..
Y_1 Logit	-0.85217 (0.2884959)***	-0.2688543 (0.3095237)	Numb.of obs=283 LR chi2(2)=10.18

[2] With X we have marked independent variables that are ranked according to size of enterprices and the sectors they belong to.

[3] With Y we marked dependent variables which are the following questions, Y1=is known as the law on accounting, Y2=known as IAS/IFRS, Y3=are accounting rules applied for accounting keeping and financial statements, Y4=how do you think that the implementation of IAS/IFRS is effective and is likely to be implemented in Kosovo, Y5=how much do you think that the implementation of IAS/IFRS gives the opportunity of reading our financial statements by external users of accounting informations.

[4] With ***, **,*, we marked significance of 1%, 5%, 10% respectively, while the standard deviations of parameter are shown in parentheses.

			Prob>chi2=0.0062 Pseudo R =0.0167
Y_1 Probit	-0.5005933 (0.1691068) ***	-0.1614733 (0.1835569)	Numb.of obs=283 LR chi2(2)=10.25 Prob>chi2=0.0059 Pseudo R2=0.0169

The first question that was posed to the accountants and managers of enterprises in this case relates to their knowledge that, they have initially about the law on accounting (Y1) and the current regulation in force[5] for financial reporting of business entities. From the significance of the relevant counting parameter through the Stata program applied in the ordered probit model and ordered logit model we came with the result (table 1.1) that the probability that accountants of small enterprises that recognize this law is smaller in comparison with accountants of large enterprises.

Table 1.2

Y_2 Logit	**-0.7171404 (0.276951)*** **	**-0.0467202 (0.2994556)**	**Numb.of obs=283 LR chi 2(2)=9.63 Prob>chi2=0.0081 Pseudo R2=0.0139**
Y_2 Probit	**-0.4194094 (0.1618822)*** **	**-0.4339363 (0.1754734)**	**Numb.of obs=283 LR chi 2(2)=9.39 Prob>chi2=0.0091 Pseudo R2=0.0136**

Such a situation is also in the passed question to those regarding the recognition of international accounting standards (Y2), where the probability is also that small enterprises accountants who recognize standards is small compared with large enterprises (see table 1.2).

This is a clear problem, perhaps to small and medium enterprises the cost, firstly for the recognition and then the implementation of standards, will probably currently has its benefits and this is why small and medium enterprises are further from acknowledging the law and accounting standards. Therefore, the appropriate recommendations are given for finding the most suitable route and the path for genuine financial reporting for these enterprises.

Table 1.3

Y_3 Logit	0.8522741 (0.3393852) ***	1.434234 (0.3605902)***	Numb.of obs=271 LR chi2(2)=16.99 Prob>chi2=0.0007 Pseudo R2=0.0288
Y_3 Probit	0.400481 (0.1851023) ***	0.7569815 (0.2017334) ***	Numb.of obs=271 LR chi2(2)=14.45 Prob>chi2=0.0002 Pseudo R2=0.0338

The question addressed to the respondents whether rules are applied for maintaining the accounting and financial statements (Y3), results in table 1.3, according to the significance counting parameters purposes, it is obvious that the probability that these rules apply to small enterprises is

[5] Regulation 2001/130 (29 October 2001)on establishment of the Board for Financial Reporting in Kosovo as well as financial reporting regime of business organizations, represents business organizations (whether annual circulation of over 100,000 or total assets over 50.000E) expect small enterprices and public-owned enterprises and social enterprises, preparation of financial statements in coherence with SKK and IAS.

large in comparison with large enterprises. This shows that small and medium enterprises currently maintain the simplified rules and without a high cost, balance sheet, statement of income and expenditure, purchase book, sales, inventory, etc. Taking into consideration the following facts, then their responses above are expected to show job progress and thus fulfill the existing gaps.

There is also the possibility of enforcement of accounting standards (Y4) to enterprises classified according to size, where again in regards to small and medium enterprises the probability that standards find enforcement is lower than in large enterprises. These results are proven us in the table below (table 1.4) pertaining to the question of how effective standard are and implementation opportunities.

Table 1.4

Y_4 Logit	**-0.6011726** **(0.2790317) *****	**-0.6877438** **(0.3136443) *****	**Numb.of obs=247** **LR chi2(2)=6.18** **Prob>chi2=0.0456** **Pseudo R2=0.0095**
Y_4 Probit	**-0.3582893** **(0.1687239) *****	**-0.3964415** **(0.184027) *****	**Numb.of obs=247** **LR chi2(2)=5.85** **Prob>chi2=0.0536** **Pseudo R2=0.0090**

It does not always mean that independent variables affect the concerned dependent variable. This is indicated, for example in the question addressed to the accountants on how they think that with the application of accounting standards, the opportunity is given to read financial statements not only by internal users but also from those outside (Y5).

Table 1.5

Y_5 Logit	-0.4459745 (0.3003326)	-0.3878014 (0.3224904)	Numb.of obs=266 LR chi2(2)=2.38 Prob>chi2=0.3036 Pseudo R2=0.0044
Y_5 Probit	-0.2610202 (0.1791692)	-0.2171985 (0.1918715)	Numb.of obs=266 LR chi2(2)=2.23 Prob>chi2=0.3281 Pseudo R2=0.0041

As seen from above table (table 1.5), the enterprises divided by size have no impact as is explained above. A response that explains the awareness of accountants and other respondents in regards to fact that the implementation of IAS/ IFRS financial reports can be read by external users, which in this case creates the same communication language on the same European line, which results in transparency, comparison of PF, and finding business balance.

Case II

The functional dependence between dependent variables Yi, where i= 1,2 [6]and independent variables Xi, where i=4,5,6 and 7 which means that we have taken only the enterprises based on sectors they belong, where X4=commercial enterprises, X5=service enterprises, X6=manufacturing enterprise, X7=financial enterprises, are taken as a base.

In this case, according the ordered logit and ordered probit model, we have these results:

Table 2.1

X / Y	**Commercial**	**Service**	**Production**	
Y_1 Logit	-0.4486755 (0.3874121)	0.250153 (0.6412136)	0.10223 (0.6525899)	**Nr. of obs=283** **LRchi2(3)=3.54** **Prob>chi2=0.3160** **Pseu R2=0.0058**
Y_1 Probit	**-0.2307094** **(0.2249647)**	**0.2418676** **(0.3932849)**	**0.0874398** **(0.3795382)**	**Nr.of obs=283** **LRchi2(3)=3.57** **Prob>chi2=0.3122** **Pseu R2=0.0059**

Table 2.2.

Y_2 Logit	**-0.3985266** **(0.3520866)**	**-0.9183662** **(0.6362862)**	**-0.5230442** **(0.6297275)**	**Nr.of obs=283** **LRchi2(3)=2.40** **Prob>chi2=0.4936** **Pseu R2=0.0035**
Y_2 Probit	**-0.2563193** **(0.2161494**	**-0.566349** **(0.381603)**	**0.3344314** **(0.3539983)**	**Nr.of obs=283** **LRchi2(3)=2.55** **Prob>chi2=0.4654** **Pseu R2=0.0037**

Therefore, the results achieved through ordered probit model and ordered logit model, tell us that the sector of the enterprise does not impact on the question regarding the knowledge of the accounting law (Y1) which is seen by non significance of the relevant parameters (table 2.1), and knowledge of international standards accounting (y2) (table 2.2). Thus, the viability of IAS does not depend on the sector concerned which a company belongs to, which is the application of the law on accounting or which is applied to financial reporting.

Case III

The functional dependence between dependent variables Yi and independent variables Xi (where

i =1, 2, 3,….7), where we take the enterprises according to the size and the sectors that they belong to, where X1=small enterprise, medium enterprise X2, X3=large enterprise (taken as a basis); X4=commercial enterprise, X5=service enterprise, X6=manufacturing enterprise and X7=financial

[6] In this case we analyze only questions Y1 and Y2, respective knowledge of the law on accounting and recognition of IAS/ IFRS by the employees in companies based on the sectors they belong.

enterprise (that were taken as a basis). Thus, we have the same results as in case I and II, where we have been taking enterprises and separately by size and sectors.

Case IV

A functional dependence is found between the dependent variables between Yi, where i=1, 2, and the independent variables, taking X1=independent accountants interviewed and X2=TAK employees[7]. Results presented throught ordered logit model and ordered probit model through the Stata program are as follows (table 4.1.)

Table 4.1.

Y X	**Independent accountants**	**……**
Y_1 Logit	-0.9057387 (0.4251882) ***	Numb. of obs = 83 Lr chi2 (1) = 4.65 Prob>chi2 = 0.0310 Pseudo R2 = 0.0259
Y_1 Probit	**-0.5097235** **(0.2499189) ***	**Numb. of obs = 83** **Lr chi2 (1) = 4.19** **Prob>chi2 = 0.0406** **Pseudo R2 = 0.0233**

Table 4.2.

Y_2 Logit	**1.776325** **(0.5130097) ***	**Numb. of obs = 85** **Lr chi2 (1) = 13.72** **Prob>chi2 = 0.0002** **Pseudo R2 = 0.0788**
Y_2 Probit	**0.8942152** **(0.2644612) ***	**Numb. of obs = 85** **Lr chi2 (1) = 11.90** **Prob>chi2 = 0.0006** **Pseudo R2 = 0.0684**

In regards to the knowledge of the law on accounting (Y1), the probability that independent accountants are knowledgeable of this law is small enterprices in comparison to employees of the tax administration that is seen by significance of the relevant parameter found through ordered logit and ordered probit model of the counting purposes of the Stata program (table 4.1). Such a thing has a logical link in the manner of training and gaining professional independent accountants, who are more closely involved in the knowledge of accounting standards, and less of the law.

This is explained by the results of the answers in the question about the knowledge of international standards (Y2) where the likelihood that the knowledge of accountants and independent auditors is larger compared to that of the tax employees, which is seen through positive relevant significance parameter in table 4.2. Independent accountants have worked and are still working in their acquisition of knowledge regarding the complete knowledge of the International Accounting Standards (IAS)/International Financial Reporting Standards (IFRS) through training seminars and various lectures. This represents very positive indicator in terms of continuous development of the

[7] In this case we analyze only questions Y1 and Y2, respective knowledge of the law on accounting recognition of IAS/IFRS by the independent accountants and employees in the tax administration.

profession, as a requirement under asquis communautaire[8]. This result in the fact that accountants retain the knowledge received and add continually adds knowledge with time requests.

Conclusions

The situation highlights the fact that international accounting standards are accepted in Kosovo, as well. The largest percentage of accountants (87%) accept IAS to increase the quality of financial reporting. While, based on the analysis made by the ordered probit model and ordered logit model, we can say that there is a depending functional probability as well as between level of implementation of accounting standards and size of enterprises. Depending from the sectors they belong to independent accountants and auditors have more knowledge compared with tax administration employees. A certain level of dependency in cases where it exists is reflected through significance arising in certain cases. Therefore, based on the great role that IAS has on financial reporting, it is recommended that further steps should be taken in Kosovo towards promoting, recognition and enforcement of international accounting standardizations. Tis is necessary, because this has effect on the ability and competence of businesses to prepare reliable financial statements, that are transparent and readable for all users.

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[8] Asquis Communautaire, so called all EU laws together.

INFORMATION, KEY ELEMENT OF ACCOUNTING AND AUDIT IN THE KNOWLEDGE SOCIETY

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Abstract
In a knowledge society, the advantage of nations will not result from their natural resources, nor to the cheap labor, but from their ability to valorize the intellectual potential and to use efficiently the information. The knowledge based economy represents a new step in the development of human civilization that promises us a better future. The knowledge transfer between people and generations in order to facilitate human society's evolution is the basic function of information science.
This paper aims to examine how, in Romania, accounting and audit use and create information in current conditions of economic development. The purpose of this study consists in offering perspectives of improving the information quality. An information is high quality when, by its form and content, it corresponds integrally to all the needs, the exigencies and expectations of its user, without sacrificing the reality. A number of errors made by the accounting profession have been identified along this paper. These errors led to the decrease of information's credibility. But the study proposes some changes in order to restore the image of this profession: the changes are sustained by the advantages of Knowledge Economy and Information Society.
The research method consists in studying a rich background material, including reference items, such as works of applied and fundamental research. The originality of this work is given by the identification of knowledge society's challenge which could be used as a lever of revival for accounting and audit in Romania.

Keywords*: knowledge society, information technologies, information science, credibility, conformity.*

Introduction

In a knowledge society, nations' advantage will not result from their natural resources, nor from the cheap labor, but from their ability to valorize the intellectual potential and to use the information in an optimum way. Knowledge society represents more than information society or computer society. Since the Internet has occurred in the world with its advantages (e-mail, electronic commerce, electronic transactions, Internet market), we have been living in an information society. Knowledge is, in fact, understandable information and, in the same time, information that acts and produces effects. Knowledge society is now present throughout the world. However, an expression more used is that of *new economy*. It is true that in knowledge society we are witnessing a new economy covering Internet economy too. This new economy is the result of the growing role of science in the economy, a moment marking the so-called *knowledge revolution*. This is the way of the transition from the economy based mainly on physical resources to the knowledge economy[1]. The new economy does not involve a total replacement of physical products with digital products, but physical products are strongly influenced by digital technologies and by Internet during production and commercialization processes. The Knowledge-based economy offers to the society the premises of a better future. The development of information technology, doubled by a rapid increase in computing techniques creates a new vision of society's evolution, of its way concerning needs' identification and the establishment of new directions regarding the economic growth. Information becomes the fundamental resource of the organizations. Romanian society has to face not only the radical change at political and economic levels, but also the significant mutations which

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[1] Rădoi, D., 2005. Locul şi rolul comerțului electronic în noua economie, *Oeconomica*, nr. 2

are taking place at a global level. Romanian society's transition to the information system seems an important component of the development strategy.

The present paper aims to analyze the challenge of the knowledge society and that of information society which could be used as revival levers of the accounting and audit in Romania. The paper also presents the way by which the accounting profession creates information during the current conditions of economic development. The purpose of this study consists in offering some perspectives improving the quality of financial accounting information. We could consider that an information is high quality when, by its form and content, it fully corresponds to the needs of a variety of users, without compromising the reality and the truth. During this study I undertook a review of the accounting profession's errors which led to the decrease of information's credibility, without losing sight of the possible changes needed in order to regain this profession's image. The measures proposed are sustained by the advantages of knowledge and information societies. Applying information technologies in order to collect, to organize and to distribute the information could reduce physical effort and also the errors caused by the manual system designed to process it. New technologies provide a greater access to information. Technological progress has an essential influence on the working methods of the accounting profession and also on the necessary level of competence, as well as on public needs. This study has a highly theoretical character and the scientific research methodology has focused on a critical analysis concerning the newest publications in the field, the different studies and the applied and fundamental research papers. The originality of this work consists in identifying knowledge society's challenge for the accounting profession. Contemporary trends (globalization, information society, knowledge society) change the perception of individuals on accounting and audit. Information becomes a key element for the accounting profession within a knowledge society. Therefore we are held to take into account the importance of information both in social and in professional life. Information represents an unequalled good, without which the evolution in the society and in the economy seems impossible. It is the moment for the professional accountant to know how to create useful and reliable information for all the users. In this respect, knowledge society provides to the accounting profession the necessary resources for improving its image and mostly the public confidence in the information furnished.

1. The importance of information for the accounting profession in the context of knowledge society

Nowadays, the society's expectations concerning business world are increasingly complex. We all agree that we are witnessing a change in the public attitude towards business environment. As a consequence, we could discuss about enterprises' social responsibility, about social and environmental accounting so that the relations arising between organizations and consumers do acquire unknown meanings. All these phenomena governing economic and social world are based on information's circulation. The development of the accounting profession had virtually the same rhythm as the information's dissemination, as business evolution and that of market economy. The objective of the accounting profession consists in "creating confidence in the modern environment of market economy; confidence needs credibility and credibility bases on sincerity"[2]. The professional accountant is required to seek and present the truth, but also to act in public interest. In this respect, the accounting profession must be seen through its role of providing confidence in the market economy; without this confidence, the commercial relations could not exist any more.

It is vital for the accounting profession to be centered on *truth*. The concept of truth has been extensively treated in literature. In fact, truth has an important place in *knowledge theory*. One of the guidelines considers truth as an exclusive ownership of knowledge's object (of processes, phenomena or real systems). On the other hand, truth is considered an exclusive ownership of

[2] Țurlea, E., Nicolăescu, E.G., Mocanu, M., 2010. Nevoia de etică în auditul financiar, *Audit financiar*, anul VIII, nr. 8, București: C.A.F.R.

knowledge's subject (of our consciousness). Starting from these two directions, specialists have arrived to consider truth as an ownership of consciousness which is the result of the interactions between the knowledge's object and the subject matter. A sentence is true, if its content could be verified and confirmed by observation, by experience or by logical demonstration. Furthermore, we appreciate that a sentence is true, if it proves useful. This premise is the beginning point in studying *the accounting truth.* The professional accountant is held to seek, to present and to act in public interest, as I have already shown during this paper. The accounting profession provides confidence in the market economy. Accounting has also a major responsibility in the process concerning capital employment. Business profitability, partners' credibility and enterprises' creditworthiness are legitimized by the calculations of accounting. Audit is required to verify the compliance between accounting registrations and the reality. Because of the formalized language, we could notice an essential mutation in the business world: "the transition from empiricism to rigueur, from arbitrary appreciations to economic truth and to *the true and fair view*"[3]. The fair reflection of the economic and financial reality and of its consequences on social, human and institutional levels, do represent the defining attribute of accounting for whose improvement are fighting today the most prestigious specialists in "the science of accounts". Preoccupied by standards, by convergence, by the accounting reflection of reality's truth, the professional accountants are, in fact, concerned in the economy and in human beings. This is probably one of the reasons for which the European Union has taken into account the opportunity of recognizing the accounting profession at European level. Faced with this challenge, Romanian accounting could not remain passive. In this respect, Romanian accounting has to adapt to the processes of normalization, harmonization and convergence, both through its national institutions and through the action of organizations representing the accounting profession. However, Romanian accounting mechanisms still have a high rigidity in the implementation of accounting concepts and principles.

The analysis of information's essential characters presents an interest, on the one hand, by the means of the transmission mechanism and, on the other hand, by its content. These are issues which have been exploited by many approaches from different fields such as mathematics, sociology, psychology, linguistics and economics. A series of studies from the literature in the field analyze accounting as *an information system*, in a mathematical sense, through a quantitative approach of information and not through a qualitative one. Therefore, "the balance sheet is perceived as a decomposition of total amounts (total assets, total liabilities, total expenses or total revenues)"[4]. In Lee or Bedford's view, "accounting operations represent an information process consisting in the collection, the classification, the systematic arrangement and data presentation"[5]. According to this paper's orientation, we could perceive the accounting as an information system that "enables information's production and dissemination for making decisions"[6]. In a knowledge society, the measurement of the intellectual capital of an enterprise does represent a very sensible element, especially for the economy with undeveloped financial markets, as it is the case of Romanian economy. A study dating from 2006 shows us that there is a substantial difference between the value of intangible assets registered by the accounting and the value of the intellectual capital recognized by the market[7]. In a knowledge-based economy, despite the accessibility of information transfer between different users, we notice that economic actors do not have a free access to any information

[3] Mihalciuc, C., *Rolul contabilului în organizarea întreprinderii moderne performante,* http://www.oeconomica.uab ro/upload/lucrari/820061/17.pdf

[4] Theil, H., 1969. On the Use of Information Theory in Concepts in the Analysis of Financial Statements, *Management Science*, vol. 15, nr. 9, mai, Theory Series

[5] Lee, L.C., Bedford, N.M., 1969. An Information Theory Analysis of the Accounting Process, *The Accounting Review*, vol. 44, nr. 2, aprilie

[6] Ionaşcu, I., 2003. *Dinamica doctrinelor contabilităţii contemporane,* Bucureşti: Ed. Economică

[7] Anghel, I., Sandu, R., 2006. *Intellectual Capital (IC) Valuation. IC Value for the Romanian listed companies,* articol propus pentru Conferința Internațională de la Craiova organizată în 2006

they need. The consequences of such an observation prove that information itself has a cost and that there is a limited and differential access to information. Therefore, we consider that the available information on market is truly partial and asymmetric.

2. Accounting and audit: key providers of information for the society

This paper aims to examine how, in Romania, the accounting and audit use and create information in the current economic conditions. The purpose of this paper is to provide perspectives to improve the quality of this information. An information is high quality when, by its form and content, it fully meets the needs, the requirements and the expectations of its users, in the same time reflecting the reality.

2.1. The failures of the accounting profession

Accounting generates, by the means of financial statements, information necessary for the owners in order to invest their capitals. In the context of markets' globalization, it has been imposed a common language centered on rigorous and accurate information assuring communication on international markets. The beginning of the third millennium marked the acceptance of the accounting standards IAS/IFRS as global accounting standards. We are witnessing the convergence of accounting referential with US GAAP[8]. However, the accounting and audit activities are taking place in a conflicting environment, under social, political and economic pressures. The existence of these pressures often put into question the quality of the information provided by the professional accountants, both at our country's level and as the global one. The negative influence of these conflicts could be overcome only by professional ethics. Therefore, in order to maintain its high quality which provides information's credibility, the professional accountants are supposed to keep their reputation intact.

This current global crisis proves, among many causes, some failures of the accounting profession, failures regarding financial statement. These failures are linked to the names of prestigious companies like: Enron, WorldCom, Quest Communication, Adelphia, Nortel, Parmalat etc. Moreover, these failures must be considered in a close connection with the auditors of the companies involved. Corporate scandals have reinforced the need for a more sophisticated regulation and for a better supervision. Despite the multiplication of these imbalanced phenomena, we are now witnessing the spread of *best practice corporate governance* in the world and of regional analyses conducted by various international bodies. These analyses are designed to assess the economic environment in terms of the respect concerning the principles of corporate governance. As a consequence of the situation created, the International Federation of Accountants (IFAC) has initiated a number of measures for regaining public confidence in the services provided by the professional accountants, including the periodic review of International Standards on Auditing (ISA). In this respect, we should consider ISA 540 concerning "the Audit of accounting estimations, including the accounting estimations at fair value and the related disclosures". At this point, the paper brings into discussion the concept of *fair value* that has become a widely used reference in the accounting estimation. In spite of its defectiveness, the fair value approaches perfection more than *historical cost.* While the latter is oriented towards the past, the fair value is oriented towards future. The concept of fair value has been in the middle of international professional accountants' preoccupations for more than two decades. According to international valuation standards, this concept concerns "the most predictable price, agreed between the buyers and the sellers of an available good or service, the value not representing a simple fact, but an estimation of the price at a

[8] Ionaşcu, I., 2008. *Internaţionalizarea contabilităţii. Evoluţii şi consecinţe în mediul românesc. Culegere de studii şi cercetări,* Bucureşti: Ed. ASE, p.7

certain moment"[9]. In Romanian practice, for many specialists, the notion of fair value knows only one reality: *market value*. This value assures a greater objectivity because it is based on external information which could not be easily influenced by the enterprise. However, from practice, we have noticed that markets lost their liquidity or ceased to exist. As a consequence, the assessment at the fair value based on market information became irrelevant and it was affected by uncertainty[10]. There are situations when fair value could be determined only by using assessment techniques based on management estimations related to future cash flows and to the actualization rates adjusted in function of risks. Therefore, this paper shows that the concept of fair value "is placed at the border between evaluation and accounting"[11]. The responsible with financial reporting is required to prove expertise and professionalism, an adequate behavior inducing transparency, fairness and seriousness for being able to proceed to estimation during his activity. According to a dictionary of accounting, the estimation represents "the act of determining the approximate value of an asset or of a liability at the end of the accounting exercise in order to be attributed to a position in the financial statements"[12]. However, the estimation process involves professional reasoning focused on the newest information. The purpose of the estimation consists in foreseeing the future result of a transaction or of an event. In some cases, estimation involves even the assessment of elements at fair value. The international accounting referential treats fair value as a market value. In the same time, fair value represents "the amount for which an assess could be exchanged between the two interested parties in informed consent, during a transaction developed in conditions of objectivity, with a price objectively determined "[13]. However, the assessments led to significant distortions within the financial situations, which caused the current economic crisis.

In order to correct the situation that decreased the credibility of financial situations, a new assessment procedure has been established in Romania whose applicability started from January 2010. This procedure concerns the possibility that the value's depreciation of tangible and intangible assets could be found using many assessment methods, including cash flows-based methods[14]. By this procedure, we try to connect Romanian accounting practices to the international accounting referential. Therefore, Romanian accounting regulations sustain that the fair value of assets is determined, in general, as evidenced by market data, through an assessment accomplished usually by professional evaluators. But there are also systems in which, entities' management proceed to estimations by the means of internal specialists. In this case the auditors have to verify if the methods chosen by the management do correspond to the nature of the asset or of the liability evaluated. On the basis of relevant information, the decision makers must be able to diagnose the health of the company starting from well established criteria such as: the size of the guarantees offered; the capacity to get profits; the capacity of auto financing and of development. On the other hand, the utility of financial systems is determined by the creation of conditions in which the decision makers could identify and compare the information concerning enterprises among whom, there are or there are not relations. The failures of the accounting profession prove that information dissemination is presented as a real power source; dissemination process has been, many times, the result of the negotiations and of compromises between companies and the external factors. However, we should

[9] IVSC, 2007, Standardele Internaţionale de Evaluare, cap. *Concepte fundamentale ale principiilor de evaluare general acceptate,* Ed. Iroval, Ediţia a VIII-a, p. 26

[10] Niţă, M.M., 2010. Consideraţii privind poziţionarea valorii juste la graniţa dintre evaluare şi contabilitate, *Audit financiar,* anul VIII, nr. 10, Bucureşti: CAFR

[11] Idem 11

[12] Menard, L. et al., 2004, *Dictionaire anglais-français de la comptabilité et de la gestion financière,* Toronto : Edition Insitut Canadien des comptables agrées, Ordre des experts comptables (France), Compagnie nationale des commissaires aux comptes (France), Institut des reviseurs d'entreprises (Belgique)

[13] IASB, 2006, *Standarde Internaţionale de Raportare Financiară,* Bucureşti: Editura CECCAR, p. 984

[14] Botez, D., 2010, Practici profesionale privind auditul estimărilor contabile, *Audit financiar,* anul VIII, nr. 9, Bucureşti: CAFR

not ignore the fact that information's users do have different interests. Therefore, those working inside the organization are interested in knowing business development strategy in order to adopt right decisions in managerial process. Users outside the company are interested in getting information in order to guide their relations with the entity in discussion. Usefulness of the accounting information in financial disclosure shall be tested under the circumstances in which receptors use it in order to understand enterprise's economic reality and to take the best decisions. Changes in this profession may be entered on the line to find a common language in the globalization's conditions. Professional's efforts converge to the internationalization of the accounting starting from the idea concerning "the homogenization of information provided, the analyze in time and space of accounting information […] but also the guarantee of other users regarding the consistency and rigor of the profession"[15]. Besides the lack of credibility and the distortions in financial reporting, the professional accountants have proved also subjectivism in determining the estimated values. In order to avoid such errors, we should take into account the adoption in every company of adequate accounting policies and of procedures manual which is held to follow: the solidity of accounting recordings; the manner used to conduct and to record the operations; the composition of the existing balances and accounts. Therefore, auditor has a very important role in implementing new procedures concerning the identification of various potential errors or frauds made by the accountants, which may affect financial health. In this respect, ISA 240 presents a series of elements supporting the auditors in order to identify and to assess distortion risks due to fraud[16]. The fact that we are going today through hard moments for the global economy characterized by instability and worry, force us to take measures for the future. First of all, auditors and accountants must reassess their role on the market and proceed to actions by which they are held to restore financial information's confidence for the safe of the entire economy.

2.2. The improvement of the accounting information's quality

A sound system managing financial reporting and statements, supported by high quality standards and also by appropriate regulatory and governance frameworks, does represent an integral part of the economic development. The benefits of accounting and auditing standards are various. In order to make profitable these benefits, we should surpass many obstacles. One of them refers to the quality of information provided by accounting and auditing. The quality of accounting information has been the subject of many theories in the field. All evaluation criteria concerning the accounting information arise from the objectives of financial information. Therefore, every change in the objectives' list will influence the characteristics of information. We could appreciate that, regarding the quality of financial and accounting information, it is strongly connected to the interest conflicts appearing between different economic actors being preoccupied by the entity's economic reality. Thus, internal audit gains a significant role for providing more value to the enterprise. Previous researches show that companies proving by their financial statements material deficiencies in their internal control system are included within the smallest, the newest and the weakest financial entities[17]. Internal control deficiencies could affect information's quality in two ways. One of these ways consists in allowing random and unintentional distortions, caused by the lack of appropriate policies, by the insufficient training of employees. The other refers to the failure in detecting intentional misrepresentations, caused by management or employees' omissions. Among intentional misrepresentations, it is necessary to bring into discussion during this paper, the following ones: the overstatement of profits for the current period; the opportunistic underestimation of current profits

[15] Ristea, M., 1995. *Contabilitatea societăților comerciale*, București: Ed. CECCAR, p. 22

[16] Manolescu, M., Roman, A.G., Mocanu, M., 2010. Considerații privind cadrul general al procedurilor contabile proprii, *Audit financiar*, anul VIII, nr. 9, București: CAFR

[17] Doyle, J., Geb, W., McVay's, S., 2007. Determinants of weaknesses in internal control over financial reporting, *Journal of Accounting and Economics*, p. 193-223

anticipating weak future performances or even the creation of exaggerate reserves. The challenge for internal audit is to increase performance level consisting in providing information and comments on the deficiencies found, but also in optimizing the process of risks evaluation and in assuring the security of information systems. In the same time, internal audit should also enjoy the benefits of knowledge society and maximize information technologies' utilization. When the quality of accounting and financial information is higher, informational asymmetry between the various users is reduced. Therefore, at this point we could not ignore that companies are required to establish and maintain a quality control system assuring that the organization itself and its employees comply with professional regulations and standards in the field. They have also to assure that reports issued from the entity are in accordance with the current circumstances[18]. The interest of Romanian professional accountants concerning the contribution in enhancing the effectiveness of internal controls must be supported by local management practices. The purpose of the internal control is to increase the credibility of financial statements and reporting. Unfortunately, up to date, risk management has not been able to manifest strongly in Romanian enterprises. The organizational culture itself could not develop an environment suitable to control.

3. Knowledge society – a premise for the revival of accounting profession in Romania

In a knowledge society, nations' advantage will not result from their natural resources, nor from the cheap labor, but from their ability to valorize the intellectual potential and to use the information in an optimum way. The knowledge-based economy offers the premises for a better future. The development of information technology, doubled by a rapid increase in computing techniques creates a new vision of society's evolution, of its way concerning needs' identification and the establishment of new directions regarding the economic growth. At this moment we should renounce to consider information technologies as a method for spending money. New technologies represent a true investment, having an important role in determining the added value. As the global economy recovers, business innovation by the means of information technologies starts to get more substance. The extensive use of technologies in the management and processing of financial-accounting data, will determine effectively the quality of information provided. We consider that information is high quality when there is certainty that transactions took place, when they are authorized, registered and processed correctly and completely (ISA 315 clarified). The paper treats knowledge society and information society as premises of the revival for the accounting profession in Romania, depending on the fact that the professional accountants have an access to a collaborative work environment based on performing information systems. The information technologies available on software market offer various alternatives for the accounting profession. On the latter depends the choice of the optimum alternative but also the accountants' training and their lifelong learning perspective necessary for increasing their skills. Moreover, the rapid development of information technologies as well as their integration at the level of all companies' activities requires a particular emphasis on the aspects connected to computer systems used by the accounting profession. Integrating new technologies into the financial and accounting systems also provides a number of advantages including the assurance that information representing the basis of financial system is complete, accurate and reliable and it could be quickly transmitted to all users. Therefore, we should set up the adequate methodology which would support the professional accountants in verifying the credibility of financial systems. They have to make sure if internal control is efficient and whether regulations have been met. Another advantage refers to the idea that new technologies reduce many of the risks associated with the manual recording systems. Despite all these, new technologies do present a number of risks. Among the risks, the present paper highlights: the risk concerning the data which will be processed to be invalid, incomplete and to contain errors; failed results obtained by

[18] Cantwell, C., 2010. Considerații privind controlul calității firmelor de audit, *Audit financiar*, anul VIII, nr. 11, București: CAFR

data processing if there are modifications or if some important files are deleted; unauthorized or even inexistent transactions might be recorded; there might be cases when the users of information technologies are insufficiently prepared and they are supposed to process data for getting financial statements. Therefore, this study aims to attract the attention that information technologies are effective only if they maintain information's integrity and data's security. These new technologies must include general controls as well as specific controls regarding the applications in discussion[19]. In order to cover the risks of using information technologies, companies have the opportunity to resort to some particular internal control mechanisms. The objective of these mechanisms consists in: assuring compliance to settlements and regulations; realizing properly the financial reporting; conducting effectively the operations etc. Therefore, we consider that it is obvious for every organization to keep justifying documents in their traditional form. The possibility of a coherent risk management presents a lot of benefits that enhance the credibility of the accounting information. Audit as well as the accounting profession could be involved in achieving the entity's objectives and also in its reshaping. The integration of data's technologies in the software specific to company's needs might lead to a new development direction of the accounting profession. This direction aims to regain the profession's image and to achieve performance indicators.

Conclusions

This study highlights the implications of knowledge society for Romanian accounting profession. The knowledge-based economy creates new opportunities for a profession that has lost its credibility and image. The valorization of the intellectual potential and the optimum use of information should represent priorities for governments and also for the specialists in accounting field. Romanian society must face not only the radical change produced at political and economic levels, but also the significant mutations taking place at the global level. The transition of our society to the information system seems a very important component of the development strategy. The paper shows the way by which the accounting profession creates information in the current economic conditions. The purpose of this study consists in offering some perspectives concerning the improvement in the quality of financial information. During this paper, I proceeded to a review of accounting errors that led to the credibility's decrease of the information provided, without losing sight of the possible changes necessary to regain the image of the profession. The proposals of this study are supported by the advantages of knowledge economy and of the information society. The increasing complexity of business environment requires a continuous improvement of the information system and also its organization in a unified, an effective and a modern form. Information leads to managerial decisions. Therefore, managers appreciate more often information as a true resource that could give to its holder a competitive advantage. Applying new technologies in order to collect, to organize and to distribute information, we could reduce the physical effort and also the errors caused by the manual system of data processing. Technological progress has a great influence on the working methods of the accounting profession, on the level of competence required and on public needs. One of the conclusions of this paper highlights the idea that the value of the intellectual capital, the so-called *knowledge value*, represents a concept which could not be ignored any more. It is the time for the professional accountant to know how to create useful and credible financial situations, both for the enterprise's management and for its partners. In this respect, I consider that knowledge society offers the opportunity of a coherent information system. In the meantime, knowledge society could become the lever for the revival of Romanian accounting profession. The actors involved in accounting and auditing should make every necessary effort to improve the profession's image and to increase the confidence in accounting reporting and

[19] IFAC, 2009. Manual de Standarde Internaționale de audit și control de calitate. *Audit Financiar*, București: coeditare CAFR-Ed. Irecson

statements. This study aims to identify some perspectives of future researches. Among the possible directions of exploration, there are: finding alternative sources of accounting and financial information which are supposed to increase the quality of financial communication; determining the cost for effective information. The way by which we could assure a moral behavior for the professional accountant, might be an interesting topic of investigation for future researches too.

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COMBINING MULTI-LEVEL AND NETWORK GOVERNANCE WITH A SPILLOVER EFFECT: THE CASE OF THE EUROPEAN "INNOVATION UNION" FLAGSHIP INITIATIVE

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Abstract
The purpose of this paper is to demonstrate the possibility of a theoretical up-grade to the framework offered by the theory of governance: from a middle-range theory to a full theory through adding a neofunctionalist component that would enhance its explanatory capabilities by projecting them at the systemic level. The authors have chosen, as a case study, the flagship initiative "Innovation Union" within the Europe 2020 Strategy; this initiative provides a set of actions that can be undertaken at different levels of political authority (supranational, national, etc.) and involving several types of actors (state, supranational, non-state, etc.), context which validates the theoretical components of governance, represented by multi-level governance and network governance. The authors consider that the integration of the research policy of the Member States will produce a spillover effect (in neofunctionalist terms) on other policy areas; the argument is based on the fact that the Europe 2020 Strategy, in general, and the flagship initiative "Innovation Union", in particular, require concerted actions within different policy directions (research, education, industrial policy, fiscal policy, employment, communications, environment, etc.), context that determines an "integration" trend of these policies on the basis of a spillover process. The authors believe that the integration of all policy areas involved in the flagship initiative "Innovation Union" would lead, through a spillover effect, to a better European economic integration. The normative foundation of the analysis is the Treaty of Lisbon, as the flagship initiative is part of the research and development policy of the European Union, in which the EU currently holds not only the competence to support, coordinate and complement the actions undertaken by the Member States, but also to define and implement programs.

Keywords: *Multi-Level Governance, Network Governance, Spillover, Europe 2020, Innovation*

Introduction

The global financial and economic crisis had a great impact on the European Union, cancelling part of the social and economic progress that has been achieved in the years preceding the crisis. Now, the most important objective of the EU is to recover soon and continue with the reforms. The world has changed, but Europe is still failing to adapt to the new reality around it. Besides the effort to overcome the crisis, the EU faces a number of other internal and external challenges (aging population, resource scarcity, climate change, globalization, the spread of new information and communication technologies, the emergence of new economic powers etc.[1]) which are continuously multiplying. In this context, it becomes imperative for the EU to reconsider its priorities and to

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[1] For more information about the internal and external challenges which the EU has to face at the moment, see European Commission *Communication from the Commission. Europe 2020 – A strategy for smart, sustainable and inclusive growth*, COM (2010) 2020 final, Brussels, 3.03.2010.

review its sources of competitive advantage on global scale. Europe's only chance to return as a major player on the international stage depends on all Member States acting together as a Union. Therefore, the current developments within the EU are an important testing ground for EU scholars, who can closely analyze the means through which the integration/convergence of the Member States can be achieved, thus developing an improved theory of European integration.

This paper is meant to explore the possibility of a (theoretical) up-grade of the theory of governance: from a middle-range theory to a full theory by adding a neofunctionalist component that would enhance its explanatory capabilities by projecting them at the systemic level. This research initiative is based on the belief that the great theories in European integration (neofunctionalism and intergovernmentalism) aren't able to explain the current developments of the EU and that the recent theoretical perspectives on EU governance (multi-level governance and network governance) aren't enough to form a comprehensive theory of EU integration (they seem to lack the prescriptive component). Thus, it calls for a rethinking of the EU integrationist theories in order to be able to reflect the present reality of the European Union.

The authors of this article believe that the good explanatory capacity of the EU governance theory, in both of its forms – multi-level governance and network governance, can be improved by adding a neofunctionalist component of spillover. For proving this assumption, we have chosen to analyze – as a case study – the flagship initiative "Innovation Union" within the Europe 2020 Strategy. We believe this initiative is the most important of all seven flagship initiatives because it focuses on innovation, a thing which, in our opinion, must define every EU policy in order for the EU to develop and to become a significant player on the global stage; thus, the integration of the research and innovation policies of the Member States can produce a spillover effect on other policy areas.

The theoretical framework of this paper is represented by the neofunctionalist approach and the theory of governance; these perspectives on European integration are presented in the light of the existing specialized literature in the domain and by trying to identify a correlation between them, in order for a new, more comprehensive EU integration theory to emerge. The methodology used for this article consists in the study of documents, especially research papers of the main authors in the field of EU studies or official documents of the EU, such as the Treaty of Lisbon and other documents that establish the framework and the functioning of the Europe 2020 strategy and of the Innovation Union flagship initiative.

The analytical approach is structured in three chapters as follows: the first chapter presents the theoretical framework of the analysis; the second chapter corresponds to the case study and the third is meant to draw the conclusions of the paper.

1. Theoretical Framework

1.1. The Theory of Governance

Within recent decades, the area of European Studies has become extremely flexible; the very concept of integration has been strongly challenged, both in terms of its traditional neofunctionalist perspective (emphasizing the importance of different types of actors pressing for integration, which would eventually lead to a supranational state able to satisfy both the security and welfare needs of its components), or from an intergovernmentalist point of view (focusing on integration as a type of cooperation between countries seeking to meet their national interests, like the model of classic international organizations). New approaches have emerged in the '80s, which were more interested in issues such as streamlining the decision-making process or in other aspects of daily political life; we are talking about "the governance turn", when studies became less concerned about international relations theory, but more focused on comparative studies and public policy. Currently, there are either theories concerned about conceptual clarification or theories which seek to build explanatory

political models, but, unlike the classical theories, they remain at a middle-range and seem to ignore the prescriptive aspect rather much.

Of all these middle-range theories, the governance perspective distinguishes itself both as a research interest in its own right and as an orientation that underlies the majority of the new approaches developed within the EU studies. In this case, the EU studies are perceived (see Chryssochoou 2009) as a combination of instruments coming from the two lines of research (the international relations theory and the comparative policy studies), in a context where traditional conceptions of both the international system and the nation-state are caused by a phenomena that determines a change of the old analytical categories (Chryssochoou 2009, p. 72)[2]. According to Rosamond, the questions addressed by this kind of analysis refer to "the nature of authority, statehood, the organization of the international system in the contemporary period", researchers being now less interested in explaining the EU *per se*, but more in the impact of the European construction on other factors/actors/ entities etc. (see Rosamond 2007, pp. 117, 119-121).

As we already stated within the introductory section, the purpose of this paper is to demonstrate the possibility of a theoretical up-grade to the framework offered by the theory of governance: from a middle-range theory to a full theory through adding a neofunctionalist component that would enhance its explanatory capabilities by projecting them at the systemic level.

Since the voices who insisted that the EU should not be considered strictly a classic international organization or a state in the making, have currently gained more power, the topical question remains: how can we tackle the EU phenomenon theoretically? By further applying the tradition of the great theories of integration or preferring to focus on particular aspects of the European experience? In our opinion, a solution may consist of the EU governance theory – one of the newest elements within the theories of integration – which distinguishes itself from the classical theories or form the once developed in the 80s especially through the way of conceiving/perceiving the levels of authority and the types of actors involved in the process of policymaking. However, a discussion about the theory of governance starts with the operationalization of the concept of *governance*. Analyzing the literature, we note that the presence of governance assumes an irregular distribution of power between administrative levels and between different types of actors (public and private, but also from the voluntary sector) and a constant process of negotiation between all these elements. One of its main merits is its capacity to bring together institutions and citizens (as individuals or, more often, as interest groups). When talking about governance, we tackle the issue of the "re-allocation of [formal] authority" in relation to state actors - individual decision-making levels, subnational (local or regional), supranational, international or transnational, are being developed - and the fact that "networks of diverse kinds have multiplied at every level"; therefore, we refer to the multiplication of actors, within an increasingly decentralized decision-making context (Hooghe and Marks 2001, p. 2; see also Gallagher, Laver and Mair 2006, p. 154).

As a working definition for governance, the following interpretation (proposed by Chhotray and Stoker) is worth mentioning: "governance is about the rules of collective decision-making in settings where there are a plurality of actors or organizations and where no formal control system can dictate the terms of the relationship between these actors and organizations" (Chhotray and Stoker 2009, p. 3). The debate on the idea of EU governance has occurred in the context of the extremely dynamic beginning of the millennium, when some European policy makers wanted to change the EU's institutional scaffolding for this to be consistent with new developments and the new political and social challenges. Thus, for the European Commission, the discussion on governance has been primarily centred on how the "the Union uses the powers given by its citizens" or on the existing solutions in order to increase transparency in policy making through involving as many elements of

[2] Pollack also believes that the development of governance studies has been influenced equally by both research perspectives (Pollack 2005, p. 42)

civil society as possible[3]. The proposals presented by the Commission in the *White Paper on European governance* for the achievement of the above mentioned objective, seek: (a) to increase citizen participation in the process of public policies making and bring greater openness to EU citizens, (b) to improve policies, regulations and results (quality improvement of the policy implementation process), (c) to promote global governance (increasing EU's role in the international system), (d) to redefine the role of EU institutions[4]. Summarizing the ideas of the European Commission, "«Governance» means rules, processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness [of the European institutions towards other actors], participation [of actors], accountability [of actors], effectiveness and coherence [of policies][5]".

When exploring the theoretical aspects of governance, we must start by saying that the idea of governance is intensively used in analysis about the European Union, especially in its multi-level aspect - multiple decision centres, multiple territorial levels involved in decision-making, multiple actors (Chhotray and Stoker 2009, p. 16-22). In any case, in Gary Marks' articles, **multi-level governance** was mainly a simple description of processes related to the implementation of structural policies (George 2004, p. 107); this phrase (multi-level governance) was assumed later also by other analysts, like Liesbet Hooghe in 1996[6], at the beginning in similar contexts and afterwards in different other areas. The emergence and development of the concept of "multi-level governance" was determined also by the exponential growth of the number of analysis on the EU in terms of being a political system, in detriment of those interested in finding the causes and purpose of the integration process. Ben Rosamond argues that the EU has a vague character ("a hybrid form: neither political system nor international organization, but something in-between" – 2000, p. 110)[7], which is why studies on governance in general, and especially in its multi-level expression, are extremely useful for exploring the originality of this Union, which is seen as an expression of postmodernism; in this context, (multi-level) governance is not considered a theory, but more of "a metaphor used to depict the mature stage of the EU polity" (Rosamond 2000, p. 201), in which authority is no longer located within the nation-state, but divided among various types of actors involved in the decision making that simultaneously takes place within several levels. In the context of the governance turn that led to a shift towards "studying the EU as a political system in its own right", M. Cini sees multi-level governance as "an approach to the study of EU politics which emphasizes the interaction of many different actors who influence European policy outcomes" (Cini 2007, p. 460, 462)[8]. Papadopoulos (2005, p. 316) doesn't consider this phenomenon to be representative enough for an analysis; he is rather seeing it at the confluence between organizational theory and the policy networks analysis[9]. Thus, among the theoretical principles of multi-level governance features the fact that power is

[3] The Commission of the European Communities, *European Governance. A White Paper*, COM(2001) 428 final, Brussels, 25.7.2001, p. 3.

[4] The Commission of the European Communities, *European Governance. A White Paper*, COM(2001) 428 final, Brussels, 25.7.2001, pp. 4-6.

[5] The Commission of the European Communities, *European Governance. A White Paper*, COM(2001) 428 final, Brussels, 25.7.2001, p. 8.

[6] See Hooghe, Liesbet, ed. 1996. *Cohesion Policy and European Integration: Building Multi-Level Governance*. Oxford: Oxford University Press.

[7] For William Wallace, in the EU one should "remark on the persistence and adaptability of the provisional", that is why the organization is seen as "relatively stable *provisorum*" and "a partial polity", although it remains "a stable structure of collective governance" (Wallace 2005, p. 471, 473).

[8] A type of multi-level governance analysis preferred by "those studying federalism, decentralization, European integration, regional and global regimes" is the one which "prepares a list of policy areas and sees how authority is allocated among them" (Hooghe and Marks 2001a, p. 3).

[9] For other authors, multi-level governance is not an alternative in itself but a "gradual incremental development in which institutions still play a decisive role" as a "complement for intergovernmental relations in a certain regulatory framework" (Peters and Pierre 2004, p. 75-76).

spread among several levels of asymmetric authority and several actors - there are differences both horizontally and vertically - the interaction between public actors and other types of actors (coming from the secondary or tertiary sector) leading to the removal of "the debate about authority away from the zero-sum notions associated with discourses of sovereignty" (Rosamond 2000, p. 110).

Another aspect of governance is the **network governance** perspective of carrying out public policies, which is perceived as an alternative for hierarchy and market. Not denying the fact that following this "third way", most processes are conducted through a network, the term "network governance" as a mode of governance seems a bit restrictive; however, networks are just one part – although significant – of governance. Thus, in our opinion, governance represents a type of governing, and its two main characteristics are its multi-level aspect and the presence of networks. An analysis of the elements of network governance (Kohler-Koch 1999, p. 24; see also Eising and Kohler-Koch 1999, p. 6) would lead to conclusions on:

- The activating role of the state – through mobilizing stakeholders and carrying out strategies to "reduce transaction costs and give stability to self-regulatory agreements";
- The dominant orientation of decisions - the negotiation to achieve the common interest without omitting to maximize private interests (however, the maximization is, usually, a sub-optimal one, compared to other cases)[10];
- Models of non-hierarchical interaction, overlapped interactions, involving both public and private actors, which differ from one context to another;
- The dominant actors - different government authorities (not the "state" as an abstract entity) and numerous interest groups;
- The level of political action - difficult to identify, with horizontal and vertical cooperation actions in order to achieve goals; Kohler-Koch insists much on the idea of the emergence of problems associated with the application of the principle of subsidiarity within the EU (the "rise to provincialism and the exploitation of the general interest").

The relationship between multi-level governance and network governance remains rather loosely defined, although theorists explicitly recognize the link between the two events occurring within governance, still the nature and purpose of the interaction between the two aren't explained as accurate as they should be. Papadopoulos, for example, mentions the recent efforts on trying to tie multi-level governance, "which developed in response to state-centric approaches to integration – and the literature on network governance, which focuses on the local level, but also on specific policy sectors at the national level" (Papadopoulos 2005, p. 316). However, his own version of their correlation is not satisfactory: multi-level governance should be intrinsically linked to "formulation and implementation of public policies by networks" (Papadopoulos 2005, p. 316), but there may be networks operating at a single decision-making level, as well as multi-level process carried out through other means than networks.

In our opinion, governance can be interpreted as a mixture of different theoretical approaches brought together under the same roof, multi-level governance and network governance being the most developed of its branches. Multi-level governance or network governance, taken separately, may represent ideal and symbolic models for the European Union; as Bunge (1974) explains: having the same referent (the EU), the two types of governance can serve as models for different – competing or not (the new institutionalism or constructivism, for example) – theories. Put together, however, the two gain the valences of a middle-range theory that explains the daily political processes of the European Union; in addition, with a neofunctionalist input, oriented towards processes at systemic level, it could lead to a full theory of European governance, having a major predictive capacity linked to the development of the system.

[10] The consensus-oriented nature of negotiations and the "sub-optimal policy outcomes" within the EU would be determined by "the complexity" and "unpredictability of the EU policy agenda" (Eising 2007, p. 207).

1.2. The Neofunctionalist Theory

Many of the researchers interested of the phenomenon of the European integration (independent of the way one looks at it – as a process or as a final target) consider that between the concept of neofunctionalism and the notion of *integration theory* there is a practical equivalence and some of the main reasons for supporting this view are that this stream is omnipresent in the theoretical approaches concerning the EU and also the similarity between the development of the EU and the predictions of early neofunctionalist analysts. In fact, we can say that the experiences of the neofunctionalist theory – the fundamental explicative theoretic framework in the first years of the EU; the main theoretical opponent of the major stream developed afterwards, the intergovernmentalism; the current significant influence on the new types of analysis of the European frame – follow rather exactly the sinuous course of the evolution of the EU, all the way from the excessive optimism of the 50's, to the difficult times of the 70's and to the recovery from these during the 90's.

The key elements of neofunctionalism, according to the systematization of Ben Rosamond, would be the spillover and the loyalty transfer. From an adjacent point of view influenced by Charles Pentland, C. Strøby Jensen (2007) also mentions the thesis of the socialization of elites and that of the supranational interest groups, besides the spillover component, indicating that these three elements are perceived as "different reasons" aimed at explaining the "dynamic integration process".

The spillover process has been introduced by Ernst Haas and was afterwards refined by other researchers. The spillover refers to the way that the creation and deepening of integration in a certain economic sector will produce pressures for a wider economic integration in and outside that sector and for a higher authority given to the European level (E. Haas, 1968 *apud* Rosamond 2000, p. 60). The example that neofunctionalists prefer is that of the creation of the European Coal and Steel Community. In a context dominated by national sensitivities of the member units interested only in a formal cooperation limited at the lowest possible level, the evolution of the idea of spillover, monitored by the researchers concerned with the evolution of the integration theories, indicates however Haas's subsequent conviction related to the need for a strong supranational institutional framework that would be able to supervise and provide the essential impetus for integration, both in terms of its scope and the increase of its own authority in the new emerged space.

If we limit the analysis to the classic type of spillover supported at first by E. Haas, we can distinguish two types of spillover, differentiated by the importance it gives either to cooperation by areas and the pressures that are being involuntarily generated by it in the direction of a wider integration – functional spillover, or to a political input, as limited as it may be, which would provide the basis for a similar cooperation.

The second main element of the neofunctionalist theory is the so called loyalty transfer from the national to the European level, and one of the explications for this kind of transfer has envisages the exemplary manner in which the new institutions at this level are supposed to action, in a way that their relationship with the citizens will be almost as direct as that of the nation-states (or even closer in some areas). In fact, in order to maintain the accuracy of the terminology, the word "citizens" appears quite rarely in the neofunctionalist analysis, as they are more interested in the role of the supranational interest groups and elites, as it is indicated also in Strøby Jensen's two thesis. Thereby, by emphasizing the role of training and socialization of these categories (let us not forget that pro-European approaches that come from that loyalty transfer have a positive extrinsic motivation), Haas, however, seems not to regard the success of the integration process as an automatic consequence of the spillover, feeling the need of constant pressures of sub-national entities, but especially those of supranational ones (those new emerged institutions that would have a political development that would eventually get out of the control of the initial design established by egocentric states; the

phenomenon was actually proved by the evolution of the European Commission and the EU Court of Justice). In other words, it would also be necessary a political spillover[11].

The transition from the functional spillover to the political one, especially through the intervention of elites and interest groups, is insufficiently argued by neofunctionalists and often criticized by analysts. In fact, this extremely important role assigned to the elites was one of the main sources of critics towards neofunctionalism. We can recall for example Rosamond's vision that said that neofunctionalism is "an attempt to theorize the strategies of the founding elites of post-war European unity" (Rosamond 2000, p. 51) and also Strøby Jensen's questions regarding the importance of a „democratic and accountable governance" (Strøby Jensen 2007, p. 87).

Leon Lindberg seemed to be more interested in the way decisions were taken at the supranational level than in the change of attitudes and preferences, meanwhile Ben Rosamond points out the possibility that „the likes of Monnet were playing typical games of power politics, but employing the fashionable rhetoric of supranationalism and European unity" (Rosamond 2000, p. 53). Although the progress of the EU offered a possible answer to the critique regarding the democratic deficit and the opacity towards its own citizens by increasing the European Parliament's powers and through various programs of information/communication/consultation for direct contact with the EU's nations, the neofunctionalist thesis that stipulated that "interests, loyalty, and power must lie at one level or another: to be *retained* by states, or *transferred* to a new entity" has proven to be inadequate, given the fact that they can actually be "shared and dispersed" (Wallace 2005, p. 463).

For a while, neofunctionalism was an integration strategy with pretty convincing results in an environment clearly defined by researchers of the international relations as anarchical (or intergovernmental as the Europeans would put it). Despite the criticism that neofunctionalism had to face during the 60s and 70s, it (relatively recent) returned to the attention of researchers. As a concession to the years when neofunctionalism couldn't explain the evolution of the EU, Philippe Schmitter doesn't think that the EU will follow the steps that the nation-state made in its consolidation process, but neither the ones of an interstate organism, no matter under what aspect. He considers that what will remain will be something new, with "major implications for the actors, the processes and the outcomes of policy-making at all levels in Europe: supranational, national and subnational" (Schmitter 1996, p. 14), outlining the need for a level of authority that could avoid the situation in which the multiplying of actors should lead to "free riders" of the public policy making process (it is also reminded the important role that the EU's Court of Justice has had over the years in this respect).

The current rediscovery of the main concepts and principles of neofunctionalism may also mean their dilution in various research approaches that are resistant to the idea of building a mega-theory of integration and focused on explaining the specific elements of the EU phenomenon (the so called middle-range theories). Although constantly present in the explanatory dichotomy of the mainstream EU visions, neofunctionalism is in C. Strøby Jensen's opinion currently just a middle-range theory, „a partial theory […] which would explain some but not all of the European integration process" (Strøby Jensen 2007, p. 96).

[11] The definition of political integration and that of supranationality in Haas's case: (1) the political integration represents "the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new centre, whose institutions possess or demand jurisdiction over the pre-existing national states. The end result of a process of political integration is a new political community, superimposed over the pre-existing ones" (Haas 1968, p. 16); (2) "Supranationality in structural terms means the existence of governmental authorities closer to the archetype of federation than any past international organization, but not yet identical with it" (Haas 1968, p. 59).

2. Case Study

As mentioned before, the purpose of this paper is to demonstrate the possibility of a theoretical up-grade to the framework offered by the theory of governance: from a middle-range theory to a full theory through adding a neofunctionalist component that would enhance its explanatory capabilities by projecting them at the systemic level. After reviewing the main features of the theory of governance and of the neofunctionalist approach on EU integration, in order to sustain our assumption about making the two perspectives complement each other, we have chosen to analyze the flagship initiative "Innovation Union" within the Europe 2020 Strategy. From all the seven initiatives, we have chosen this one because we believe it is the most important of all due to the acute need of innovation in every policy field of the EU and the spillover potential of innovation.

2.1. Defining the Issue

First of all, we must define what we understand under the term *innovation*. Ann Mettler (2009, p. 14-15) cautions that innovation mustn't be seen only as a "social phenomenon that is mostly about research and technology", but as a means that provides change within the society (both in the economy and in the social structure); innovation shouldn't be considered an exclusive feature of private companies, which seek to gain profit through using it, because in the public or in the third sector innovation is also needed to "solve societal challenges or empower users and citizens". In the documents of the EU institutions, innovation is mainly seen as an instrument for increasing EU's economic competitiveness[12], but also as EU's "best means of successfully tackling major societal challenges"[13]. Thus, innovation is especially associated with research and technology through which new products and services can be delivered to the citizens, but it also implies a renewal of business and social processes and models.

The importance of research and innovation to the European construct is first stated in Article 3 (2) of the Treaty on European Union[14] within the Treaty of Lisbon[15], where, besides the commitment to enforce an internal market and work for the sustainable development of Europe, the EU engages to "promote scientific and technological advance". By including this statement in the General Provisions of the TEU, scientific and technical innovation becomes one of EU's core values; thus, every EU policy and activity must be designed and implemented in an innovative manner, by both using the latest technical and scientific findings and contributing to the development of new research outcomes.

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[12] See The Commission of the European Communities, *Putting knowledge into practice: A broad-based innovation strategy for the EU*, 2006, The Commission of the European Communities, *Towards world-class clusters in the European Union: Implementing the broad-based innovation strategy*, 2008, The Commission of the European Communities, *Assessing Community innovation policies in the period 2005-2009*, 2009.

[13] The European Commission, *Europe 2020 Flagship Initiative "Innovation Union"*, 2010, p. 2.

[14] When referring to the Treaty of Lisbon we mean both documents adopted in December 2007 and entered into force on 1 December 2009, i.e. the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU); in all other cases, the document being referred to will be indicated: TEU or TFEU.

[15] Through its entry in force on 1st December 2009, the Treaty of Lisbon marks the adapting of the EU legislation to the global economic and political context of the early 21st century: a Union of 27 states - or maybe more sometimes in the future - that one can not apply the same rules which were valid for six states. As stipulated in the Treaty, some of the main changes in the functioning of EU institutions and to the EU in general are: the redefinition of EU powers, the strengthening of the role of the European Parliament and of the national parliaments, the social partners' active involvement facilitating social dialogue at all levels and the horizontal "social clause" etc. (For a brief review of the changes brought by the Treaty of Lisbon to the functioning of the EU, see http://europa.eu/lisbon_treaty/glance/index_en htm). The legislative and political reform within the EU has been necessary in order to create the favourable prerequisites for internal economic and social reforms, but also in order to strengthen the EU's external action.

The increased pressure for the progressive integration of research activities within the EU is revealed by the fact that, in the research and technological development field, the EU shares with the Member States the competence to legislate and adopt legal binding acts[16]. Thus, according to the TFEU (Article 4.3), in the area of research and technological development, the European Union is entitled to "carry out activities, in particular to define and implement programmes", but by doing so, the Union should by no means prevent the Member States from exercising their competence in this field. Articles 179 to 188 of the TFEU outline the main features of the R&D domain within the EU. Thus, the EU seeks to create a European research area (n.b. some sort of "internal research market") where researchers, knowledge and technology circulate freely, and supports research within the European enterprises, including SMEs, research centres and universities, by facilitating the cooperation between such entities at EU level, but also with similar entities from third countries. As mentioned before, the Union encourages research activities to be delivered within every policy field of the EU and urges for the dissemination and use of research outcomes within all its activities, which is expected to lead to an increase of the external competitiveness of the Union. In order to carry out the outlined objectives, the Union and the Member States have to coordinate all their actions in the field of research and technical development. Therefore the European Commission, with the support of the Member States, has the task of developing guidelines and indicators in this field, but also of creating the necessary conditions for a fair exchange of good practices and a just monitoring and evaluation process. According to Article 182 of the TFUE, a multiannual framework programme, which includes all EU actions in the R&D field, is adopted by the European Parliament and the Council, following the ordinary legislative procedure and after consulting the European Economic and Social Committee. This framework programme is implemented through a number of specific programmes, which are adopted by the Council acting according to a special legislative procedure after consulting with the European Parliament and the European Economic and Social Committee. All decisions regarding the establishment of the European research area are also taken by the European Parliament together with the Council on the basis of the ordinary legislative procedure, after a consultation with the European Economic and Social Committee. Therefore, we can conclude that, according to the Treaty of Lisbon, the decision making process in the field of research involves a multitude of actors coming from different levels of authority – national and European – which interact with each other in order to influence the research policy outcomes.

2.2. Presenting the Data

In a time of big social and economic uncertainties, like the period we are currently going through, after the global financial crisis, the best way for the European economy to recover is to capitalize the innovation and development potential of its Member States. To give an impetus to the EU's future development, the European Commission defined in March 2010, the Communication "Europe 2020 - A European strategy for smart, sustainable and inclusive growth", laying out the main objectives and initiatives for the Europe 2020 Strategy, which was approved by the European Council in June 2010 and thus formally became the new EU's development strategy. This isn't EU's first such attempt, because the Union went through a similar process in 2000, when the Lisbon Agenda[17] was adopted, whose final results were far below expectations. Hence, the following (justified) question may arise: why would Europe 2020 have a different fate from the previous initiative? One possible answer might be that, learning from past mistakes, in the new EU strategy,

[16] For more details about what a "shared competence" means, see TFEU Article 2 (2).

[17] The Lisbon Agenda was EU's development plan to turn the European economy into "the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion" by 2010 (*Presidency Conclusions* of the Lisbon European Council Meeting on 23-24 March 2000). Based on its modest progress in reaching its goals, seen at the mid-term report, the Lisbon Agenda has been reviewed in 2005 through focusing on achieving a strong and sustainable economic growth and on the creation of more and better jobs. In 2010, the final year of the Lisbon Agenda, its unfulfillment has been intensively debated upon.

the coordination of national economic policies and the monitoring progress will be stricter. This will be possible, especially due to new legislative framework provided by the entry into force of the Treaty of Lisbon.

The Europe 2020 strategy was designed as EU's response to the crisis and as EU's development plan for the next 10 years, which would make the EU smarter, sustainable and more inclusive. As stated in the European Commission's Communication[18], the EU will focus on 3 main priorities:

✓ Smart growth – the development of a genuine knowledge - and innovation - based economy,

✓ Sustainable growth – the establishing of a resource-effective, greener and more competitive economy,

✓ Inclusive growth – the built of an economy with a high employment rate, which will be able to ensure economic, social and territorial cohesion throughout the EU.

These three priorities, as well as the five goals[19], through which they are developed and given a more concrete shape, and the seven flagship initiatives[20], which support the strategy, all are deeply inter-connected. Thus, the strategy provides guidelines for actions to be undertaken, by both the EU and the Member States (as an example of multi-level governance), in policy areas such as education, employment, research, ITC, environment, energy, industry, economic, social and territorial cohesion. It rests on the idea that by taking a collective action in one domain (e.g. the coordination of Member States' research and innovation activities) – thus acting as a Union – it will encourage the integration of other policy fields as well (e.g. industry and employment). The strategy also provides an institutional framework which has the task to ensure the surveillance of the process and give it an integrationist boost[21]: the European Council first approves the strategy, the EU and national targets and the integrated guidelines and afterwards keeps an eye on the implementation of the Europe 2020 programme, while focusing, in its meetings, on specific issues (e.g. research and innovation). In each domain, the relevant Council formations ensures the implement of the programme through facilitating the exchange of information and good practices between different Member States; on the basis of a set of indicators, the European Commission will annually monitor the overall progress in achieving the Europe 2020 goals, but it will also assess the country reports and convergence programmes of the Member States, and make policy recommendations, warnings or proposals; the European Parliament has the task to convince and mobilize the citizens and the national parliaments to contribute to the success of the strategy.

Through the inter-connections it creates between different policy areas and the well defined institutional framework responsible for the strategy's management, Europe 2020 is a good example for the use of the spillover effect within the EU. Integrationist pressure in the policy areas targeted by the strategy is expected to come from the local, regional and national authorities within the Member States, as well. By involving these authorities in the development and the implementation of national

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[18] The European Commission, *Communication from the Commission. Europe 2020 – A strategy for smart, sustainable and inclusive growth*, p. 10.

[19] The strategy sets five measurable goals to be achieved by the EU by 2020: - a 75% employment rate for women and men aged 20-64; - 3% of EU's GDP to be invested in R&D (by both public and private entities); - the reduction of school drop-out rates below 10% and at least 40% of 30-34–year-olds completing third level education; - the reduction of greenhouse gas emissions by 20% compared to 1990 levels, the increase of the share of renewables in final energy consumption to 20% and a 20% increase in energy efficiency; - at least 20 million fewer people in or at risk of poverty and social exclusion.

[20] As mentioned before, the Europe 2020 strategy is accompanied by seven supportive flagship initiatives, which demand actions from both the EU and the Member States: "Digital Agenda for Europe", "Innovation Union", "Youth on the Move", "Resource Efficient Europe", "An Industrial Policy for the Globalization Era", "An Agenda for New Skills and Jobs", "European Platform against Poverty".

[21] The European Commission, *Communication from the Commission. Europe 2020 – A strategy for smart, sustainable and inclusive growth*, pp. 28-31, 34.

reform programmes[22], side by side with the national parliaments, the social partners and the civil society, the strategy aims to establish a permanent dialog between different levels of governance and bring the EU decisions and initiatives closer to the stakeholders, to EU citizens (thus, moving towards a neofunctionalist loyalty transfer from national to the European supra-national level or to the regional and local level). Another implicit goal of the strategy is to encourage the establishment of policy networks within the EU in order to involve more citizens, business entities, civil society organizations and other public or private entities in the making and implementation of the much needed socio-economic reforms. In order to ensure both the loyalty transfer and the implication of various stakeholders in the success of the Europe 2020 strategy, several information programmes and consultations have been initiated by the European Commission, so that the importance of taking action towards the Europe 2020 goals is well understood by everyone and concrete measures will be taken.

As part of the integrated framework of the Europe 2020 strategy, the **Innovation Union flagship initiative** focuses on improving access to finance for research and innovation, and ensuring that innovative ideas can be turned into products and services that create growth and jobs[23]. The initiative is part of EU's efforts to achieve smart growth through improving the level and conditions for innovation within the Member States. It aims at readjusting the research and innovation policy to the societal challenges of the 21st century (climate change, resource scarcity, aging population, globalization etc.) by intensively exploiting Europe's innovative potential and strengthening every link of the innovation chain – from 'blue sky' research to commercialization[24].

As we said before, innovation is the fundamental value for the EU, therefore the initiative urges for the embracing of a strategic approach where all EU policies and funds "are designed to contribute to innovation[25]". This desire to make innovation a cross-cutting policy, is a sample of the functioning of the spillover effect within the EU: it is believed that, through integrating the innovation policies of the Member States, the appropriate conditions for the integration of other policy areas, such as education, industry, employment etc. are created. The European Commission[26] admits that the Innovation Union initiative has been developed and will only have the expected outcome when it is accompanied by other EU initiatives, such as An Industrial Policy for the Globalization Era, Digital Agenda for Europe, Youth on the Move, An Agenda for New Skills and Jobs, which are meant to improve the conditions for innovation through their specific lines of action. Other already much more integrated EU policy areas (i.e. single market, competition policy, trade policy) are also designed to support and strengthen the goal of achieving a European innovation union. This comes as a proof for the fact that, in the case of innovation, the spillover effect works both ways: innovation acts as an integrator for other EU policies, but, at the same time, the integration of the research and innovation field is encouraged by actions coming from outside this policy area. Responsible for the political boost towards the integration of research activities within the EU are the European institutions (the European Council, the EU Council, the Commission and

[22] The European Commission, *Communication from the Commission. Europe 2020 – A strategy for smart, sustainable and inclusive growth*, pp. 29-30.

[23] The European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative "Innovation Union"*, p. 6.

[24] The European Commission, *Communication from the Commission. Europe 2020 – A strategy for smart, sustainable and inclusive growth*, p. 12.

[25] The European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative "Innovation Union"*, p. 2.

[26] The European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative "Innovation Union"*, p. 6.

the European Parliament) which set out the main strategic guidelines and monitor the implement of the innovation agenda. According to the European Commission[27], the delivering and implementation of the tasks within the Innovation Union initiative fall in the burden of regional, national and European entities; thus a multilevel governance approach is imprinted to the process of creating EU's innovation union. The EU and national research policies have to be closely aligned and, in order to achieve that, all types of actors (local, regional and European) must act together creating a network for promoting innovation (this is a proof of the need for network governance in order to achieve the innovation union).

2.3. Data Analysis

In the next part of the paper, the main actions included in the Innovation Union initiative will be analyzed through the grid of the two European integration theories described in the theoretical part of the paper: governance and neofunctionalism.

One of the main goals of the European Union is to promote innovation throughout its member states and an important part of this process concerns the education of the European citizens. This involves improving the education system from every point of view. For example, one of the weaknesses of the basic education system that were identified by the European Commission refers to the gender dimension, more specifically the small percentage of girls that reach an advanced level in science in the case of some Member States[28]. The higher education system should also be strengthened in order to become more attractive to potential talents, offering smarter specializations across different fields[29]. Europeans must become more competitive in this R&D field because, as it is underlined in the European Commission's Communication regarding the Innovation Union Flagship Initiative, by comparing the number of researchers as share of the population, Europe is "well below" that of the US, Japan and other countries.

Therefore, the EU and the Member States will work together for promoting excellence in education and skills development[30] so that more young people are attracted and trained in the research field. The EU's support can be illustrated by the Marie Curie fellowships under the Research Framework Programme, and the one of the member states by the Finish example of using inter-disciplinary approaches in universities as to bring together skills from different areas. More specifically, the Member States must take provisions so that by the end of 2011, they have enough researchers as needed for reaching their national R&D target and so that they promote attractive employment conditions in public research institutions (it is outlined the importance of taking into account the gender and dual career considerations at the moment of developing these strategies). The role of the European Commission is to support an independent multi-dimensional international ranking system to benchmark university performance that will make it easier to identify the best European universities. Furthermore, the European Commission will propose an integrated framework regarding e-skills for innovation and competitiveness, in accordance with the stakeholders. Not only the national and supranational authorities should be part of this process, but also other actors, like the business sector, that should have a more consistent contribution to the curricula development and

[27] The European Commission, *Communication from the Commission. Europe 2020 – A strategy for smart, sustainable and inclusive growth*, p. 12.

[28] The European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative "Innovation Union"*, pp. 8-9.

[29] The European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative "Innovation Union"*, p. 9.

[30] The European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative "Innovation Union"*, pp. 8-10.

doctoral training. As to make this possible, the European Commission will create *Knowledge Alliances*, which will support business-academia collaborations, in order to develop new curricula addressing innovation skills gaps. All these emphasize the fact that we are dealing with more than just a multilevel governance (highlighted by the national and supranational examples examined before), but with a real network governance, that involves not only actors from different authority levels, but at the same time from different activity sectors (like universities, non-state actors like the business sector, supranational state actors or national state actors).

Another important aspect of the R&D development is the creation of a European Research Area[31], which is meant to reduce unnecessary costs that may appear in case of duplication in national research. In 2012, the European Commission will propose a European Research Area framework and also a set of supporting measures to remove obstacles to mobility and cross-border operation, so that they can be in force by 2014. The neofunctionalist perspective in this case is obvious, given the spillover effect that is expected with the creation of the European Research Area, because first of all, a part of the national attributes in the research area pass on to the supranational level, and at the same time, this unification of an important part of the research policies will determine a wider cooperation in more aspects of the education national policies or even other policies (for example a possible harmonization of the PhD areas or an enlargement of the variety of these areas so that they can be correlated to the demands on the European single market). Along with the neofunctionalist theory, the multilevel governance is the component that can help us fully understand the integration process. Thereby, the collaboration between the European Commission and the Member States on account of reaching by 2015 the 60% target of the construction of the priority European Research infrastructures is significant, given the fact that they are already identified by the European Strategy Forum for Research Infrastructures (the European Commission), leaving the Member States with the mission of reviewing the Operational Programmes so that they facilitate the use of cohesion policy money for this purpose.

Furthermore, the EU funding instruments shall focus on Innovation Union priorities[32], making them more efficient in accordance with the European goals in this area. The idea of all EU research and innovation programmes focusing on promoting excellence at European level highlights the neofunctionalist effect of the spillover, which will determine the integration of research and innovation at the supranational dimension. As always, the spillover will affect other dimensions of public policies that have to be taken into account, such as the societal challenges, the industrial and technological priorities). In this case the European Commission, the supranational actor, plays the main role in supporting this part of the European Strategy, because it will design future EU research and innovation programmes and took the commitment to strengthen the science base for policy making through its Joint Research Centre (creating also a European Forum on Forward Looking Activities in order to add coherence and efficiency to this step).

The promotion of the European Institute of Innovation and Technology as a model of innovation governance in Europe[33] emphasizes the fact that the network governance pattern is clearly applied in the European innovation strengthening process, as the EIT must set out by 2011 a Strategic Innovation Agenda to expand its activities, close links with the private sector and build a stronger

[31] The European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative "Innovation Union"*, pp. 10-11.

[32] The European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative "Innovation Union"*, pp. 11-12.

[33] The European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative "Innovation Union"*, pp. 12-13.

role in entrepreneurship (thus outlining the importance of the cooperation between the state and non-state actors).

Due to insufficient funding opportunities for investing in innovation, European companies can hardly develop new products and technologies; therefore the EU aims to improve the innovative companies' access to financing. In order to do so, actions both at European and national level have to be undertaken; hence, a multilevel governance perspective is embraced. The main actor which ensures the implementation of all actions at EU level is the European Commission[34]: by 2014, it will have to make a proposal, to the Council and the European Parliament, for financial instruments meant to increase private financing in the field of R&D; by 2012, it will make sure that venture capital funds established in one of the Member States will function in the whole EU; it will strengthen cross-border investment in innovation and focus on innovative SMEs' financing problems; by 2011, it will make a mid-term review of the state aid R&D and innovation framework. In finding solutions for increasing private financing of innovation, the Commission will work closely with the European Investment Bank Group and other national financial intermediaries and private investors, thus creating a policy network for developing the best response to the critical gaps in investing in R&D. The European Commission had a spillover effect in mind when it engaged in liberalizing the venture capital market in order to ease investment in innovation. Since venture capital is a type of capital, it ought to "run freely" within the single market of the EU (free capital movement is one of the features of the European single market); by reading between the lines, we understand that the EU seeks to strengthen its single market and thus create an integrationist pressure on R&D and innovation. The European Commission plays also a mobilizing role through bringing together innovative firms with potential investors and building a network through which companies have better access to capital.

The establishing of the single innovation market[35] implies a series of actions to be undertaken at EU level – by the European institutions – and within every Member State (multilevel governance approach). One of the most important steps towards the integration of the EU innovation market is the adoption of the EU patent. The European Parliament together with the Council are encouraged to adopt the EU patent, its linguistic regime and the unified system of dispute settlement as soon as possible, so that the first EU patents be delivered in 2014. A significant pressure towards the integration of the European innovation markets is being delivered – through a spillover effect – from other EU policy areas such as competition policy (an effective competition policy is expected to stimulate the demand for innovation), environment policy (stricter environmental standards would stimulate eco-innovation) or telecommunication policy (the liberalization of the telecom market together with the GSM standard started the success story of mobile phones in Europe). Another important issue, having a spillover effect on the innovation domain, is the establishing of EU-wide standards. The European Commission plays the central role in integrating EU standards by presenting a communication accompanied by a legislative proposal on modernizing of standard-setting procedures in order to be able to enhance interoperability and stimulate innovation; the communication will include an analysis of how to adapt the standardizing system to a constantly changing environment, how this system could best contribute to EU's internal and external objectives and what kind of influence the European standardization system would have on innovation.

In 2011, under the guidance of the European Commission, both the EU and the Member States will engage in evaluating the regulatory framework of key areas such as eco-innovation and

[34] The European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative "Innovation Union"*, pp. 14-15.

[35] The European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative "Innovation Union"*, pp. 15-17.

the European Innovation Partnerships in order to identify which rules need to be changed, updated or introduced so that innovation can be promoted. By early 2011, the European Commission will present an action plan for eco-innovation, focusing on finding ways to achieve environmental goals through innovation (this action plan counts on a spillover effect resulting from the integration of the innovation field which will determine the integration of environment policies). Making use of the multilevel governance principle, starting 2011, the Member States and the regions will have to adopt budgets exclusively devoted to pre-commercial procurements and public procurements of innovative products and services. The European Commission has the task to provide the necessary guidance and create the financial support mechanism to help the regional and national authorities deliver the procurements in an open and non-discriminatory manner.

In the process of promoting openness and capitalizing Europe's creative potential[36], the European Commission plays a key role by collaborating with stakeholders for the development of a set of model consortium agreements, thus creating a policy network meant to ease the knowledge transfers and research collaboration initiatives. After working together with the Member States and the stakeholders, the Commission will have to present, by the end of 2011, a proposal for the establishing of a European knowledge market for patents and licensing. The initiative encourages the recognition of the so-called "fifth freedom" – the free movement of researchers and innovative ideas within the EU, which could be added to the four features of the European single market, thus consolidating it and making pressure towards the integration of the innovation markets. Through EU-wide networks (i.e. Enterprise Europe Network) large companies are brought together with SMEs, universities, research centres and communities of scientists and practitioners to exchange knowledge and ideas, but also contribute with suggestions to the improvement of the functioning of knowledge transfer offices within the public research organizations in order to make the results of publicly-funded research more available to everyone.

Another EU goal is to maximize the social and territorial cohesion, first of all by spreading the benefits of innovation across the Union[37]. The EU is a heterogeneous structure and any development initiatives must take this into account so that the effect of such action does not deepen the current gaps in the core of the Union. Consequently, the Innovation Union must involve all regions, avoiding the situation in which it produces disproportionate effects that result in less performing regions, endangering the convergence that has been reached so far. In order to succeed, the EU can use the Structural Funds, that are not fully taken advantage of and that should be used more effectively for innovation and achieving the Europe 2020 objectives, especially in a way that each region can become excellent in a certain area in which it has relative powers. Accordingly, the Member States should start improving their use of Structural Funds for research and innovation projects, by helping people to acquire the necessary skills in this respect and implementing smart specialization strategies and trans-national projects. The neofunctionalist element of the existence of trans-national interest groups can be found in this part of the strategy because it supports the cooperation between this type of actors and national state actors in the advantage of the supranational progress, which in turn produces benefits for all member states and European citizens. As a matter a fact, an important role is given to the Member States, which have to prepare post 2013 Structural Funds programmes with an increased focus on innovation and smart specialization. The spillover's influence is found here because of the crossing of different types of policies at the EU's level (that regard for example the structural policy and the innovation dimension).

[36] The European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative "Innovation Union"*, pp. 18-20.

[37] The European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative "Innovation Union"*, pp. 20-21.

The EU wants to increase the social benefits that innovation can produce[38]. The European Commission's document uses the phrase *social innovation* to define the idea that brings together the actors in charge of meeting this goal and the benefits of their set of actions. Although thanks to its influence in the institutional system of the EU and the fact that it represents the supranational interest, the European Commission may have a leading role (given the fact that it has made a commitment for: a) promoting innovation through the European Social Fund, which will be complemented by the social experiments developed in the framework of the European Platform against Poverty, b) launching a European Social Innovation pilot partnership that will provide expertise for the social entrepreneurs and the public and third sectors and c) supporting a research programme on public sector and social innovation that emphasizes on measurements, evaluation, financing and barriers to scaling up and development), it doesn't work alone, but in cooperation with the Member States (that will also have to step up efforts regarding the promotion of social innovation through the European Social Fund) and different non-state actors (like the social partners that are to be consulted on how the knowledge economy can be spread to all occupational levels and sectors). Consequently, we have a very good example of the functioning of not only multilevel governance, but true network governance, which involves supranational, national and non-state actors. Furthermore, the development of an Innovation Union becomes more than just a goal, but also a mean to be used as to increase the social welfare of the European society and its citizens, in an obvious use of the spillover, the main element of the neofunctionalist theory and in the same time the way that the EU uses as to gain the progress it aspires to, by using all the instruments it has at hand, even if that involves the need of further cooperation in that specific area or in other related ones.

The establishment of European Innovation Partnerships[39] is another important issue aimed to be delivered through the Innovation Union flagship initiative. A wide range of actors coming from both the European supra-national level and the national level, as well as from the local and regional level, are all involved in the creation and implementation of these partnerships (a multilevel governance approach combined with a network governance perspective): the Council, the European Parliament, the Member States, the industry and other stakeholders are first invited to determine the extent to which they will get involved in making these partnerships work; afterwards, they are expected to contribute with competences and resources to the achievement of each partnership goals. As to be expected, the central role in defining and carrying out of the European innovation partnerships belongs to the European Commission, which, alongside with the Council and the European Parliament, will secure the political support of each partnership. Following a neofunctionalist perspective, the Commission is the supranational institution which launches – after taking account of the Council's and European Parliament's views and of the stakeholders' opinion – a wide series of innovation partnerships in key areas addressing societal challenges and, more or less directly, watches over their implementation. For defining the EU innovation partnerships, the Commission has to first develop a set of selection criteria and a transparent selection process; afterwards, it has to present the partnership proposals which have met the criteria and then set out the governance and financial arrangements for the selected partnerships; last, but not least, the Commission would evaluate the efficiency of the partnerships and decide whether it is worth continuing with the partnership in the context of the next Research Framework Programme and under what circumstances.

[38] The European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative "Innovation Union"*, pp. 21-22.

[39] The European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative "Innovation Union"*, pp. 22-26.

The idea of creating innovation partnerships in areas such as energy and water supply efficiency, sustainable supply and management of raw materials, transport with lower greenhouse gases emissions, digital society, agricultural sustainability and active and healthy aging, comes from the belief that by contributing to the deepening of the integration of the innovation sector within the EU – through a spillover effect – an integrationist impulse would be given to other EU policy areas. An issue that requires special attention in the developing of the European innovation partnerships is the establishing of an appropriate governance framework for the implementation process of these partnerships. Thus, each partnership will be led by a Steering Board, composed of a certain number of high representatives of the Member States (Ministers), members of Parliament, industry leaders, researchers and key stakeholders; the board will be chaired by the lead Commissioner(s) and supported by a secretariat assigned by the Commission, but also by operational groups of experts, practitioners and users coming from both the private and the public sector. Once again, a multilevel governance approach is used alongside with a network governance perspective which has the purpose of bringing the policy making process closer to its stakeholders.

In the context of a globalization of the competition for knowledge and markets, Europe has to reverse "several decades of a relative *brain-drain*"[40], so that it can assure the possibility of remaining in Europe for the ones who leave their countries in search of a better career in the research field. The EU should work together with the Member States in order to take measures meant to ensure that leading academics, researchers and innovators reside and work in Europe, but also for attracting a sufficient number of highly skilled third country nationals to stay in Europe. For this end, both the EU and its Member States (as parts of a multilevel governance functioning) should treat scientific cooperation with third parts as an issue of common concern and develop common approaches. The European actor who plays an important role is once again the European Commission, that will propose common EU-Member States priorities in S&T as a basis for coordinated positions or joint initiatives vis-à-vis third countries.

After setting the targets and the measures which would lead to the establishing of the Innovation Union, the role and responsibilities of every actor engaged in this process, alongside with the evaluation methods must be very well defined[41]. In order for the research and innovation systems of the Member States to integrate, some reforms have to be made to their national and regional policies. For conducting this reform of the research and innovation policies, a multilevel governance approach needed to be embraced. Thus, the European Commission has identified the set of key policy features for a best-performing system. The Member States have to assess their research and innovation systems based on the features presented by the Commission and then define, within their National Reform Programmes, the reforms they need to undertake. In this multilevel policy framework, the Council – to be more precise, the Competitiveness Council component – could play an important role in monitoring the progress of the Member States on reforming their R&D policies via the integrated economic coordination framework, the so-called "European semester". The Commission will support the Member States in their assessments by facilitating the exchange of best practices regarding the reform of innovation policies between EU states. The degree to which the national innovation systems of the Member States converge and thus the European Innovation Union is achieved, are measured through two indicators set by the European Council together with the European Commission, which can be analyzed, in neofunctionalist terms, as being the institutions which monitor and boost the integration process.

[40] The European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative "Innovation Union"*, pp. 27-28.

[41] The European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative "Innovation Union"*, pp. 28-31.

The first indicator for measuring the performance towards the Innovation Union is the Europe 2020 target of achieving a R&D investment value of 3% from EU's GDP; the second innovation-related indicator needs to be developed by the European Commission. For finding the best way to measure the share of fast-growing innovative companies in the economy, the Commission will call on the help of Member States and international partners, thus applying a network governance approach. Last, but not least, the Innovation Union flagship initiative describes the role and responsibilities of each actor involved in creating this Union, by basically using a multilevel governance approach. Thus:

- the European Council is responsible for the coordination and the political impetus of the initiative;
- the Council should adopt the necessary measures for improving EU's framework conditions and, through its semester meetings as an "Innovation Council", should evaluate the progress and identify the areas where more actions are needed;
- the European Parliament should have annual debates on the progress of the initiative with members of national parliaments and different stakeholders (this way, a loyalty transfer – in neofunctionalist terms – from the national to the European level comes out);
- the Commission is responsible for developing the main lines of actions within the initiative, for assisting the Member States in their reforms and facilitating the exchange of best practices within the EU, but also for systematically monitoring the progress, reporting once a year the achieved progress and giving country-specific recommendations in the field of innovation;
- the Member States should reform their innovation systems, review their operational programmes co-financed by EU Structural Funds in order to respond to the priorities set by the Europe 2020 strategy and allocate extra financial resources for R&D and innovation;
- in the attempt to involve more and more stakeholders in the policymaking process, the European Economic and Social Committee, the Committee of the Regions and other stakeholders are invited to support the initiative and help disseminate the good practices;
- also for filling in the gap between the policymakers and the stakeholders, the European Commission plans to call for an annual Innovation Convention which would complement the European Parliament's debate on the progress of the Innovation Union;
- in the debates of the convention a large range of actors should be involved: Ministers, Members of the European Parliament, business leaders, deans of universities and research centres, bankers and venture capitalists, top researchers and innovators, and last, but not least, citizens.

Due to the fact that the actors coming from different levels of authority need to permanently interact with each other and act together towards achieving the integration of the R&D and innovation sector, we can conclude that a network governance perspective has also been in mind of the European Commission when writing this initiative.

3. Conclusions

The recent global financial crisis reshaped the international environment profoundly. As one of the important global players, Europe has to recover soon from the losses it suffered due to the crisis (i.e. economic recession in most of its Member States, the Euro-Zone crisis) and start engaging in serious reforms in order to ensure a better life for its citizens. The EU started reforming in 2009 with the entry into force of the Treaty of Lisbon and continued in 2010 with the Members States agreeing on the Europe 2020 strategy and its initiatives and with the setting of guidelines for future developments through the Project Europe 2030.

Regarding the process of European integration, reality has by far overcome theory. Classic theories have many times failed to describe the evolution of the EU and recent theoretical approaches seem to be incapable of fully explaining the complexity of the EU. In this paper, we followed the assumption that the theory of governance can be upgraded from a middle-range theory to a full theory by adding a neofunctionalist component to it, so that the explanatory capabilities of the governance theory can be increased and thus a more exhaustive theory of European integration can be developed.

In our attempt to prove our assumption, we first reviewed the main features of the theory of governance (putting a great emphasis on multi-level governance and network governance) and of neofunctionalism (especially the spillover element) as they are shown in the literature. Then, we applied these concepts on an EU initiative – the "Innovation Union" flagship initiative within the Europe 2020 strategy. Through our in-depth analysis of the initiative, we emphasized that the actions included in the initiative must be undertaken at different levels of political authority (supranational, national, regional and local), involving several types of actors (state, supranational or non-state actors) which permanently interact with each other – all these being characteristics of multi-level governance and network governance as components of the EU theory of governance. The analysis has also shown us that the initiative is based upon the belief that the integration of the research and innovation policies of the Member States would lead to a better economic integration within the EU, through the spillover effect it produces on other policy areas. The fact that the actions included in the initiative target not only the R&D policies of the Member States, but also other policies, such as education, industrial, fiscal, employment, ICT and environment, is very likely to create a spillover between all these policies. Through increasingly involving non-state actors (including supranational European entities) in the delivering of EU's innovation objectives, a significant loyalty transfer (in neofunctionalist terms) from the national to European level appears and thus the EU decisions are brought more closely to their true stakeholders, to the citizens.

The concrete examples provided by the "Innovation Union" flagship initiative come to acknowledge the fact that the current evolution and functioning of the EU cannot be explained solely through a governance perspective; multi-level governance and network governance aren't enough for delivering a full, exhaustive image on the present European integration process. Therefore, by adding a "touch" of neofunctionalism (some spillover effect) to the mixture, a clearer theoretical explanation of the real EU integrationist process can be provided. The initiative also shows that the gradual involvement of the stakeholders in the policymaking process (another aspect of neofunctionalism) can occur through using policy networks.

The implications of the conclusion we have reached after the analysis are quite important because this study aims to offer a different theoretical approach for the explication of the European integration process. The mixture of the two theories in order to create a new way of understanding the EU's internal functioning and its consequences for the future of the European construction seems to be the best theoretical framework for analysis in this area because it has a larger explanatory capability than other theories or than each part separately considered.

We believe that, when researching the European construction and its integration incentives, a particular, increasing attention should be given to the impact that the inter-connectivity and inter-dependence of various types of actors coming from different sectors of activities and different levels of decision-making have on EU law and EU's way of functioning. The main reason why it is imperative that this issue ought to be taken account of is the fact that there is a wide range of actors already involved in EU's decision-making (having specific ways of collaborating and acting, depending on the policy area in question) and this number is expected to increase in the future. The spillover effect is also present in more and more policy areas, transmitting integrationist impulses from one domain to another. Thus, we believe future research in European integration should focus more on combining the elements of the existing theories of integration – as we have done in this article – in order to develop a comprehensive theory of European integration.

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THE ROMANIAN ASPECT OF THE E.U. GOVERNANCE CASE STUDIES: EDUCATUION POLICY AND ENVIRONMENTAL POLICY

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Abstract
This paper belongs to the domestic studies which try to connect the Romanian research to the current debates within the EU studies. The authors' aim is to analyze the aspects and the implications of the EU governance at the Member States' domestic policies level, as most of these policies are currently facing the challenges brought by the Europeanization process. Therefore, the theoretical framework selected is the theory of governance, focusing on the explanatory and analytical opportunities of two components – multi-level governance and governance networks; in this way, it is underlined the separation from the classic model of relation between the (multiplied) levels of political authority (supranational, national, subnational) and the exponential increase in the number and types of actors participating at the decisional process and implementation of European public policy. Within the selected case studies (environmental policy and education policy), the authors advance a research structure with the aims (a) to identify the relevant actors involved in the policy-making process of these policies, at all stages of its cycle; (b) to offer an explanation of the types of interactions between these actors, and (c) to identify the influence these interactions exert on the communitarization pronounced tendency of some EU policy sectors. The analysis is performed in terms of the Treaty of Lisbon (the selected policies being part of distinct categories of the Union competences) and it is oriented towards the national level of the making process of these policies.

Keywords: *Multi-level governance, Governance networks, Environmental policy, Education policy*

1. Introduction

The theme of this article is extremely important in the EU studies: the analysis of the implications that the new policymaking methods have at the Union's and at the national states' level. Moreover, it is about analyzing the relationship between different administrative levels involved in the design and implementation of public policies and the relationship between different types of actors that influence all stages of the policy cycle. The actuality and the importance of the subject are determined, therefore, especially by the theoretical potential offered by the governance (through two of its components, multi-level governance and network governance), the researches built on this framework being still insufficient - both quantitatively and qualitatively – in order to simultaneously capture the common points, but also the diversity within the analyzed public policies. In addition, extremely interesting is the fact that the EU "realities" can differ from the national ones, in terms of authority levels and actors involved in various policies.

Therefore, our option was to select two case studies – the environmental policy and education policy – and to try to build a triple-founded research structure: (a) the identification of the relevant actors involved in the policy-making process of these policies, at all stages of its cycle; (b) the

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explanation of the types of interactions between these actors, and (c) the identification of the influence these interactions exert on the communitarization pronounced tendency of some EU policy sectors[1]. The researches we want to accomplish by subsequent steps are double-oriented in what concerns the triad actors-relationships-consequences: firstly, it is envisaged the situation existing at the EU level; in the second row, we consider the situation of Romania, in which case, to better reflect the before-mentioned triad, we narrow the scope of the research and we refer to two specific cases: (a) the Sectoral Operational Programme Environment (environmental policy), (b) the legislative framework, including the recent National Education Law (education policy).

It should be noted here that the choice of these two case studies is not accidental, being based on the Treaty of Lisbon, document where there are explicitly listed the „categories and areas of Union competence". Thus, environmental policy belongs to the „competence shared between the Union and the member states" section, while education policy can be found within the EU „actions to support, coordinate or supplement the actions of the Member States" area (TFEU, art. 2). These are counter-intuitive cases to be analyzed in terms of governance[2]; however, also following the works of other EU and governance-interested scholars[3] (mostly foreign analysts, because these studies are still at the beginning in the domestic academic landscape), we selected them in order to test the explanatory power of the theory of governance. Therefore, the theoretical statement that we submit to tests is this one: whatever the nature of the EU policies, in Romania one can hardly talk about governance, as the involvement of several levels of authority and of several types of actors is precarious.

The structure of the article will comprise two parts: the theoretical framework and two case studies in the second part. The theoretical framework (second chapter) will try to cover the aspects of governance, more exactly Multi-Level Governance and Network Governance, and also a broad frame of works on public policies, Europeanization and the relation with governance. In the third chapter, we will analyze two case studies – environmental policy and education policy – and how the theory of governance can be applied to them. In both cases we tried to build a research structure based on three elements - identification of the actors, the relations between the actors and the influence these interactions between the actors have on the EU integration process. We identified the actors who operate in both European and Romanian environmental and education policy, the interactions between supranational, national, regional, local or non-governmental actors, when it was the case, and also how these interactions provide the factors for multi-level governance or network governance.

2. The Theoretical Framework

Although in Romania there have been very few academic writings on topics such as governance or its components; nevertheless, in spite of a fairly reduced number of local contributions on the topic, the issue of governance, as a theory as well as a practice, is a widely spread one in foreign research groups. Therefore, the attempts to coagulate a theory of governance that would properly apply to the space of the European Union and the conduct of precise analyses by which well defined sectors of the EU political and institutional construct are studied through a focus on

[1] Despite the fact that the entry into force of the Treaty of Lisbon abolished the pillar-based EU structure, we use the "communitarization" notion to underline the well-known processed of integration deepening in different (more or less) EU-determined policies.

[2] One should not forget that the governance studies applied within the EU framework firstly developed in areas of policies that usually belong to the Union's exclusive competence.

[3] For example, Piattoni (2010) – in a volume about the multi-level governance theory – has the same case studies; however, our contribution is different for two reasons: (a) her selection was determined by different arguments (mainly, the probability of some EU policies to subscribe to the multi-level governance pattern); (b) our approach innovates on the applicability dimension, as we explicitly take into consideration the policymaking at the national level.

governance components, have represented for almost twenty years a well-established path within the European (but not only) studies.

2.1. Governance. The Theory of Governance: Multi-Level Governance and Network Governance

Defining the concept of governance can take into account more dimensions: definitions comprised in lexicographical papers; definitions offered by different researchers in the field of (but not limited to) political science, interested in the phenomenon of governance; definitions present in the glossaries of large (international) organisations that are more or less influenced by this process.

There are several reasons for which it is extremely difficult to talk about a commonly accepted definition of this term. Firstly, the theorisation of governance as a distinct phenomenon is relatively recent (twenty years at the most, period in which considerable changes have occurred in the perception of this phenomenon, making it even more difficult for us to talk about continuity of visions), leaving insufficient time for researchers to agree on a general and relatively stable framework for defining the term. Secondly, the conclusion has been reached that there are several political, economic, as well as social sectors that are affected by the reality of governance, reason for which the unifying of these descriptions has turned out to be not so much only a difficult process, but also an impractical one. Thirdly, even when analyzing a single well-defined sector, the variety of aspects associated with governance, concerning the actors involved, the possible relations between them, the management of such interactions etc. leads to a great range of interpretations and descriptions.

From the perspective of political science and to better serve as a working definition of governance, we decided to work with the definition proposed by Chhotray and Stoker (2009, p. 3) on this concept: „governance is about the rules of collective decision-making in settings where there are a plurality of actors or organisations and where no formal control system can dictate the terms of the relationship between these actors and organisations". Thus, governance has a concrete dimension, involving interactions determined by political factors (negotiation between „conflicting power positions and perceptions") of human factors characterized by „bounded rationality" (Chhotray and Stoker 2009, pp. 3-6). We believe that the implications of this definition should be further clarified in respect to:

• (i) the rules of collective decision, both formal as well as informal, and (ii) the wide applicability of governance both for systemic activities and ordinary activities, as one has to point out to the fact that regardless of the decision type, this decision should be made, as much as possible, by negotiations, be they formal or informal;

• (iii) the fact that the state remains the most important actor of these processes, without having – in general or evermore often – the capacity of directing the game, but rather of coordinating and influencing it;

• one should also add another point, (iv), in order to mention the multiplication of decision making levels as well as the predominance of networks as means of tackling the collective action processes.

Here is a schematic presentation of the ideas concerning the *main traits of governance*, traits that one can also find in the case of the European Union:

Structure	Plurality of decision centres No clear hierarchy between these various centres The presence of networks as decision structures formed by „relatively stable relationships between formally autonomous organizations or actors" Decision making units formed on functional criteria, not territorial ones.
Actors	The access of actors to decision making structures is relatively easy. By actors they understand the representatives of the public sector (mainly the ones with administrative

	roles and not directly elected by citizens), private or non-profit sector, but these authors place their emphasis on "collective actors", interest groups that have the capacity to influence the decision making process.
Decision making process	Based on negotiations, a system often configured by informal strategies, showing too little transparency and legitimacy from a democratic point of view[4].
Source: Adaptation after Benz and Papadopoulos 2006, pp. 2-3.	

In order to be able to talk about a theory of governance as a political theory, in a general sense, or as a theory of integration, in a more particular sense[5], that theory must fulfil several functions. For example, on the lines suggested by Diez and Wiener, it should have the functions of:

1. explaining or understanding the causes or the unfolding of a phenomenon;
2. describing and analyzing, aspect which infers "development of definitions and concepts (…) labels and classifications";
3. critique and normative intervention; this refers to questioning the existing realities or offering „normative alternatives" (Diez and Wiener 2009, p. 18).

Additionally, one has to identify the area of research targeted by the theory, with the relation between the three possibilities being a variable one, in accordance to their being defined as dependent or independent variables:

1. the political system (*polity level*) a whole;
2. European policies (*policy level*) from the EU perspective and the perspective of the member countries;
3. *politics level* – day to day political phenomena (Diez and Wiener 2009, p. 19).

From our standpoint, in the case of the EU, there is a theory of governance localized at a middle range of generality[6], in other words, applicable to at least the areas of policy and politics. This theory satisfies the above-mentioned functions by two major components: *multi-level governance* and *network governance*.

Multi-level governance (MLG) represents a phrase whose appearance in closely linked with the European Union, with it being used in the beginning of the '90's by Gary Marks in order to describe the, novel in his opinion, way in which a public policy was forged within the EU: this concerned the administration of structural funds from different regions of EU member states, activity undertaken in a partnership by different types of actors (public and private) located in different administrative levels (supranational, national, sub-national). Currently, this practice has expanded to other policies. What would be the advantages of a MLG in the EU? European integration and multi-level governance intersect of several key traits: a decision making process that equally involves different levels of authority, a decreased weight of the state actor – in a post-westphalian definition – in this decision-making process, the fact that a hierarchic perception of these decision making levels no longer exists, fact which determines the acceptance of the involvement of different types of actors at any level, in different policies (Hooghe and Marks, 2001). Referring to the European Union, Rosamond sees the attempt to highlight the complexity of the European structure as a fundamental trait of the MLG approach, with emphasis on the „variability, unpredictability and multi-actorness" involved and the „fluidity, the permanence of uncertainty and multiple modalities of authority"

[4] Which is why, in the governance case, the authors give a secondary role to parliaments.

[5] As a brief academic support regarding our understanding of the meaning of (a) „political theory" and (b) „theory of integration", please consult (a) *The Blackwell Encyclopaedia of Political Thought* (Basil Blackwell 1991, second edition), translated in Romanian as *Enciclopedia Blackwell a gândirii politice*. Bucharest, Ed. Humanitas, 2006 and (b) Diez and Wiener 2009, p. 4.

[6] About „middle-range theories" in general see the contribution of Robert K. Merton in the mid-twentieth century (Chelcea 2004, 40). Considering the middle-range status of the governance theory, see Rosamond 2000 or Hix 2005.

(Rosamond 2000, p. 111). For Papadopoulos, MLG represents a result as much a solution for „resource dispersion and to social fragmentation" (Papadopoulos 2005, p. 318).

All this considered, the orientation towards multi-level governance does not represent a panacea for the formulation of policies in a political system characterized by complexity and fragmentation, for several reasons, either general ones or defined strictly by reference to the EU. Here is a short presentation of these considerations, as described by Papadopoulos (2005, p. 322):

- there is no presence of key actors defined by the control of different types of resources (financial, of authority, of knowledge), within the essential points of MLG, reason for which the entering of other actors that only posses the quality of having been chosen democratically is complicated;

- the complicated structure of MLG is in itself lacking in transparency due to the informal nature of many decisions;

- there are credibility costs related to the involvement of decision making factors (the decreased credibility being associated, for example, with the increased resistance by the affected groups to the implementation of policies);

- the presence of more actors is often translated in a decrease in the intensity of the decision-making responsibility experienced by each individual unit. Furthermore, each unit is responsible before different political, economical and social groups, which does not lead to a greater overall responsibility before all of these categories, but a blurring in the collective responsibility, etc.

Despite all these deficiencies, the balance between the advantages and the disadvantages of using MLG looks tilted towards the positive end, with many researchers preferring to highlight its positive aspects.

Network governance (NG) represents, unlike multi-level governance, a concept also applied in contexts different to the EU space. In general, as a specific manifestation of governance, it is an insufficiently clear term that indicates a multiplication in the number of actors and a dislocation of decision-making authority from central level (DeBardeleben and Hurrelmann 2007, p. 3). For Torfing, according to an analysis of the specialized literature and especially Rhodes and Jessop, governance networks refer to:

„(1) relatively stable horizontal articulations of interdependent, but operationally autonomous actors who (2) interact with one another through negotiations which (3) take place within a regulative, normative, cognitive and imaginary framework that is (4) self-regulating within limits set by external forces and which (5) contributes to the production of public purpose" (Torfing 2005, p. 307).

The following table shows in a structured manner part of the arguments and explanations that Torfing initially presented in favour of the upper-quoted definition.

Keyword	**Argument/explanation**
Interdependence	Resources, capacities
Autonomy	There are no hierarchical constraints in order to adopt certain decisions; voluntary involvement in network processes.
Horizontal	There are no hierarchies, but there are differences in power and resources that do not allow for the monopolisation of control.
Negotiation	Involves a mixture of talks (for maximizing results during a decision making process that does not use unanimous voting) and deliberation (for the consolidation of certainties in the system, the increase in expertise by learning from past lessons and by facilitating the creation of common meanings between actors).
Normative, cognitive and imaginary framework of regulation	It is not „an institutional vacuum, (but) a relatively institutionalised framework, which is more than the sum of its parts, but does not constitute a homogenous and completely integrated whole". The structure and way in which the network functions may change according to the actors, the stakes etc.
	„It has a regulative aspect, since it provides rules, roles and procedures; a normative

	aspect, as it conveys norms, values and standards; a cognitive element, given that it generates codes, concepts and specialised knowledge, and an imaginary aspect, seeing as it produces identities, ideologies and common hopes".
Self-regulation	Implies the delimitation from the political hierarchies of the state, as well as from the rules of the market.
Set boundaries	There is, however, „a particular organisational environment that must be taken into account, since it both facilitates and constrains their capacity for self-regulation".
Public aim	Network governance appears within well defined policies in the wider context of public interest.

Network governance is sometimes perceived as a third way, an alternative to the state and markets. We have summarized in a chart the differences identified between these three ways of achieving the goals of a system. One also should specify that the information included here are mainly based on a previous article by Torfing, as in a paper written in 2007 together with Eva Sørensen he reproduces, at least for this part, the analysis from the original article:

Presented difference	**Network governance**	**State**	**Market**
Relationship between the actors	Pluricentric governance system (actors are interdependent, but relatively autonomous, with a common public goal)	Unicentric system	Competitive multicentric system – actors with no common goals or obligations
Decision making	Reflexive rationality (based on interaction and negotiations)	Substantial rationality (emphasis on values and norms)	Procedural rationality – "invisible hand" type
Compliance with collectively negotiated decisions	Trust in the other actors and political agreements according to self-constituted rules and norms	Legal sanctions	Economic loss
Information processed from Torfing (2005, p. 309), Sørensen and Torfing (2007a, pp. 11-12).			

Generally, taking into account the feedback from the academic environment as well as the one coming from the political area to which the NG is actually applied, the advantages brought upon by using NG can be summarized as follows:

- by involving more actors, NG has a deeply democratic and legitimate character;
- NG increases the efficiency in the realization of public policies process by influencing all of its stages: it entails technical benefits by facilitating access to know-how even from the early stages, due to the diversity of the categories involved, contributing to a better identification of the public involvement necessary (by consulting all the interested parties, reason for which the decision making process obtains an increase in the level of information in accordance to which the respective policy is to be formulated), as well as the solutions for it (solutions that should not be directed towards a single group of beneficiaries, but satisfy the interests of as many groups as possible, with the aim of minimizing the possibility for the emergence of an opposition to the policy implementation);
- the fragmentation and dynamics of the political system are well controlled by NG, with the rate of consensus occurrence versus crisis occurrence being clearly in the favour of the first one.

One also has to point out to the fact that network governance does not represent a universal solution to the problems of collective decision, for two reasons. Firstly, the evolution of network is on many occasions unpredictable, with it being dependant on certain variables. Secondly, the networks structure itself can induce objectionable effects or even lead to "the failure" of such networks. Amongst the vulnerabilities of NG one can mention „precarious social and political processes", „uncontrollable political and economic context", „high transaction costs", „small

immediate chances", „common solutions that [usually do not] go beyond the least common denominator", „difficulties identifying the relevant political authority with whom to negotiate its policy proposals" (Sørensen şi Torfing 2007b, p. 96), whilst the failure of governance networks[7] is seen as the „inability to provide effective governance through negotiated interaction between a plurality of public and private actors"; in other words, one can also discuss in terms of „the failure to balance openness and closure, consensus and conflict, and efficiency and legitimacy" (Sørensen and Torfing 2007b, pp. 97, 110).

The applicability of network governance to the EU can be given, on the one hand, by the structure of the European institutional system („a multi-level structure, the combination of supranational and intergovernmental elements, and a strong role for the judiciary" - Eising and Kohler-Koch 1999, p. 269), and on the other, by the decoupling of competences associated with different stages of forging a policy, with the conception most often being associated with the supranational level (with a tendency towards consensus, be it formal or informal) and the implementation, to the national one; the key words than can describe this system are fragmentation (if we take into account the extreme specialization present within European institutions), homogeneity and fluidity, especially due to the upper-stated reason – the involvement of more actors just in the policy formulation stage, but not in the implementation one, that takes place at a national level, often involving the same people; the competences of those involved are, therefore, not only different from one policy to another, but they also vary in the separate stages of the policymaking cycle (Eising and Kohler-Koch 1999, pp. 269-271).

2.2. Public Policies, Europeanization and Governance

But what kind of policies can we identify within the EU? One way of classifying policies within the EU could be that of considering the different „categories and areas of Union competence" as defined by Treaty of Lisbon (TFEU, art. 2-6): (a) Union's exclusive competence (concerning legislative issues), (b) competence shared between the Union and the member states and (c) EU „actions to support, coordinate or supplement the actions of the Member States", whilst also keeping in mind the areas of special policies, such as the economic ones or the ones regarding the occupation of the labour force (fields in which states only coordinate their actions) or the common foreign and security policy (with competence falling to the Union, but also with specific procedures that preserve the main role for intergovernmental actors, such as the European Council and the Council of the European Union).

What do the majority of these extremely different types of policies have in common? One possible answer is the following: the process of their realization involves multiple levels of authority and most often it takes place inside networks that appeared in the context of developing public policies specific to the EU. One can notice the fact that, from this perspective on governance, the process of policymaking involves multiple categories of actors, differentiated according to administrative levels on which they operate as well as in compliance to their own constitutive character – public, private, non-profit – that determines their agendas and extremely varied interests. Applying this to the case of the European Union we can talk about:

• **Supranational actors**: from the category of supranational actors involved in the EU process of governance one can mention the European Commission, the European Parliament and the European Court of Justice, alongside a multitude of organisms created by the Union with the aim of obtaining a better regulatory process in different sectors of policies;

• **Intergovernmental actors**: The European Council and the Council of the European Union. In the whole of their existing working formations, as well as the dual character by which they are

[7] The meanings of the "governance failure" concept may be: failure of the actors, suboptimal results compared with other modes of governance, the divergent interests of the actors involved, poor management of the network (Chhotray şi Stoker 2009, pp. 48-49).

defined (common institutions and national representatives of the member states), they remain, to a overwhelming extent of actions, the expression of a intergovernmental philosophy;

• **National actors**: member states, each with their own agenda derived from distinct national interests;

• **Regional and local actors**: the process of policymaking at EU level cannot ignore the existing political, economical and social differences existent not only amongst member states, but also within them, with each national administrative unit presenting its own internal organization and decentralization peculiarities, fact which require – to a smaller or larger extent – the involvement of regional and local authorities in the decision making process;

• **Actors from the secondary and tertiary sectors**: aggregated in a manner organized according to the groups whose interest they represent, this type of actors exercises their presence in all the administrative levels by constant attempts to influence the design of the different types of policies in question, with the major impact taking place at the highest level – EU institutions – by specific lobby actions undertaken both directly and indirectly. In this context, one can discuss the pressure of national representatives, national authorities, or the business environment (multinational, national and local companies), worker unions from different economic sectors, NGO's (cf. Cuglesan 2006) and even individuals.

More authors are drawing attention to the differences that exist within the European policymaking process between the conception and implementation stages, or between the cycles of realizing different policies (Wallace W. 2005, p. 458; Kohler-Koch 1999, p. 29). Cini (2007, p. 6) or Andersen and Eliassen (2001, p. 16) admit to the fact that **one cannot discuss a unitary European policymaking process**, taking into consideration the major intra-sectors differences. Similarly, Warleigh (2003, p. 22) finds that there is no unitary policymaking process because of the variations (in terms of „decision rules and policy styles" and involved actors), within the EU, depending on „the policy area and the stage in its development". Concerning variations at the level of member states, one has to emphasize the fact that the policymaking cycle raises issues especially in the stage of effective implementation[8]. The reasons are extremely different and often transcend the unwieldy structure of the normative apparatus of the Union, thus leading to many situations in which there are major discrepancies between the form in which certain laws (that one could even refer to as being progressive) are adopted and what is actually put into practice (Gallagher, Laver and Mair 2006, p. 143), and the deviations are mostly caused, willingly or not, by national authorities trying by any means at their disposal to firstly satisfy the national interest and/or minimize the electoral costs of that particular government. Moreover, the involvement of sub-national authorities varies from one state to another, mainly because of the states' different internal structure (Gallagher, Laver and Mair 2006, p. 164).

Hofmann and Turk claim that any discussion about the "transformation of forms of government and governance in Europe" should be based on analyzing the stages of the public policy realization process which involve public actors from four levels – sub-national, national, supranational and international – and the institutional configuration that determines the degree of involvement of the supranational level in the process (direct involvement, actions taken through states or mechanisms of influencing just the national normative framework). In theory, the majority of the implementation process takes place, according to the "executive federalism", with regard to the principle of subsidiarity which states that supranational intervention should be limited to the cases in which the decision making process efficiency would be potentiated by its presence. In fact, the cooperation between all administrative levels would be felt during all the phases of the policy realizing process, therefore in the implementation phase as well, hence leading to "a multitude of

[8] For more information about the typology of implementation measures that may lead to differences, see Hofmann and Türk (2006, p. 74): „rule interpretation, rule application, rule-setting/rule-evaluation, approval of funds, the extension/new specification of funding programmes and information management".

institutional structures and ad hoc policy solutions" united under the general concept of „the EU administrative network" (Hofmann and Türk 2006, pp. 1-3). In this way, the bottom-up „transfer of competences" actually „increased the demand for implementation at European level"; this process is possible by vertical and horizontal cooperation (contextualized depending on the field under scrutiny), most often regulated by the secondary law of the Union (Hofmann and Türk 2006, p. 75).

The analysis of the EU public policies in regard to the impact governance has on the way such policies are realized has to take into account the phenomenon of Europeanization[9], as this usually influences EU policies and the policies of its member states.

Europeanization: National Institutions with European Policies

There are "different levels of Europeanization" according to Radaelli (2006/transl. 2009, p. 113). Thus, the influence of the EU governance on its member states should depend on three variables:

a.*the EU type of governance* – the functionalist spillover on the level of extended integration cannot be equivalent to an assimilation by member states of the modes of governance, especially since these are so different from one sector to the other;

b. *types of governance on the national level and „the degree of their institutionalisation"* – widely varied. Nevertheless, the top-down penetration is mainly achieved by policies, with the national institutional system being less affected;

c.*the ratio between costs associated to adaptation to the European norms and the potential further benefits of such adaptation*. If between points a. and b. from above significant differences should appear, a possible outcome would be the reification of the network (Eising and Kohler-Koch 1999, pp. 278 - 280).

Some authors consider that adaptation to the European context would present a greater challenge at policy level rather than at the level of national institutions (Eising and Kohler-Koch 1999, p. 284). Metcalfe also draws attention to the impact that the policy internationalization process has on the states, exemplifying by EU member states that have to permanently adjust to the EU *acquis* in order not be subjected to pressures by different interest groups[10] that could "begin to disregard the national level and jump directly to the European one", situation that could even lead to interferences with the national interests of governments (Metcalfe 2008, pp. 107, 132). Be that as it may, top-down Europeanization doesn't always act in perfect accordance with the lines established by the stakeholders in Brussels, with situations existing in which the implementation of a central norm would be reported as a success, without taking into account the way in which the rule was reinterpreted on the field (the member states, in this case). A good example of such situation is the implementation of the subsidiarity principle[11] - focal to the EU – and the negotiation of its sense (by

[9] One of the most frequently mentioned definitions of Europeanization is that of Radaelli, for which it means „processes of (a) construction, (b) diffusion, and (c) institutionalization of formal and informal rules, procedures, policy paradigms, styles, 'ways of doing things', and shared beliefs and norms which are first defined and consolidated in the making of EU public policy and politics and then incorporated in the logic of domestic discourse, identities, political structures, and public policies" (Radaelli 2003, p. 30).

[10] I refer here only to the strategies of the states, not to the nature of these pressures, if made by some powerful interest groups or expressing a view widely shared by many citizens of that state that decided to "jump" over the national level (considered, for example, inefficient or undemocratic) to directly address the supranational one.

[11] Justification for the transfer of competences either upward or downward, is always based on the principle of subsidiarity; the keyword is to maximize efficiency (Veggeland 2004, p. 161).

For Iordan Barbulescu, the concept of sovereignty is central for integration, namely the changes suffered in terms of: "renunciation of the dogma of absolute sovereignty (...). Giving up his own powers is voluntary, the Member States being the only actors that can decide on the integration process in its entirety, but also on its configuration". Important here are ideas as "transfer of sovereignty" or "joint exercise of sovereignty at the EU level", and constant association with the principle of subsidiarity (cf. Barbulescu and Rapan 2009, pp 399-400).

loopholes left intentionally during the normative codification or searched by every participant) between different types of actors from the Union's multi-level decision making system (according to Van Kersbergen and Verbeek, 2007).

3. Governance and Categories of Competences of the Union: Two Case Studies

As we have already stated, our aim is to analyze the aspects and the implications of the EU governance at the Member States' domestic policies level, as most of these policies are currently facing the challenges brought by the Europeanization process. Therefore, considering the different competences existing within the EU framework of policies, in the light of the Treaty of Lisbon, in order to cover a larger testing area, we have selected the environmental policy for the section of „competences shared between the Union and the member states" and the education policy as illustrative for the EU „actions to support, coordinate or supplement the actions of the Member States" (TFEU, art. 2). Our analysis is not exhaustive. We mainly intend to propose an analytical framework (to be used in a further research) for studying (a) the types of actors and decision levels involved in the policymaking process of these cases, in all the stages of the policy cycle[12]; (b) the interactions between these actors; (c) the binomial relation between Europeanization and governance in these sectors.

3.1. The Environmental Policy: EU and Romanian Aspects

This section of the paper will focus on how the multi-level and network governance can be identified in the Romanian environmental policy, more exactly in the implementation of the Sectoral Operational Programme Environment (SOP ENV). For all this to be possible we will first try to summarize EU's environmental policy and identify the most influential actors and how they affect the development of the policy as a whole. The second part of this case study is focused on the implementation of SOP ENV and the actors involved in it. Also we will try to observe how the paradigm of multi-level and network governance is applied in this specific case of Romanian environmental policy.

3.1.a. General Context

Regarding multi-level governance, environmental policy is one of the best examples that can be analyzed. This is due to the multitude of actors involved in the field of environment protection, from governmental institutions to civil society actors with more or less influence in the policy making process. From the EU's point of view, there are even more actors involved, given the supranational level that has been added and the influence that transnational nongovernmental organizations have on environmental issues.

EU environmental policy[13] came to attention in the early 1970s as a complementary policy for the development of the common market. This new policy input in the European Communities (EC) was due to the different environmental standards the member states have had at that time. To be more precise, "the [European] Commission feared that different national environmental standards would

[12] In fact, we subscribe to the idea that there is no clear linearity of the policy cycle and it should be seen more as a useful analytical instrument: „policies are shaped and reshaped in the early decision making step, as well as in later steps, by the environment and the implementation process itself. Moreover, policies have effects which have or have not been estimated, they imply actions and reactions. The policies are defined in a subjective manner and they cannot be analyzed independently from their own elaborating process" (Hâncean 2009, p. 6). This analysis was carried out by Hâncean on a text written by Adrian Kay. 2006. *The Dynamics of Public Policy. Theory and Evidence*. Edward Elgar Publishing Limited.

[13] We based our short historical description of the EU environmental policy mostly on Scheuer (2005) and Piattoni (2010).

act as non-tariff barriers and produce trade distortions that would slow down the creation and impede the proper functioning of the common market" (Piattoni 2010, p. 133).

The moment that raised the awareness on environmental problems was the United Nations Conference on the Environment held in Stockholm in 1972, the first conference on environmental issues that has ever been held. This moment gave the Commission the opportunity to act towards the establishment of a new policy for the EC, opportunity accomplished through the approval of the first Environmental Action Programme (EAP) in November 1973. Among the most important objectives highlighted by the first EAP were "the prevention, reduction and containment of environmental damage, the conservation of an ecological equilibrium and the rational use of natural resources"; the EAP also "emphasized the need for a comprehensive assessment of the impacts of other policies, in an effort to avoid damaging activities" (Hey 2005, p. 18).

Until the 1970s there was no legal basis for environmental action stipulated in EC treaties, although the member states "agreed to setting compulsory environmental standards in a handful of hazardous industries — for example, Council Directive 59/221 on ionizing radiations, later replaced by Council Directive 66/45/Euratom, and Council Directive 67/548/EEC on the classification, packaging, and labeling of dangerous substances" (Piattoni 2010, p. 134). The fact that unanimity voting in the EU Council was needed in order for a decision to be taken made it hard for environmental issues to pass the negotiation level. This problem was partially solved by the introduction of qualified majority voting (QMV) regarding environmental policy elements related to the common market, by the Single European Act (SEA) in 1986, completed by the cooperation of the European Parliament, while the unanimity rule remained in use for the rest of the aspects of environmental policy. Through the SEA, an environmental policy with a stronger legal basis was instated which gave the opportunity for the future development of the policy in areas not related to the common market.

Further on, ratification of the Treaty on the European Union (TEU) in 1992, in Maastricht, meant that the Commission and the European Parliament played a more significant role in the decision making process regarding environmental policy. "The TEU […] brought those areas of environmental policy not linked to internal market harmonization under QMV in the Council of Ministers and the cooperation procedure with the European Parliament. Areas linked to internal market harmonization became subject to the stronger procedure of co-decision with the European Parliament" (Sbragia, Alberta. 2000a. "Environmental Policy," in eds. H. Wallace and W. Wallace, *Policymaking in the European Union*. Oxford: Oxford University Press, pp. 293–316; p. 297 in Piattoni 2010, p. 134).

Another significant step in environmental policy development was the establishment of the European Environmental Agency (EEA) in 1994, followed by other measures of empowering the Commission and the Parliament through the Treaty of Amsterdam (1997). According to the Treaty of Amsterdam, the EU "further expanded the scope of legislation to be decided by QMV (Art. 95) and through the simplified co-decision procedure, thus giving the European Parliament—and the environment-friendly parties and groups that either sat in it or had easy access to some of its members—a much stronger voice in environmental matters" (Piattoni 2010, p. 134). The Treaty of Nice didn't bring any changes in European environmental policy, although there were changes in the QMV procedure of the Council. The changes consisted in the modification of the qualified majority threshold for the weighted votes and in the fact that the proportions between Member States votes in the Council changed (and, implicitly, the Member States' voting powers).

Nowadays, competences in environmental policy are shared between the EU and the member states, as it is stipulated in art. 4 of the Lisbon Treaty, signed in 2007. But, comparing the legal basis provided by the Lisbon Treaty with that of the previous treaties, the competences of both the Commission and the Parliament have increased in significance. EU is in charge of the strategic overview and the general legal frame on environmental issues; on the other hand the member states

are responsible with the implementation of the grand strategies envisaged by the EU, controlling the specific details of policy implementation.

3.1.b. Actors within the EU Environmental Policy

In order to sustain the development of EU's environmental policy, specific bodies, with the purpose to prepare, define and implement the environmental policy's specific actions, were created. These institutional actors are in a permanent consultation with national environmental institutions of the member states, but also with nongovernmental actors, such as NGOs and environmental think tanks.

In this section of the chapter we will try to identify the most influential actors at the supranational and transnational level on environmental policy. First, we will begin with a short description of EU institutions responsible with the development and implementation of environmental policy, and we will continue by identifying the most important and active NGOs and think tanks on environmental actions and their contribution to environmental policy.

The first actor to be mentioned is **the European Commission** through the *Environment Directorate-General or DG Environment* (as it will be referred to from now on). The main objective of the DG Environment is "to protect, preserve and improve the environment for present and future generations" (http://ec.europa.eu/dgs/environment/index_en htm). This Directorate-General has been instated in 1981, and since then it has been given extended competences on environmental policy. It also has the role to monitor, elaborate and implement the aspects of environmental policy, and, also, it can take legal action against the member states if the environmental law is infringed by them.

The **Council of the European Union,** as *Council of Environment Ministers*, is also an important actor of the environmental policy making. The Council of the European Union can pass laws, usually in a joint procedure with the European Parliament named co-decision, and it coordinates the policies of the EU. In the environmental field, the Council of the EU has mostly legislative responsibilities and it can adopt acts such as "regulations, directives, decisions or common actions" (http://www.consilium.europa.eu/showPage.aspx?id=242&lang=EN).

Another actor that influences the environmental policy is the **European Parliament** which has a specialized committee on environmental issues, the *Environment, Public Health and Food Safety Committee*. The members of the European Parliament, being direct representatives of the citizens of their country, have a greater accountability for their actions and decisions; therefore, there is an indirect implication from the citizens in the legislative process. Also, given the fact that there are two ecologist groups in the European Parliament, the Group of the Greens/European Free Alliance (GREENS/EFA) and the Confederal Group of the European United Left - Nordic Green Left (GUE/ NGL), we can assume that the development of environmental policy has its support in the legislative body of the EU as well.

The two groups obtained during 2009[14] elections a total of 90 out of 736 seats available in the European Parliament; the first group, GREENS/EFA, won 55 seats, and the second, GUE/NGL, won 35 seats, but even though the number of seats is not a great one, the coalition potential of the two groups can be decisive in environmental policy making.[15]

Although the **European Economic and Social Committee** is only a consultative body, it represents the interests of nongovernmental actors from the member states, such as entrepreneurs, representatives of trade unions or of a whole range of NGOs. The EESC represents the interest of the

[14] Our main source for European elections results was http://www.europe-politique.eu/.

[15] The first elections the GREENS took part were the European Parliament elections in 1984 and they won 20 seats out of a total of 434. Their percentage was higher in the next elections in 1989, but the most significant result of the group was the 1999 elections, when they obtained 48 seats out of 626, also due to the partnership with the European Free Alliance. On the other hand, GUE/NGL first elections were in 1999 and they won 42 seats, from 626, and 41 out of a total of 732 in 2004.

civil society at decision level and can bring a new perspective on environmental policy, especially if we take in consideration that some of the representatives from EESC are public figures at the national level and that they can arouse public support on important issues and put pressure on the decision makers.

Also a consultative body, the **Committee of the Regions** has a special commission on environment, the *Commission for Environment, Climate change and Energy*, and plays an important role in environmental policy development, with a perspective from regional and local level. The Lisbon Treaty "obliges the European Commission to consult with local and regional authorities and their associations across the EU as early as the pre-legislative phase, and the CoR, in its role as the voice of local and regional authorities at the EU level, is heavily involved right from this early stage" (http://www.cor.europa.eu/pages/PresentationTemplate.aspx?view=folder&id=be53bd69 -0089-465e-a173-fc34a8562341&sm=be53bd69-0089-465e-a173-fc34a8562341). It is essential to keep in mind that the Commission (and the other EU institutions) is only obliged to consult the CoR, but the practice shows that there is not an "obligation to take into consideration" the amendments brought by the CoR.

The CoR has representatives from all 27 member states which are members of the regional or local national authorities of the member states. Given the fact that the CoR representatives "continue with their local or regional government responsibilities, whether as regional president, mayor of a major city or county councilor, [they keep in touch] with the views and concerns of the people they represent." (http://www.cor.europa.eu/pages/PresentationTemplate.aspx?view=folder&id=be53bd69 -0089-465e-a173-fc34a8562341&sm=be53bd69-0089-465e-a173-fc34a85 62341).

The **European Environment Agency** started its work in 1994, after the regulation which established the agency was adopted by the EU in 1990 and came into force in 1993. The main objective of the EEA is to provide European actors, member states of the EU, business society, academia or nongovernmental organizations "sound, independent information on the environment" (http://www.eea.europa.eu/about-us/who). The EEA is a very important instrument for decision-makers, "the aim of the EEA being to ensure that decision-makers and the general public are kept informed about the state and outlook of the environment" (http://www.eea.europa.eu/about-us/who). Although the EEA is not involved directly in the decision making process, it provides the European institutions the necessary information in adopting new strategies and protection measures for the environment at the community level.

Other important actors for the environmental policy come from the nongovernmental scene and are represented by **NGOs or NGO coalitions, think tanks or by actors from the business community**. These actors can be either national actors that can put pressure on member states national governments, or transnational ones that act at the European institutions level.

As we mentioned in the beginning of this chapter, the environmental policy, even though it is a separate policy, it is also complementary and dependent of other policies, especially the common market and trade policy. The financing of the environmental policy comes from both the Cohesion Fund and the European Fund for Regional Development with the purpose to preserve the environment quality and to develop the new member states environmental infrastructure to the EU level.

3.1.c. Environmental Policy in Romania

The history of environmental policy in Romania started in 1990 when the first **Minister of the Environment** was established. The Minister of the Environment has been the main actor in the environmental policy making and implementation ever since. Between 1990 and 2007 there were three National Strategies for Environment Protection elaborated, in 1992, 1996 and 2002.

In 2007, Romania became a member of the EU and with this another strategy for environmental protection and development of environment infrastructure has been adopted under the name National Development Plan (NDP) 2007-2013. This new strategy was adopted in 2005 as a

condition for Romania's accession to the EU, and it contained European environmental regulations and a plan to finance environmental development in Romania. "The main objective of the environment sector of the NDP is the protection and the enhancement of environment quality, in conformity to the economic and social needs of Romania" (The National Development Plan 2007-2013, p. 282).

From its inception, the Minister for Environment changed its name many times, and was associated with other policies. Since the parliamentary elections in 2008, the environmental policy is administered by the Minister for Environment and Forests (MEF). The MEF is the most important actor involved in environment policy making and implementation and its main attributions are: "development of strategies and plans for the environmental field, water management, sustainable development and forestry; (…) elaborates normative papers and approve the normative papers of other governmental bodies [related to environmental law]" (Operating and Functioning Code Regulations of the MEF, pp.6-8).

The MEF has no less than 21 directorates in its composition and other agencies directly under MEF's subordination, authority or coordination. From these agencies, the National Environment Protection Agency, the National Environment Guard or the National Forest Administration is worth mentioning, without disregard of the importance of the other bodies subordinated to MEF.

As in the case of EU's environmental policy making process, the Romanian environmental policy development is influenced by other actors. The **Romanian Parliament** is an important actor due to its legislative function and the influence it can have on passing environmental legislation. The **nongovernmental sector** is of great importance too, given the fact that the most active NGOs are environmental ones, even though the degree of influence in environmental decision-making is not high.

3.1.d. Sectoral Operational Programme Environment: Actors and Governance

Our main attention in this section of the paper will focus on one of MEF's directorates, the Sectoral Operational Programme Environment Managing Authority Directorate (SOP ENV) that covers a financing timeline from 2007 to 2013, and the implications of MLG and network governance in the implementation process of this programme. The main concepts we will be analyzing are SOP ENV actors, the relations between them and the Europeanization process through the *acquis* implementation in the Romanian environmental policy.

The SOP ENV is responsible with the "protection and improvement of the environment and living standards in Romania, focusing in particular on meeting the environmental *acquis*. The aim is to reduce the environment infrastructure gap that exists between the European Union and Romania both in terms of quantity and quality" (Sectoral Operational Programme Environment Paper, 2007, p. 7).

In order to achieve the objectives, SOP ENV runs a financial instrument funded from the Cohesion Fund and the European Fund for Regional Development. The financing is divided in six axes which will be presented in Addendum no.2. There is a close link between environment and other social or economic sectors, and due to this the SOP ENV has been developed in correlation with the other Sectoral Operational Programmes in order to secure a uniform and complementary development towards the Lisbon Treaty's objectives. To attain the objectives established by SOP ENV, EU has allocated approximately Euro 4.5 billion from a total of Euro 5.6 billion, the rest of the funds representing the national contribution to SOP ENV.

The management framework of the SOP ENV is divided in several levels of action: the Managing Authority, the Intermediate Bodies, the Beneficiaries, the Monitoring Committee, the Certifying Authority and the Audit Authority. Also, through the Priority Axis 6 Technical Assistance, another level of management is added and it consist of the consultancy services offered to governmental actors by private enterprises qualified on environmental issues.

The **Managing Authority** (MA) for SOP ENV is the Minister of the Environment and Forests and has the role to ensure the strategic overview of the SOP ENV. The MA is also responsible for the programme implementation and it "ensures compliance with national and EC policies on state aid, in close cooperation with responsible bodies, public procurement, environment protection, equality of opportunities for men and women and non-discrimination" (Sectoral Operational Programme Environment Paper, p. 106).

The **Intermediate Bodies** (IB) are the regional representatives of the SOP ENV implementation. There are eight IBs, each one responsible for one of the eight development regions in Romania. They play an important role, due to the fact that they are the interface between the MA and the beneficiaries. Their main attributions are related to "programming, monitoring, controlling and reporting activities. They have also been involved in the monitoring of ISPA projects in their region and in the development of grant schemes of environmental projects run under PHARE" (Sectoral Operational Programme Environment Paper, p. 106). Being the direct link to the beneficiaries and the process of implementation of SOP ENV, the IB's reporting is essential to further development of the SOP. Although, until 2010, the IBs had fewer responsibilities, a gradually increase of these responsibilities in programming and selection process is a midterm objective for the SOP.

The main actors in the management and implementation process are the **Beneficiaries**. Beneficiaries can be NGOs, local public authorities or even state organizations and their main responsibilities are to ensure that the services and contract for their projects are as incorporated in the application for SOP ENV funding. The funding is eligible as long as the projects help attaining the SOP ENV's objectives and the beneficiaries are accountable for any problem the implementation of the project has. Through some technical assistance projects the beneficiaries are also able to get involved in the amending of the regulations in which they are directly involved, more exactly the project evaluation and application process. This is possible through joint meetings between the IBs and the beneficiaries in which issues related to the application framework are discussed.

The **Monitoring Committee** is another actor involved in the SOP ENV implementation process and it is comprised of representatives from ministers with a Managing Authority role, representatives from business or professional associations and of members of the civil society involved in environmental protection sector. It also comprises representatives from the European Commission and from international financial institutions.

The **Certifying Authority** and the **Audit Authority** are two other actors involved in the implementation process of the SOP ENV. The first one is a part of the Certifying and Paying Authority within the Minister of Public Finances and is "responsible for drawing up and submitting to the Commission certified statement of expenditure and applications for payment in line with the provisions of Article 61 of the Council Regulation No 1083/2006" (Sectoral Operational Programme Environment Paper, p.117). The Certifying and Paying Authority is also responsible with the payments beneficiaries should receive. On the other hand, the Audit Authority is an associated body to the Court of Accounts and it provides, on one hand, internal audit for the MEF, and on the other hand audit services for SOP ENV.

3.1.e. Conclusion: Multi-level and Governance Networks in the Structures of MEF and the DG SOP ENV

The **MEF** is the main actor in the environmental policy making in Romania and it has a hierarchical structure which contains state secretaries, directorates and other bodies under the authority of the MEF. The highest rank in the MEF is occupied by the minister followed by his/her state secretaries; directorates are the next level of authority, under the subordination of the state secretaries, and also have specialized divisions depending on the specific domain they are responsible with. The **SOP ENV** is one of the directorates of the MEF and is under the authority of

the minister and his/her state secretaries. There are also separate institutions, also public ones, which are under the coordination or the authority of the MEF and its subordinated directorates or divisions.

The simplistic structure stated above is the official structure of the MEF, but there are also other methods of interaction that transcend the hierarchical structure and make possible the influence of non-governmental actors in environmental policy making. Although the Operating and Functioning Code Regulations of the MEF contain a statement regarding cooperation relations between the MEF and other subordinate governmental structures or non-governmental actors, a clear method through which non-governmental actors can influence the policy making process does not exist at the moment.

Given the fact that there are no institutionalized ways in which the non-governmental actors can intervene in the environmental policy making process, through the sixth financing axis, Technical Assistance, it is possible to bring the **Beneficiaries** perspective in the process. This consists in regular meetings to discuss the improvement of project selection regulations and process within the SOP ENV. The meetings are organized by the **Intermediate Bodies** with the assistance of experts coming from the consultancy part that implements the project; the Beneficiaries proposals and the conclusions of the discussions are filtered by the Intermediate Bodies and then reported to the DG SOP ENV; the DG SOP ENV then decides which proposals are feasible and then modifies the Solicitors Guide and the project selection procedure depending on the requested modifications.

There are also other forms of influencing the environmental policy making process through interest groups or NGO coalitions. These actors lobby in order to attain their own interests by influencing the environmental policy development. This type of intervention can influence the whole environmental policy from Romania, and not only a small part, like the project selection procedure, as in the case of DG SOP ENV seminars.

In terms of MLG or governance networks, the Romanian environmental policy has a high degree of centralization. The decision stays in the hands of central government, with little influence from regional, local or non-governmental actors, even though in some instances the perspectives of these actors could be more feasible. The implication of non-governmental actors is not visible, partly due to the lack of instruments to do so, and partly because the policy making process is not a transparent one. This is one of the factors that make it hard to measure the level of implication and influence that the non-governmental actors truly have in the policy development process.

Our preliminary findings show that, at a first glance, the MLG and network governance cannot accurately describe the Romanian environmental policymaking. Nevertheless, although the decision stays mainly at the centre, the EU directives have a great influence on the environmental policy, bringing the involvement of the supranational level within this policymaking process. Also, in some aspects, the local or regional bodies influence, even though in a minor way, the development of environmental policy. Non-governmental actors have even less influence on environment policy making, but they can be present in the process of policy evaluation, especially the national non-governmental actors. The presence of at least three levels of governance actors is the proof that MLG is present in Romanian environmental policy, but we have to keep in mind that MLG is not a frequently used method in Romanian environmental policy development. In regard to governance networks, the high centralization of decision making to the MEF makes the existence of multiple decision nodes almost impossible. The MEF is a decision node, considering that it has relations in the same time with supranational actors and with local or regional ones.

In this analysis, our goal was to frame a research structure which can be developed by a thorough policy analysis based on empirical research. This thorough analysis consists in following certain aspects of environmental policy and assessing the course a certain policy topic has from its inception to its implementation. The specific aspects that we intend to study comprise a broader analysis of the actors involved in the environmental policy, a deeper research on the relations between the actors and the exact influence each actor has on the policy-making process. Such an analysis will be the subject of future research.

3.2. The Higher Education Policy: EU and Romanian Aspects

3.2.a. General Context

In this case study, we intend to examine education policy in general, and policies concerning higher education (HE) in particular. We will start with the analysis of the Lisbon Treaty which specifies that the EU, through its institutions, support, coordinate or complement the actions of Member States in terms of education. Why is this happening? Why is it that we do not find a greater involvement of the supranational level in formulating policies in higher education? A general and common response among scholars would be as follows: it was always a sensitive area for EU Member States because of its complex social implications. More specifically, there is a direct link between the educational process and the formation of identity, which has always been operated by the state in order to create specific citizens. However, in recent decades, globalization and technological developments in communication, lead us to a different conclusion: „At the same time, knowledge knows no boundaries. Despite the effort of national states to nationalize knowledge and excellence, intellectuals often display marked cosmopolitan attitudes and identify themselves more with their own brand of science than with their nationality" (Piattoni 2010, p. 151).

Therefore, in the space of the European Union we can see two trends in terms of education: (1) One is keeping policies under the control of member governments; in this case education is understood as a political project of national conservative elites; (2) The other is the breaking down of boundaries of nation states and correlating the entire educational process to the supranational level[16]. Regarding the first possibility, things are relatively easy to understand, the national education system is generally dominated by local norms and traditions: „National and professional identity, political organization, policy formation and public/private markets are all viewed as contained within the borders of the state" (Novoa and Lawn 2002, p. 1). But the trend of education (transferring authority to supranational level) is in turn strongly influenced by two factors: pressure from academics which get involved in broader cultural facilities to be up to date with what is written in a certain area in the world; and, as regards the European Union, the process of globalization that leaves states of this old continent behind the other world powers like the United States, China and India.

Next we will refer to higher education policies from both the EU and the transnational level (Bologna Process), where the EU is only a partner. As a general characterization, the main strands of higher education policy at European level, as shown by Simona Piattoni are:

- Attempting to create a university or university system with a high standard of quality;
- Mutual recognition of vocational training[17] diplomas, for greater ease in the free movement of skilled workers across Europe;
- Community policies on the mobility of students and scholars (for example, Erasmus and Socrates);
- Intergovernmental processes of harmonization of the higher education system inside and outside of the EU (Bologna process and the Open Method of Coordination).

The purpose of this case study is to identify the appropriate European and national actors who participate in HE policy, and to analyse the types of relationships between them. Regarding the theoretical framework of this study, HE policies may be, on the one hand, interpreted in the light of MLG: „The governance of Europe has specific problems and forms. It can be conceptualized as a

[16] These two trends (that can be seen as the intergovemmental versus supranational disputing viewpoints) influenced in comparable degrees the evolution of the education policy; therefore, nowadays, one can say that its design can be considered as sitting somewhere in the middle of an axis limited on the one side by the intergovemmentalists, and on the other by the supranationalists.

[17] This was the wording of the Treaties of Rome for the education in general. This extension of the concept of education to vocational trainings was possible after a decision of the European Court of Justice.

multilevel system of governance where private and public actors at the transnational, national and local level deal with problems of a lack of central authority and a dispersal of resources (Novoa and Lawn 2002, p. 5). The specific of this type of governance is the territorial level at which decisions are taken and not necessarily the logical order between institutional levels. On the other hand, the governance also can be understood as a "networking" process, where the state has only a motivating role (establishing the rules, reducing or increasing transaction costs, etc.). In this case, we talk about policymaking processes where interactions present non-hierarchical features, where the network depends on the actors' resources and where it is emphasized the importance of the nodes of the network, nodes which contribute in a greater or lesser level to achieve its targets.

3.2.b. European Actors Involved in the Educational Policy

In this chapter, we are going to present European actors from European educational policy in the chronological order of their establishment. The first discussions regarding the HE dimension began immediately after the signing of the Rome Treaties in 1957, as a proposal by Etienne Hirsch, chairman of the EURATOM[18], to create a European University or a network of universities with profiles based on a supranational quality assurance. This project met a strong opposition from the French president, Charles de Gaulle. Although this first initiative had no concrete results, its contribution was important in shaping the image of the two kinds of actors which were going to be decisive for the future of this policy: the national actors (Member States) and the supranational ones (the Commission). One can also see how the interests of these two entities contrasted when the educational policy, the most viable tool of creation identities and loyalties, starts to be a subject of international debates.

The dialogue continued between the education ministers of member countries at that time; in turn, in 1971 the Commission created two working groups on this issue led by Altiero Spinelli. This work culminated with an approved "Program of Action" in 1976[19]. Furthermore, four years later - in 1980, the Commission implemented the follow-up programs: Comett I and II (Community Programme for Education and Training in Technology), Erasmus I and II (European Action Scheme for the Mobility Community of University Students) Lingua (Language and Training Program).

The Action Programme provides a transnational intensification of university relations, mutual understanding of educational systems and guarantees education for children of migrant workers. This program, however, appeared as a result of "mixed process resolution of the Council of Ministers of education meeting with the Council," whose implementation was also to be controlled by a "mixed process committee" which acted under direct control by the Council, but had the Commission as a full member, given its expertise and ideas on how to get Community funding for the implementation of the Action Program" (Corbett, Anne. 2006. "Higher Education as a Form of European Integration: How Novel is the Bologna Process?" *ARENA Working Papers*, WP 15/14, December; pp. 13–14 in Piattoni 2010, 156). But national ministers have classified it as an intergovernmental policy and they have done everything possible to keep the Commission far from this area so that it could not be tempted to expand its mandate.

Afterwards, in 1985, the ministers of education from all twelve Member States agreed for the first time to use Community funds and legislation to implement two projects of European education: the Erasmus program and the European Credit Transfer System. On the other hand the implementation of these projects required a change in the nature of education policy. From an intergovernmental coordination, it would gradually move to a supranational one. However, the

[18] The proposal came from the President of the EURATOM's Commission because the community sought to develop techniques for producing atomic energy, exporting and the excess out of EU borders. In these conditions, it had to be created a „know-how" European area.

[19] We should mention here that the results appear 20 years after the initiative of Etienne Hirsch. This is a topic for a further analysis.

Maastricht and Amsterdam treaties would do nothing but strengthen the idea of promoting the quality of education and specify the supporting role of Community regarding the educational policy in Member States.

Consequently, two major agencies were created in the field of education. The first is the European Centre for the Development of Vocational Training (Cedefop), which provides analysis on vocational education systems, facilitates the exchange of information between Member States and actively participates in the process of recognition of qualifications. Basically this centre has done nothing but increase research capacity in the field through regular dissemination activities (publications, documentation centres or research groups). „Furthermore, it provided a focus for exploring various policy options, a function which can be seen as decisive for the Commission's policy in the late 1970s and 1980s" (Preston, Jill. 1991. *EC Education Training and Research Programmes. An Action Guide*. London: Kogan Page; pp. 51f in Ertl 2003, p. 19). The second is the European Training Foundation (ETF) that is designed to „help transition and developing countries to harness the potential of their human capital through the reform of education, training and labour market systems in the context of the EU's external relations policy" (ETF.EUROPA 2011, http://www.etf.europa.eu/web nsf/pages/AboutETF_EN?OpenDocument). In addition to these agencies, the Commission also established a DG EAC (Directorate-General for Education and Culture) which is used for a supranational coordination of educational policy.

Among all the committees established to manage the educational programs, Socrates and Eurydice were the most stable. The first was simply an information program which contained countries from the outside of EU and the second was nothing more than a comitology committee, its members being appointed by the Ministers of Education from Member States. „**The operation of the entire Socrates program involved "centralized" and "decentralized" actions and configured a multi-level system of governance**" (Piattoni 2010, 158).

To complete this process, two other agencies, based on network structure, have been established: NARIC (National Academic Recognition Information Centres) and ENIC (European Network of Information Centres). „The NARIC network is an initiative of the European Commission and was created in 1984. The network aims at improving academic recognition of diplomas and periods of study in the Member States of the European Union (EU) countries, the European Economic Area (EEA) countries and Turkey" (ENIC-NARIC) 2011, http://www.enic-naric net/index.aspx?s=n&r=g&d=about#ENIC). It must be said that this network was part of the Community's Lifelong Learning Programme (LLP) and empowers mobility of scholars and students by facilitating information access and recognition of diplomas. Regarding ENIC, it was established to implement the Convention on the Recognition of Qualifications Concerning Higher Education in the European Region signed in Lisbon (1997) and entered into force in 1999. On the same website, we also find that this network cooperates closely with the NARIC and aims to provide information in the following areas: recognition of any kind of foreign qualifications (ex. diplomas or degrees), the educational systems of foreign countries and the ENIC's countries, opportunities of studying abroad (scholarships or loans and advice on mobility and equivalence).

These networks have managed to build a very close dialogue both among themselves and with the Commission DG EAC, and so has appeared the first European Network for Quality Assurance in Higher Education, which aimed to promote cooperation in the field of quality assurance. Then, in 2004, the need for supranational coordination led to the creation of a European agency dealing with the HE quality assurance issues: the European Association for Quality Assurance in Higher Education (ENQA[20]). The proposal was made by the European Commission and then accepted by the Council and the European Parliament.

[20] The mission of this association is „to represent its members at the European level and internationally, especially in political decision making processes and in co-operations with stakeholder organisations; to function as a think tank for developing further quality assurance processes and systems in the EHEA; to function as a communication

In parallel with the European initiatives which outline a coherent educational policy, in 1999 appeared the well-known Bologna Process through a political statement where officials from 29 European countries pledged[21] to reduce disparities in the European education across the continent, by creating a European Higher Education Area; in other words, the aim is „to create a European Higher Education Area (EHEA) based on international cooperation and academic exchange that is attractive to European students and staff as well as to students and staff from other parts of the world"[22]. This project had as main objectives the establishment of an official European Credit Transfer System (ECTS), improving the quality of European education or the production of diploma's supplements for courses compatibility. Under this project, regular meetings were established to assess the national HE systems, structural comparisons between systems, the creation of indexes serving the before mentioned purpose or making regular progress reports. Many of these ideas were present in long debates and initiatives in the integration of HE national systems.

To ensure the permanence between meetings, Bologna Follow-Up Group (BFUG) was created as a secretariat. The Bologna Process website shows that it consists of all members of the Bologna Process and the European Commission, with the Council of Europe, the EUA[23] (European Universities Associations), EURASHE[24] (European Association of Institutions in Higher Education), ESU[25] (European Student's Union), UNESCO-CEPES[26], Education International[27], ENQA and BUSINESSEUROPE[28], as consultative members. „The BFUG is being co-chaired by the country holding the EU Presidency and a non-EU country, which rotate every six months. The vice-chair is the country organising the next Ministerial Conference" (EHEA 2011, http://www.ehea.info/article-details.aspx?ArticleId=5).

Through these mechanisms, it was succeeded in creating a European academic community which has worked increasingly better, editing a growing number of European journals and creating of European organizations. Further, „a **Standing Group on Indicators and Benchmarks** (SGIB) was also established and (roughly eighty) non-governmental organizations have been involved in the process as well, mostly to act as watchdogs vis-a`-vis their national governments in case these lagged behind in the implementation of agreed goals." (Piattoni 2010, p. 162).

Finally, we will present a classification of the actors indentified as taking part in the evolution of this policy, both within the EU and in the field of trans-national cooperation, in accordance to their nature:

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platform for sharing and disseminating information and expertise in quality assurance among members and towards stakeholders." (ENQA 2011, http://www.enqa.eu/mission.lasso).

[21] Statement had not coercive power.

[22] Quotation from the official website of the Bologna Process within the July 2007 – June 2010 period: http://www.ond.vlaanderen.be/hogeronderwijs/bologna/.

[23] Supports and represents around 850 HE institutions from 46 countries. Its role is to provide them a forum for cooperation and exchange of information on higher education policy.

[24] „EURASHE is the (international) association of European Higher Education Institutions – Polytechnics, Colleges, University Colleges, etc. – devoted to Professional Higher Education and related research within the Bachelor-Masters structure." (EURASHE 2011, http://www.eurashe.eu/RunScript.asp?page=108&p=ASP\Pg108.asp)

[25] It is an international network which includes 45 student organizations from 37 countries.

[26] „The UNESCO European Centre for Higher Education/Centre européen pour l'enseignement supérieur (CEPES) promotes co-operation and provides technical support in the field of higher education among UNESCO's Member States in Central, Eastern and South-East Europe" (CEPES 2011, http://www.cepes ro/cepes/mission htm).

[27] „As the world's largest Global Union Federation, and the only one representing education workers in every corner of the globe, Education International unites all teachers and education workers no matter where they are." (EI-IE 2011, http://www.ei-ie.org/en/aboutus/).

[28] „BUSINESSEUROPE plays a crucial role in Europe as the main horizontal business organisation at EU level. Through its 40 member federations, BUSINESSEUROPE represents 20 million companies from 34 countries. Its main task is to ensure that companies' interests are represented and defended vis-à-vis the European institutions with the principal aim of preserving and strengthening corporate competitiveness. BUSINESSEUROPE is active in the European social dialogue to promote the smooth functioning of labour markets." (BUSINESSEUROPE 2011, http://www.businesseurope.eu/content/default.asp?PageID=582).

Supranational actors	• European Commission – DG EAC, European Education Information Network: Eurydice, European Information Network for Young People: Eurodesk.
Intergovernmental actors	• Council of the European Union (Education, youth, culture and sport)
Transnational actors	• European Centre for the Development of Vocational Training (Cedefop) • European Network of Information Centres • National Academic Recognition Information Centres • European Association for Quality Assurance in Higher Education (ENQA) • European University Association (EUA) - 850 members in 46 countries • Bologna Follow-Up Group (BFUG) • European Training Foundation • European Association of Institutions in Higher Education (EURASHE) • The European Students' Union (ESU) • Confederation of European Union Rectors' Conferences (CRE) • European Quality Assurance Register for Higher Education (EQAR)[29]

We observe two directions in terms of higher education in Europe. On the one hand, we have policies and programs coordinated by the EU through specialized institutions; on the other hand we have a general process of policy coordination in this field where 47 countries are participating with other international institutions and organizations. Any further research in this area has to clarify some of the dilemmas arising from the rays of the system of European actors: what is the relationship between the EU and the Bologna Process? To what extent all these organizations and networks contribute to a rapprochement between Bologna and EU objectives? We can also wonder which is the exact role of each actor in policy formulation and management of both the EU and the Bologna Process?

Besides the questions listed above, questions addressed to researchers interested in the supranational/transnational level of the European HE system, there can be identified items to be analyzed at the national level of the member states. For example, in the Romanian HE area, to what extent all these European processes and policies contribute to the Europeanization of the Romanian HE dimension? In order to offer the appropriate answers, we must begin with an analysis of the national actors involved in the implementation of the HE policy.

3.2.c. National Actors within the Romanian HE Policy

In this part, we analyse the Romanian HE actors, as well as the relations between them in order to reveal exactly their role in the policymaking process; we underline that our goal is not to make an exhaustive description of these actors, but to propose a structure for a further research. The analysis will be based on a study of official documents such as the current education law or informal documents (for example, barometers of public opinion) or specific literature.

We consider as stakeholders in higher education those institutions or combinations of institutions that contribute, to a greater or lesser extent, to the national formulation, implementation and evaluation of policies in this area. One such actor is the state, defined here as an institutional ensemble characterized by relations and tensions, and whose role is to legitimate itself (alongside its comprising institutions) in front of the higher education establishments. The State exercises its

[29] An important actor at the larger European level is EQAR, „founded by ENQA, ESU, EUA and EURASHE, the European representative bodies of quality assurance agencies, students, universities and other higher education institutions, respectively, to increase the transparency of quality assurance in higher education across Europe" (www.eqar ro).

powers in higher education through Parliament, Government and Ministry of Education, Youth and Sports" (National Education Law, 2011).

Included in the state level, we also meet governmental actors represented by the Government and the Ministry of Education. As educational law stipulates, "Ministry of Education, Youth and Sport[30] is a public authority and it is entitled to monitor, to control the application and enforcement of regulations in higher education and to apply sanctions where it is appropriate" (National Education Law, 2011). We may also meet 'buffer' institutions in higher education such as: ARACIS (Romanian Agency for Quality Assurance in Higher Education), CNCSIS (National Council of Research in Higher Education), UEFISCDI (Executive Unit for Financing Higher Education, Research, Development and Innovation), CNFIS (National Council for Financing Higher Education) and ACPART (National Agency for Qualifications in Higher Education and Partnership with Economic and Social Committee), accordingly to a 2009 document elaborated by Miroiu, Birzea et al. within the SOP HRD financed project „Quality and Leadership for the Romanian Higher Education"[31].

Institution	Nature of the institution	Mission
ARACIS (Romanian Agency for Quality Assurance in Higher Education)	• "autonomous public institution of national interest, with legal personality and its own budget of income and expenditure. The agency is not subject to political or other types of interference" (ARACIS 2011 - *http://www.aracis.ro/despre-aracis/istoric/*).	• "External evaluation of the quality of education offered by higher education institutions and other organizations providing specific curricula of higher education" (ARACIS 2011 - *http://www.aracis.ro/despre-aracis/misiune/)* • To develop institutional culture within the Romanian HE; • To notice that the education meets the requirements of the beneficiaries; • To protect beneficiaries by developing quality evaluation; • To propose policies to the Ministry for improving the HE quality.
CNCSIS (National Council of Research in Higher Education)	• "It is an advisory body to the Minister of Education, Research, Youth and Sports, expressing the view of the university community in terms of policy research" (CNCSIS 2011 – *http://www.cncsis.ro/*). • Members appointed by the ministry on the basis of scientific and managerial competence.	• „CNCSIS provide the interface between academic research community and the Ministry of Education, Research and Youth, which represents the Government, in allocating funds for research in universities and performance evaluation of scientific research" (CNCSIS 2011 - *http://www.cncsis.ro/*). • To mediate the relationship between universities and the ministry on scientific research.
UEFISCDI (Executive Unit for Financing Higher Education, Research,	• Public institution with legal personality, subordinated to the Ministry.	• „Organization's mission is to manage the financial resources needed to support development of higher education and scientific research. • This organization is seeking to attract new financial resources and focus its activity on quality management of funding for higher education and

[30] From the same National Law of Education, we also find that the functions of Ministry of Education are: the proposal of national policies and strategies, development of organizational and operational regulations of the higher education system, monitoring and verifying the bodies which operate in higher education, managing the process of continuous evaluation, recognition and equivalence of diplomas according to internal laws, elaboration of the draft budget and of a report for higher education.

[31] The title of the document is „Understanding the Romanian System of Higher Education: Internal functions and structures" and it was created as a panel report within the above mentioned project, implemented by UEFISCDI.

Development and Innovation)		scientific research"(UEFISCSU 2011 - *http://www.uefiscsu.ro/text.html*)
CNFIS (National Council for Financing Higher Education)	• National advisory body to the Ministry of Education and Research.	• „Develop principles and methods of distributing public funds to state universities in Romania. • Through its work, CNFIS promote continued growth of the Romanian system of higher education quality, ensuring all citizens equal opportunities in higher education" (CNFIS 2011 - *http://www.cnfis.ro/*).
ACPART[32] (National Agency for Qualifications in Higher Education and Partnership with Economic and Social)	• Specialized body under the Ministry of Education and Research that has legal personality and branches in major cities of Romania.	• „Developing, implementing and updating national qualifications framework for higher education development, recognition and certification of qualifications based on knowledge, skills and competences acquired by the beneficiaries of the higher education system; • Compatibility analysis of curriculum specialization in the fundamental areas of higher education with national qualifications framework standards; • Involving Romanian higher education institutions in the development of a European society based on knowledge and productivity, with a competitive and dynamic economy; • Promoting the opening of higher education institutions to socio-economic environment through collaborative actions of cooperation between higher education institutions, businesses and other organizations to develop specific partnerships, labor market research, entrepreneurial dimension to universities in Romania and the transfer of Knowledge" (ACPART 2011 - http://www.acpart ro/index.php?page=misiuni)
CNATDCU (National Council for University Titles, Diplomas and Certificates)	• Specialized institution under the Ministry of Education control.	• „it proposes a set of minimum standards necessary and obligatory for conferring titles in academic institutions, research and development professional degrees, the quality of doctoral coordinator and certificate of entitlement. […] • annually checking, at the request of Ministry of Education, Youth and Sport or its own initiative, the competitions for university teachers and researchers jobs. • report annually to the Ministry of Education, Research, Youth and Sports on human resource for teaching and research in higher education, based on specific indicators" (National Education Law, 2011).

The institutions listed above participate in different degrees in the policymaking process by expertise offered by to the Ministry regarding the current state of higher education, as well as by external norms that have to be implemented at a national level, norms that are retrieved by these institutions through constant dialogue with various European actors.

[32] This agency was abolished in 2010 by the Romanian Government.

We offer here some additional details about the national actors presented in the table above. We mention that, for the purposes of this article (to identify relevant stakeholders and possible links between them, from the perspective of governance theory and in the context of the Europeanization process, proposing a structure of an extensive research), the next descriptions are based primarily on the official data available on the websites of these institutions. We are aware, however, that the continuation of this research requires further information.

ARACIS is a very important player for the Romanian HE; it has three key dimensions of action: evaluation of universities, partner of the ministry on policy formulation and bond between the Romanian and European HE. This relationship was strictly necessary after Romania's accession to the Bologna Process by which they try to create a European Higher Education Area. It must be said that the independence of this institution and its credibility come from the way of financing: taxes on institutions of higher education for credential evaluation, assessment service contracts or external grants and funds (ARACIS 2011, http://www.aracis ro/despre-aracis/istoric/).

Besides the before mentioned actors, there are also other institutions formed by experts with an advisory role for the Ministry of Education in policy formulation: the National Council for Higher Education Statistics and Forecasting (CNSPIS), National Council for Titles, Diplomas and Certificates (CNATDCU), National Scientific Research Council (CNCS), the Advisory Board for Research and Innovation Development (CCCDI), National Council of University Libraries (CNBU), the Board of Ethics and University Management (CEMU) and the National Council of Ethics in Scientific Research, Technological Development and Innovation (CNECSDTI). "Teachers and researchers may be part of these organisms, with at least the title of lecturer or researcher II or equivalent titles from abroad, members of the Romanian Academy and the institutions of culture" (National Education Law, 2011) and a student representative. But we assume that their role is not a very important one in the process of making policies, because they are practically branches of the ministry, financially dependent on them, while the appointments have usually political connotations.

Moreover, at the central level of analyzing the HE National Policy there is the civil society sector that includes trade unions, student groups and associations or political parties. Perhaps the most important role belongs to academic unions, but they act only on specific issues and their lobby action lacks consistency. Usually, parties have a purely electoral behaviour, getting involved only when their actions appeal to voters (and because higher education has no significant media impacts[33], public interest is also very low).

As to the local level, one can "analyse the institutional profile and how organizations such as municipalities, county councils, research centres, etc. influence the behaviour of public and private universities" (Miroiu, Birzea et al., 2009). These do not, however, have much significance because Romania is a highly centralized state, at least in the education policies, where the political decision is formed at the centre and applied implemented locally. The data obtained from an ARACIS barometer is very relevant: "Given that local authorities have been indicated as the main decision makers of a small number of respondents (2.7% of the financing and less than 1% otherwise), we decided to unite this category with the category of central authorities" (ARACIS Quality Barometer 2010, p. 138).

Another category of actors, even if they may be seen as some of the most important ones, is represented by the very core elements of the whole system, the universities. They may participate in the policy process by acting individually, their importance being given by the size and financial strength, or jointly by the National Council of Rectors, for example. But this does not happen actually; universities work more on domestic policies because of the centralized system. The potential of the universities' involvement has to be strengthened in the extended version of this article.

[33] Some debates, as that of the recent law of education in general, and the stipulations regarding HE in particular, have appeared in the national media, but the interest was fleeting.

3.2.d. Conclusions: Multi-level and Governance Networks in the Structures of the Romanian HE Policy

The majority of the institutional actors presented above are largely dependent on the Ministry of Education; even the expertise offered by them on specific areas is not always taken into account. Anyway, there are also significant exceptions, like ARACIS, an independent organization in terms of structure or finances.

All these things show that the Romanian system of making higher education policies is hierarchical. The biggest influence is held by the ruling party or coalition which exercises its power through parliament (the main legislative institution) and the government. Romania is, moreover, a strongly centralized state; the sub-national level has not a vital role in the HE politics and the institutions at this level often act as the agents of central power in the territory. We can therefore conclude that internally, we do not have governance, but rather a classic process of government (understood as "state" or "hierarchy"): the vertical action of government occupies the central place.

Nevertheless, the analysis of the European actors showed that HE policy has both a transnational dimension (Bologna Process) and a European one (EU) through a more pronounced role of supranational institutions. And here we refer particularly to the starting period of the student and teacher mobility process, when the Commission has begun to play an increasingly more important role. Here is what Simona Piattoni said in her latest book regarding multi-level governance: „From a purely intergovernmental "mixed process" mode, higher education has become increasingly supranational, first, by finding some legal basis in a broad interpretation of the ECJ; then, by developing a proper legal basis in the Treaties of Maastricht and Amsterdam; further, by developing a full-fledged comitology system that brings in experts, stakeholders, and education providers; and, finally, by generating a rather complex multi-level governance system that connects commission functionaries directly with national and local administrators." (Piattoni 2010, p. 171)

4. Conclusions

In terms of multi-level governance and governance networks, the study we conducted showed that the European level of policy-making works differently than the Romanian process of policy development. We also found differences between the policy-making process in environmental sector and the educational one. If the European environmental and the education and training policy have a high presence of MLG and GN practices, given the influence of supranational, transnational and non-governmental levels/actors, the same policies, this time at the national level, follow a different pattern.

The case of Romanian environmental policy-making revealed a low level of governance practices – either MLG or GN – as consequence of the high centralization of the decision making responsibilities to the central government. Nevertheless, despite the absence of the network features and despite the fact that SOP ENV is a subordinated body of the MEF, the level of MLG is higher in its case, especially due to the fact that the financing is from European funds and there is a direct link between the actions of SOP ENV and European legislation in the environmental field. The evaluation of SOP ENV comes both from national institutions and from supranational ones, this being one of the reasons that can explain the higher level of MLG. Being able to restrict the funding, the Commission plays a more powerful role in controlling some environmental policy sectors.

On the other hand, in the Romanian education policy is present a more hierarchical system, where the MLG and governance networks practices are weak, if not missing at all. Similar to environmental policy, the education policy is highly centralized; the sub-national level plays a minor role in the final decision making process, and also, the supranational level has no direct competences in the educational policy-making process of the Member States. In the case of Romanian HE policy, we can conclude that the process of governance is not present, and that a classical governing mechanism is functioning. Nevertheless, there are two peculiar aspects of this conclusion. On the one

hand, in comparison with the EU attempts to foster a greater cooperation between different types of actors situated at different decisional levels, in Romania – as we mentioned before – there are still lessons to be learnt in this cooperation aspect. On the other, one cannot say however, that there is not an Europeanization trend of this policy, even if it is mainly a top-down one, driven by national official entities; this trend can be seen if we basically compare the Romanian HE framework to the general European (not specifically EU) one.

The current analysis is just a general assessment of the levels of multi-level and governance networks in environmental and educational fields, but a future research will comprise a deeper evaluation of both policies. This future research will be based on empirical facts discovered by following certain aspects of environmental and education policies and assessing the course a certain policy topic has from its inception to its implementation. Resulting from the envisaged research will be a clearer view of the relations that the actors have in both policies and which levels of policy-making are involved. The research will also involve a broader documentation on the two subjects, other than the official documents provided by the actors we identified, to ensure a better understanding of the general framework and to better enounce the evolution the two policies had accordingly to the multi-level (on the one hand) and network (on the other) governance practices.

ADDENDA

Addendum 1

The specific objectives of the SOP ENV are:

1. "Improve the quality and access to water and wastewater infrastructure, by providing water supply and wastewater services in most urban areas by 2015 and by setting efficient regional water and wastewater management structures;
2. Development of sustainable waste management systems, by improving waste management and reducing the number of historically contaminated sites in minimum 30 counties by 2015;
3. Reduction of negative environmental impact and mitigation of climate change caused by urban heating plants in most polluted localities by 2015;
4. Protection and improvement of biodiversity and natural heritage by supporting the protected areas management, including NATURA 2000 implementation;
5. Reduction of the incidence of natural disasters affecting the population, by implementing preventive measures in most vulnerable areas by 2015". (Sectoral Operational Programme Environment Paper, 2007, p.7).

Addendum 2

- **Priority Axis 1** "Extension and modernization of water and wastewater systems";
- **Priority Axis 2** "Development of integrated waste management systems and rehabilitation of historically contaminated sites";
- **Priority Axis 3** "Reduction of pollution and mitigation of climate change by restructuring and renovating urban heating systems towards energy efficiency targets in the identified local environmental hotspots";
- **Priority Axis 4** "Implementation of adequate management systems for nature protection";
- **Priority Axis 5** "Implementation of adequate infrastructure of natural risk prevention in most vulnerable areas";
- **Priority Axis 6** "Technical Assistance" (Sectoral Operational Programme Environment Paper, 2007, p. 7).

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CARTELIZATION AS EQUILIBRIUM? EVIDENCE FROM ROMANIA

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Abstract
This paper discusses the development of the Romanian party system in view of the cartel party thesis proposed by Richard Katz and Peter Mair. The paper is divided into three sections. In the first section I offer a brief review of the cartel party thesis and present a few theoretical arguments regarding the study of cartelization. I argue that Katz and Mair may have overemphasized the importance of cooperation between established parties as necessary for the passing and enactment of cartel related legislation. I hold that the existence of cooperation between established political parties, with or without overt collusion, may be difficult to pinpoint due to the strategic voting that goes on in most legislative bodies. Thus I think it is appropriate to view the passing of the cartel associated legislation as a collective action problem: given high electoral volatility the rules and regulations needed for reducing political uncertainty will be adopted and enacted but not necessarily through cooperation. I suggest that such a perspective can explain every instance when the passing of cartel legislation is dependent on cooperation as well as those instances where no evidence of cooperation can be found. The second section presents some methodological aspects. In the third section I analyze the development of the Romanian party system with emphasis on those electoral rules and regulations that limit open political competition as well as on the system of party finance. I show that electoral rules have gotten progressively harsher and that the system of party finance clearly handicaps new competitors. Moreover the cartel has been extremely successful in keeping new competitors out of Parliament: since the transition from communism to democracy only one genuinely new party has won legislative representation.

Keywords: *cartelization, equilibrium, electoral volatility, electoral legislation, party finance*

Introduction

This paper offers a theoretical and empirical analysis of the process of cartelization using evidence from Romania. The aim of the study is to discuss the theoretical assumptions of the cartel party thesis and to propose a solution for some of the inconsistencies contained in the original model. The study of cartelization is an important topic in political science as it relates to party system consolidation and the relationship between political parties and voters. Party systems in Central and Eastern Europe have been characterized by very high levels of electoral volatility which suggests party system instability yet the party incumbency rate (the number of parties which remain in Parliament after each election) has been high and the success of genuinely new parties has been extremely limited. Thus the development of the Romanian party system can best be explained by using the cartel party thesis which argues that the established political parties use their control over the legislative body in order to prevent new competitors from gaining paliamentray representation and in order to gain acces to state resources, specifically state funding. One of the main arguments of this paper is that such a strategy is an equilibrium outcome: if electoral volatility (which is the most common indicator of electoral uncertainty) is mainly influenced by government performance (poor government performance leads to an increase of electoral volatility) and by permissive electoral

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rules[1], the major political parties will always decide to pass and enact progressively harsher electoral legislation in order to reduce uncertainty. This is because such a strategy implies a very low cost and its effects are immediate while trying to reduce electoral uncertainty by ensuring a good performance in government is costly and its effects are difficult to predict. In order to support this claim I shall analyze the relevant electoral legislation as well as the system of party finance, the incumbency rate of Romanian parties and the success of genuinely new parties. The second aim of this paper is to strengthen the cartel party model by offering a solution to some of the theoretical problems of the original thesis.

A Discussion of the Cartel Party Thesis

This paper discusses the development of the Romanian party system in view of the cartel party thesis proposed by Richard Katz and Peter Mair[2]. They argue that, by the 1970s, political parties in Western democracies were faced with a series of challenges: a decline in formal party membership and in party psychological identification, due to the weakening of traditional social boundaries associated with the emergence of welfare politics and mass society (the process of partisan dealignment); the growing costs of professional electoral campaigns brought about by the increasing reliance on mass media (particularly television) and the fiscal limits of catch-all politics. Katz and Mair also point out that politics has become a profession and in many cases the politician's primary source of income which means that politicians have a common interest in lowering the costs of electoral defeat. Since all the major or established parties face these challenges they have an incentive to set up a cartel which ensures the collective survival of its members. The process of cartelization has two primary aspects: the restriction of policy competition and the use of the state's resources in the interest of the cartel parties. Established political parties use their function as lawmakers to introduce state subventions in order to compensate for the decline of internally generated funds and to devise the system of public finance and the electoral laws in ways that disadvantage new competitors[3].

Katz and Mair base the cartel party model on the movement of political parties toward the state, in the sense that parties are heavily influenced by laws and regulations laid down by the government. Building upon this uncontested finding Katz and Mair propose a set of hypotheses, two of which I would like to discuss. The first such hypothesis states that if parties are drawing closer to the state then they are also likely to be drawing further away form the electorate[4]. Herbert Kitschelt has already pointed out that, as far as party leaders are concerned, the best strategy would be to allocate resources to their own parties and to enact the preferences of their electorate in order to improve their chances of winning a larger share of the vote[5]. There are however a few other issues regarding this hypothesis. Katz and Mair insist on the declining levels of party identification suggesting that a fair share of the voters act as consumers would, rationally assessing political parties on the basis of past performance and experience. If this is the case, rather than distancing themselves from their voters, parties would have a very strong incentive to closely enact the preferences of their constituencies since they can no longer rely on subjective votes. Even if we accept the contentious assumption of high policy convergence in a multiparty system, party leaders still need to convince

[1] Mainwaring, Scott; Espana Annabella; Gervasoni, Carlos. 2009. „Extra System Electoral Volatility and the Vote Share of Young Parties", www.cpsa-acsp.ca/papers-2009/Mainwaring.pdf*: 3-4.*

[2] Katz, Richard S., Peter Mair. 1995. "Changing Models of Party Organization and Party Democracy: The Emergence of the Cartel Party", *Party Politics*, Vol. 1 (1), 5-28; Katz, Richard S., Peter Mair. 1996. "Cadre, Catch-all or Cartel?: A Rejoinder" *Party Politics*, Vol. 2 (4), 525-534; Katz, Richard S., Peter Mair. 2009. "The Cartel Party Thesis: A Restatement", *Perspectives on Politics*, Vol. 7 (4), 753-766

[3] Katz, Richard S., Peter Mair. 2009. "The Cartel Party Thesis: A Restatement": 757-759

[4] Katz, Richard S., Peter Mair. 2009. "The Cartel Party Thesis: A Restatement": 755-756

[5] Kitschelt, Herbert. 2000. "Citizens, politicians, and party cartelization: Political representation and state failure in post-industrial democracies" , *European Journal of Political Research*, Vol. 37 (2), 149-179: 156

the electorate of their managerial expertise. A significant part of the electorate may lack the information or analytical tools[6] necessary in order to assess the managerial performance of an incumbent party with any degree of objectivity (baring extremely poor performances). The same goes for the competing claims of the opposition and we may reasonably assume that political parties are well aware of this fact and that the risk adverse politicians described by Katz and Mair would not stake their electoral fortunes on such a strategy. In fact we can assume that the extreme difficulties involved in explaining complex social and economic issues to the voters may have been one of the reasons why the established chose to devise laws that disadvantage new competitors, regardless of their own performance.

Another reason why parties can't distance themselves from their voters refers to the fact that while it may be true that "the pecuniary difference between being in office and out of office"[7] may be reduced in a cartel arrangement, constantly being out of office entails significant risks. Parties which fail to become part of a national governing coalition for more than two turns are more exposed to the threat of new entrants regardless of the institutional barriers devised by the cartel parties. Secondly, some of their members in the legislature may choose to defect to other parties. There is also the possibility that other established parties may appropriate their particular issues in order to win a larger share of the vote (if we accept some degree of policy divergence) or they may lose some part of their electorate due to strategic voting. Particularly in countries with a high degree of electoral volatility the threat of being excluded from Parliament provides a strong incentive for parties to maintain close relations with their electorate. The Romanian party system provides good examples of this sort of threat.

The second hypothesis I would like to discuss refers to Katz and Mair's argument that while parties are more influenced by the state, it is in fact the parties who devise and vote the laws and rules they are influenced by and that it is "necessary for parties to cooperate with one another if general party regulations are to be accepted and if a system of public financing is to be introduced"[8]. Katz and Mair emphasize the importance of cooperation although it is not at all clear why parties must cooperate in order to create the institutions that define the process of cartelization. Consider for instance the situation in which a governing coalition decides to introduce state subventions for political parties or to raise the electoral threshold. Let us assume that the main opposition party votes against such measures but that they are implemented nonetheless. Such an example illustrates that it is not in fact necessary for the established parties to cooperate in order for the laws and regulations associated with the process of cartelization to be adopted. Let us now assume that the government does not have a majority in Parliament and that cooperation is needed if the cartel legislation is to be adopted. How exactly does the process of signaling, which can produce the effects of collusion without any illicit communication or covert coordination, work? In their attempt to negate the fact that the process of cartelization relies on an actual conspiracy Katz and Mair may have gone too far by explaining concerted action on the basis of signaling. Legislative parties routinely negotiate with one another and in this respect it is quite unclear what illicit communication refers to. There are no rules stating that political parties are forbidden to negotiate with each other or that they may not cooperate as a result of said negotiations. Bargaining and log-rolling are the trademarks of representative assemblies and there is no strong argument why they should not apply to the process of cartelization. Katz and Mair do not contest this fact but state that parties might "be disinclined to

[6] Bartels, Larry M. 1996. „Uniformed Votes: Information Effects in Presidential Elections", *American Journal of Political Science*, Vol. 40 (1), 194-230; Gentzkow, Matthew. 2005. „Television and Voter Turnout" *The Quarterly Journal of Economics*, Vol. 121 (3), 931-972; Toka, Gabor. 2007. „Information Effects on Vote Choices in European Elections" in Michael Marsh, Slava Mikhaylov, Hermann Schmitt (eds.), *European Elections after Eastern Enlargement*, Mannheim: MZES

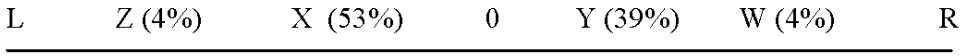
[7] Katz, Richard S., Peter Mair. 2009. "The Cartel Party Thesis: A Restatement": 758

[8] Katz, Richard S., Peter Mair. 2009. "The Cartel Party Thesis: A Restatement": 756

rely heavily on overt deals with another"[9], although the legislative process offers multiple opportunities for direct and relatively private negotiations. In some European countries the introduction of state subvention for political parties was preceded by a public debate on the advantages of such an arrangement in which case parties would have had the opportunity to send out signals concerning their stance on the matter. In some countries however, such as Romania, there was no debate before the introduction of the system of public finance. Regardless, there are may be opportunities for signaling but Katz and Mair make the contentious assumption that such signals are necessarily followed by the corresponding action. The main problem with the signaling argument is that parliaments don't approximate an oligopolistic market very well (except in the case of a minority government) due to the dominant position of the governing coalition. Also, in an oligopolistic market a signal might equal commitment but in the case of representative assemblies it does not, mainly due to strategic voting and therein lies one of the problems associated with the cartel party thesis: although one might assume that the major or established parties share a common interest in devising and enacting laws that ensure their own survival and disadvantage new competitors said common interest may prove difficult to pinpoint empirically due to strategic voting. If the governing coalition wishes to implement cartel legislation the opposition doesn't have to vote alongside it in order to enjoy the benefits, nor does it have any incentive to pay any of the costs. More importantly, cooperation is unnecessary for the implementation of most cartel associated laws.

In my view, Katz and Mair impose two unnecessary constraints on the emergence of the cartel of parties or, more accurately, on the implementation of cartel legislation: the need for cooperation and the lack of direct negotiations. If we eliminate these two constraints and reject the assumption that parties distance themselves from their constituencies we can look at cartelization from a fresh perspective. I propose a model based on Mancur Olson's collective action theory. The major political parties in a legislature can be viewed as a privileged group and voting for the enactment of cartel related laws and regulations closely resembles the production of collective goods. There are two important factors which influence the production cartel related legislation: electoral uncertainty and the political cost of enacting said legislation. According to Katz and Mair[10], in order to reduce electoral uncertainty political parties have used to types of laws: a) laws which disadvantage new competitors, such as the rising of the electoral threshold and harsher ballot access requirements and b) laws which help maintain the dominant position of the established parties such as an advantageous system of public finance and privileged access to public and private mass media. The cost (in lost votes) of producing these public goods is generally not very high. Let us, for example, analyze the cost of raising the electoral threshold from 3% to 5% as shown in figure 1. For the major parties the political cost of such a measure is nonexistent. The political leaders of the major parties would reason that party supporters have no motive to oppose such a move while the supporters of other parties could hardly be convinced to defect by a different stance on the issue. It is worth mentioning that the raising of the electoral threshold cannot be used against parties that are ideologically opposed.

Figure 1.



In this example, raising the electoral threshold to 5% would result in party X getting a share of party Z's votes and in party Y getting a share of party W's votes, regardless of whether we use the

[9] Katz, Richard S., Peter Mair. 2009. "The Cartel Party Thesis: A Restatement": 757
[10] Katz, Richard S., Peter Mair. 2009. "The Cartel Party Thesis: A Restatement".

proximity model or the directional model. Of course, whether parties Z and W would in fact manage to pass the electoral threshold at the next election depends on many other factors but they might lose votes due to strategic voting. Even if the immediate gain for the major parties might be uncertain the cost is clearly nonexistent. If this is the case then why wouldn't party X simply enact the measure? In my view there is no strong argument as to why the two major parties would have to cooperate in order for the law in question to pass. Similarly there is no reason why the supporters of major parties would oppose privileged media access or harsher ballot access requirements. There is the problem of the undecided voters but it can be alleviated by enacting the entire set of cartel related laws during one legislature. Of the laws that define the party cartel only the introduction of state subventions carries a significant cost of potentially lost votes. There is the possibility that the electorate might penalize the parties which vote for such a measure if it is seen as rent-seeking. There are certain alternatives for the process through which this particular law could receive the necessary votes. One of them is that Olson's model is correct and that the privileged member will pay the entire cost of producing the good[11], that is the governing party or coalition might decide that gaining a significant source of revenue is worth losing a certain number of votes. However Olson's model has been criticized for not taking into account the possibility of strategic interactions taking place between the members of a privileged group. According to McLean[12] the smaller a group is the higher the probability that strategic interaction will take place between its members. Thus, Olson's model must be modified in order to recognize the fact that the privileged members of a group could engage in a repeated game of Chicken[13]. When the game of Chicken is played repeatedly it becomes a game of bluff and precommitment. In the particular case of privileged groups this refers to the fact that, when there is more than one member who would be better of if the good was produced even if he had to pay the entire cost himself, each of them has an incentive to make a precommitment, announcing that he will not pay for the production of the good, in order to force the other(s) member to pay the entire cost. Even if there is a single privileged member he still has an incentive to precommit to not paying in order to force the non-privileged members to contribuite[14]. McLean's argument does not refer to the fact that privileged groups will fail to produce the good but rather to the fact that it is not necessary for one of the privileged members to pay the entire cost by himself. In order to reach a cooperative solution in a repeated game of Chicken one must resort to irrevocable precommitments. Brams and Kilgour[15] offer a solution for cooperativley solving a repeated (with an undefined number of rounds) Game of Chicken. The situation of parties in a legislative body is different however. Each of the parties would like for state subventions to be introduced but would prefer it if the other parties payed the electoral cost. Let us assume that there is only one privileged member, the governing party or coalition, and that he doesn't want to pay the entire cost by himself. The privileged member could make a irrevocable precommitment anouncing that he will not vote for the introduction a state subventions unless the opposition also votes for the law. There is the possibility that this strategy will work and that the major parties will all support the bill. The opposition could however also make a irrevocable precommitment not to support the bill in order to force the governing coalition to pay the entire electoral cost in which case the bill wouldn't pass. Each of the players is aware of this and also knows that the game has a defined number of rounds, given that the legislative turn lasts four years and that the vote can only be repeated a few times each year. Thus, before the last game, both the governing coalition and the opposition know that if they maintain their position the law will not pass and the opportunity of gaining the extra funds will be lost for that legislative turn. It follows that, in

[11] Olson, Mancur. 1965. *The Logic of Collective Action: Public Goods and the Theory of Groups*, Cambridge: Harvard University Press: 34

[12] McLean, Iain. 1989. *Public Choice: An Introduction*, Basil Blackwell

[13] McLean, Iain. 1989. *Public Choice:* 67

[14] McLean, Iain. 1989. *Public Choice:* 67-68, 134

[15] Brams, Steven J., Kilgour, D. Marc. 1986. "Is Nuclear Deterrence Rational?", *PS*, Vol. 19 (3), 645-651

the last game, both the government and the opposition should cooperate. Moreover the value of the good decreases if its production is postponed (if state subventions are introduced in the first year parties recevie subventions for the next four or three years, depending on when the budget law gets voted, before the state subventions are introduced or after) so it is reasonable to assume that the players will cooperate from the first game in order to maximize the time span during which they can enjoy the benefits of the good. If my argument is correct then the introduction of state subventions should happen during the first year of a new legislature and the bill should pass with a supermajority. The only remaining problem concerns the manner in which parties can make irrevocable precommitments. This depends on the route a new bill must follow before it is voted upon. In Romania a new bill must first go to a specialized commision which is composed of members from every legislative party (in proportion to each party's number of seats). In order for the bill to go to the vote it must first recevie a majority of votes in the commision. In my view this is the arena where parties can make precommitments and negotiate with each other, away from the media.

What I have tried to show is that, from a theoretical standpoint cooperation between the major political parties isn't necessary for cartel legislation to be enacted and that, when it does occur, it has more to do with the desire to share the associated electoral cost of certain cartel laws than with an actual need for cooperation.

Research Questions, Hypothesis and Methods

Research Question 1: Can we speak about the cartelization of the Romanian party system?

Research Question 2: If the major Romanian parties form a cartel how effective did it prove in keeping new parties out of Parliament?

Hypothesis I: Due to the electoral uncertainty facing political parties during the 90's cartel related legislation has been implemented in order to reduce it. This hypothesis includes to elements:

a) progressively harsher electoral legislation: Since one of the main functions of the cartel is to keep new competitors out of Parliament and out of the electoral market in general, electoral legislation should become progressively harsher following the 1992 elections;

b) the system of public finance: The second important function of the cartel is to ensure that cartel members maintain their dominant position. In this respect, the rules for the allocation of state subventions should favor legislative parties.

Hypothesis II: If the major parties in Parliament form a cartel I expect that, following the 1992 elections, the number of new parties that gain parliamentary as well as the number of minor legislative parties which are excluded from Parliament should drop towards zero.

In this paper I shall analyze the cartelization of the Romanian party system only at the systemic level. As Allan Sikk[16] has already pointed out theoretical models regarding western democracies don't always translate well in the case of post-communist countries. There are however certain characteristics of post-communist politics which approximate the developments described by Katz and Mair quite well: the weak ties between parties and the electorate, especially during the first years of democratic politics, and the political party's inability to fund professional electoral campaigns through internally generated resources.

One of the first methodological issues when looking for cartelizing behavior in the case of a post-communist country regards the moment one can expect such behavior to start. Given the fact that we cannot talk about established parties in this context it is my opinion that the logical place to start is the moment when there are at least two major parties or coalitions. In the case of Romania I believe we can expect to see cartelizing behavior following the 1992 elections.

[16] Sikk, Allan. 2003. „A Cartel Party System in a Post-Communist Country? The Case of Estonia", ECPR General Conference, Marburg, 18-21 september 2003,
http://www.essex.ac.uk/ecpr/events/generalconference/marburg/papers/16/3/Sikk.pdf

Methods

Party systems in Eastern Europe have generally been characterized by high electoral uncertainty which represents a important precondition of the emergence of the cartel. Given this fact the first step will involve determining the extent to which this precondition is met. I shall use *electoral volatility* and the *percentage of the voting population which were party members* (in order to assess party's capability to generate internal resources and party's ties with the electorate) as indicators.

In regard to the system of public finance the following indicators shall be used: *a) the existence of state subventions for political parties; b) the evolution of the amount available as state subventions; c) the rules for allocating state subventions, particularly if these rules favor legislative parties; d) the proportion of state subventions in party's budgets.*

I shall also analyze the rules for access to publicly owned television and radio stations during electoral campaigns as well as the regulations imposed on private media enterprises at election time. Another important aspect regards the electoral legislation, particularly the *evolution of the electoral threshold* and the *regulations regarding the establishment of new political parties*. Finally I shall analyze the success of what Sikk called "genuinely new parties" that is parties "that are not the successors of any previous parliamentary parties, have a novel name as well as structure, and do not have any important figures from past democratic politics among its major members" (Sikk 2003: 8). Additionally I shall also look at the number of legislative parties that are excluded from Parliament after each election.

I would like to mention that Romania's Parliament consists of two houses: The Chamber of Deputies (Camera Deputatilor) and the Senate. The following data only refers to the Chamber of Deputies. This paper stops at the 2004 elections as there have been no new developments regarding cartel related legislation.

The Romanian Party System

During 1990-2004 Romania has used a system of proportional representation (d'Hondt electoral formula) with closed lists. There was no electoral threshold at the 1990 elections (the first democratic elections after the fall of the communist system), a 3% threshold for the 1992 and 1996 elections and a 5% threshold for parties and 8-10% for alliances (depending on the number of parties) for the 2000 and 2004 elections.

The evolution of the Romanian party system has been rather complicated and requires a brief introduction. There have been four major party families in the Romanian party System.

The Social Democratic family included: The Party of Social Democracy (PSD, former PDSR, the Party of Social Democracy in Romania, 1992-2000) appeared when the National Salvation Front (FSN) split in 1992; The Democratic Party (PD) was the second party which resulted from the split of the National Salvation Front; the Romanian Social Democratic Party (PSDR, merged with PDSR in 2000 to form PSD).

The Christian Democratic family: the National Christian Democratic Peasants Party (PNTCD) was the main party of two large coalitions, the Romanian Democratic Convention (CDR) and Romanian Democratic Convention 2000.

The Liberal family: the National Liberal Party (PNL) split into four parties in 1992-1993. These parties were: the National Liberal Party (PNL), the Liberal Party '93 (PL '93), the National Liberal Party-Democratic Convention (PNL-CD) and the National Liberal Party the Young Wing. These four parties merged again under the label of the National Liberal Party after the 1996 elections.

The Nationalists: the Romanian National Unity Party (PUNR) and the Greater Romania Party (PRM).

In addition the party of the Hungarian ethnic minority, the Democratic Union of Hungarians in Romania has been in Parliament since 1990.

At the 1992 elections the Romanian Democratic Convention (CDR) consisted of: PNTCD, PNL-CD, PNL the Young Wing, PSDR, the Romanian Ecologist Party (PER) and the Civic Alliance Party (PAC).

At the 1996 elections the Romanian Democratic Convention (CDR) consisted of: PNTCD, PNL, PNL-CD, Romania's Alternative Party (PAR), PER and the Romanian Ecologist Federation (FER).

Table 1. Electoral Results, Chamber of Deputies, 1990-2004

Party	1990		1992		1996		2000		2004	
	% votes	seats	% votes	seats	% votes	seats	% votes	seats	% votes	seats
F.S.N	66,31	263	-	-	-	-	-	-	-	-
UDMR	7,23	29	7,46	27	6,64	25	6,8	27	6,26	22
PNL	6,41	29	-	-	7,2	25[1]	6,89	30	19,3	64[4]
MER	2,62	12	-	-	-	-	-	-	-	-
PNȚCD	2,56	12	12	41[1]	23,9	82[1]	-	-	1,85	-
PER	1,69	8	1,1	4[1]	1,4	5[1]	-	-	-	-
PSDR	0,53	2	2,9	10[1]	2,9	10[2]	3,1	11[3]	-	-
PDSR/ PSD	-	-	27,72	117	21,52	91	40	138[3]	34	113
PUNR	2,2	9	7,72	30	4,36	18	-	-	-	-
PRM	-	-	3,89	16	4,46	19	19,48	84	13,63	30
PSM	-	-	3,04	13	-	-	-	-	-	-
PD	-	-	12,6	43	12,5	43[2]	7,03	31	14,46	48[4]
FER	-	-	-	-	0,3	1	-	-	-	-
PUR/PC	-	-	-	-	-	-	1,7	6[3]	5,7	19
Other Parties	3,16	12	-	-	-	-	-	-	-	-

Source: http://www.essex.ac.uk/elections/, Preda (2003), Stefan, Grecu (2004)

[1] As a member of the Romanian Democratic Convention

[2] Social Democratic Union, electoral alliance: the Democratic Party (PD) and Romanian Social Democratic Party (PSDR)

[3] Social Democratic Pole of Romania, electoral alliance: PDSR, PSDR and PUR/PC

[4] Justice and Truth, alliance: the National Liberal Party and the Democratic Party

Electoral Uncertainty in Romania

The Romanian party system has been characterized by very high electoral volatility, mainly due to the weak ties between the political parties and the electorate as well as to the high number of inconsistent, minor parties. The effects of electoral volatility on the electoral fortunes of different types of parties can be illustrated with a few examples. Let us first look at the evolution of the National Christian Democratic Peasants Party. The party contested the 1990 elections with a program that emphasized radical change: the privatization of state owned enterprises, the return of the proprieties confiscated by the communist regime to their rightful owners, the exclusion from public office of all significant members of the Communist Party and clear pro-European and pro-NATO stance.

Table 2. Electoral Volatility in Romania, 1992-2008

Year	Volatility
1992	30,2
1996	14,3

2000	29,1
2004	14,94
2008	17,48

Source: Sikk (2005) for the years 1992, 1996, 2000 and own calculations for the years 2004, 2008

The party fared poorly at the 1990 elections and as a result it gradually adopted a catch-all approach to politics, contesting the following three elections in broad coalitions. It went on to obtain 41 seats at the 1992 election and 82 seats at the 1996 elections following which it formed the coalition government together with PD, PSDR and UDMR. Although there is a rather serious debate among Romanian political scientists about the performance of the Romanian Democratic Convention government in my view it had a number of very important achievements: it managed to stop the violent strikes of the miners (by offering generous unemployment packages), who were protesting against the reform of the mining sector, which had been responsible for the fall of several governments since 1990, it managed to avoid the bankruptcy of the Romanian state and it started the negotiations regarding Romania's integration in the EU. However it failed to implement significant economic reforms and its administration was characterized by the failure to limit corruption and the interpenetration of politics and business. Moreover it utterly failed to explain its policies to the electorate and went on to be excluded from Parliament.

On the other hand the two parties that have sought to form close relations with their constituencies, the Democratic Union of Hungarians in Romania and the Party of Social Democracy, the only Romanian party that is organized as a mass party, have mostly been spared the effects of the high electoral volatility.

In regard to the percentage of the voting population which were party members this was 3,3% in 1993[17]. Unfortunately, since political parties were under no obligation to declare the number of their members there isn't any official data for the 1990-2000 years. However based on the fact that the nr. 8 Decree of 1989 required parties to have 251 members and taking into account the electoral volatility for the years 1992 and 1996 it is very likely that most parties didn't have large memberships and that they were unable to fund electoral campaigns and political activity on the basis of membership fees. As a result 10 of the 17 parties which had gained legislative seats at the 1990 elections were excluded from Parliament following the 1992 elections. As a result of the 1992 elections 12 parties gained electoral representation (although as I have shown 6 of these contested the elections as the Romanian Democratic Convention) with two more parties being excluded from Parliament following the 1996 elections. We may conclude that electoral uncertainty was very high between 1990 and 1996 and that the preconditions for the emergence of cartelizing behavior had been met.

Party Financing in Romania

The system of state subventions was introduced in 1996 through Law no. 27/1996[18], the Law of Political Parties. Unfortunately I have been unable to find hard data on the positions adopted by the political parties regarding law 27.

Law no. 27/1996 states that political parties can finance their political activity through the following sources: party members' dues; donations and legacies; funds obtained through specific activities (the sales of party literature, bank interests, letting out of their own space for conferences and cultural actions, etc.) and state subventions.

[17] Letki, Natalia. 2004. „Socialization, for Participation? Trust, Membership and Democratization in East-Central Europe", *Political Research Quarterly*, Vol. 57 (4), 665-679

[18] http://www2.essex.ac.uk/elect/database/legislationAll.asp?country=romania&legislation=rolpp#chapter6

Regarding members' dues the law stipulated that the sum of the dues paid over the period of one year by a single person cannot exceed fifty minimum basic wages countrywide. The countrywide minimum basic wage taken as reference shall be the one existing on January o1 f the respective year.

Regarding donations the law forbids donations from public institutions, from self-managed public companies, from trading companies, and from banking companies where the state is the majoritary shareholder as well as donations from foreign states, organizations, firms and private individuals.

Donations received by a political party over a period of one year may not exceed 0.005 per cent of the state budget income in the respective year. In the financial year in which parliamentary, presidential or local elections take place, this ceiling doubles. A donation received from an individual over a period of one year may not exceed one hundred minimum basic wages country-wide in the respective year. The donation received from a legal entity over a period of one year may not exceed five hundred minimum basic wages country-wide.

Political parties receive yearly state subventions which are transferred monthly to the account of each political party. The sum allocated yearly to political parties may not be greater than 0.04 per cent of the state budget income. Political parties which are represented at the beginning of the legislature by a parliamentary group in at least one Chamber shall receive a basic subsidy. The total of basic subsidies shall represent one third of the budgetary subsidies allocated to political parties. Political parties represented in Parliament shall also receive a subsidy in proportion to the number of seats obtained. The sum due for one mandate shall be established by dividing the remaining two thirds of the subsidies from the state budget for political parties by the total number of parliamentarians. The total subsidy granted from the State budget to a political party after these operations may not exceed five times the basic subsidy. Political parties which have not obtained parliamentary seats but have won at least *two per cent* of the votes cast shall receive equal subsidies, which shall be established by dividing the sum which remains after the procedures concerning parliamentary parties have taken place by the number of the respective political parties. The total sum granted to non-parliamentary parties may not be greater than a basic subsidy. The sums unconsumed by redistribution shall be distributed to the parliamentary political parties in proportion to the number of mandates.

The Court of Audit was the institution charged with checking that parties respect the provisions on the law. Until 2000 there was no audit report regarding the state subventions received by political parties and a significant number of them had not presented the lists of donors. Moreover party finances could not, in fact, be checked as the methodological guidelines, which had to be adopted by Parliament, had never been devised.

The 1996 Law of Political Parties was replaced with Law no. 43[19] of 2003 regarding the financing of political parties and electoral campaigns. The legislative proposal was initiated in 2001 by the National Liberal Party, then in opposition. The proposal finally passed in the Chamber of Deputies with 184 favorable votes versus 41 negative votes. The main aim of the new law regarded members' dues and donations. Thus the ceiling for donations became 0,025% of the state budget income in the respective year and 0,050% in years when parliamentary, presidential or local elections take place. The ceiling on donations from an individual became 200 basic wages countrywide per year.

Regarding members' dues the sum of the dues paid over the period of one year by a single person can not exceed 100 minimum basic wages countrywide. Another interesting development was that, in order to receive state subventions, political parties which had not obtained parliamentary representation had to obtain at 4% of the votes cast. The rest of the procedures for allocating state subventions remained the same.

[19] http://legislatie resurse-pentru-democratie.org/43_2003.php

Table 3. The major sources of party financing, state subventions and donations, 2002-2005 (Lei)			
Party	Year	Income	
		Subventions	Donations
PSD	2002	2.121.120,6	186.477,5
	2003	2.266.310,2	969.500,6
	2004	2.266.310,2	7.503.086,6
	2005	1.984.529	710.769
PNL	2002	892.890,8	66.259,7
	2003	1.125.094,6	667.896,4
	2004	1.125.094,6	4.962.014,6
	2005	1.375.557	1.645.356
PD	2002	913.091,9	701.873,2
	2003	812.026,5	1.113.792,0
	2004	812.026,5	3.180.240,3
	2005	1.110.780	2.323.885
PUR/PC	2002	569.672,4	9.000[10]
	2003	443.231,1	159.681,9
	2004	443.231,2	1.198.492,0
	2005	708.298	960.392
PRM	2002	1.680.735,6	0[10]
	2003	1.636.392,6	84.295,7
	2004	1.636.392,6	2.380.868,8
	2005	1.121.363	194.627
UDMR	2002	852.488,5	222.050
	2003	746.945,0	633.402,8
	2004	746.945,0	3.019.315,6
	2005	729.481	662.844

Source: http://www.apd ro/map/venituri.php;
http://www rcc ro/documente/rap_part_pol2005.pdf**;**
http://www rcc.ro/documente/raport%20partide%20politice%202005.pdf

[10] The Greater Romania Party and the Romanian Humanist Party (PUR) didn't declare their donations for 2002; the Romanian Humanist Party changed its name in May 2001 to the Romanian Social Liberal Humanist Party (PUR-SL). PUR-SL declared that it had received 9.000 lei as donations in 2002.

The data presented in Table 3 shows that state subventions were the main source of revenue for political parties in the years of 2002 and 2003, with the exception of the Democratic Party. Funds received from donations have a greater share in every party's budget than state subventions in the year of 2004. This can be explained by the fact that 2004 was an election year and that the maxiumum ceiling allowed for donations was 0,050% of the state budget income. As I have shown the ceiling for a non-election year is 0,025% of the state budget income. Secondly it is a well known fact that political parties greatly increase their efforts to attract donations at election time.

The National Liberal Party, the Democratic Party and The Conservative Party (the curent name of the Romanian Conservative Party) have recevied more money from donations than from state subventions in the year 2005, while The Party of Social Democracy, The Greater Romania Party and the Democratic Union of Hungarians in Romania gained more funds from state subventions than from donations.

As there is no data regarding donations for the years 1996-2001 I cannot make any firm statements as to the degree to which parties are dependent on public funding. As Table 4 shows, the total sum of the state subventions to political parties has been rising since the system was first introduced in 1996 until 2003, after which the total sum remained the same until 2006. If we take into account the fact the 1996 Law of Political Parties stipulated that the maximum ceiling for donations was 0,005% of the state budget income for the respective year there is a good chance that state subeventions were the main legal source of party revenue until Law no. 43/2003 was adopted.

Table 4. Total State Subventions allocated to political parties, 1996-2003 (Lei)

1996	1997	1998	1999	2000	2001	2002	2003
450.000	1.575.506,1	2.780.000	3.390.000	3.900.000	5.800.000	7.020.000	7.030.000

Source: Monitorul Oficial (the Romanian Official Gazette)

Regardless of whether parties were in fact dependent on public funds the data from Table 3 proves that state subventions were a major source of revenue for the legislative parties. In my view it is clear that both laws regarding party financing offered a significant advantage to legislative parties given the fact that state subventions allocated to **all** parties without legislative representation cannot exceed one basic subsidy. Even theese sums are conditioned by the necessity that non-parliamentary parties gain at least 2% of the votes cast, according to the 1996 law, and 4% of the votes cast according to the 2003 law. It is worth mentioning that following the 1996, 2000 and 2004 elections no party (without legislative seats) has met these conditions. The fact that the laws regulating party finance favor legislative parties is also supported by the way in which state subventions are allocated. First of all the subventions for non-parliamentary parties are not fixed, but rather they are allocated whatever remains after the legislative parties have been allocated their subsidies according to the rules. Secondly, the laws (27/1996 and 43/2003) state that if there aren't any non-parliamentary parties which meet the required conditions the remaining sum is distributed to the legislative parties in proportion with their number of seats. However there is no rule stating that, at this point, a legislative party cannot receive more than the equivalent of 5 basic subventions.

The Romanian legislation regarding the establishment of new parties

The legislation regarding the establishment of new parties has progressed from a set of minimal requirements to a set of very restrictive conditions. The firts act which regulated the establishment of new parties was the Law Decree no. 8/1989. In order to be formally registered parties had to have 251 members. This law was replaced in 1996 by the Law of Political Parties according to which a new party had to have 10.000 founding members reziding in at least 15 counties, but no less than 300 per county. The requirements changed again in 2003 through Law no. 14/2003 which required 25.000 founding members reziding in at least 18 counties and Bucharest, but no less than 700 per county.

Legislation regarding access to publicly owned media at election time

The first law regarding the access of political parties to publicly owned media at election time was the Law Decree no. 92/1990 which stipulated that all political parties shall have equal access to radio and television services at election time and that access is free of charge. This law was replaced by Law no. 68/1992 which stated that the parliamentary political parties shall receive access to state owned radio and television servicies at the expense of the state budget. Non-parliamentary parties were required to pay for broadcast time. The law also stated that the broadcast schedule and broadcast time was to be determined by a parliamentary commission and that the broadcast time for parliamentary parties was to be double the time recevied by non-parliamentary parties. Each parliamentary party was to recevie broadcast time in proportion with its number of seats. Furthermore the law stated that political parties which didn't enter candidates in at least 10 districts wouldn't be granted broadcast time at the national level. There are two more rules which advantage parliamentary parties. First, commercial publicity with the intent of electoral propaganda in the media and printed press was forbidden. Secondly, interviews and news reports of general interest to the citizens were not to be taken into consideration by the parliamentary commission when allocating broadcast time. The provisions of Law no. 68/1992 disadvantaged parties without legislative representation by having them pay for broadcast time, which they could only buy a limited amount of as well as by excluding interviews and news buletins, through which members of the major parties

could gain the attention of the public, from the time granted to parliamentary parties. This law was in effect until 2004 when it was replaced by Law no. 373/2004. The new law still forbade publicity for electoral purposes but granted free access to state owned media to all political parties. A special parliamentary commission determines broadcast time for each party in proportion with the number of complete candidate lists for the Chamber of Deputies and the Senate. However parties which do not enter candidates in at least 50% of the electoral districts do not recevie broadcast time. The law does not specify how the broadcast time is to be divided between parliamentary and non-parliamentary parties so, assuming that every party entered candidates in every electoral district, it is up to the parliamentary commission to decide. Law no. 373/2004 contains provisions regarding private radio and televisions stations which must allocate 75% of the broadcast time in which they cover the election to parliamentary parties in proportion to the number of seats they have in Parliament. Non-parliamentary parties recevie 25% of the broadcast time if they have entered candidates in the electoral district in which the radio or television station is located.

It is worth mentioning that the provisions of Law no. 373/2004 contradict Ruud Koole's criticism of the cartel thesis which state that private media enterprises are a powerful counterweight to a possible cartel of parties[20]. How this can be if new competitors cannot in fact buy air time remains up to debate.

The success of genuinely new parties and the exclusion of minor legislative parties

The cartel has proven very effective in Romania: following 5 elections only one genuinely new party has managed to gain legislative representation: the Greater Romania Party. The Greater Romania Party was founded in 1991 and is a far right party.

The number of minor political parties in Parliament has been steadly decreasing since the 1990 elections. As I have already mentioned 10 of the 17 parties which had gained legislative seats at the 1990 elections were excluded from Parliament following the 1992 elections. As a result of the 1992 elections 12 parties gained electoral representation (although as I have shown 6 of these contested the elections as the Romanian Democratic Convention) with two more parties being excluded from Parliament following the 1996 elections. Six more parties lost legislative representation following the 2000 elections, one of them being the National Christian Democratic Peasants Party, a major party until then. No parties were excluded following the 2004 elections.

Conclusions

The Romanian party system displays all the major characteristics of a cartelized party system as identified by Richard Katz and Peter Mair: electoral legislation which has gotten progressivly harsher; party financing laws and laws regarding access to state owned media at election time which clearly favor the major legislative parties and the upward evolution of the electoral threshold. State subventions are definitely one of the major sources of revenue for political parties. It is my view that the high level of electoral uncertainty has been the determining factor for the emergence of the cartel which has been instrumental in reducing it. Since the 2000 elections there has been no change of the parties in Parliament (at the 2004 elections) despite the fact that electoral volatility remains high. New political parties have had very little succes while minor legislative parties which have gained representation during the early stages of the democratic system have been excluded from Parliament. My interpretation is that, in the case of the Romanian Party system, there is no evidence of a toning down of competition. Further proof of this issue regards the exclusion of the National Christian Democratic Peasants Party from Parliament at the 2000 elections and the exclusion of the Greater Romania Party at the 2008 elections. This goes to show that, although

[20] Koole, Ruud. 1996. „Cadre, Catch-All or Cartel? A Comment on the Notion of the Cartel Party", *Party Politics*, Vol. 2, No. 4, 507-523: 519

institutional structures meant to ensure the organizational survival of the major parties are truly effective, there is still a significant need for parties to maintain strong bonds with their constituencies. The main implication of the existence of a parties cartel is that it is a major factor in the consolidation of party systems in new democracies. The emergence of the parties cartel also appears to be an equilibrium outcome. On the other hand, the existence of the cartel may have a detrimental effect in regard to the functioning of the democratic system if new political alternatives are unable to gain representation due to the institutional rules created by the established parties, especially if this gives rise to far right anti-system parties.

The Romanian case is unfortunatly not ideally suited for the testing of my theoretical arguments regarding the way cartel related legislation is adopted as the Romanian Parliament archives only record votes in favor of a bill and negative votes and not what parties the parliamentarians in question belonged to. Law 43/2003 was adopted with a supermajority which would seem to confirm both my argument and Katz and Mair's argument. On the other hand the modification of the electoral threshold from 3% to 5% before the 2000 elections was done by a governmental emergency decree, no. 129/2000 which would support my claim that such electoral laws carry no associated electoral cost as far as the major parties are concerned (of course the National Christian Democratic Peasants Party must have bitterly regretted this decision). Whether parties cooperate with one another on a regular basis using signals or whether they only cooperate because the governing coalition refuses to pay the entire electoral cost requires further study. It is my hope that the argument I have presented might offer a different perspective on the emergence of the parties cartel.

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THE EUROPEAN DIMENSION OF ROMANIAN CULTURE IN CONSTANTIN NOICA'S PHILOSOPHICAL WORK

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Abstract:
After joining the EU, the concept of European cultural identity became a much debated issue in all the new member states of the Union, alongside with the "old" EU members. Our paper aims to present the contribution brought by Constantin Noica to preserving the spirit of Romanian culture alive during the totalitarian period that our country underwent from 1945 to 1989. We also intend to point out that Constantin Noica's attempt to define the particular profile of our country remains a current topic nowadays. In fact, this topic should be tackled more frequently by students, professors, research workers in order to help us rediscover the European vocation of our culture.

Key words: *Romanian culture, European culture, cultural identity, history of Romanian thinking, European cultural model.*

"...s-a ivit de vreo 1500 de ani o cultură europeană care a împânzit, a exploatat, e drept, dar a şi educat, cu valorile ei restul umanităţii/.../ aşadar aproape tot ce se întâmplă azi pe glob şi se va întâmpla mâine chiar în cosmos poartă pecetea Europei, oricât ar pretinde altfel etnografii şi istoricii, care descoperă alte lumi, în fond pentru a le scoate din letargie şi a le jefui de comorile lor spirituale. Suntem piraţi, conchistadori şi corsari în continuare, dar conchistadori ai spiritului – şi asta schimbă totul."[3]

"Orice coborâre în infern poate fi suportată dacă paradisul culturii e cu putinţă"[4]

Constantin Noica (1909-1987) was one of the most famous and a prolific Romanian philosopher, whose work widely enjoys the appreciation of contemporary intellectuals both in our country and abroad. Constantin Noica manifested interest for a various range of philosophical directions of research: gnoseology, ontology, axiology, logic, the philosophy of culture and the history of philosophy.

Perhaps at present Constantin Noica's name is mainly linked to the School of Păltiniş, basically to the closest collaborators of the philosopher – Andrei Pleşu and Gabriel Liiceanu, as well as to the research workers that tackled the famous thinker's philosophical work (e.g. Laura Pamfil, Sorin Lavric – to mention only two of the most important specialists who undertook this difficult attempt).

The repeated publication of Noica's volumes, especially after December 1989, has brought into evidence the philosopher's continuous strain to define the specific features of Romanian

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[3] Constantin Noica, *Modelul cultural european*, Editura Humanitas, Bucureşti, 1993, pag. 7: ".. for about 1500 years a European culture has evolved and it has widespread, exploited, it is true, but also educated with its values the rest of mankind /.../ thus almost all that is happening in the world at present or that will happen tomorrow, even in the outer space, bears the mark of Europe, no matter what ethnographers and historians, who are discovering other worlds to take them out of lethargy and to deprive them of their spiritual treasures, would pretend. We are sea robbers, conchistadors and corsairs, but corsairs of the spirit – and this makes the whole difference." (our translation).

[4] G. Liiceanu, *Jurnalul de la Păltiniş*, Editura Humanitas, Bucureşti, 1991, pag. 124 ("One can face up to any decent into the inferno, should the paradise of culture be possible" – our translation.

spirituality, to outline a history of Romanian thinking, as well as to highlight the main characteristics of European culture, of which our country has always been part (see the posthumous volume *Modelul cultural european* – initially published in German under the title *De dignitate Europae*, 1988, and later on translated and published in Romanian, in 1993).

The particular features of our culture – outlined by the Romanian philosopher in a large number of volumes (*Pagini despre sufletul românesc*, 1944, *Rostirea filosofică românească*, 1970, *Creaţie şi frumos în rostirea românească*, 1973, *Sentimentul românesc al fiinţei*, 1978, *Spiritul românesc în cumpătul vremii*, *Şase maladii ale spiritului contemporan*, 1978) – must appear to the nowadays reader as worth being praised because they were meant to preserve the spirit of our culture alive during half a century of totalitarianism. Consequently, Constantin Noica's merit was basically to re-establish and consolidate the connection existing between Romanian culture and the European one. Our spiritual values – which were either denied or permanently reinterpreted from a political perspective as the one-party state dictated – found in the famous philosopher a real defender, whose voice made itself heard despite of the harsh censorship which functioned at the time. From this perspective, Noica's attempt to outline and promote the spiritual profile of Romanian culture, as well as of the European one, during the communist regime, was an effort aimed to recover and preserve our cultural identity alive and to oppose the spiritual annihilation of our nation.

Now, after 22 years since the Romanian political regime was changed, a discussion about Romanian cultural identity is still an isolated issue, which draws the attention of a small segment of the population. Normally, such an issue should have concerned most of the Romanian citizens not just after December 1989, but also before this year. However, the attitude of indifference towards essential issues (such as preserving and enriching cultural values, enhancing the level of civilization) that one can notice today in Romania can be regarded as an indicator of their superficial relation to collective past. Education and culture have been for too long a secondary existential problem in Romania. Today we ask ourselves why the effort made by Romanian intellectuals (among whom Constantin Noica) to preserve these values during the restrictive communist period is now not widely discussed and valued by the majority of our co-nationals. The question can be answered in several ways: the fundamental value and respect for culture has been either ''deleted'' (see the 1950's when the most important men of culture were interdicted in schools, universities and were forbidden to be mentioned in any kind of publications) or constantly attacked by ideological slogans or even replaced with the allowed political cliches of the time. Culture became not just a target to be assaulted by oppressors, but also a shelter, in which citizens tried to preserve their freedom of thinking. It was against such a background that Constantin Noica strived to become a mentor for a young group of promising students and, in fact, to make his conationals aware of their duty to cultivate the spirit of Romanian culture and transmit it to the new generations.

Constantin Noica supported with arguments the originality of our culture and tried to bring into evidence its identity by approaching complex subjects such as: proposing the creation of a history of Romanian thinking, identifying representatives of our cultural elite who could be regarded as real voices of their centuries (Neagoe Basarab, Dimitrie Cantemir, Mihai Eminescu and Lucian Blaga). In fact, the famous philosopher continued to manifest a particular interest in Romanian spirituality as other important Romanian thinkers did during the interwar period (see Mircea Vulcănescu, Lucian Blaga, Emil Cioran, Dimitrie Gusti and others).

During the interwar period the obsession of cultural identity was a normal consequence for Romanians whose country had just become united (on the 1st of December 1918).

So far we have used terms like *identity* and *culture*, but we have not explained them in order to reveal the multiple connotations that these terms involve. For defining *identity*, we are going to quote Professor Ion Goian, who gives the concept of identity the following fundamental connotations: "In order to understand the whole complexity of this topic, it is necessary to sum up all the meanings attributed to the notion of identity. The term itself is borrowed from Latin: *identitas* is the quality of being equal to oneself or the same (idem, eadem). /…/ Identity might be understood as

similarity, according to which something is regarded as wholly similar to something else /…/ but, analyzing the term from a different perspective, one could understand it as the quality of a subject to remain unchanged as time passes and to be <<identical to itself>>, while escaping the universal ceaseless change and transformation, which affects all undermoon realities, as the antique people used to think. Consequently, the second meaning confers a temporal, historical, and basically, dialectical meaning to the term which is, in fact, the main characteristic of the notion of identity."[5] (our translation)

Nevertheless, as Ion Goian points out, the problem of a European cultural identity is an old issue, characteristic of ancient times, when it defined itself under the influence of two major cultures (the Roman and the Greek cultures): "Undoubtedly, the European identity issue is even older and it naturally appears in connection with the contacts existing between cultures and civilizations. Since the Mediterranean was the place where several cultures and civilizations met, it was natural for the notion of cultural identity to appear during ancient times and, within the Greek and Roman worlds, there is no important antique historian who has failed to write about this subject. That is why, once the antique thinkers were rediscovered, the Renaissance authors rediscovered the European identity issue, too."[6]

According to Constantin Noica[7], European culture began in 325 at Niceea, when the first religious Congress was held here. The seven religious Congresses that were organized in Niceea (325-787) are in the Romanian philosopher's opinion the starting point for the problematic philosophical spirit of Europe. The Christian perspective of Divinity – as a Unity of three Parts (The Father, The Son and The Holy Spirit) – reflects the matrix of European culture, as a unity in diversity. However, according to Constantin Noica, this unity in plurality is not static, but expansionist and it tends to cover other cultural areas and to assimilate those influences that are assumed to be akin to it. Through the tolerance and universalist spirit of the Christian faith, as well as through prospective philosophy and science, European culture is an open structure which refuses stagnation and pre-established/commonly shared beliefs.

Like any minor culture, within the European one, Romanian culture has strived to correlate its creative directions to the ones introduced by the major cultures of the world. However, a minor culture, as Constantin Noica points out, is not necessarily an inferior one. On the contrary, the philosopher's conviction is that Romanian culture – basically founded on the popular anonymous creations – will be surpassed in time. Like Lucian Blaga, Constantin Noica appreciates that a minor culture needs continuity in order to become major. It is, in fact, this problem of lack of continuity that interrupted the smooth evolution of culture during the years of totalitarianism, when severe censorship brought with it the denial of Romanian valuable cultural heritage (except for the years of *ideological thaw* – from 1964 to 1971).

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[5] Ion Goian, *Eseu despre identitățile culturale*, în *Revista de Științe Politice și Relații Internaționale*, VI, *4*, p. 95–105, București, 2009, pag. 96: "Pentru a înțelege întreaga complexitate a acestei teme, este necesară o sumară trecere în revistă a sensurilor atribuite noțiunii de identitate. Termenul însuși este preluat din limba latină: identitas este însușirea de a fi egal cu sine, același sau aceeași (idem, eadem). /.../ Identitatea poate fi înțeleasă ca însușirea similarității, prin care ceva anume este arătat a fi întru totul asemănător cu un altceva /.../ dar și, privind lucrurile din altă perspectivă, drept însușire a unui anume subiect de a rămâne neschimbat odată cu trecerea timpului, de a fi „identic cu sine", salvându-se, într-un fel, din fluviul eternei schimbări și transformări universale, la care sunt supuse toate realitățile sublunare, cum credeau anticii. Prin urmare, acest al doilea înțeles se deschide asupra unei perspective temporale, istorice, dialectice, în fond, în care se integrează noțiunea complexă de identitate." (original text).

[6] Ion Goian, *Revista de Științe Politice și Relații Internaționale*, VI, 4, p. 95–105, București, 2009, pag. 98: "Fără îndoială, tema identității europene este mult mai veche și ea apare, firesc, legată de contactele dintre culturi și civilizații. Cum în bazinul mediteranean s-au întâlnit mai multe culturi și mai multe civilizații, era de așteptat ca ideea unei identități culturale să fie elaborată încă în lumea antică și nu există niciun istoric important al antichității greco-romane care să nu fi scris, într-o măsură sau alta, cu privire la acest subiect. De aceea, odată cu redescoperirea anticilor, autorii din epoca Renașterii au redescoperit și tema identității Europei." (original text).

[7] Constantin Noica, *Modelul cultural european*, București: Editura Humanitas, 1993.

It is interesting to notice that Constantin Noica's optimistic vision (identifiable in the volume entitled *Pagini despre sufletul românesc*, 1944) – as to the faith of Romanian culture – was not lost during the totalitarian regime, but, on the contrary, it determined the writer to concentrate all effort for continuing his mission of prophet for his people's cultural rebirth.

The above mentioned book (*Pagini despre sufletul românesc*) outlines – by means of three symbolical figures (Neagoe Basarab, Dimitrie Cantemir, Lucian Blaga) – three main directions of development in Romanian spirituality: the religious stage (Neagoe Basarab), the stage of self-awareness and criticism as to improving the character and education of the autochthonous population (Dimitrie Cantemir), and, last but not least, the stage of conceiving a stylistic profile of Romanian culture (Lucian Blaga).

In this volume, Constantin Noica depicted Romanian culture as a particular presence in the European context, no matter about what century we discuss: the XVIth, the XVIIIth, the XIXth or the XXth. For the XVIth century, the book written by Neagoe Basarab – *Învăţăturile lui Neagoe Basarab către fiul lui, Teodosie*[8] – is regarded as a landmark in our culture. The book reveals the subjection of Romanian spirituality to Christian dogma, which encourages the cultivation of all religious virtues and points out the uselessness of searching another form of truth outside faith in God.

As far as the XVIIIth century is concerned, Constantin Noica regards Dimitrie Cantemir as the prominent voice of Romanian culture of the time, not just for the philosophical and history books written by the famous scholar, who became a member of the Academy of Berlin, but also for the well-documented description of Moldavja – *Descriptio Moldaviae*[9]. Regarded as a half bitter-critical, half objective presentation of Moldavja, Constantin Noica appreciates that this book is the first attempt of a Romanian ruler to compare the Romanian spiritual profile with the Western European one, offering accurate information about his country's geography, politics, social classes, traditions, history, religion and approximate information (not very praising) about the particular features of the Romanians' character.

An impressive approach to the philosophical dimension of Romanian language can be found in *Rostirea filosofică românească*, 1987. In the philosopher's opinion, Romanian language reveals an unexpected capacity to create words whose connotations lead to an original interpretation of existence. It is Constantin Noica's conviction that: "If our language really tells us things that have never been uttered before in other languages and that could determine these languages to mould themselves according to our word, then, if there exists a Romanian component in thought, we owe to share it with the world."[10]

In *Modelul cultural european* (1993), Constantin Noica attempts to identify the inner mechanism of the European culture, which he deciphers linguistically, by applying morphologic parts of speech to the morphology of spirit. In the author's opinion, before becoming a model, a culture has been a scheme and a structure. Thus, one could narrate the history of European culture by using parts of speech to describe it. Cultural epochs are attributed a part of speech: e.g. the Renaissance is analogous with the noun, the Baroque with the adjective and so on.

Besides the conferences gathered in the volume *Pagini despre sufletul românesc*, besides discovering the philosophical dimension of Romanian language in *Rostirea filosofică românească*, Constantin Noica had the merit to publish Mihai Eminescu's 44 manuscripts in 17 facsimile copies (known as *Caietele Eminescu*). The philosopher made a huge effort to have these manuscripts copied

[8] Neagoe Basarab, *Învăţăturile lui Neagoe Basarab către fiul său Theodosie*, Editura Litera, Chişinău, 1998.

[9] Dimitrie Cantemir, *Descriptio Moldaviae*, Editura Litera, Chişinău, 1998.

[10] Constantin Noica, *Rostirea filosofică românească*, Editura Eminescu, Bucureşti, 1987, pag. 8: "Dacă graiul nostru spune într-adevăr lucruri ce nu s-au rostit întotdeauna în alte limbi şi care le-ar putea îndemna pe acestea să se mlădieze după cuvântul nostru, atunci, în măsura în care există un rest românesc în cele ale gândului, suntem datori lumii cu acest rest".

and offered to the public and research workers for reading and analysing. For ten years Constantin Noica asked persons with important positions in Romanian cultural life to support him in accomplishing this project. Finally, after continuous hard work, the philosopher made the impossible possible.

Constantin Noica regarded these manuscripts as the laboratory of our absolute poet's creation. The approximate 9,000 pages that are included in the manuscripts contain accurate translations from Kant, unknown poems, everyday thoughts and notices, pages written in German Gothic, prose writings a.s.o.

In Constantin Noica's opinion, Mihai Eminescu represents the prototype of the European universal spirit through his permanent search for knowledge in a large and diverse sphere of foreign cultures: Indian, Greek, Latin, Hebrew and German.

Not only did Constantin Noica praise Eminescu's wide culture and ceaseless thirst for knowledge, but he also praised the poet's incredible historical intuition. For exemplifying this aspect, Constantin Noica quoted Eminescu's comments regarding the role that the Germans were about to play in history during the second half of the XIXth century: "He loved, admired the German people and, still, for the period 1870-1871, he has this intuition; in a letter sent to Negruzzi, in the unused manuscript 2[2]91, he wrote: "Oh, the silent thinkers, the German humanitarians…Where are they? I confess you that you cannot find them anymore." And he says this thing, which must make us ponder today: "A part of the world's historical faith is today, in 1871, when the clock of their forgetfulness has struck, in their hands. You will see what they will do." This man – who puts an end to his manuscript with the thought that "Every existing thing bears in itself its measure, the trees cannot grow up to the sky" – was a visionary. We cannot either grow up beyond our measure and our measure is Eminescu. We shall not grow more than that. But I would we grew that much! Because our soul must be fertilized in the same way in which land is. And unless we feed our souls with Eminescu – but not with an idealized Eminescu, not with Eminescu isolated in his geniality – but with this Eminescu of the germinative chaos, unless we feed our souls with this Eminescu, then we shall remain hungry in culture."[11] (our translation)

Constantin Noica's books on Romanian culture, language and history of thinking, as well as his attempt to identify the fundamental characteristics of European culture still represent a current issue for our society.

As a man of spirit, Constantin Noica understood that nothing valuable can be built outside spiritual evolution and permanent cultural progress.

The prophecy that one finds in Constantin Noica's books points out the right path that we should follow as Romanians and European citizens: the cultivation of spirit, the nurture of mind and souls with culture and knowledge. This permanent contact with ideas and spiritual values is not only a means for progressing as human beings but it is also a form of preserving our identity as Romanians.

[11] *Eminescu – Omul deplin al culturii românești*, Conferințele Bibliotecii Astra, nr. 2/2007, pag. 43, ISSN: 1843 – 4754: "Iubea, admira poporu' german și totuși, în '70-'71, are intuiția aceasta; într-o scrisoare către Negruzzi, în manuscrisul 2[2]91, nefolosit: „O, tăcuții, gânditorii, umanitarii germani… Unde sunt ei? Vă încredințez că nu-i mai găsești." Și spune lucrul acesta, care trebuie astăzi să ne pună pe gânduri: „O parte din soarta lumii e azi, în '71, în ceasul uitării lor, în mâinile lor. Veți vedea ce vor face." Avea simț istoric omul acesta, care încheie manuscrisu' de care vă vorbesc cu gândul: „Fiecare lucru poartă în sine însuși măsura sa, arborii nu cresc până în cer." Nici noi nu putem crește dincolo de măsura noastră și măsura noastră este Eminescu. Nu vom crește mai mult decât atât. Atât însă să creștem! Pentru că sufletul trebuie hrănit ca pământul. Și dacă nu ne vom hrăni cu Eminescu – nu cu un Eminescu idealizat, nu cu un Eminescu trimes în genialitatea lui –, cu Eminescu acesta al haosului germinativ, dacă nu ne vom hrăni cu Eminescu acesta, atunci vom rămâne, în cultura, mai departe înfometați.".

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ROMANIA'S SECURITY POLICY CONCERNING THE FIGHT AGAINST CORRUPTION AND ORGANIZED CRIME

VALENTIN-BOGDAN DĂNILĂ*

Abstract
The corruption is an ubiquitous phenomenon that can be met in different countries from an ideological, economical or state development point of view. Taking in consideration the way how this phenomenon affects the economy and the process of taking decisions in the public and private life , there is no doubt regarding the fact that the damages resulting from corruption exceed the individual interests acquired as a result of corrupt actions. The fight against the corruption must constitute one of the main points on Romania's public agenda, with a view of aligning to normality from a political, economical and social point of view, and also to the effective harmonization of the Romanian society with the European practice. The corruption is being perceived moreover like a severe and dangerous phenomenon undermining the force and the authority structures, deceiving the citizen's expectations concerning the maintenance of a social equity climate that can provide equal chances for everyone, but favoring the progress of certain groups and persons. The causes that generate this phenomenon are different from a country to another, from a region to another, generating specific forms of manifestation.

Keywords: *"anti-corruption legislation", "national security", "organized crime", "conflicts of interest", "criminal investigation", "reports".*

Introduction

The present work illustrates corruption like an expression of moral disintegration and spiritual degradation manifestations, a complex social problem, its modes of utterance, social consequences and solution ways concerning public opinion and the legalized level of social control.

Corruption is perceived as a major negative weak point, a disease of the Romanian transition society, which undermines the efficiency and the state institutions lawfulness and restricts the economic development in Romania.

Thus, it was obtained a work reflecting in detail how the state institutions intercede as a response to the necessity of performing rapidly the entire spectrum of action regarding civil security.

Through this work it is suggested the improvement of the existing regulatory framework to ascertain the efficient application of the law norm not only theoretically but also in practice, and at the same time, to outline an image of the corruption phenomenon against the state democracy, social equity, justice and human fundamental rights and liberties observance.

The national defence system, which at the present is undergoing a serie of changes, remains one of the fundamental pillars of our society. But this phenomenon developing to the level of the entire society affects also domains which jeopardize the safety and the integrity of the country. Hopefully, after finalizing the reorganization process in the designated state defence institutions, and by adopting adequate regulations, the corruption would disappear or at least decrease its ampleness.

Those situations can be avoided by taking certain measures like practicing severe and objective inspections from competent commissions on events that allow the appearance of this more and more wide-spread infringement of the law in our society. A measure like that could certainly reduce this constantly rising phenomenon proportions.

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The current state of corruption in Romania

The lack of transparency of regulations regarding public works contracting, fluctuating import duties, tax reductions, subsidies and access to foreign currency, can facilitate, unintentionally, criminal activities. If the law is confusing, it is easier for groups of criminals to circumvent or to interpret it for their benefit.

These problems are becoming more acute, due to the low level of funding for law enforcement institutions, lack of training and knowledge needed in the fight against organized crime and the insufficient level of cooperation and coordination on an international level. The emergence of corruption is related to the deterioration of morality in social relationships.

The economy has become increasingly stronger and the social system more complex, so corruption has taken various forms.

After a period of almost two decades of democratic development in post-communist space, we can estimate that the social-political system and administrative environment in Romania is vulnerable to corruption and this kind of risks have increased with the liberalization of movement of people and ideas.

In the early stages of transition, organized crime, through the forms of black and gray economy, filled much of the present vacuum in the legal economy, with few structures able to respond to this rapid change, especially economic ones.

Power structures of the old regime were abolished, and new ones have experienced a difficult process of affirmation. Thus, criminals were able to freely carry out illicit activities, such as bank fraud, extortion, illegal trade, illegal formation of corporations, embezzlement and the black market.

"Savage Capitalism" has become a dominant feature of the democratic germs in the last decade of the twentieth century in Romania.[1]

Samuel Huntington said that, "In a society where corruption is widespread adoption and implementation of special laws against corrupt individuals only serves to multiply the opportunities for corruption"[2].

Given the scale and diversification of corruption, the government need to align to European standards, the Romanian authorities have adopted a "National Anti-Corruption Strategy" embodied in the "National Program to Prevent Corruption" and "national Action Plan Against Corruption" adopted by Government Decision no. 1065/2001.

The two programs express Romanian Government's position towards corruption, the unprecedented scale and diversification are the main motivation for developing a strong and unified strategy for the prevention and control in the future.

The adoption of a secondary anti-corruption legislation consisting in the Law side. 161/2003 regarding some measures to ensure transparency in the exercise of public dignities, public functions and business environment, preventing and punishing corruption, also arose form the same necessity.

The finding that corruption tends to globalize and embrace severe forms in Romania has become a regular coordinated of public speeches of high officials of the Romanian state, which permanently evokes new methods and tools for prevention and social control of corruption. As a member of the European Union, Romania has been the concern of the European Commission, which monitored and is still examining corruption in our country.

Thus, according to European Commission's Report on Cooperation and Verification Mechanism in Romania, which was published on 18.02.2011, is required "independent review of the judiciary system, reform of the disciplinary system for judges and measures likely to increase the rapidity of the act of justice in cases of high level corruption and strengthen the overall policy in the fight against corruption.

[1] AbrahamPavel, *Coruptia*, Ed. Detectiv, 2005, p.420.
[2] *Ibidem*, p.420.

"Within the Cooperation and Verification Mechanism were established for Romania the following benchmarks:

1.providing a measure of justice more transparent and efficient, especially by strengthening capacity and accountability of the Superior Council of Magistracy; reporting and monitoring the impact of new civil and criminal procedure codes;

2.establishment, as foreseen, an integrity agency with responsibilities for verifying assets, incompatibilities and potential conflicts of interest, with the task of issuing mandatory decisions based on which dissuasive sanctions can be applied;

3.on the progress made so far, making further professional and impartial investigation regarding the allegations of corruption at high level;

4.additional measures to prevent and combat corruption, especially in local government. "[3]

It should also mentioned the results of studies conducted by international organizations such as Transparency International or Freedom House Inc.. presenting the main positive and negative aspects related to the efforts and recommendations of organization continuing fighting corruption in Romania (Annex 1)

The relationship of information services with law enforcement

Information Services provide information for judicial authorities regarding potential criminal activity. Not infrequently, such information is obtained from an underground hardly penetrated and inaccessible to judicial authority. In such cases, law enforcement is not possible without compromising sources and methods protection, because intelligence can not be admitted to the probation system.

Judicial authorities are different from traditional consumers of intelligence from at least the following respects:

• lack of experience in information services;

• their interest in specific subjects must not have operational priorities of the intelligence services, but post-operative problems;

• potential public use (under judicial investigation) of classified information which they receive.

Judicial authority need tactical information to serve criminal construction, that lead to certain people or to bribe, a source of material evidence or to suggest new directions of investigation, to indicate an aggravation or a mitigation of responsibility of subjects of the investigation.

According to data presented by the General Direction of Anticorruption account activity during 2010, the institution has conducted research and submitted to the prosecution 2.000 papers and criminal files (+40.15% compared to 2009). Of these, 424 were submitted to the National Anticorruption Directorate and 1576 the territorial structure of H.C.C.J (High Court of Cassation and Justice). A criminal investigation was initiated in 458 criminal cases (43%), of which 65 to the National Direction of Anticorruption and 393 to territorial structures of H.C.C.J. [4]

In terms of intelligence for the purpose of achieving national security is a dissatisfaction with the manufacturers and suppliers of classified information about the degree of responsiveness shown by the recipients of information.

This problem is neither new nor unique, and cases deserve to be highlighted ca, at least the following aspects:

• conditions to obtain and limits of use secret information are not intimately known to recipients of that information;

[3] http://www.consult-avocat ro/stiri/raportul-comisiei-europene-privind-MCV-in-romania html;

[4] http://www mai-dga ro/ "*Analiza principalelor activităţi desfăşurate şi a rezultatelor obţinute în anul 2010*";

• acceptation, significance and meaning of information messages are different to law enforcement authorities, receiving information directly to the realities perceived by those who receive and provide information;

• important intelligence with obviously degree of relevance and utility are sometimes left unexploited because it could not create a possibility of their use under conditions not detrimental to the security interests or national security circumscribed to rules of classification;

• capitalization requirements of the information provided in the decisions of their beneficiaries are not always sufficiently well known to operators of information services;

• in the relationship between intelligence community and law enforcement involvement are some disorders that are perceived by the public, press, Parliament.

Nr.51/1991 Law on National Security of Romania

Currently, all laws that relate to this concept, refer to Law 51/1991 on national security, adopted shortly after the change in December 1989.

National security is defined in Article 1 of the Act, as "state of law, balance and social economic and political stability, necessary for the existence and development of the Romanian National State, as sovereign, unitary, independent, indivisible, maintaining the order of law and the climate of unrestrained exercise of the fundamental rights, freedoms and duties of citizens under the democratic rules and principles in the Constitution."

Threats to national security of Romania, under article 3 of Law on national security of Romania nr.51/1991 is the legal basis for the state authorities with responsibilities in national security, to propose to the state prosecutor, where justified, to request authorization to conduct certain activities to collecting information, consisting of:

• interception and recording of communications, seeking information, documents or writings to which access is required to obtain access to a place, an object or at the opening of an object;

• lifting and restoring to its place of an object or document, review it, extracting the information it contains, and recording, copying or taking of statements by any means;

• installation of objects, maintaining and taking them from places that have been submitted.

The proposal is made in writing and must include:

• *data or evidence showing the existence of a threat to national security, for whose discovery, prevent or counteract the issue, an authorization is required;*

• *categories of activities which is necessary to authorize: the identity of the person whose communications must be intercepted, if known, or person holding the information, documents or objects to be achieved;*

• *general description, if where and when possible, the place where the activities are authorized to be made, the duration of the authorization.*

The proposal is submitted to the general prosecutor of the High Court of Cassation and Justice and is examined in terms of merits and legality by the specially appointed prosecutors. If satisfied that the request is justified, with the completion of admission, the judge issuing the warrant authorizing the carrying out proposed activities.

Application, issuance and implementation of the mandate are the observance of the Law 182/2002 on protection of classified information.

In special situations which require immediate removal of threats to national security, specialized state authorities in this field may perform those activities without the required permit, followed: it may be claimed as soon as possible but no later than 48 hours.

If the judge considers that no further work performed without authorization is necessary, he dispose immediately cessation of them.

Anti-corruption campaigns

As noted in the report of Freedom House, the most important anti-corruption campaigns have been "Coalition for a Clean Parliament" and "Do not give bribe. "

The first was aimed at informing citizens about the integrity of the candidates on lists in parliamentary elections in November 2004, being mentioned candidates who have been involved in various scandals. This campaign was conducted at the initiative of major non-governmental organizations, including the Pro Democracy Association. The objectives of this campaign, voter education and the empowerment candidates can be said that have been if not totally satisfied, at least useful, showing that the initiative will not remain without an echo in public opinion in Romania.

The second campaign involved here, was one entitled "Do not give bribe." To conduct this campaign, there was collaboration between the Concept Foundation, Media Transparency International Oops (See Appendix 6.).

This was meant to warn the population through mass media on the negative effects of the practice is bribery. Through television and radio spots as well as the placement of billboards containing the message "Do not give bribe" people would be followed to inform and especially aware of the extent that it has "small" corruption in Romania. The target population for this campaign was created by the population aged between 15 and 25 years in urban areas, which according to the initiators of the campaign is most receptive to such a post but at the same time the bribery among which produces a feeling of frustration or even revolt.

At the initiative, the campaign was widely appreciated, but an impressive number of difficulties and obstacles to achieving this campaign was revealed by the Concept Foundation executive director, Radu Mateescu. From the absence of initial investigations to even refusing to transmit certain television commercials[5], along with the already usual funding difficulties (including those by European programs), have hampered development and likely diminished the impact of campaign against small corruption.

With all this indicative of the difficulties encountered by organizations that have taken the initiative campaign, as in fact is mentioned in the report of Freedom House, the campaign was recognized as a success.

These were the main campaign of civil society structures in Romania to raise awareness about corruption, and despite remaining obstacles (charges of libel, financial bottlenecks, etc..) they are likely to continue to exist and may even become more frequent.

In January 1997 was established at the initiative of the presidential institution, the National Action Against Corruption and Organized Crime Council (N.A.A.C.O.C.C.) as informal structure designed to facilitate cooperation in investigating corruption cases thoroughly for submission to court. This "collective" organism with an advisory and coordination role, has been challenged from the outset on grounds it violates principles of separation of powers is a political interference in the judiciary.

Eventually, in early 1998 to boost efficiency concerns for combating corruption, a part of overall efforts N.A.A.C.O.C.C. were taken and continued by the Consultative Group on preventing and combating crime, organized by the Ministry of Justice.

Bringing together representatives of all institutions involved (except those of the judiciary) working group examined in the fortnightly sessions, issues of corruption, so preoccupied with the shortcomings of the Romanian legislation in force and its improvement opportunities, as well as difficulties encountered in the practice and the legal treatment of some important cases.

The effectiveness of the fight against corruption were reflected in the reorganization in 1998 of the Prosecutor's Office Supreme Court of Justice by establishing anti-corruption Department,

[5] An example would be considered even if the TVR spots as "violent. "

forensic investigators and that it was intended to strengthen the capacity of the Public Ministry to deal with corruption cases throughout the country and resolve the priority of new cases of corruption.

It has been founded the National Institute of Forensic Expertise aiming at streamlining these procedures required in criminal proceedings[6], and the Division for coordination strategies to prevent and combat corruption and crime[7], was created within the Ministry of Justice.

In November 1998 he signed a Protocol of Cooperation between the Ministry of Justice, Ministry of Public, Ministry of Administration and Internal, Ministry of Finance (Directorate General of Customs and Finance Guard), the Romanian Intelligence Service and Foreign Intelligence Service, under which national and county will establish working groups coordinated by prosecutors to speed up prosecution and coordination of the institutions involved to better handling of cases of corruption, organized crime, money laundering.

National Office for Preventing and Combating Money Laundering[8] was established in 1999 consisting of representatives of the Ministry of Finance, Justice, Internal, Prosecutor of the Supreme Court of Justice, National Bank, the Romanian Banking Association and the Court of Auditors. The office was established as a specialized authority of the Government's aims to prevent and combat money laundering activities that aim receives, analyzes and processes the information and notify the competent authorities[9].

In May 2000 Law 78/2000 was promulgated on preventing, detecting and sanctioning corruption[10]. For tracking and investigation of offenses under this law, in June was set up Anti-Corruption Department of the Supreme Court of Justice and the prosecution services in the specialized tribunals which have not worked because there were busy vacancies contest.

In the Ministry of Administration and Internal was established the Central Task Force Organized of Crime and Corruption Group.

Since 2001 they focus in particular on concrete measures to combat corruption. The government program, some of the set priorities includes restoration of state authority, reducing bureaucracy and fight corruption and crime.

In the National Program for Prevention of Corruption prerequisites to success are predicted in this fight, the political will, accountability of institutions, the correct estimate of the cost, transparency and public access to information, support civil society and the media are highlighted.

The program details the notion of corruption as the misuse of public power to obtain improper benefits and makes direct reference to the abuse of power in the line of duty, fraud (deception and harm another person), use of illicit funds to finance political parties and campaigns elections, establishment of an arbitrary mechanism for the exercise of power in the area of privatization or procurement and conflict of interest (commitment in transactions or acquiring of a position or an incompatible commercial use is with their role and official duties).

Government Control Office Department was reorganized in the Control and Corruption Department[11].

This change was one of the points of the acquis communautaire to be performed by Romania in order to integrate into European structures, to have a specialized state authority to combat corruption. Later, is organized the Prime Minister's Control Authority part of the apparatus of the Prime Minister headed by a secretary of state named by decision of the Prime Minister[12], and its functions including the detection and reporting corruption cases to empowered state authorities in criminal investigations.

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[6] It was established by Government Decision nr.368 dated 03 July 1998.
[7] It was established by Government Decision nr.487 / 1998.
[8] It was established under Law No. 21 of 1999.
[9] National Program for Accession to the European Union, version 1999.
[10] Published in the Official Gazette of 18 May 2000 nr.219.
[11] Government Decision nr.22/2001 nr.71/09.02.2001 published in the Official Gazette.
[12] According to Law 90/2001 in the Official Gazette 164 of 02 April 2001.

Alternatively, with the Government Emergency Ordinance no. 5 / 2002[13] were thus set some limitations for local elected officials and civil servants. Are covered exactly the situations where local officials are managers, members of the board of directors or hold other leadership positions within companies, in which case they can not enter commercial service contracts, execution of works or supply of goods to public authorities to which they belong, with RAs under the authority of local council or companies that were set up by local councils or county councils[14].

A series of regulations to reduce corruption are contained in the Law on local government which sets out the principles of local autonomy and decentralization of public services, prohibitions and incompatibilities to avoid conflicts of interest, elements of transparency and public participation to drafting judgments and decisions, control and responsibilities for local government, including the legality of control exercised by the prefect, the terms and obligations in the administration of the patrimonial administrative unit - territorial, concessions and public procurement regime.

A highlight of actions to combat corruption in Romania is the decision to align to European requirements and the implementation of experience of other countries with experience in fraud detection and investigation, National Anticorruption Prosecution (N.A.P.) being etablished by the Government Emergency Ordinance no.43/2002 as independent structure, specialized in combating corruption crimes.

In the period 2002-2004, trying to answer alarming dimensions of the phenomenon of corruption in Romania, there have been numerous legislative measures which were referred to the activities of this institution. Also, international and European authorities, in particular the European Union, but also similar specialized structures in the Member States of the European Union, have offered N.A.P. professional and financial assistance in order to make it more effective. At the same time, he was constantly criticized the lack of activity of N.A.P. in serious corruption[15].

National Anti-Corruption Department was established by the Emergency Ordinance 134 / 29 September 2005, following the reorganization of N.A.P. Emergency Ordinance nr.235/2005 respond to Constitutional Court and the decision meant regaining power and anti-corruption prosecutors to investigate crimes of corruption committed by Members of the Parliament.

Corruption in international law

There are numerous international initiatives to fight corruption belonging to international authorities such as the United Nations, the Organization for Economic Cooperation and Development (O.E.C.D.), World Customs Organization, the Council of Europe, the Commonwealth, the Group of Eight, etc.

These initiatives may include exchanging information, promoting best practices, developing international recommendations and development of international law in order to encourage national programs to combat corruption and foster international cooperation and technical cooperation in this field.

The most important international legal instruments that enable collaboration in combating corruption states are:

• O.E.C.D. Convention on combating corruption of foreign public officials in international business transactions;

The scope of the O.E.C.D. Convention is relatively close and specific. His only objective is to use national law to criminalize acts of corruption committed by foreign public officials. The Convention deal in particular with active corruption, such as the offense committed by the person

[13] O.U.G. No.5 of 2002 on the establishment of elected local ban was published in the Official Gazette Nr.90/02.02.2002.

[14] See art.l of O.U.G. nr.5/2002.

[15] See European Commission country report in October 2004.

who promises or offers a bribe, as opposed to passive corruption, that the offense committed by the public official receiving the bribe.

• Revised OECD Recommendation on combating corruption in international business transactions;

It covers several areas such as taxation, accounting rules and operations of the institutions, regulations and procedures relating to the control, banking and financial provisions, public funds, public authorizations, etc.

• Inter-American Convention against Corruption;

It is the first international document against corruption that has ever been adopted (March 6, 1997). It has been ratified by 29 countries, and its scope is broader than the O.E.C.D. Provisions of the Convention can be classified into three main groups: preventive measures, criminal offenses and mutual judicial cooperation. European Union Convention on combating corruption involving European Community officials or officials of Member States.

• Council of Europe Criminal Law Convention on Corruption;

This agreement is drafted as a legal instrument of coercion and applies to a wide range of activities and circumstances. It contains specific provisions that criminalize various forms of corruption, cover active and passive corruption, private and public sector.

• Council of Europe Civil Law Convention on Corruption;

This is the first attempt to define common international rules in civil actions in cases of corruption. While the Criminal Law Convention seeks to control corruption by ensuring that crimes and penalties are clearly established, the Civil Law Convention requires Member States to proceed so that those who were affected by corruption can bring a civil action when they are identified offenders of corruption, which, in practice, victims of corruption in integrating anti-corruption strategy.

• United Nations Convention against Corruption.

In the period 1999-2001 were conducted negotiations which was developed this international legal instrument of coercion, applicable worldwide. Negotiations have been used not only for specific development tool, these are also a forum in which all United Nations member states can come together to evoke the problems of corruption, to apply effective measures to combat corruption and to reach an international consensus in favor of these measures.

The Convention was signed by more than 90 countries, entered into force on 14 December 2005 and provides for joint action by governments and specific measures, such as:

• public policy control of assets for public officials, senior civil servants, magistrates and others;
• implementing the law on protection of whistleblowers;
• international mechanisms for the repatriation of assets acquired through corruption;
• strengthening institutions for prevention of conflicts of interest and incompatibilities;
• prevention of corruption in business[16].

Conclusions

Corruption has become a structural and professional phenomenon, who, through informal networks of organizations and individuals, can influence decision makers in the sphere of political, legislative, judicial or administration and thus national security, so the measures and targets that must take into account immediate and future dynamics of the Romanian reality, to eliminate causes of corruption, in areas where the coefficient of vulnerability is high.

"Corruption" is both an expression of the proliferation of negative phenomena which are amplified in the context of globalization, as well as a direct consequence of inefficient management

[16] www.onuinfo ro/biblioteca/sistemul_de_documente.

of political exchanges, economic and social depth that occurred in Central and Eastern Europe in the disappearance of the communist regimes.

From 1989 until now, Romania has made significant changes, but nothing comparable to the capitalist society, explicitly embracing the idea of modernization and transition, as such, the European model.

Transitions are efforts to change the societies by groups of politicians with initiative who are proposing to modernize the company they run. Romania has seen many transitions and so far none of them fully succeed. Therefore, Romania is currently in a position underdeveloped society, and the distance from the developed world tends to increase. Romania currently has, however, by joining the European Union, a very special opportunity to modernize.

Unanimous opinion of theorists, lawyers and experts in economics is that, today, corruption has reached a significant size and the underground economy and organized crime increases by a huge amount that these forms convey them to criminal and protection.

Corruption is perceived more as a serious and dangerous phenomenon that undermines the power and authority structures, deceiving peoples expectations about maintaining a climate of social justice to ensure equal opportunities for everyone, but encouraging the rise of groups and individuals.

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FEMINISM AND COSMOPOLITANISM: SOME INEVITABLE CONNECTIONS

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Abstract
In this paper I will approach the issue of feminism and cosmopolitanism in order to give arguments in sustaining the fact that, today, feminism and cosmopolitanism are inevitable connected. In constructing my discourse I will begin by laying out the main ideas of cosmopolitanism, followed by a presentation of the construction of the feminist movement over time, inter-relating these two discourses at the end of the analysis.
Connected with political ethics, political theory and political philosophy, the theoretical framework selected for this paper is based on the cosmopolitan theory developed by scholars like Martha Nussbaum, Fiona Robinson and Kwame Anthony Appaih who, underlining universality, define cosmopolitism as a universal concern with every human life and its well-being, but who are also giving value to the differences (seen as cultural or/ and of identity) insofar as they are not harmful to people.

Keywords: *Feminism, cosmopolitanism, differences, identity, ethics.*

Introduction

What are the connections, if they are, between feminism and cosmopolitanism – this is the main questions at which I try to give an answer in this paper. In order to achive my goal I divided the paper in three parts. In the first one I present the way cosmopolitan discourse developed over time, but in the same time I try to give some practical answers to some critics that put the cosmopolite theory in difficulty, critics related to the problem of identity and diversity. The main scholar the are guiding my arguments in this part are Martha Nussbaum, Fiona Robinson and Anthony Appiah. In the second part of the paper will be focused on the presentation of the successive stages that feminism went through in order to become the present movement, stressing along this presentation, the common elements between the feminist and the cosmopolitan construction. At the end of this paper I will underline how the *cosmopolitan discourse* which revolves around a few principles regarded as being fundamental is highly convergent with that promoted by the feminist movements. In order to do so I will answer to the questions: *How did the feminist movement evlove in time? What were the central and defining concepts of the three waves?* by using the main core of cosmopolitan principles - humanity, universality of the human rights, acknowledging, understanding and valorizing differences – and the metaphor of concentric ciercles developed by Martha Nussbaum.

The discourse of cosmopolitanism is revolves around some basic principles, among which: *humanity* which is a distinctive feature to all humans, the *universality of human rights* resulting from their very belonging to humanity, the awareness and understanding of the *differences*, principles by the means of which it aims at designing a truly inclusive and universal „human community", namely encompassing all human individuals.

The philosophical origins of cosmopolitism reside with the stoics, who claimed that the moral foundation of the human being consists in its very quality as member of the humanity, perceived as

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being essentially rational[1]. Diogenes the Cynic was the first one to refuse his membership with the local community by defining himself as a „citizen of the world". Besides the stoics, another important contribution to the development of the cosmopolitist moral was Descartes', who assumed the task of reconstructing the entire philosophy on the basis of a mathematical model, applicable with the entire science, model that could mediate the transition from doubt to certainty. Therefore, by means of the „doubt method" he attempted to systematically deconstruct the contemporary accepted beliefs in order to gain access to the *essence*, namely to that which can no longer be subject to deconstruction, i.e. reason – „I think therefore I am". Strongly influenced by the Cartesian philosophy, by the logic that there had to be a certain *a priori*, an undoubtable essence, the philosophy of Immanuel Kant is one of the sources on the grounds of which a model of universal ethic was later on developed, claiming as fundament the aforementioned "essence", namely the very quality as a human being, especially by postulating the categorical imperative – "act only according to that maxim whereby you can, at the same time, will that it should become a universal law", respectively „act in such a way that you treat humanity, whether in your own person or in the person of any other, always at the same time as an end and never merely as a means to an end."[2] This universal ethic is guided by a fundamental principle claiming that any human being must be humanly treated, that is in keeping with an undeniable dignity hypostasized in a global attachment to a culture of non-violence and respect for life, to a just economical order, to tolerance, to a life led by truth and, last but not least, to the principle of equal rights[3].

Alejandro Colas defines cosmopolitanism through the following three principles:

1. all individuals are members of a single moral community by virtue of their humanity;
2. therefore, they have reciprocal moral obligations that transcend the particular boundaries of ethnicity, nationality or of any other particular definition of identity;
3. these obligations require political involvement with respect to their enforcement[4].

Easily discernible is the fact that the first two principles refer to the moral dimension of cosmopolitanism, while the third to its political one. These dimensions aroused strong debate with respect to the validity of this concept, more specifically to the possibility of transforming a moral vision into a political one. One of these critiques claim that a universalistic moral vision, once it has been transformed into a political vision, involves the great risk of imperialism and ethnocentrism, namely that of claiming that all, or at least part of "our" values are or should be shared by the "others", the problem getting even more complicated once we try to find out what these values are.

These disputes bring to the forefront the problem of respecting diversity, looked upon as a solution both to these objections, as to the issue of the importance of the moral dimension promoted by cosmopolitanism with respect to identity construction. Therefore, as a way of avoiding the imperialistic or ethnocentric traps, the core of cosmopolitanism is fundamentally embedded with the *principle of respecting diversity*, concept which, I find, requires a few observations. The concept of diversity which I find to be related to cosmopolitanism implies the type of diversity that assumes not so much intrinsic valorization –diversity as a value in itself- as extrinsic valorization – that is valorization as a means of generating the kind of social emulation by the means of which

the citizens of the world can gain access to diversity as being empowering and not constraining[5]. At the same time, when I refer to diversity as a value in itself and to the instrumentality of diversity within a cosmopolitan construction, I do not necessarily mean to imply that lack of diversity would be negatively valued, but rather I attempt to avoid the use of diversity as a generative

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[1] F. Dallmayr, Cosmopolitanism. Moral and Political, *Sage Publication, Political Theory 2003*; 31; 421, 23;

[2] A. Flew, *Dicţionar de filosofie şi logică*, (Bucharest: Humanitas, 1979), 193;

[3] F. Dallmayr, Cosmopolitanism. Moral and Political, *Sage Publication, Political Theory 2003*, 6;

[4] A. Colas, Putting Cosmopolitanism into Practie: The Case of Socialist Internationalism, *Millenium: Journal of International Studies 23*, no. 3, (1994), 513 – 534;

[5] Diversity is valuable in the sense of becoming instrumental to the attainment of certain legitimate purposes within a cosmopolitan construction.

doctrine for certain forms of hierarchization unavoidably leading to various forms of moral exclusion, fact that would necessarily impinge on the cosmopolitan essence by the hierarchical categorization of the human beings. The same argument is also supported by the Frankfurt School, by the Habermasian tradition in particular, according to which universal inclusion presupposes a continuous dialogue between all the parties affected by a decision, dialogue which is grounded on the moral acknowledgement of the subjects resulting in their right to participate in the decision making[6].

Differences and their acknowledgement are essential aspects of the discussion on constructing human identity. Although the cornerstone of cosmopolitanism is represented by the membership with the humanity, our quality as human beings remains only part of the complex identitary puzzle, the mere *yarn of the fabric*. At the same time, identities can be not only dynamical, but also multiple depending on the contexts to which the individuals adhere, but these identities do not impinge on the cosmopolitan one, quite the opposite, they complete it without diluting it. Martha Nussbaum, one of the modern theorists of cosmopolitanism, stresses the fact that there is no conflict among the multiple identities, that is between the national, the ethnic, the religious and the cosmopolitan one, turning to the metaphor of the concentric circles in order to illustrate this idea of identity, in which context, the bigger circle obviously represents the membership with the universal human community[7]. This metaphor of the concentric circles is also assumed by Kwame Anthony Appaih when discussing cosmopolitan patriotism, presenting communities as small spheres within which individuals can perceive and at the same time bring into force their moral duties[8].

These individuals become cosmopolitan by acknowledging, understanding, respecting and mediating the identity spheres of their interacting parties, thereby becoming "rooted cosmopolitans"[9]. "When identities are manifold, passions are divided and leave open the possibility of having particular loyalties and a universal moral concern at the same time"[10].

As such, setting about with the acknowledgement of diversity we are, more or less unavoidably led to another essential concept for the cosmopolitan construction, namely that of identity, amply discussed by philosophers such as Nussbaum or O'Neill[11] who claim that precisely the kinds of identity, which are shaped within diversity, generate a complex set of interactions which sometimes can be conflictual in nature, but which are especially useful for creating a cosmopolitan perspective. There might be added the cosmopolitan interpretation of the well known Hegelian dialectic, in the sense that conflictual interactions among nations, ethnic groups, religions etc. are conducive to that type of *conflict* which could reveal in the end that something that unites us all, namely our capacity as human beings. This struggle for acknowledgement can therefore generate mutual understanding and respect by getting to know *the other*[12]. A notable aspect is the fact that the shaping of the cosmopolitan citizen cannot be realized by the elimination of the process of knowing/understanding the other, therefore, dialectically speaking the synthesis necessarily presupposes both thesis and antithesis.

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[6] Fioana Robinson, Cosmopolitan Ethics and Feminism in Global Politics, *All Academic research*, accessed on 12.02.2011 , http://www.allacademic.com//meta/p_mla_apa_research_citation/0/7/4/3/8/pages74386/p74386-1.php

[7] Nussbaum M., Patriotism and Cosmopoiltanism, *Boston Review, A Politycal and Literaly Forum*, accesed in 12.02.2011 at http://bostonreview net/BR19.5/nussbaum html;

[8] Kwame Anthony Appiah, *The Ethics of Identity*, (London: Princeton University Press, 2005) chapter 6, Rooted Cosmopolitanism;

[9] *ibid.*, 232

[10] Fioana Robinson, *Cosmopolitan Ethics and Feminism in Global Politics*, All Academic research, pp. 7, text accessed in 12.02.201, http://www.allacademic.com//meta/p_mla_apa_research_citation/0/7/4/3/8/pages74386/p74386-1.php

[11] D. O'Neill, Justice, Gender and International Boundaries, *British Journal of Political Science*, Vol. 20, No. 4 (Oct., 1990), 11;

[12] F. Dallmayr, Cosmopolitanism. Moral and Political, *Sage Publication, Political Theory* 2003, 2;

If someone wanted to sketch the generic portrait of a cosmopolitan citizen, the following features should be account for:

- continuous swinging between the local and the global spheres, with a definitive influence on the shaping of the global citizenship;
- respect for and acknowledgement of cultural diversity whenever possible, therefore the enactment of an interested dilletantism;
- general intent and opening to cultural diversity, leaving open the possibility of rejecting certain principles this diversity implies;
- high mobility rate, as empowering factor ;
- perceiving the notion of "home" in an extremely diverse manner;
- critical attitude with respect to fixed boundaries.[13]

In short, cosmopolitanism requires a continuous swinging of the individuals along a central axis determined by their membership to humanity, by their capacity as human beings. Therefore, on one end of the axis there is humanity, the citizens of the world, *sifted* through many diversity and contextual filters, thereby generating, first groups of individuals[14] (nations, ethnic and religious groups), then communities and, on the other end, the individual, whose identity is defined, according to Martha Nussbaum, by the small circle, namely that of the family. The essential link between the latter aspect and the cosmopolitan citizen is the humanity membership, but the individual, along its identity construction process, can just as well get to the other end of the axis, as he can stop along the way, at any intermediary point.

II

After this presentation of cosmopolitanism, I want to return to the main subject of this paper, namely cosmopolitan feminism. In what follows I aim at showing why today, as I was claiming in the beginning, feminism can only be seen as a cosmopolitan movement. In constructing the argument I will appeal to the *conceptual mechanism* involved with the construction of the cosmopolitan citizen which I have previously described.

I set about my argument, with a nutshell definition of feminism, followed by a presentation of the successive stages that feminism went through in order to become the present movement, stressing along this presentation, the common elements between the feminist and the cosmopolitan construction. As such, in short, feminism represents the movement for the women's rights. As such, the substance of the feminist movements and theories can be traced back to the following minimal assumptions: a) women are the subjects of systematical oppression; b) gender relationship are neither natural nor immutable; c) they are unjust with respect to women and therefore political action is called upon for their amendment.[15] Feminism is also defined as the belief that men and women are the equal heirs of the world and while most societies favor men as a group, the emergence of social movements promoting the idea of equality among men and women becomes unavoidable and legitimate[16]. However it would be false to assume that these are the definitions by which the first feminists operated, as would be equally false to imagine that these definitions, just as any others in fact, would have the capacity to convey the fierce unrests which generated them, or to exhaustively cover the concepts employed by feminism. These definitions are intended to raise interest for the realities behind the defined concept through a, so called, minimal effort shortcut.

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[13] K. Gunesch, Education for cosmopolitanism? Cosmopolitanism as a personal cultural identity model for and within international education, *Journal of Research in International Education* 2004; 3; 251, 16;

[14] Individuals who are aware of the common interests.

[15] M. Miroiu, O. Dragomir, *Lexicon feminist*, (Iasi: Polirom 2002), 121;

[16] B. Winslow, Feminist Movements: Gender and Sexual Equality, in T. A. Meade, M. E. Wiesner-Hanks (ed), *A Companion to Gender History*, (London: Blackwell Publishing Ltd, 2004), 186;

Therefore, what lies behind the concept of feminism? Most authors, in explaining the emergence of feminism, take as landmark the Enlightenment discourse, the concept outspreading in Europe during the second half of the 19th century. The feminist movement initially manifested through the publication of a few isolated works[17] in which the opinion according to which women are an inferior social category, a "minority", was objected. But these works were the product of thousands of years of male dominance, during which women were denied the *privilege* of humanity[18] and treated accordingly. Toma d'Aquino, one of the most important Christian philosophers, claimed that women are "defective men", the source for this interpretation being The Old Testament, more specifically women's birth out of Adam's rib[19]. Several other sources of oppression are to be found in other religions as well. For example, the sacred Hindu text, The Law of Manu, classifies the Indian society according to castes and gender ("the woman is guarded by her father during childhood, by her man during her youth, she must never be allowed to act according to her will"[20]), while Imam Nawawi claimed that the seduction of men is in the nature of women and that is why the prophet did not appreciate their company[21].

The degree of oppression varies across societies[22], but generally speaking, women were disadvantaged for being borne as such, disadvantages that generated, along millennia, various reactions. Initially those were isolated reactions, most of the times consisting in religious revolts. For example, Mohammed's third wife, A'ishah created her own religious norms; in India, a group of women supported the *bhakti* movement objecting to one of the forms of the Hindu religion, demanding spiritual equality with men; in Europe, at the end of the 13th century, Guillemine of Bohemia created a women's church by which means she contested the catholic norms[23]. However, the origins of modern feminism can be traced back to the Renaissance and the Enlightenment, Marry Wollstonecraft's *A Vindication of the Rights of Woman* being one of the grounding works of feminism[24]. In the same period, the feminist movement in the USA was grounded, event marked by the Seneca Falls Convention in 1848, the main demand of which involved the complete abolition of all gender based discrimination forms.

Generally speaking, most of the initial feminist demands revolved around what we call today First-wave feminism – that of *equality*. As previously mentioned, the First-wave feminism started with the identification and deprecation by a group of women of the injustices they were subject to. The debate originated with a certain type of society, the Western one – Great Britain and USA, with a certain intellectual context – the Enlightenment – sticking to this circumstance for a significant period of time. At the same time, the demands strictly involved equal rights[25] and their attainment is

[17] Just as isolated was Diogene's position when claiming he was rather a citizen of the world than of the local community;

[18] They were denied membership to humanity;

[19] Another source for women's oppression also to be found with The Old Testament is the doctrine of the original sin, but I will not follow this path, as it doesn't strictly concern the subject of this paper.

[20] I. Mihălcescu (trad.), *Lega lui Manu*, (Craiova: Chrater B.), 229;

[21] B. Winslow, Feminist Movements: Gender and Sexual Equality, in T. A. Meade, M. E. Wiesner-Hanks (ed), *A Companion to Gender History*, (London: Blackwell Publishing Ltd, 2004), 188;

[22] For example, in societies that venerated goddesses such as Astarte, the Summerian goddess Innana, the Greek Gaia; in Egypt, during the Old Kingdom, women were allowed to manifest within the public sphere, girls had equal inheritance rights with those of boys; in the Aztec civilization women had parallel but equivalent parental rights with those of men etc..

[23] B. Winslow, Feminist Movements: Gender and Sexual Equality, in T. A. Meade, M. E. Wiesner-Hanks (ed), *A Companion to Gender History*, (London: Blackwell Publishing Ltd, 2004) 192;

[24] Among those who gave political coherence to the first wave feminist demands were John Stuart Mill, with his work *Subjection of Women (1869)* and his wife Harriett Taylor with her *Enfranchisement of women (* anonymously published*)*.

[25] Women's access to higher education, the secondary and high school education reform, the access of women to some professions from which they had been previously excluded (especially those related to medicine and law), the

still regarded by some theorists as sufficient correction of the injustices. At the same time, the First-wave feminism predilectly answered the needs of certain categories of women: *white, European, middle class*. The main point of this stage in the evolution of feminism was the attainment of rights for a specific category of women and was less responsive to issues concerning race, worker women and peasant women matters. Notwithstanding the fact that some of the voting right militants were also abolitionists, among which Elizabeth Candy Stanton, the former movement had a separate agenda from the latter[26]. The women's rights movements in Asia and Middle East have assumed some of the Western principles, while at the same time opposing imperialism and strongly supporting nationalist, socialist and anti-colonialist movements.

Therefore, if we were to make an analysis of the origins of the feminist movement according to Martha Nussbaum's cosmopolitan model, we should place it somewhere close to the middle of the representation, where it is preponderantly characterized by a strong loyalty to a certain group of women belonging to a certain geographical region, ethnic group, social class or even religion.

Even if after a long period of feminist militantism, the demands of the First Wave became a reality for most women, its results were not quite those envisioned, in the sense that equal rights proved to be a necessary but not sufficient aspect of the elimination of gender inequalities, part because it became a rather formal equality and part because the application of such rights, that were originally conceived for a masculine model, on other groups (consisting of both men and women), characterized by very different needs could not have led to the desired results. Therefore the feminist discourse started to include a completely different concept as to the difference and diversity issue, concepts which were related to certain needs to which the new theoretical constructions should provide an answer, thereby widening the militants' view of the nature of rights and women's emancipation.

The starting point of the Second-Wave Feminism – that of difference and liberation – was marked by Simon de Beauvoir's *The Second Sex* (1949), in which the author attempts to find an explanation for the inefficiency of equal rights with respect to women's emancipation and reaching the conclusion that in order to benefit from such rights, women must become men. Simone de Beauvoir paves the way for the new manners of approaching the issue of women on the grounds of the concept of difference. In 1963 another capital work for the Second-Wave Feminism is published, i.e. Betty Friedan's *The Feminine Mystique*, stressing the aspect of women's identitary construction, that up to that point had allways been considered as being closely and naturally linked to the private sphere and to family life. She objects to the mainstream thought of that time, in the view of which women can only perfect themselves by raising and caring for their children and, generaly speaking, through activities strictly belonging to the private sphere. Thereby, the problem of equality through and in diversity, problem that includes, alongside equal rights issues, that of the gender speciffic differences, leading to the acknowledgement of the common interests based on common experiences.

During the same period and following the acknowledgement of the common interests, the concept of trans-racial women's solidarity gains strong support[27]. As such, while, for example, the original feminist movement was ignorant as to the problems faced by coloured women, under the assumption of the preeminence of the racial criterium and, therefore, that coloured women would become fierce critics of white women and, followingly, reject feminism, dialectically Afro-american women contributed to the revival of the feminist movement during the 60's and the 70's, movements such as Black Woman's Liberation Commitee of Student Non Violent Coordinating Commitee, The Third World Women's Alliance, The Harlem-bases Black Women Enraged and The Oakland Black Women Organizig for Action belonging to this period. Moreover, during this period the radical

acknowledgement of the property right for married women, legislation improvement with respect to divorce and child custody, as well as, the gradual extension of the right to vote (M. Miroiu, 2004, 22);

[26] M. Miroiu, *Drumul către autonomie*, (Iasi: Polirom, 2004), 21;

[27] M. Miroiu, *Drumul către autonomie*, (Iasi: Polirom, 2004), 24;

movement promoting an internationalist view and supporting the anti-colonialist and liberation movements from South Africa, Palestine, Mexico and Cuba emerged. The radical feminism in that period demanded a deconstruction of the gender based order, which was considered to be male-centered and a reconstruction convergent with the particular experiences of women, thereby militating for the construction of a distinct feminine culture.

Obviously, the Second Wave feminism is a feminism of contrasts, of swinging between the local and the global dimensions, between women and women groups, between race and gender, between national and international, between androcentric and ginocentric. By the same dialectical logic, just as with cosmopolitanism, we can notice how the struggle for the acknowledgement of women's rights (First Wave) led, first, to a better understanding of the interests of women, second to a better understanding of women's and men's interests (Second Wave). This knowledge and understanding led to the possibility of the internationalization of the women's movement by organizing conferences (World Conference on Women, Mexico City 1975), by the signing of the International Convention on the Elimination of All Forms of Discrimination against women etc..

The internationalization of the movement coincided, not at all by accident, with the starting point of the Third-wave Feminism – that of *autonomy*, beginning in the 80's, that lays special emphasis on contextualization. This wave is generically characterized by the refusal of universalistic thought, accused of imperialism and ethnocentrism, and by the stressing of the importance of the plurality of women's experiences. The agenda of the Third Wave includes the acknowledgement of "pluralism, of the hybrid orientations, of the fact that opinions differ with context. […] Feminism is an argument, an action dirrected to women that have to preponderently dirrect themselves towards capacitation […] a new political generation is born, in the context of which neither age, nor the old statal frameworks matter, but rather the relevance of the similar experiences[…]"[28]. Therefore, pluralism and diversity are the values that oppose the imperialistic universalism, that could facilitate the empowerment of the individuals, of women, in this case. Boundaries become flexible and criticizable, a permanent interaction between the local and the global spheres takes place, interaction leading to the understanding of diversity as an empowerment generating mechanism. The change in the problems' approach strategy is very important, this consisting in the formulation of punctual solutions, coherent with a maximum degree of autonomy, the general purpose remaining however the same: the elimination of the oppression of women[29].

In short, thereof we speak of the First Wave as the struggle for the acknowledgement of women as persons, as moral subjects, realized through ensuring equal rights for men and women; the Second Wave mainly reffers to the struggle against the imposition of the male model as rights landmark, to the discovery and valorization of the differences between men and women, to the internationalization of the movement, grounded on the acknowledgement of the common interests; the third wave, bringing forth a much more nuanced concept of difference, stressing the differences among women and the necessity of knowing, acknowledging and understanding womens' multiple identities.

Conclusions

At the beginning of this paper we were speaking of the fact that the *cosmopolitan discourse* revolves around a few principles which it regards as being fundamental and that, as I will hereafter attempt to prove, are highly convergent with those promoted by the feminist movements: *humanity, universality of the human rights, acknowledging, understanding and valorizing differences.*

[28] M. Miroiu, O. Dragomir, *Lexicon feminist*, (Iasi: Polirom, 2002), 143;

[29] Notwithstanding our acceptance or denial of the theory by which women have common interests resulting from their specific experiences – womanly and feminine- the feminist movement still revolves around the idea of oppression even if its deployment mechanisms became ever more subtle.

How did the feminist movement evlove in time? What were the central and defining concepts of the three waves? First, the First Wave stressed the importance of **acknowledging women as persons, as moral and as legal subjects**, militating, first and foremost, for the acknowledgement of their humanity and, on these grounds, for the universalization of the human rights. The universality of the human rights which resulted from the membership to the human community, brought forth **women's rights as human rights**, while at the same time underlining an aspect that had been previously neglected, namely the issue of the differences. This issue, that proved to be central with the Second-wave Feminism, determined and stimulated the theoretical constructions regarding the acknowledgement and understanding of the differences **– both between men and women, as among women.** Further on, the acknowledgement, understanding and valorization of the differences, involves a specific sensibility as to the **identitary constructions** and to the **autonomy support**. As such, the Third Wave emerges, promoting principles by the means of which it seeks to shape a community which is truly inclusive, **as to both men and women**. – by taking into account, this time, the multiple differences among the individuals and **their valorization**.

As it can be seen, this entire edification of the feminist movement took place on two interconnected levels:

1.*the actual, pragmatic level*, related to the actual emmancipation of women;

2.*the theoretical construction level* involving the consolidation of the feminist theory;

The two levels evloved in a permanent interconnection, their ultimate goal remaining that of promoting, as efficiently as possible, the rights of women and creating a just society. As such, the theoretical constructions have allways had the same purpose, namely that of integrating women *as women* in a construction in which hyerarchies are not determined by gender and in which humanity, involving equal respect for the dignity of women as human beings, is the foundament of any judgement of value. Therefore, we speak of ineluctable connections between the theoretical and the practical evolution of the feminist and cosmopolitan movements and perspectives. These connections consist, on the one side, in the stagial and, at the same time, non-exclusive[30] construction of both theories, on the other, in the assumption and promotion of the previously mentioned valorical core.

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[30] Third-wave Feminism does not exclude First-wave Feminism, just as, in the case of cosmopolitanism, the familial loyalty does not exclude the loyalty to the global community.

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DO WE STILL WANT AN AMERICAN HEGEMONY?

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Abstract
We are not just in an economic crisis. We are witnessing a global identity crisis that challenges the very nature of the international system. And the current system seems to be made after the image and likeness of the United States of America: The Global Hegemony.
This paper aims to analyze the current international system in terms of challenging the U.S. hegemony; the conclusion being favorable to the status-quo.
In the first part of this paper, I will make an analysis of the last 20 years of American hegemony. My investigation is based on the concepts of the realistic and liberal theories. Then, based on the imperial overexpansion theory and on the critical theory, I will review the key moments of the American hegemony challenge. The analysis will emphasize the military conflicts in which U.S. were involved since the end of the Cold War and their un-civilizing influence on the international relations.
In the last part I will try to evoke the risks of overturning the existing world order, making a parallel with the period before the Second World War. Thus, because of the weakening of the U.S. and the challenges they face, the present economic crisis could find justification for the totalitarian regimes and for the nationalist effervescence which marked the period of the Great Depression of 1932 and the Second World War.
In conclusion, I will try to argue a favorable response for the title of this paper.

Introduction

The first evidence that the U.S. has become a regional hegemony was winning the Spanish – American War in 1898, gaining control over Cuba, the Philippines, Puerto Rico Islands and Guam. The U.S. already had the strongest economy in the world and obtained clear hegemony in the Western Hemisphere. Since the nineteenth century, the U.S. has had the belief that it has a divine destiny to bring moral dignity, equality and freedom to the world. After the Second World War, with victory against Germany and Japan, and amid the breakdown of Great Britain and Russia, the U.S. is in the position for claiming global hegemony. In the past 100 years the U.S. has consistently had the highest GDP and is undoubtedly the greatest military power on land, sea and air. It also became a cultural and technological leader. It concluded the most bilateral and international treaties and is the main initiator of political and economic international organization – with the greatest financial contribution. It is a proponent of democracy, political freedom and constitutional rights guaranteed.

End of the Cold War

After 1990, people lived a moment of definit American hegemony. So definite, that some voices were quick to announce the „end of history" (Fukuyama, 1992). Liberalism rant by Fukuyama's voice the triumph of „ideal state". The collapse of the Soviet Union has shown that liberal democracy, whose flag is USA, has no serious ideological competitor (Scott Burchill, 2008, page 72). And above all, this was a peaceful transition, as liberal doctrines have always preached that it should be. And victory was not one that can be demonstrated in realist terms of power. The military forces of the two superpowers, did not come to confrontation.

It thus fulfilling the wishes of interwar idealists, who have put their peace hopes in the League of Nations. And which after the painful experience of the First World War, with the help of U.S. President Woodrow Wilson, founded the first formal structure of a community of nations. An

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organization to manage relations between states and respond to the need for harmonization of the interests, like the world seen by the liberal internationalists.

Unlike that time, when the U.S. senate had chosen not to ratify the League of Nations Convention, the end of the Cold War is a peak moment of U.S. liberal foreign policy. The vast majority of political and economic global organization operated under American protection. The headquarters of the United Nations is in New York and the main contributor to the organization's budget is US. At U.S. intiative was elaborated in the Geneva Conference in October 1949, attended by 23 countries, a multilateral trade agreement known as GATT (General Agreement of Tariffs and Trade), which in 1995 became the WTO (World Trade Organization). Because of the GATT negotiations, tariffs and other trade barriers where reduced, which contributed to acceleration of international trade and the adoption for the first time, of the government's economic growth strategy under an open market.

U.S. victory in the Cold War, is a liberal victory, in which the free trade economy has proven it promotes best „welfare for all through a more efficient allocation of scarce resources in society" (Scott Burchill, 2008, pag71). Soviet Union has failed to resist the liberal internationalist pressure and accepted democracy in its country and sphere of influence.

But here comes Josh Mearsheimer, who tell us that the end of the Cold War is the best proof of permanent uncertainty that surrounds U.S. and the extra need for security to ensure survival. It confirms the anarchy of the international environment in which all states rationally pursue their own interests. And the U.S. has followed the percepts of offensive realism. You never know how much power is needed, so the best way to ensure your survival is to try to achieve hegemony, what the U.S. did, and eliminate any possibility of another power to challenge you, which happened again at the end of the Cold War by unraveling USSR.

Iraq War 1990-1991

And the right time to confirm hegemony had come for US, also military. Iraq invaded Kuwait in 1990. John Mearsheimer had published in New York Times a controversial article that claims a broad and rapid response of the U.S. military, leading to a decisive victory and all this with no more than 1.000 casualties among U.S. soldiers. Those predictions were contradicted by the vast majority of analysts which forecast a minimum four months war, with thousands of victims.

Mearsheimer's arguments were all rational, bound to the reality on the ground. Iraqi Army was poorly trained and equipped, unprepared to face U.S. military, both tactical and technological. And all predictions have been confirmed during the war.

And U.S. prove that it would not tolerate open defiance of its demands, threats to its interests in political stability and the continuous delivery of oil from the Gulf, or broader attempts to overturn the 'international order.' As the dominant power in the international system, the U.S. would act to protect the stability of the system, and also to ensure perpetuation of its own pre-eminence. The Gulf War prove both America's dominance of the international system and its resulting relative freedom in enforcing its interests, consistent with the tenets of Realist IR theory.

Neither have the liberals hesitated to belive the war in Iraq was the first military intervention in history in accordance with liberal theories and a demonstration of their validity. The invasion of Kuwait was immediately followed by a rapid UN reaction, which tried through diplomatic means to push for restoring the rule of international law. United States had not acted unilaterally, when it was clear that an intervention would be based on American forces and technology. U.S. managed to create a coalition of states that have acted after eliminating all other possibilities under a clear UN mandate, while respecting international law in the field and exceeding the Kuwait boundaries, after Iraqi troups defeat. 28 states, including powerfull muslim countries like Saudi Arabia, joined in a coalition with a legal mandate for intervention, was the U.S. argument that they were a liberal hegemon which takes into account the importance of multilateralism and international institutions.

US President, George H.W. Bush, on January 16, 1991, two hours after the rescue of Kuwait, speaking in the language of liberalism and emphasizing a new world characterized by the principles of international law, the UN, and peacekeeping: "This is an historic moment… We have before U.S. the opportunity to forge for ourselves and for future generations a new world order, a world where the rule of law, not the law of the jungle, governs the conduct of nations".

Although realists claim that military force is the ultimate form of power, liberals find this claim problematic. They argue instead that, the use of force is always influenced by other political factors, and moreover, must always be employed in tandem with other forms such as diplomacy, economic influence, and media influence. For liberals, pure force is a less efficient means of achieving one's will than persuasion and politics.

Prior to, during, and since the 1990-91 Gulf War, the Kurds and Shiites of Iraq have suffered huge repression from the Iraqi regime. Immediately after Operation Desert Storm, UN Resolution 688 established "no fly zones" for Iraqi forces along with "safe havens" to protect the Kurds. Viewed through a liberal way, the establishment of these safe havens may constitute a case of humanitarian intervention.

NATO

North Atlantic Treaty Organization as a political-military alliance was created by the U.S. with a clear intention to counterbalance Soviet power on the European continent. After the collapse of the Soviet Union there voices that questioned the need to maintain this military alliance.

But the end of the Cold War gave new opportunities to both NATO and the European Union to spread East, and bring the economic, political and security advantage to a wider area. NATO took in Poland, Hungary and the Czech Republic in 1999, and another 7 new members in 2004. This is a great step forward for peace and security in liberal terms.

But both Kenneth Waltz and also John Mearsheimer, have not shared the libera post-Cold War optimism, arguing that the collapse of bipolarity in the early 1990s was a cause for real concern. Both deplore the equilibrum of nuclear forces which maintained the balance of power in the world for more than four decades, considering unipolarity unstable and prone to lead to a major war. This is because even the U.S. does not have enough power to truly be a hegemon, not have sufficient resources to impose worlwide, as to enjoy, security. Furthermore Stopping Power Of Watter (SPOW), will prevent any power to become a truly global hegemon.

This explains the attitude of maintaining and increasing U.S. military and financial support of NATO, and even its extension to the Soviet bloc countries. On the long-term, maintaining the alliance had the desired effect in terms of American security and its ability to defend and enforce the offensive policy. The alliance played a key role in controlling the conflicts in the Balkans. Because Europe has shown that it dosen't have the needed cohesion to act decisively.

And the Balkan Wars prove that realists are right again. The war in Bosnia and Hertegovina was unable to be stopped, despite intervention of UN peacekeeping forces UNPROFOR and Rusian mediation attempts. Only decisive U.S. intervention forced the warring parties to sit at the negotiating table and sign the Dayton Peace Agreement in November 1995. U.S. ultimatum and NATO presence in the area were apparently stronger than Security Council indecision and powerless peacekeeping forces deployed by the UN.

Also, by maintaining NATO, the U.S. could invoke, for the first time in the alliances history, the article which requires that any attack on one member state to be considered as an attack against the entire alliance. And that happened in September 13, 2001, two days after the terrorist attacks.

Realistic conclusion of this post-Cold War era, would be that balance is maintained not by the signed treaties, but by threat of a hegemon, in a unipolar system in which power belong to the United States of America.

Challenging U.S. hegemony

All accusations against the United States, are reduced to one, they were wrapped in liberal doctrine while they have always had a realistic attitude. And this, can be best observed by looking at modern forms of humanitarian intervention. The United Nations recognizes the sovereign right of all independent states, but also intervention right in certain cases when there is an acute humanitarian crisis. It is particularly difficult to reconcile both international standards.

War in Kosovo

In 1999 we have the first seriously challenged humanitarian intervention in the world, a key moment of the charges of U.S. aggression and imperialism. Charges were aroused precisely by the humanitarian justification of the NATO bombing campaign. Which has never been agreed by the UN Security Council. Because the permanent members who had relations with Yugoslavia, especially China and Russia, opposed any resolution authorizing the military intervention. And it could not be argued as intervention coming from a liberal hegemon.

NATO claim security interests of alliance members to justify the intervention, and crossed over the Security Council, citing an international humanitarian emergency, but the realistic American attitude was visible. Thus wrote the history of the first military NATO intervention. The War in Kosovo, was a campaign of 11 weeks, longer than hoped and with significant casualties and material costs. It was the milestone of challenging American interventionism in the modern era, and the first sign that the U.S. will fall into the sin of all great powers, imperialistic over extension.

War against terrorism

The liberals were wrong once again proclaiming that political and economic development ends with liberal democracy and its victory is complete with the end of the Cold War. The challenges come not only from communism. Fukuyama did not take into account national and cultural differences. How, otherwise, could the realists, who saw states with „religions, ideologies and different economic systems; as similar in their actions relating to national power", not have been taken into account either (Morgenthau H.J. 2007, p46). They reduced everything to the interests of actors and to objective rules of the international anarchical system.

Because of September 11 and the War Agains Terrorism, a recent wave of anti-western islamic terrorism emerged as a significant obstacle on the path of globalization, which put the U.S. in a series of intellectual and political dilemas for which they were not prepared.

The Bush Doctrine has changed American foreign policy from containment of the Soviet Union during 1947-1990 to the preemption policy (Iraq War), and the prevention policy (Afganistan War): „promise of massive retaliation against nations means nothing for terrorist networks ... containment is not possible when crazy dictators, possess weapon of mass destruction ... we can not trust the word of tyrants who solemnly sign nonproliferation treaties and then systematically violate them" (Bush G.W., 2002)

But the Bush doctrine has led to a more subtle and dangerous anti-Americanism. The view that the U.S. is an aggressive power which mix in the affairs of other states, has been promoted. „Targeting terror cells proved to be more difficult than traditional containment and deterrence of the states. " (Joshua S. Goldstein,2009, p.144).

Offensive realists urge was: reorientation to the old politics of power which still operates in this world. „Power is the international system currency, and the United States should use it as it believes" (Mearsheimer J, The New York Times , 2002). And this advice was followed in the first term of U.S. President George Bush.

Liberal advice, aimed at reorientation of policy towards international cooperation. It acknowledges the superior power of America but it showed the risk of turning the U.S. into an unpopular and alone power. And in the second term in the White House, Bush nuanced U.S. position in this direction, as a tacit acknowledgment of failure.

For adherents of critical theory, the events that followed the terrorist attack on September 11, 2001, including this „unfinished war", were liable to bring this concept to the attention of those concerned to understand the central features of contemporary society. Critical theorists have sustained the idea that action taken by Washington and London against terrorism will induce rather "de-civilizing forces in international relations" (Richard Devetak,2008, p.155). And this because the most important aspect was overlooked: analysis of fundamental social structures which result in such abuses. Knowledge is always conditioned by material and historical context. Critical theorists recognize the political nature of the claims about knowledge, and more, states that any theory always serves someone and a specific purpose (Richard Devetak,2008, p.159). Thus classical theories of international relations are not just about politics, but they themselves have a political character.

Perhaps the best description of this reality is made by Peter Mansoor, U.S. Army colonel and brigade commander in the Iraqi War. „When U.S. forces invaded Iraq in 2003, soldiers were not interested in the cultural impact operations. American leaders believed that an assault would be followed quikly by a stabilization only slightly more difficult than in Kosovo. I quickly discovered not only that this assumption was incorrect but also that sectarian and ethnic identities, the role of tribes in Iraqi society, and the U.S. Army's own internal culture would weigh heavily on the course of the conflict, influence our approach to waging the war, and impact our interactions with our coalition allies" (Foreign Affairs – January 2011). And all this are not the words of a critical theorist but from a U.S. Military employee. We can see in a few phrases, a shift of thinking from a realism to critical, in terms of concepts of international relations theories.

Looking back on a decade of war between America and Al Qaeda, literally the longest U.S. war in history (Daniel Byman,2011), conducted in recent years in the context of a major economic crisis, we can not avoid thinking of what the historian Paul Kennedy has said since the 80s. Imperial over expansion is the main cause of all empires decline, which sooner or later will also hit America.

Iraq not only means that the U.S. will need at least a generation to recover from this war, but first of all, that the U.S. does not have enough military and political means to continue this adventure; Afghanistan also. Even if by such action of force, the U.S. is trying to preserve its hegemony, the decline is visible in the growth of reserved or even hostile attitude towards the U.S. and in record budget deficits. Amid risky monetary and fiscal policies and a high government spending, U.S. starts the global economic crisis, stressing hegemonic decline. The latter have benefited countries such as China, which is the best example of a state taking advantage of U.S. decline, in a zero sum game.

The risks of overthrowing the current world order

The current world order means U.S. hegemony. And this translates in to the present also by a set of standardized and subtle practices identified with a particular state. U.S. hegemony means projection and movement of an exemplary pattern, which works as an ideal regulator (Richard Devetak, 2008, p.197). But now a growing number of conservative political leaders from Asia, have argued that there is an "Asian model of political organization and social education, which includes the principles of harmony, hierarchy and consensus (Scott Burchill, 2008, p.85). But all these regimes do not enjoy democratic legitimacy.

Islamic terrorism is not just a concern for internal security of the U.S. Ie looks back upon an ideology and an islamic culture that makes states immune to ideas of liberal democracy. However incoherent in terms of politics, islamic terrorism is deeply anti-secular and a critic of liberal doctrine.

Amid increasing islamic terrorism, even the strongest democrats allowed the state to accumulate more power. State sovereignty, which the liberals have thought was eroded by globalization, has returned to the foreground with the revival of national security. This has taken various forms, ranging from restrictions of civil liberties, to increase in the power of intelligence services and surveillance of the population. Realistic rational precepts have prevailed over liberal partisans.

Wikileaks disclosures gave a blow to U.S. diplomacy and American prestige. They also revealed corruption and organized crime in Tunisia, where this information has led to outbreak of the rebellion, which increased appreciably global threats. As if it is not enough, like the revolutions that broke out in parallel in the former communist countries in the 90s, Egypt was seized by revolutionary fever. Egypt was an authoritarian state, ruled for nearly 30 years by Hosni Moubarak, a recognized protege of the U.S. Yemen is also preparing to street moves and no one can give a prognosis on the evolution of the Middle East. There is no certainty that the current uprising against authoritarian and corrupt regimes will not lead to even more dangerous dictatorship, at islamic fundamentalism and complet removal from liberal democratic values. Or even worse, given the existing tensions related to Iran and North Korea, will not degenerate into an international conflict.

1918-1939 vs. 1991-Today

By its consequences, the First World War, profoundly affected political, social and cultural life of the globe. The Ottoman Empire collapsed completely and was divided between the victorious powers of the Allies, after signing the Treaty of Sevres on August, 1920. Collapse lead to the modern Middle East. New states have emerged on the political map of the world, old ones have disappeared or have changed the boundaries. International organization were established, new political and economic ideas have earned a place in the world. Liberalism has proclaimed a new era of cooperation under the banner of the League of Nations, which will bring world peace after a devastating First World War.

Here is that even after the Cold War, liberals have proclaimed the decisive victory of peace and completeness of the "final form of human government" (Fukuyama, 1992). New states claimed independence, those detached from the former USSR and those formed by dividing the countries in the sphere of the red influence. International organization has soared, with the newly proclaimed European Union in front – the Maastricht Treaty in 1991.

Realists, however, demonstrated after the Second World War, that utopian interwar idealism was wrong, and this huge mistake has cost humanity tremendously. Today realists, are also afraid of a tough transition and a violent rearrangement of the geopolitical world map.

Upon hearing the provisions of the Treaty of Versailles, which left Germany intact after the WWI, there were voices that warn: "this is not peace, it's an armistice for 20 years" (Field Marchal Ferdinand Foch). Also the collapse of the communist USSR, has not lead to a Russian democracy like the western countries hoped. It has not lead to a calming of latent conflict. Furthermore, with the advent to power of Vladimir Putin and outbreak of the Georgian War, we have even more reasons for threats in this area.

The beginning of the Great Depresion is usually associated with the collapse of the stock market on the so-called Black Tuesday October 29, 1929. The current global economic crisis took as a starting point the New York stock market crash in October 2008. Both were preceded by years of prosperity for Americans. If after the First World War, the U.S. chose isolationism, the end of the Cold War marked the official start of globalization and even Americanization. Both, however, have concluded in a major economic crisis that has spread progressively through the world. World trade levels fell rapidly, just as personal income, business revenue and profit decreased. Unemployment and inflation on the other hand will increase dramatically. Hundreds of banks will declare bankruptcy and will be needed a strong state intervention.

U.S. was the promoter of the "open doors" policy, which changed the whole world trade. But it also made countries more interdependent and vulnerable to crisis. Even these days, The World Economic Forum in Davos is more often dominated by questions, rather then answers. It is recognized that the current model of capital market was the source of excess. All for shareholders welfare, and this principle can not dominate the 21 century. Countries are no longer happy with the american financial system and stock market rules.

The Great Depression ended at different times in world countries. In most countries have been designed rehabilitation programs and most have gone through various political transformations that have pushed to the left or right political extreme. Liberal democracy-based societies have come weakly from the crisis, and the dictators like Adolf Hitler and Benito Mussolini came to lead some of the most powerful states and will prepare the conditions for initiation in 1939 of the Second World War. Even now, economic crisis brought to power more authoritarian governments. If on the background of the Great Depression, nationalism led to the installation of communist and fascist, totalitarian regimes, current threats came especially from islamic countries and China, countries who can not justify in democratic terms their place in the domestic political scene. Alike, Europe now admits that it has failed in its multicultural attempt. The German and British Prime Ministers, as well as the President of France, was surprised the public opinion at the beginning of 2011, with statements that require the introduction of a "muscular liberalism". Which should have as priority the integration, equality and rule of law. David Cameron said "We encouraged the cultures to live separate lives, away from each other and the rest of society". And thus explain the terrorist attacks, who have generally been done by its own citizens, but with islamic religion and ethnicity.

This crisis proved to be a system of power redistribution. Amid economic crisis, China has managed to reach the second world economy, displacing Japan. More, keeping this cadence of growth will threaten the U.S. itself. All this power is already beginning to be felt in the international relations. China has in recent years, consistently had the largest delegation participating in any global event: World Economic Forum in Davos, International Climate Conference in Cancun, etc. China helps countries with authoritarian regimes such as Venezuela and Cuba, engages in the exploitation of African resources and buy bonds issued by the European countries which are still in economic crisis. Despite reassuring statements of Chinese leaders, that it's just a peaceful developing country, its actions often lead us to think to a dangerous predator. China has managed to get into the spotlight because of authoritarian domestic policies combined with the unprecedented long term economic growth. In recent years, China has also tried to become a major military power. It is the only country outside the U.S., who owns an "invisible" plane, and is the country with the second largest military budget (87 billion USD in 2010), tailing the U.S.

On the other hand, Russia claim its place on the international stage, place lost in 1990, under a power that it's not afraid to show in the most realistic way: the war in Georgia, maintaining armed forces in Transnistria, blackmail gas supplies, missile installation threats in the islands under dispute with Japan etc.

League of Nations – the organization designed to introduce the principle of collective security after the First World War, had to face very similar crisis to those of today's U.N. The League was undermined by the bellicosity of Nazi Germany, Imperial Japan, and Mussolini's Italy. A series of international crises strained the League to its limits, the earliest being the invasion of Manchuria by Japan and the Abyssinian crisis of 1935-36 in which Italy invaded Abyssinia, one of the only free African nations at that time. The Abyssinian war showed Hitler how weak the League was and encouraged his participation in the Spanish Civil War. He also remilitarized the Rhineland in flagrant disregard of the Treaty of Versailles. This was the first in a series of provocative acts culminating in the invasion of Poland in September 1939 and the beginning of the Second World War.

In 2003, the war against Iraq has divided the world into two camps, and above all it was a time when U.S. decided to go to war without the approval of the Security Council. Dramatically weakening U.N. authority and coherence of the European Union. Russia attacked Georgia in 2008, and international organization proves to be powerless despite global protests.

Nevertheless, the League did witness one effort to go beyond mere cooperation between governments. This was the proposal for European unity, made by the French statesman Aristide Briand. In 1925 he had declared his ambition to establish "a United States of Europe," and on Sept.

9, 1929, he made a speech to the then 27 European members of the League in which he proposed a federal union. The general response was at best skeptical and at worst politely hostile.

In 2005, the European Union failed to adopt a draft constitution that would have been a unique occasion to reach the european politic purpose. Even after the adoption of the Lisbon Treaty in 2009, european states are reluctant. Defence and also foreign policy are still prerogative of national governments. Even newly created External Action Service lead by the High Representative Catherine Ashton, who really wanted to be a European Foreign Minister, a unique voice for Europe, proves to be a failure in these days.

If we draw a parallel between the interwar period and today, we discover those similarities that should give us a pause for thought in view of avoiding a global confrontation.

Conclusions

We are not just in an economic crisis. We are witnessing a global identity crisis that challenges the very nature of the international system. And the current system seems to be made after the image and likeness of the United States of America, the Global Hegemon. Throughout history no passing power from one cycle to another was easy nor peaceful. Now more than ever, risks are measured in terms of technological progress. The dangers are not the same, because the destructive forces of modern weapons are at a lethal level, hard to imagine.

Given the real power: economic, technological, military and ideological; the U.S. hegemony was rather peaceful and providing hope for human evolution. Despite the political mistake that have eroded confidence in the American Dream, U.S. hegemony is desirable if we consider the alternative.

Through the followed policy as a global power, the U.S. is responsible for peace, stability and prosperity of humanity after the Second World War, especially for countries who have embraced democracy and the American way.

In these days we are witnessing a crucial moment in rewriting the world order agenda: The visit of Chinese President Hu Jintao in America. The discourse is one that gives hope for the prospects of global stability. Beyond liberal message, this speech is a symbol of possible reconciliation U.S. – China, and entry into a new phase of international cooperation. Notify the major powers were seated at the negotiating table, a new club of power which would ensure global stability and the transition to a postindustrial civilization.

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EUROPEAN UNION AND ROMANIAN POLICIES ON WOMEN'S SOCIAL EXCLUSION AFTER THE LISBON TREATY

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Abstract
The Lisbon Treaty marked many important changes in European Union's institutional make-up and policy-making. One particularly important field of inquiry, especially in light of the current financial crisis, is European policy-making regarding social exclusion in general and women's social exclusion in particular.
First, through my paper I aim to answer three interconnected questions: 1) Has the Lisbon Treaty influenced policy-making regarding social exclusion, in the context of the current financial crisis? 2) What were the specific changes ensued? 3) IF/How is the European trend translated in Romanian national policies concerning women's social exclusion? Second I aim to sketch several recommendations for addressing women's social exclusion in light of the Lisbon Treaty.
Since social exclusion is a vast domain I will limit myself in discussing primarily issues connected to women's participation in the labour market, as well as participation in decision-making. In this sense I will use policy documents, available data and academic papers concerning the changes bought on by the Lisbon treaty, the main theoretical contributions in the field of women's social exclusion and recent data obtained through a series of conferences on the Lisbon Treaty and Romania's Role in the Process of Deepening European Integration 2010. The conferences, where I was a key speaker for one of the panels, were developed by the Romanian Government- the Department for European Affairs, The National School of Political and Administative Studies and the Academic Club of European Studies and provided an opportunity for conducting a small pilot-research providing data on the response of various social groups to the changes brought on by the Lisbon Treaty.
Both the theme and the analysis of the paper are relevant and current, focusing on the interplay between the EU and Romanian policies after the Lisbon Treaty in the context of the present financial crisis.

Keywords: *Lisbon Treaty; women's social exclusion; participation; financial crisis*

Introduction

The Lisbon Treaty marked many important changes in the European Union's institutional make-up and policy-making. One particularly important field of inquiry, especially in light of the current financial crisis, is European policy-making regarding social exclusion in general and women's social exclusion in particular.

First, I aim to answer three interconnected questions: 1) Has the Lisbon Treaty influenced policy-making regarding social exclusion, in the context of the current financial crisis in Romania? 2) What were the specific changes ensued ? 3) IF/How is the European trend translated in Romanian national policies concerning women's social exclusion? Second, I aim to sketch several recommendations for addressing social exclusion, particularly women's social exclusion in light of the Lisbon Treaty.

Since social exclusion is a vast domain I will limit myself in discussing primarily issues connected to women's participation in the labour market and income, as well as participation in decision-making. My approach focuses on two main aspects of social exclusion. Jane Millar proposed that a distinction needs to be made between two avenues of research: one focusing on *becoming socially excluded* and one on *being socially excluded.* The first approach underscores the processes of social exclusion, the way people, social networks and institutions respond to social exclusion. The second approach is focused on identifying specific indicators and dimensions of

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social exclusion[1]. While limited to only two dimensions, my accounts seeks to identify and discuss both the specific dimensions with their correlating indicators, as well highlight the processes of exclusion, particularly in a Romanian context. While numbers and indicators are useful in determining women's particular reality of social exclusion, Romanian institutions' response to this reality, in the context of changes within the European Union emerging after the Lisbon Treaty is just as relevant.

1. At a glance: Social Exclusion and the Lisbon Treaty

1.1. A Brief History of a Complicated Journey: the emergence of Social Exclusion on the EU policy stage and its General Meaning

Social policy started to become a part of the EU's working agenda with the introduction of the principle of equal treatment for men and women in social security and in labor law and with start of the European Communities anti-poverty programs (1975-1980, 1986-1989 and 1990-1994). By the beginning of the third one, a multidimensional approach to poverty was adopted and social exclusion became the key policy term. The Community Charter of the Fundamental Social Rights of Workers used the term social exclusion in 1989 and the European Observatory for Combating Social Exclusion was set up[2].

The significant shift was made from a social policy oriented towards the poor to a policy oriented towards the excluded, and this entailed "a change in perspective: from a static to a dynamic approach, from a one-dimensional to a multidimensional perspective, and also from a distributional to a relational focus"[3]

Social exclusion's recent emergence on the EU public policy scene has roots in different national contexts and debates[4]. The French context[5] proved particularly relevant, since the term's "social exclusion" initial appearance on the policy and political theory stage is usually traced to *Les exclus: Un francais sur dix*, written by Rene Lenoir, then the Secretary of State for Social Action in the Chirac government, in 1974. According to the author the excluded were not only the "traditional" poor, but also people from a wide range of groups[6].

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[1] Jane Millar "Social Exclusion and Social Policy Research: Defining Exclusion" , in *Multidisciplinary Handbook of Social exclusion Research* edited by Abrams, Dominic; Christian, Julie; Gordon, David, John (Wiley&Sons, Ltd: England, 2007), 4

[2] Schulte, Bernd "A European Definition of Poverty: The Fight Against Poverty and Social Exclusion in the Member States of the European Union". In *World Poverty. New Policies to Defeat an Old Enemy*, edited by Peter Townsend and David Gordon, (Bristol: The Policy Press, 2002), 120; Daly, Mary and Saraceno, Chiara. "Social Exclusion and Gender Relations". In *Contested Concepts in Gender and Social Politics*, edited by Barbara Hobson, Jane Lewis, Birte Siim, (Cheltenham: Edward Elgar Publishing, 2002), 86.

[3] Saraceno, Chiara. Social Exclusion. Cultural Roots and Diversities of a Popular Concept. 2002 http://www.childpolicyintl.org/publications/Saraceno.pdf., 2.

[4] This is only meant as a brief introduction to the subject matter. The current presentation is based on a more detailed account and interpretation of the history and understanding of social exclusion within the European Union : see. Alice Iancu *A Conceptual Approach to Social Exclusion,* PhD. Thesis, Bucharest, National School of Political and Administrative Studies, 2010 (unpublished)

[5] Social exclusion did not reach the mainstream of European and Anglo-Saxon Political public discourse until the late 90's and was fully established within the European Union's policies after 2000. See 2. Haan, Arjan de. 1999: Social Exclusion: Towards a Holistic Understanding of Deprivation, http://webarchive nationalarchives.gov.uk/ +/http://www.dfid.gov.uk/Documents/publications/sdd9socex.pdf., 55-56

[6] The concept of social exclusion encompassed " the mentally and physically handicapped, suicidal people, aged invalids, abused children, drug addicts, delinquents, single parents, multi-problem households, marginal, asocial persons and other "social misfits" that Lenoir estimated made for a tenth of the French population at the time. During the 1970's the term seemed to depart from (explicit) political discourse as it divided into objective and subjective exclusion. Subjective exclusion "referred to alienation and the loss of personal autonomy under advanced capitalism".

Social exclusion was not a term widely used in France until when it became apparent, during the late 1970's, that some were not benefiting from the economic growth. France was confronted with a series of social and economic crisis the 1980's. The Socialist Government in the mid-80's, as response to criticism, adopted the language of solidarity and inclusion. By this time we can begin to attribute to the concept of social exclusion a multi-dimensional character. New dimensions were addressed and "There were not only material, but also spiritual and symbolic aspects to this phenomenon"[7]. New groups of individuals were enlisted as vulnerable. Political discourse centered on the need to include or insert these groups into society. By the late 1980's the inclusion discourse had made its way on the political agenda of both the French Left and Right and by this route entered European Union's policy discourse[8].

At the European Union Level social exclusion was related initially to social groups being outside the social protection system and exposed to different types of risks. In time some groups remained within the social exclusion discourse while others became the target of specific policies- such as abused children- and others were added- such as young people and the long-term unemployed[9]. At the present, there still is a strong connection between social inclusion and social protection, and the two domains are reported on through annual Joint Reports on Social Inclusion and Social Protection[10].

The European Union published within its 2004 Joint report the following definition of social exclusion: "Social exclusion is a process whereby certain individuals are pushed to the edge of society and prevented from participating fully by virtue of their poverty, or lack of basic competencies and lifelong learning opportunities, or as a result of discrimination. *This distances them from job, income*[11] and education opportunities, as well as social and community networks and activities. *They have little access to power and decision-making bodies*[12] and thus often feeling powerless and unable to take control over the decisions that affect their day today lives." [13]

Social inclusion policies show an overarching approach, comprising of three interconnected strands: social inclusion, pensions and health care.[14] The European Union established a set of overarching objectives and a list of objectives for each strand: In 2008 the overarching objectives set in 2006 were re-stated: (a) social cohesion, *equality between men and women and equal opportunities for all*[15] through adequate, accessible, financially sustainable, adaptable and efficient social protection systems and social inclusion policies; (b) effective and mutual interaction between the Lisbon objectives of greater economic growth, *more and better jobs*[16] and greater social

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See Silver, Hilary. "Social Exclusion and Social Solidarity: Three Paradigms". International Labour Review 133, (1994/5-6), 532.

[7] Silver, Hilary. "Social Exclusion and Social Solidarity: Three Paradigms". International Labour Review 133, (1994/5-6), 533

[8] Silver, Hilary. "Social Exclusion and Social Solidarity: Three Paradigms". International Labour Review 133, (1994/5-6), 532-535

[9] Daly, Mary and Saraceno, Chiara. "Social Exclusion and Gender Relations" in *Contested Concepts in Gender and Social Politics*, edited by Barbara Hobson, Jane Lewis, Birte Siim, (Cheltenham: Edward Elgar Publishing, 2002), 85-86

[10] As the 2005-2008 Joint Reports indicate

[11] My emphasis

[12] My emphasis

[13] European Commission, "Joint Report on Social Protection and Social Inclusion", 2004 http://ec.europa.eu/employment_social/spsi/docs/social_inclusion/final_joint_inclusion_report_2003_en.pdf, 10

[14] European Comission Employment, Social Affairs and Equal Opportunities DG, *Portofolio of overarching indicators and streamlined social inclusion, pensions and health portofolios*, April 2008 Update, http://ec.europa.eu/employment_social/spsi/docs/social_inclusion/2008/indicators_update2008_en.pdf, 1

[15] My emphasis

[16] My emphasis

cohesion, and with the EU's Sustainable Development Strategy; (c) good governance, transparency and *the involvement of stakeholders in the design, implementation and monitoring of policy*[17]."[18]

Under these overarching objectives each strand: social exclusion, pensions and healthcare, have three specific objectives. There are three objectives and indicators stated under the eradicating poverty and social exclusion strand "(d) access for all to the resources, rights[19] and services needed for participation in society, preventing and addressing exclusion, and fighting all forms of discrimination leading to exclusion; (e) the active social inclusion of all, both by promoting participation in the labour market and by fighting poverty and exclusion; (f) that social inclusion policies are well-coordinated and involve all levels of government and relevant actors, including people experiencing poverty."[20] In the same time it is clear that, both at the level of objectives concerning pensions and those concerning healthcare there is an inclusion/exclusion axis to be considered. The objectives set for the pensions strand clearly state the necessity to assure that retirement be accessible to all (both through public or private pension schemes), that it provides a decent life standard and that it is transparent and available[21]. The first objective of the health strand is addressing "accessibility and health inequalities"[22], along with issues related to the quality and sustainability of healthcare systems. Thus the three strands are to be taken into account as interconnected.

In terms of methodology and measurement, social inclusion was a policy area subject to specific methods and indicators. The member states all were encouraged to work together in combating social exclusion through the Open Method of Coordination, which entailed agreeing to common objectives, a set of common indicators, preparing national strategic reports and evaluating these strategies jointly with the European Commission and the Member States[23]

The social indicators were initially agreed on at the Laeken Council in 2001 and they have been considerably updated since then. Three levels of indicators have been established: primary indicators, secondary indicators and third-level indicators. The primary and secondary indicators were commonly agreed on and thus allow for a European-wide analysis, while the third-level indicators are to be established by each member state, to better reveal its own national context[24].

The evolution in the understanding of the complexity of social exclusion indicators is reflected through the differences between the 2001 report, the 2006 one and the 2008 update[25]. The 2001 report on indicators in the field of poverty and social exclusion reflects the beginning of an attempt to keep up with the requirements of the Lisbon Agenda, measuring the only dimension of

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[17] My emphasis

[18] European Comission Employment, Social Affairs and Equal Opportunities DG, *Portofolio of overarching indicators and streamlined social inclusion, pensions and health portofolios*, April 2008 Update, http://ec.europa.eu/employment_social/spsi/docs/social_inclusion/2008/indicators_update2008_en.pdf, 4

[19] The named rights are those defined in the *Charter of the Fundamental Rights of the European Union*. See: http://www.europarl.europa.eu/charter/pdf/text_en.pdf

[20] European Comission Employment, Social Affairs and Equal Opportunities DG, *Portfolio of overarching indicators and streamlined social inclusion, pensions and health portfolios*, April 2008 Update, p. 15 http://ec.europa.eu/employment_social/spsi/docs/social_inclusion/2008/indicators_update2008_en.pdf

[21] European Comission Employment, Social Affairs and Equal Opportunities DG, *Portfolio of overarching indicators and streamlined social inclusion, pensions and health portfolios*, April 2008 Update, http://ec.europa.eu/employment_social/spsi/docs/social_inclusion/2008/indicators_update2008_en.pdf, 29-38

[22] European Comission Employment, Social Affairs and Equal Opportunities DG, *Portfolio of overarching indicators and streamlined social inclusion, pensions and health portfolios*, April 2008 Update, http://ec.europa.eu/employment_social/spsi/docs/social_inclusion/2008/indicators_update2008_en.pdf, 40

[23] For more details see the official EU site: http://ec.europa.eu/social/main.jsp?langId=en&catId=750

[24] Atkinson, Anthony B.; Marlier, Eric; Nolan, Brian "Indicators and Targets for Social Inclusion in the European Union" , *JCMS* 42, No.1. (2004), 52.

[25] European Comission Employment, Social Affairs and Equal Opportunities DG, *Portofolio of overarching indicators and streamlined social inclusion, pensions and health portofolios*, April 2008 Update. http://ec.europa.eu/employment_social/spsi/docs/social_inclusion/2008/indicators_update2008_en.pdf

social exclusion, at that time: access to labor market. And while in 2002 the indicators were addressed in terms of financial poverty seen as multidimensional and cumulating deprivation, financial or otherwise by 2004 the concept used was social inclusion[26]. The 2006 report on indicators covers three dimensions of social exclusion, therefore it has three portfolios: on social inclusion, on pensions and on health. Thus social exclusion is a relative flexible field in European policy-making, having been modified many times over the years, sometimes substantively. The Lisbon Treaty is another new context with great potential for impacting the domain of social inclusion.

1.2. The Lisbon Treaty: a Brief History of Revisioned Objectives

The Lisbon Treaty was seen by many as a sign of surprising recovery for the European Union. After the failure of the attempt for a European Constitution it proved hard for many to imagine that a new treaty, and one so similar to that Constitution, would be in place only a few years later:" The negative outcome of the referendums in France and the Netherlands in May–June 2005 was expected to precipitate the European Union into one of the most serious crises of its 50- year history. Its predicted lethal effects, however, failed to materialize"[27]. The new treaty, called the Lisbon Treaty, maintained most of the provisions of the old rejected one and side-by-side comparisons reveal how the bulk of the articles have endured, albeit modified to less or greater extent.

What was lost were the "constitutional and statist references"[28], what was left provided the European Union with a framework for many substantial changes. The separation between what was lost and what was to be retained became an important issue fairly quickly after the rejection crisis: "In terms of the search for a solution to the 'constitutional crisis' in Europe during this period, what soon emerged was a perceived need to separate the symbolic (and therefore constitutional) elements of the Constitutional Treaty from the substantive reforms to the institutional structure and decision-making processes"[29]

The Lisbon Treaty or "Reform treaty" subsequently shifted the focus on three documents: the *Treaty on European Union*, the *Treaty on the Functioning of the European Union* and *The Charter of Fundamental Rights of the European Union.* One could argue that one of the most potentially momentous changes was the positioning of the Charter as a central EU document: "The protection of citizens' rights is being expanded, with the Charter of Fundamental Rights, adopted at the Nice European Council in 2000 merely as a 'solemn proclamation', becoming *legally binding*[30] with the Lisbon Treaty"[31]

Of the many modifications the treaty entails for the EU status quo, mostly issues pertaining to participation and democratization became some of the most discussed, especially in light of the "democratic deficit" attributed to the European Union[32]. A brief presentation[33] of these issues will be

[26] Atkinson, Tony; Cantillon, Bea; Marlier, Eric; Nolan, Brian "Social Indicators. The EU and Social Inclusion" (Oxford: Oxford University Press, 2002), p. 79

[27] Carbone, Maurizio "Introduction: understanding the domestic politics of treaty reform" in *National Politics and European Integration From the Constitution to the Lisbon Treaty,* edited by Maurizio Carbone (Cheltenham: Edward Elgar Publishing Limited, 2010), 1

[28] Carbone, Maurizio "Introduction: understanding the domestic politics of treaty reform" in *National Politics and European Integration From the Constitution to the Lisbon Treaty,* edited by Maurizio Carbone (Cheltenham: Edward Elgar Publishing Limited, 2010), 1

[29]Cristiansen, Thomas "The EU reform process: from the European Constitution to the Lisbon Treaty" in *National Politics and European Integration From the Constitution to the Lisbon Treaty,* edited by Maurizio Carbone (Cheltenham: Edward Elgar Publishing Limited, 2010), 24

[30] My Emphasis

[31] Cristiansen, Thomas "The EU reform process: from the European Constitution to the Lisbon Treaty" in *National Politics and European Integration From the Constitution to the Lisbon Treaty,* edited by Maurizio Carbone (Cheltenham: Edward Elgar Publishing Limited, 2010), 27

[32] Some researchers stress the many ways in which the democratic deficit works on several different levels and is not to be understood as a general overall distancing of the EU vis a vis its citizens: "the democratic deficit of the EU

useful for understanding the overall purpose of the Lisbon Treaty. The Treaty clearly states in a most inclusive article "Every national of a Member State shall be a citizen of the Union" (Lisbon, art. 8, TFUE, art. 20). In terms of democracy Article 8 of the treaty established three important principles ensuring "democratic equality, representative democracy and participatory democracy"[34]

One way of insuring the inclusion to decision-making of all citizens was by increasing the role of their representative institutions. Thus both the European Parliament and national Parliaments saw their powers increased (through the extension of the co-decision method) and overall a greater status was attributed to national representative bodies (such as the European Council).

The EU-citizens dyad should not be however read in terms of it being a one way street. What was sought ever since 2006 was the practice of an active citizenship, through a visible "citizens' agenda" that could gain new visibility and importance[35]. The Treaty insures through its provisions that European Citizens can actively participate in policy-making. The widest discussed and perhaps controversial provision regards the "Citizens' initiative" though which a million citizens from several European states could in fact propose issues for the Commission to Consider (Lisbon, art. 8B.4; TEU 11.4). Any citizen, NGO or other forms of association pertain the right to petition the European Parliament, to access the documents of EU institutions or to question European institutions regarding a particular issue (Charter, art. 42, art.43, art. 44).

In terms of social inclusion and four main issues are central to the Lisbon Treaty: acknowledging the Charter rights (Lisbon art. 6.1; TEU, art. 6), stating the equality of all citizens (TEU, art. 9), setting the EU to function as a truly representative democracy (TEU, art. 10) and ensuring the interactions between the EU and its citizens (TEU, art. 11). All these under the principles established in Art. 8 mentioned previously[36].

However, while democratization is linked to social inclusion in terms of access to decision making by citizens, social inclusion remains a distinct domain and it connected rather to issues such as access to the labour market, social protection, healthcare and the pensions system. Before moving to a more detailed analysis of how the social dimension is addressed in the Lisbon Treaty, one should note, as part of a general presentation, that among the goals of the Treaty a wide encompassing social

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can be summarized in four aspects: The constitutional architecture of the EU, which has evolved from a series of Treaties agreed by the Member States and contitutionalised by the European Court of Justice (ECJ), points out a system lacking constitutional clarity, since the consent of citizens at national level has not been taken at national level. In the institutional design of the EU, which is based on a set of common institutions at EU level, the decisions evolve from intense bargaining within and across the policy-making institutions, operating within a delicate institutional balance. In this institutional design, there is no doubt that Europe's citizens have difficulty in identifying "who governs" in the Union and cannot exercise their own perogative to dismiss them at elections." See Nevra Esentürk "Democracy in the European Union and the Treaty of Lisbon" in Alternatives: Turkish Journal of International Relations, Vol. 8, No. 4,)Winter 2009), 4.

[33] For a more extended presentation see *Strategy and Policy Study: Adapting the legislation, institutions and policies to the functioning of the European Union, after the entry into force of the Treaty of Lisbon* (coauthors: Iordan Gheorghe Băbulescu, Alice Iancu, Oana-Andreea Ion and Nicolae Toderaş). IER – The European Institute of Romania.

[34] Nevra Esentürk "Democracy in the European Union and the Treaty of Lisbon" in Alternatives: Turkish Journal of International Relations, Vol. 8, No. 4, (Winter 2009), 4.

[35] European Commission "Delivering Results for Europe: Commission calls for a Citizen's agenda", http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/595&format=HTML&aged=0&language=EN&guiLanguage=en

[36] I aim to offer only a brief presentation of the democratization issue. The implications of the Treaty for democratization of the EU are many and some researchers review the ensuing changes as positive: "In the first place, the Treaty of Lisbon has strengthened the role of the EP as a co-legislator through extension of the coverage of co-decision procedure discussed above and the national parliaments are more involved in the decision-making process. Secondly, the lack of the Council's control by the national governments due to secret deliberation and voting in this institution, is partly removed by the Treaty of Lisbon and the vacuum of the control of European government is filled with the European citizens' initiative, which is an important development in line with Preface of the Treaty, stating to make the Union closer to its citizens." (Esenturk, 2009, p. 16)

objective is present: the "well-being of all its people" (Art 3.1 TEU). This well-being is explicitly linked to social inclusion and related issues: "It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States." (Art.3.3 TEU). This approach, as researchers have noted, is a premiere for EU treaties.[37]

2. Social Inclusion European Policies in the Lisbon Treaty Aftermath: Preliminary intersections

While much attention has been given to the democratization aspect of the Lisbon Treaty, social inclusion and Social Europe in general have been secondary. However new momentum is gained in questioning the impact of the Lisbon Treaty for social policies. One provision with great potential impact ensures a mainstreaming of social policy "In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health". (TFEU Article 9). This provision became known as the horizontal "the social clause"[38].

One key aspect to be mentioned is that in terms of actual EU competences in the field, they remain secondary to those of the national member states[39]. The enrichment of objectives, the clarification of competencies and instruments (OMC) are clear positive signs of an enrichment of social policies after the Lisbon Treaty. However, the limitations on the EU competencies and the maintaining of the member states as key actors for such policies allowed for some researchers to conclude "From a social policy perspective, the assessment of the Lisbon Treaty is rather ambivalent"[40]. However, in light of the horizontal social clause and of the clarification of the role of social dialogue, a new dynamic of social policy could ensue. Thus sub-national actors and supra-national actors might prove to become important actors in social policy and their role could prove fundamental-with trade unions and employer associations as the most prominent[41].

Other specific provisions give a fuller picture of the Treaty's social aspects: It specifically mentions social partners as key to social policies[42] and it re-affirms the place of social dialogue[43],

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[37] Andreas J. Obermaier "Common objectives at the EU Level. Social policy" in *EU Policies in the Treaty of Lisbon. A Comparative Analysis,* edited by Gerda Falkner, Institute for European Integration Research, Working papers series no.3/2008, 14

[38] Andreas J. Obermaier "Common objectives at the EU Level. Social policy" in *EU Policies in the Treaty of Lisbon. A Comparative Analysis,* edited by Gerda Falkner, Institute for European Integration Research, Working papers series no.3/2008, 14

[39] Andreas J. Obermaier "EU Competencies in the Field. Social policy" in *EU Policies in the Treaty of Lisbon. A Comparative Analysis,* edited by Gerda Falkner, Institute for European Integration Research, Working papers series no.3/2008, 27

[40] Andreas J. Obermaier "The importance of the Lisbon Treaty from a Policy Perspective. Social policy" in *EU Policies in the Treaty of Lisbon. A Comparative Analysis,* edited by Gerda Falkner, Institute for European Integration Research, Working papers series no.3/2008, 61

[41] Brian Bercusson "The Lisbon Treaty and Social Europe", Academy of European Law, 2009, http://www.springerlink.com/content/7u92hp2u51n06062/fulltext.pdf, 88

[42] Andreas J. Obermaier "Common objectives at the EU Level. Social policy" in *EU Policies in the Treaty of Lisbon. A Comparative Analysis,* edited by Gerda Falkner, Institute for European Integration Research, Working papers series no.3/2008, 14

[43] Andreas J. Obermaier "The importance of the Lisbon Treaty from a Policy Perspective. Social policy" in *EU Policies in the Treaty of Lisbon. A Comparative Analysis,* edited by Gerda Falkner, Institute for European Integration Research, Working papers series no.3/2008, 61

which could potentially have great impact in the future. The Tripartite Social Summit for Growth and Employment and its role are benefited from their mention to the treaty.[44]

At a general level, apart from taking the well-being of all as an overall objective and setting a horizontal social clause, the Lisbon Treaty contains many premiere provisions in terms of social policies and consolidates other previous trends. The validation of *The Charter of Fundamental Rights of the European Union*, containing many social rights, remains "widely interpreted" and explicitly avoided in some cases[45]. Some researchers believe that the European Court of Justice could become a pivotal actor for social policies: "In two cases decided by the European Court of Justice at the end of 2007: the Viking case, referred by the English Court of Appeal and the Laval case, referred by the Swedish Labour Court, the issue raised was whether EU law includes a fundamental right to take collective action, including strike action, as declared in Article 28 of the EU Charter of Fundamental Rights. The decision of the Court as to the fundamental right of workers and trade unions to take transnational collective action may have a catalytic effect on the future of Social Europe"[46]. However, since through the Lisbon Treaty the Charter is given the same weight as the treaties (implying it is not to be extended) and since it lacks reference to fundamental rights (as the Constitutional Treaty maintained), the effects might, from a European Court of Justice perspective, prove to be actually damaging[47].

3. Methodological considerations A modest feminist proposal

Gender equality is present at the level of overarching objectives in the field of social exclusion, and this should be put in the larger context of the European Union's commitment to equal opportunities between men and women. The instrument for achieving this is gender mainstreaming, meaning "the integration of the gender perspective into every stage of the policy process – design, implementation, monitoring and evaluation – with a view to promoting equality between women and men. Gender mainstreaming is **not** a goal is itself but a means to achieving equality."[48] As an example the social indicators that have an explicit gender dimension are the result of gender mainstreaming at the level of measuring social exclusion.

The Lisbon Treaty clearly affirms as its core values non-discrimination and equality between women and men (Art 1.a TEU), also understood as key instruments in combating social exclusion (Art.2 TEU). While at a principle level the gender dimension is vindicated, some researchers have noted that the actual instruments provided by the Treaty (Including the strenghthening of the Charter's position) are rather weak " in fact, the right to a decent employment does not exist, and some rights referring especially to women, such as the right to contraception and or legal abortion, are not mentioned at all"[49]. Also the vagueness of the provisions regarding decent employment affect primarily groups vulnerable to exclusion and discrimination in the market[50].

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[44] Brian Bercusson "The Lisbon Treaty and Social Europe", Academy of European Law, 2009, http://www.springerlink.com/content/7u92hp2u51n06062/fulltext.pdf, 99

[45] Poland and the UK have chosen not to acknowledge this particular provision. See Andreas J. Obermaier "Available Policy Instruments. Social policy" in *EU Policies in the Treaty of Lisbon. A Comparative Analysis*, edited by Gerda Falkner, Institute for European Integration Research, Working papers series no.3/2008, 37-38

[46] Brian Bercusson "The Lisbon Treaty and Social Europe", Academy of European Law, 2009, http://www.springerlink.com/content/7u92hp2u51n06062/fulltext.pdf, 88

[47] Brian Bercusson "The Lisbon Treaty and Social Europe", Academy of European Law, 2009, http://www.springerlink.com/content/7u92hp2u51n06062/fulltext.pdf, 93-94

[48] European Comission Employment, Social Affairs and Equal Opportunities DG, "Manual for gender mainstreaming. Social inclusion and social protection policies" http://www.imagendermainstreaming.at/cms/imag/attachments/9/0/1/CH0133/CMS1181910131400/man_gma_si+spp.pdf, p. 3

[49] Laura Bisio and Alessandra Cataldi *The Treaty of Lisbon from a gender perspective: Changes and challenges*, (Brussels: WIDE, 2008), 12

[50] Laura Bisio and Alessandra Cataldi *The Treaty of Lisbon from a gender perspective: Changes and challenges*, (Brussels: WIDE, 2008), 14-15

As mentioned earlier, my approach focuses on *becoming socially excluded* and on *being socially excluded.* Estivill offers one definition of social exclusion as a process that is representative of this specific approach: "Social exclusion may therefore be understood as an accumulation of confluent processes with successive ruptures arising from the heart of the economy, politics and society, which gradually distances and places persons, groups, communities and territories in a position of inferiority in relation to centres of power, resources and prevailing values"[51]. Focusing on social exclusion as a process puts agency at the center of the analysis. Agency is correlated with both spectrums of social exclusion: the excluded and those doing the excluding. At one end, the focus is on how people respond to social exclusion and the resources they have at their disposal in reacting to it. At the other end the analysis addresses the ways in which individuals, communities or states act to exclude certain groups or individuals[52]. While limited to only two dimensions, my accounts seeks to identify and discuss both the specific dimensions with their correlating indicators, as well highlight the processes of exclusion, particularly in a Romanian context. While numbers and indicators are useful to determining women's particular reality of social exclusion, Romanian institutions' response to this reality, in the context of changes within the European Union emerging after the Lisbon treaty is just as important. In this sense "being socially excluded" is treated here as the basis for addressing questions about "becoming socially excluded" as a woman in present day Romania.

If one were to categorize feminist research on social exclusion by its scope two categories would unravel. The first category is one that adds gender to the analysis working within present dimensions. The second category addresses the need for new dimensions of social exclusion for a more adequate account of social exclusion to be reached. The first one is a minimalist approach, while the second seeks to maximize feminist theoretical insights.

Minimalist approaches focus particularly on measuring and operationalizing of women's life experiences and specific forms of exclusion. Such studies focus on the exclusion of women from a variety of rights and services: social protection schemes, political participation, the labour market and social networks[53]. While such analysis is valuable, it remains limited in terms of impact of the overall theoretical frame of one domain[54].

Maximalist approaches focus not only on indicators or measurement, but also on how a concept itself and our theoretical understanding of it is gendered. In the case of social exclusion what such approaches would provide are in fact new dimensions to be added to the analysis. For example, they focus not (only) on how women fare in the labour market, but also on related dimensions highly relevant from a gendered perspective, such as care or reconciliation between work, career and private life. The resulting gendered account of social exclusion has thus, at least from a feminist theoretical standpoint, one additional dimension and it is one dimension I will address here. My approach could in this sense be considered maximalist ,in that it introduces new variables into the analysis. However, while care work has significant impact on a variety of women's experiences in Romania relating to social exclusion and social protection (such as healthcare or pensions), I will focus here only on how it impacts employment. Also, while taking care into account entails analysis of a variety of factors (the valorization of care though an ethics of care, the cultural factors favoring women's unpaid care work, the conception of the welfare state encompassing or not care) I will not go into such details

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[51] Jordi Estivill *Concepts and Strategies for Combating Social Exclusion. An Overview,* International Labour Organization, 2003 http://www.ilo.org/public/libdoc/ilo/2003/103B09_267_engl.pdf, 19

[52] Jane Millar "Social Exclusion and Social Policy Research: Defining Exclusion" , in *Multidisciplinary Handbook of Social exclusion Research* edited by Abrams, Dominic; Christian, Julie; Gordon, David, John (Wiley&Sons, Ltd: England, 2007), 7

[53] An example of such an analysis is Houston, Diane "Women's Social Exclusion", in Multidisciplinary Handbook of Social Exclusion Research , edited by Dominic Abrams, Julie Christian and David Gordon, (West Sussex: John Wiley&Sons, 2007), 17-28

[54] For a minimalist approach to women's social exclusion in Romania see Iancu, Alice 2007: "The Gender Dimension of Social Exclusion" (Dimensiunea de gen a excluziunii sociale) in *Equal Partners, Equal Competitors (Parteneri egali, Competitori egali),* coordinated by Băluță, Oana, Maiko Publishing, Bucharest, 2007

here[55]. In this sense, my analysis is modest in scope: my purpose is not an analysis of the entirety of dimensions of social exclusion.

Finally, a note on the two selected main variables: the labour market and decision-making. Choosing to focus on the labour market is in sync with current European and Romanian policy priorities in the field of social inclusion. In 2006 the concept of active inclusion was introduced and it stressed the importance of participation to the market and the importance of assuring both a sufficient income and of improved services needed for a better participation in society (in the market). The concept " is based on three main pillars, namely: (i) a link to the labour market through job opportunities or vocational training; (ii) income support at a level that is sufficient for people to have a dignified life; and (iii) better access to services that may help some individuals and their families in entering mainstream society, supporting their re-insertion into employment"[56]. Even if during the public consultation it became apparent that the focus on the labour market as means of inclusion raises several objections, this remains *the* priority area within the EU [57]. Also, as I will show in the next section, it remains the central focus within Romanian policy-making concerning social exclusion.

As far as decision-making is concerned, while the official European definition of the socially excluded does mention that "*They have little access to power and decision-making bodies*[58] and thus often feeling powerless and unable to take control over the decisions that affect their day today lives."[59], there has been little focus on this particular dimension in European social policy, explicitly connecting it to social exclusion. In the aftermath of the Lisbon Treaty, since much attention was given to its democratization provisions, such a link appears fitting. Thus the next section will address how relevant actors (Romanian state institutions and policy-makers) and women themselves act and think in relation to those two dimensions.

4. Romanian policies on women's social exclusion after the Lisbon treaty

The Romanian context is one particularly favorable to assessing the Lisbon treaty's impact on social policy, especially when one considers the overall public opinion regarding the EU. The latest Eurobarometer on public opinion indicates a positive attitude of Romanians regarding the EU: "Six months into a year officially declared as one of global economic crisis, Romanians have kept their optimism and traditionally positive image of the EU. Around two thirds of the population aged 15 years and over has a positive image about the EU (62%), expresses its optimism about the Union's future (67%), believes that Romania's membership is a good thing (66%) and that Romania benefits from being an EU Member State (63%)."[60] Women are more skeptical than men in their view of the EU, as well as older people and people with a lower level of education. However, this optimism needs to be treated with caution, as it is often accompanied by a low level of knowledge on the actual

[55] For my own detailed account of feminist theories regarding care in relation to the Romanian context see Alice Iancu *The Politics of Care in a State of Crisis: the Romanian case*, LESIJ NO. XVII, VOL. 2/2010, 224-241.

[56] It was highlighted that focusing on the labour market neglects other types of exclusion, some social categories might never be integrated in the market and thus would remain excluded should the definition of social exclusion (and the policies it entails) become equated with exclusion from the labor market. See *Public consultation on active inclusion. Synthesis report by the Commission Services,* p.1
http://ec.europa.eu/employment_social/spsi/docs/social_inclusion/2006/active_inclusion/synthesis_en.pdf

[57] *Public consultation on active inclusion. Synthesis report by the Commission Services*, p. 2
http://ec.europa.eu/employment_social/spsi/docs/social_inclusion/2006/active_inclusion/synthesis_en.pdf

[58] My emphasis

[59] European Commission, *Joint Report on Social Protection and Social Inclusion, 2004,* http://ec.europa.eu/employment_social/spsi/docs/social_inclusion/final_joint_inclusion_report_2003_en.pdf, 10

[60] *Eurobarometer 71 Public Opinion in the European Union,* 2009, http://ec.europa.eu/public_opinion/archives/eb/eb71/eb71_ro_en_exec.pdf, 3

functioning of the EU[61]. This overall positive attitude was also reflected in how Romania related to the Lisbon Treaty. It is important to note that "Romania has been one of the first member states to ratify the reform document in parliament, on the 4th of February 2008, with a striking majority, where only one vote stood against the treaty. In fact, there have been no significant voices advocating a rejection of the legislative act in public debates[62]."

In 2010 a series of conferences was conducted named *Lisbon Treaty and Romania's Role in the Deepening of European Integration.* The Conferences were organized by the Romanian Government's Departement for European Affairs, The National School of Political and Administrative Studies, the Comission for European Affairs of the Romanian Parliament, with the support of the Academic Club of European Studies. With this occasion a small pilot-research was conducted among the participants[63] entitled *The Lisbon Treaty and its Implications for Romania.* This research showed that 60% of respondents believed the Lisbon Treaty would help diminish the distance between the EU and its citizens. Based on all these numbers one could presume an overall positive atitude among the policy-makers and among the Romanian population. However our pilot-research indicated that respondents did not feel confident in significant poverty reduction by 2020. They also believed that the portion of the European budget for social cohesion is too small and that European funding has done little to address this problem. What remains to be seen is how exactly and if the Lisbon Treaty has actually had an impact on Romanian policies regarding social exclusion.

Romanian policies regarding women's social exclusion: Has anything changed?

This section of the paper will address the Romanian context of women's social exclusion by following three distinct coordinates: 1. the actual reality on the ground regarding women's access to the labour market and decision-making 2. the official social inclusion reports and their analysis in relation to the Lisbon Treaty, as well as 3. relevant policies adopted by the Romanian Government.

At a general level, even if the Lisbon Treaty acknowledges gender equality as one of the EU core values, news of this has apparently not reached Bucharest policy makers. In terms of overall policy approach to gender equality the Romanian Government *disbanded* in 2010 both the National Agency for Equal Opportunities for Women and Men (responsible for the promotion and implementation of equal opportunities policies) and the National Agency for Family Protection (responsible, among others, with gathering data and managing domestic violence).

4.1. Women, Poverty and the Romanian Labour Market

Romania, like all European states, has been affected by the financial crisis. In 2009 there was great trust among Romanians in their government and the EU in terms of leadership for combating the current financial crisis[64]. In 2010 however data provided by the The Research Institute for Quality of Life showed that 74% of Romanians believed their quality of life and overall living conditions has worsened in the past year. Even more, the researchers asserted that " In many aspects of material

[61] *Romanians Trust the EU- Similar to Trust in the Church (*Increderea in UE la romani - dupa modelul increderii in biserica) http://www.euractiv ro/uniuneaeuropeana/articles|displayArticle/articleID_14138/Increderea-in-UE-la-romani-dupa-modelul-increderii-in-biserica html

[62] Adrian Corpădean, *The Lisbon Treaty from the Perspective of the 27 Member States*, in Proceedings of the International Conference "*European Integration between Tradition and Modernity*", nr. 3, (Târgu-Mureş: "Petru Maior" University Publishing, 2009), p. 1176

[63] There were 300 de respondents, reprezentatives of the public administration, non-profit sector, the media and the education system. For more details see Bărbulescu et all, *Strategy and Policy Study: Adapting the legislation, institutions and policies to the functioning of the European Union, after the entry into force of the Treaty of Lisbon* (IER – The European Institute of Romania, 2011- forthcoming).

[64] *Eurobarometer 71 Public Opinion in the European Union*, 2009, http://ec.europa.eu/public_opinion/archives /eb/eb71/eb71_ro_en_exec.pdf, 5

living conditions in 2010 we had a return of conditions from 1999, another moment of socio-economical crisis"[65]

The Romanian social exclusion policies focus on the labor market. The institution with most attributions in the area of social inclusion is the Ministry of Labor. In terms of priorities, the first priority for increasing social inclusion is "general improvement of the population's standard of living and stimulation of income gained from work by means of ensuring employment and promoting inclusive policies."[66]

The Romania Joint Inclusion Report 2010 named as some the poorest social groups elderly women, single parent families and young people. The 2010 Report only explicitly names women when referring to the elderly. However single-parent families are overwhelmingly run by women. Young women also have higher poverty rates their male counterparts, something acknowledged within the National Strategic Report on social Protection and Social Inclusion 2008-2010 [67]. Aproximately 30% of women within these three categories fall beneath the poverty threshold, in a country where overall women are poorer than men[68] and the overall population has *the lowest incomes* in the European Union[69]. In this sense one could argue that one in three women of these categories are the poorest of the poor in the European Union.

Income is directly connected to both access in the labour market and women's position within it. In terms of employment the overall numbers show a decrease in employment, with women less present on the labour market than men (52%)[70]. The Romanian market place is affected by both horizontal and vertical segregation, with negative consequences for women's income. This mirrors the overall situation at the European level, since "the gender pay gap, labour market segregation, work–life balance and the unfair distribution of reproductive and care work are still major challenges"[71]. In Romania nothing has been done in the last year to address such issues and the only state Agency who actually had a National Strategy for addressing such issues, the National Agency for Equal Opportunities for Women and Men, was disbanded.

Research also highlights the connection between care and employment or income, where dependents in the household are, lacking necessary politics, one of the obstacles faced by women in accessing the labour market[72]. This is also supported by European Union official documents[73].

In Romania the numbers are significant: 61% of women living in household with dependants declared that they do not have their own income; in households with no dependents only 38% of

[65]The Research Institute for Quality of Life (Institutul de cercetare a calității vieții) *Quality of Life in Romania 2010* (Calitatea vieții în România 2010), http://www.iccv ro/node/190, 6

[66]Ministry of Labour, Family and Social Protection, *National Strategic Report on social Protection and Social Inclusion 2008-2010*, 11

[67] Ministry of Labour, Family and Social Protection, *National Strategic Report on social Protection and Social Inclusion 2008-2010*, 6

[68] Ministry of Labour, Family and Social Protection, *National Strategic Report on social Protection and Social Inclusion 2008-2010*, 6

[69] The Research Institute for Quality of Life (Institutul de cercetare a calității vieții) *Quality of Life in Romania 2010* (Calitatea vieții în România 2010), http://www.iccv ro/node/190, 11

[70] The Research Institute for Quality of Life (Institutul de cercetare a calității vieții) *Quality of Life in Romania 2010* (Calitatea vieții în România 2010), http://www.iccv ro/node/190, 31

[71] Laura Bisio and Alessandra Cataldi *The Treaty of Lisbon from a gender perspective: Changes and challenges*, (Brussels: WIDE, 2008), 15

[72] Mary Daly and Katherine Rake,*Gender and the Welfare States. (*Cambridge: Polity Press, 2003), 59

[73] The European Economic and Social Committee and the Committee of Regions *Report from the Commission to the Council, The European Parliament Equality between women and men— 2009*, Brussels, 27.2.2009, 4.

women declared the same thing[74]. From 1991 to 2006 the number of state-funded kinder gardens reduced dramatically[75]. In 2008 National Strategic Report on social Protection and Social Inclusion named as its second priority the insurance of access to rights and services, including those related to child-care. The report stated that "measures shall be taken with regard to the consolidation of equal opportunities on the labour market between men and women and to enabling the harmonization of the professional life and the family life."[76] . The same document clearly showed both the acknowledgement of a link between the labor market and care and expressed commitments to address it "During 2008 – 2010, the development of family policies shall focus on promoting measures to encourage women's participation on the labour market by developing child care facilities and developing day-care centers to ensure the return of mothers to their jobs"[77]. In a Romanian setting however it is necessary that other categories of dependents be included in reconciliation policies: most people with disabilities in Romania are taken care of within the family (read: by women within the family), for example. This is addressed in 2009 in terms of access to proper care for people with disabilities, but the gender dimension of their care-takers escapes unnoticed by policy-makers[78].

This brief presentation of Romanian key policy-papers indicates a rather gender-blind understanding of social inclusion. *Some policy documents on social inclusion fail to even mention women at least once*[79]. Some of the policies undertaken by the Government in 2010 showed the true extent of this gender blindness.

Policies for child-care facilities were never put into place, however the Government tampered with child- care leave period and benefits as it saw fit, invoking that such measures had been requested by the International Monetary Fund[80]. Child support policies were changed throughout the year. Child support was slashed in June 2010 and the Government announced its intention to reduce child-care leave to one year. In December the Government finally came up with a new law regulating child leave. The new law Emergency Ordonance 111/2010 gives women the option of choosing for a one-year or two-year leaves, with different monetary benefits (the maximum threshold is higher for a one-year child-care leave option). What was apparent throughout the year was that the overall Romanian political debate simply ignored the lack of child care facilities. A one-year mandatory leave would have put women in very difficult situations, since losing child-support in a country with so few care facilities would have impacted greatly on their unemployment and poverty risks. It is still difficult to ascertain the future impact of the present policy, however the year 2010 clearly indicated how gender-(in)sensitive Romanian policy makers are.

Social policy is not something Romanians automatically link to the EU. As far as the Eurobarometer indicated, most respondents' own representation of the European Union, in terms of

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[74] The data was obtained through a national-representative survey conducted as part of the CNCSIS (National Centre for Scientific Research in Higher Education) Project No.964, coord. Prof. Dr. Mihaela Miroiu, *Gender, political interests and European insertion*, developed by the National School of Political Studies and Public Administration.

[75] Băluță, Oana *The Gender Dimension of Reconciliation Between Work, Family and Private Life* in Equal Partners. Equal Competitors, coordinated by Oana Băluță, Bucuresti: Maiko, 2007, 114-116

[76] Ministry of Labour, Family and Social Protection, *National Strategic Report on social Protection and Social Inclusion 2008-2010*, 20

[77] Ministry of Labour, Family and Social Protection, *National Strategic Report on social Protection and Social Inclusion 2008-2010*, 26

[78] România *Joint Report on Social Protection and Social Inclusion* (Raport comun privind protecția socială și incluziunea socială), 2009, p.9

[79] *Report on the activity of the Ministry of Labour, Family and Social Protection in the field of social inclusion, January-September 2010*, http://www mmuncii ro/ro/articole/2010-12-10/raport-privind-activitatea-ministerului-muncii-familiei-si-protectiei-sociale-in-domeniul-incluziunii-sociale-in-perioada-1-ianuarie--30-septembrie2010-2001-articol html

[80] Mediafax *IMF Asks Romanian Govt To Reduce Maternity Leave To One Year*, http://www mediafax ro/ english/imf-asks/romanian-govt-to-reduce-maternity-leave-to-one-yr-sources-7771972

values indicates that a direct connection to social protection decreased from 23% to 17%[81]. However Romanian state institutions have an obligation to take EU social policies into account, including the social clause of the Lisbon Treaty. Budget cuts undertaken by the Government in 2010 show that such a clause was not taken into consideration. In 2010 salaries in public sectors were cut by 25%, affecting mostly public workers, those working in healthcare and those working within the public education system. *Something that was never addressed in Romanian public and political discourse was that the vast majority of the workers in these sectors are women*.

In short, 2010 proved to be a year when policy-makers, far from taking into account women as a vulnerable group to poverty and social exclusion, actually worsened their situation. The main budget cuts aimed at feminized sectors. Any policies or measures to combat non-discrimination in the labour market and to promote equal opportunities were disturbed by the disappearance of the National Agency for Equal Opportunities for Women and Men. Also, Romanian mothers faced a deeply insecure year and were vulnerable to changes in child support and child-care leave.

Women in decision-making

The sense of insecurity and anger felt by Romanian mothers in 2010 lead to a premiere event in Romanian post-communist transition: Romanian mothers organized public protests against the Government's policies. Two separate protests were held in Bucharest, one in front of the Ministry of Labour, Family and Social Protection and one in front of the Government building and similar protests were organized in other cities. While these were not big protests, they were a first in Romanian politics. More remarkably, they were organized at a grassroots level, by mothers, through the internet. These protests were supported publicly and at the protest (through actual participation) by one NGO and a handful of women politicians[82].

This rare instance of Romanian women public protests serves to underline their absence in decision-making bodies. Women hold 5.3% of the seats in the Senate and 11,3% of the seats in the Chamber of Deputies. In county councils women make up 12,6% of the total seats, in local councils 10,8%, 3,4% as mayors and 4,7%as prefects[83]. Only two women are ministers in the Romanian Government. These numbers are exceptionally low. When Romanian mothers protested they found that they had few other women in decision-making positions to count on. This was partly due to politicians' own positions, but also had a great deal to do with the fact that there are scarcely any women in Romanian decision-making representative bodies. The only state Agency that would have at least had a public position on the matter, the National Agency for Equal Opportunities for Women and Men, was already functioning with great difficulty and practically disappeared by the end of the year.

In terms of social partners, women's presence in decision-making bodies is not better. While the Lisbon Treaty does explicitly support Social Dialogue this is primarily concerned with tripartite dialogue between political representatives, employers' associations and unions. Romania has steadily sought to increase social dialogue in recent years and several institutions and mechanisms were put in

[81] *Eurobarometer 71 Public Opinion in the European Union,* 2009, http://ec.europa.eu/public_opinion/archives/eb/eb71/eb71_ro_en_exec.pdf, 9

[82] Cotidianul Newspaper *Desperate parents yell at Basescu and his supporters: We want rights, not charity!* http://old.cotidianul ro/vrem_drepturi_nu_pomeni-114694 html

[83] National Agency for Equal Opportunities for Women and Men *Analysis on the Degree of Participation of Women and Men in the Decision-Making Proces at the Central and Local Administration Leve (*Analiză privind gradul de participare a femeilor și bărbaților în procesul decizional de la nivelul administrației publice centrale și locale), accessed in May 2010. The presentation was available at the Agency's website, however the site is now inactive since the Agency no longer functions.

place in the field before Romania's ascension to the EU[84]. The Economic and Social Council of Romania (CES) is the organization that should be central to social dialogue. Within our research *The Lisbon Treaty and its Implications for Romania*, 61% of respondeds believed its policy assessments should be mandatorily taken into consideration, while 53% believed it should have legislative initiatives. Applying a gender lens in looking at social partners in Romania the absence of women becomes apparent. Of the 45 members of the Economic and Social Council of Romania (CES) only four are women in 2011[85] (one being vice-president). No available data exists on the numbers of women present at the level of unions or employers' associations, although some unions have their own women's organizations. Several active womens' NGO's do exist in Romania, however NGO's are not usually a part of sustained social dialogue. As far as individual women's participation to NGO and association life in Romania, I could find no recent data. In this particular instance analysis of the consequences of the Lisbon Treaty, for example to what extent the "citizens initiative" would be used by women in Romania, would be highly speculative.

In one particular area the Lisbon Treaty could in fact have a mixed effect on women's representation. First, the increase of the role of the European Parliament is positive, since more women are elected to the European Parliament than to national parliaments (for Romania 36.36% of MEP's were women, with only 11, 38 % representation in the national parliament[86]). However the increase of the role of national representative bodies is ambivalent. Theoretically the Treaty's provisions would lead to better representation of national interests, in practice in Romania there is no significant representation for women's interests and needs. Gender-wise the increased role of national parliaments could in fact prove detrimental.

Conclusion and recommendations

As a social group women in Romania are vulnerable to social exclusion and lack adequate representation in decision-making bodies. In 2010 women's risks of social exclusion and poverty were only deepened by state policies. They had few voices or avenues to contest or even address the gender dimension of such policies at the decision-making level.

In keeping with The Lisbon Treaty's affirmation of the values of non-discrimination and equality between women and men (Art 1.a TEU), Romanian state policies should reflect a similar commitment. The National Agency for Equal Opportunities for Women and Men, with an adequate budgeting and clear strategies, needs to be reinstated.

Gender needs to be truly mainstreamed in Romania's Reports on Social Exclusion. This means that gender has to be taken into account in relation to a multitude of variables and consistently included into the analysis. The recommendations of the National Strategic Report on social Protection and Social Inclusion 2008-2010 regarding child-care facilities, social benefits and family support needs to be put into action. The foreseeable financial and social consequences of the current policies on women's income and access to the labour market are yet to be measured. All signs however point to a deepening of women's socio-economical vulnerabilities.

In terms of the presence of women in decision-making bodies several measures need to be undertaken. First national databases should be compiled detailing the presence of women at the social partners' level. Second, women's presence in political representative bodies should be encouraged by

[84] For more details see Bărbulescu et all, *Strategy and Policy Study: Adapting the legislation, institutions and policies to the functioning of the European Union, after the entry into force of the Treaty of Lisbon* (IER – The European Institute of Romania, 2011- forthcoming).

[85] *List of Members the Economic and Social Council of Romania 2011* (Componenta Consiliului Economic si Social 2011) ces ro/newlib/DOC/Componenta-Plenului-CES.doc

[86] Cristina Chiva, *Women in the European Parliament: The Case of the Post-Communist Member States*, CRCEES Working Papers, WP2010/02, http://assessingaccession.eu/Documents/Chiva%20CRCEES.pdf, 5

enforcing quotas on party lists of candidates. The under-representation of women in Romanian politics is a long-standing continuous reality. In 2010 this lack of representation emerged clearly, with state policies hitting women hard and with gender not even being taken into account at a legislative or Government level. In this sense the effects of the Lisbon Treaty should be subject to further gendered analysis.

My account unveils a (still incomplete) image of a social group of women, the women of Romania, vulnerable to poverty and social exclusion, vulnerable to state policies and without having a significant voice in the decision-making process affecting them. In short, the brief presentation in this article and the data and indicators available at this time point to the social exclusion of a significant part of the Romanian population, on account of gender.

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IDENTITY AND INTERESTS IN EUROPEAN INTEGRATION THEORY: THE INSTITUTIONALIZATION OF THE CFSP

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Abstract
The paper aims to analyze the evolution of the Common Foreign and Security Policy from the stand point of two competing approaches: the intergovernmentalist theory, based on rational institutionalism, and the constructivist theories in integration studies. I also attempt an evaluation of their analytical importance inside the theoretical research concerning CFSP. The contribution of this paper lies in emphasizing that even if interests, material and negotiation power and asymmetrical interdependence are useful starting points in analyzing the potential influence of states on early institutional evolution, power alone does not explain the final outcomes of this evolution or of the policies pursued inside the CFSP.

Keywords: *rational institutionalism, constructivism, interests, identities, logic of consequentiality, logic of appropriateness.*

Introduction

The paper aims to analyze the evolution of the Common Foreign and Security Policy from the stand point of two competing approaches: the intergovernmentalist theory, based on rational institutionalism, and the constructivist theories in integration studies. I also attempt an evaluation of their analytical importance inside the theoretical research concerning CFSP.

In the first part of the paper I discuss the main theoretical assumptions associated with intergovernmentalism with an emphasis on liberal intergovernmentalism. In this section I will also underline the methodological roots that the liberal intergovernmentalism borrowed from rational institutionalism. In the second section, I seek to outline the constructivist approaches in integration studies, with their emphasis on the importance of identity for the evolution and the implementation of CFSP. In the third section and fourth sections, I briefly consider the evolution of the CFSP institutionalization and I will present some empirical cases that can be successfully explained using identity as an independent variable. I conclude with an evaluation on the dynamics and interactions between interests and identity and I seek to asses the advantages and disadvantages that rest with each theory taken into consideration.

The contribution of this paper lies in emphasizing that even if interests, material and negotiation power and asymmetrical interdependence are useful starting points in analyzing the potential influence of states on early institutional evolution, power alone does not explain the final outcomes of this evolution or of the policies pursued inside the CFSP.

The intergovernmentalist approaches and rational institutionalism in theorizing the CFSP

In the following section I will present the intergovernmentalist (IG) approaches in theorizing the CFSP. The first part of the section contains an overview of the different types of IG and their place inside the larger field of integration studies. In the last part of the section, I will present the hypotheses formulated by these theories regarding the field of CFSP.

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Before embarking on the presentation of the theories brought into discussion, I want to stress their intellectual roots in the field of international relations[1], a point to which I will return to during the following presentation. As for IG approaches, although they might appear to favor realist assumptions in their explanations, they are not realist per se. As Rosamond points out, "intergovernmentalists of various persuasions are distinguished from realists because they are attentive to the fact that the (international) politics of European integration takes place within a very specific institutional environment"[2]. The IG approaches are rather liberal institutionalist in their origins because they treat the EU as an international regime where national security is not the dominant motivation, states power is not based on coercive capabilities, state preferences and identities are not uniform, and interstate institutions are not insignificant[3]. This association is justified in the light of the fact that these theories emphasize the influence of institutionalization on state behavior.

IG emerged in the context of the lack of progress in European integration in the late 1960' and of the apparent failure of neofunctionalism in explaining these phenomena. One of the first proponents of the IG approach was Stanley Hoffmann, the most famous supporter of traditional or classical IG. His main theoretical concern was to emphasize "the importance of national interests in the international politics of post-war Europe"[4]. He explained the tension between integration and diversity in Western Europe after the Empty Chair Crisis through the incursions of supranational principles and institutions in the sensitive areas related to national sovereignty. In order to ground his explanatory approach, Hoffman[5] resorts to the distinction between high politics (the politics of "vital national interests" and military security) and low politics (dominated especially by economic matters). In Rosamond's formulation, Hoffmann's basic assumptions about the integration at that moment was that high politics is an autonomous domain, "virtually immune from the penetration of integrative impulses"[6], even if the governments were cooperating in the field of low politics in order to maintain control over the areas where intersocietal transactions became pervasive. In other words, his theory didn't give much chances of success to integration in domains like foreign policy and national security.

In the same IG tradition, economic historian Alan Milward tries to argue that, rather than undermining the nation-state, the integration process and the EU saved it. He points out that after the Second World War, European governments were confronted with two dilemmas: rising interdependence and societal discontent. They opted for integration as a solution to the need to provide public policies for their domestic constituencies and to mitigate the negative effects of interdependence.[7]

The preoccupation for the domestic context of the state is also illustrated by liberal IG, one of the most developed theoretical strands of IG. Andrew Moravcsik is the main exponent of this theory which some main characteristics: it is an application of rational institutionalism used to explain interstate cooperation; it is a "«grand» theory that seeks to explain the broad evolution of regional

[1] For a broad discussion on the relationship between the field of international relations and European integration studies see Morten Kelstrup and Michael Williams, (ed.) *International Relations Theory and the Politics of European Integration. Power, Security and Community* (London: Routledge, 2000).

[2] Ben Rosamond, *Theories of European Integration* (Basingstoke, Macmillan and New York: St. Martin's Press, 2000), 141-142.

[3] Andrew Moravcsik and Frank Schimmelfennig, "Liberal Intergovernmentalism", in *European Integration Theory* ed. Thomas Diez, and Antje Wiener (Oxford: Oxford University Press, 2009), 68;

[4] Rosamond, *Theories…* , 76.

[5] Stanley Hoffmannn, *Sisiful european. Studii despre Europa (1964-1994)*, trans. Elena Neculcea (Bucureşti: Curtea Veche Publishing, 2003).

[6] Rosamond, *Theories…* ,77;

[7] Alan, Milward, *apud*. Rosamond, *Theories…* ,138-139.

integration"[8] and it is a parsimonious theory that uses a limited number of parameters (among which the decisive one is the domestic issue-specific preference structure of a few major states)[9].

Regarding the first characteristic mentioned above, the theories in the fields of international relations or European integration studies that build on rational institutionalism share some basic assumptions: individualism, state-centrism, materialism, egoism and instrumentalism[10]. Individualism refers to the fact that the agent (and not the structure) with given and relatively stable identity and interests is the primary generator of social practices. In the rational institutionalist approaches in international relations and European integration studies, the agent is not the individual, but a collective actor: the state, whose unitary character is assumed. Materialism refers to the fact that the distribution of power and wealth are the main variables that explain the processes and variations in international politics. This doesn't mean that institutions are not important but that they are generated by the materials interests of agents and do not modify their identities or interests, only cost-benefit calculations. The institutions are intervening variables between the actors and the environment and between individual and collective action. The good functioning of institutions depends on their utility to the actors. They act on the basis of concern for their benefits and not for the others benefits (they are egoistic). The last characteristic of rational institutionalism, instrumentalism, refers to the fact that actors act according to rational instrumentalism: they try to maximize their own utility. But generally, this assumption is relaxed through "bounded rationality" which assumes that actors don't have to be strict utility maximizers, to posses all the information about the consequences of their actions or to have the capacity to process this information[11]. Building on these characteristics it can be argued, like Schimmelfennig, that "the assumption of rational states acting in a materially structured system and the rationalist indifference to actor-specific cognitions and individual as well as social meanings suggest an *objectivist* analysis"[12]. Moreover, theories that are rooted in rational institutionalism emphasize that agents operate according to the logic of consequentiality, not according to the logic of appropriateness. "In a logic of consequentiality, behaviors are driven by preferences and expectations about consequences."[13] and this logic is associated with anticipatory choice. On the other hand, the logic of appropriateness is associated with obligatory action[14] and it involves fulfilling the obligations of a role in a situation[15] and actions are chosen by recognizing a situation as being familiar, typical.

Returning to the other characteristics of liberal IG, it is worth mentioning that the latter is using three theoretical subcomponents: a liberal or societal theory of national preference formation; a theory of international negotiations and a functional theory of institutional choice[16]. The main assumption of liberal IG is that rational and unitary states are the most important actors in the international anarchical context and international institutions such as the EU are the result of negotiations between states that "continue to enjoy pre-eminent decision-making power and political legitimacy"[17]. The "unitary actor" character of the state is given by the fact that domestic political

[8] Moravcsik and Schimmelfennig, "Liberal Intergovernmentalism", 67-68.

[9] Moravcsik and Schimmelfennig, "Liberal Intergovernmentalism", 85.

[10] Frank Schimmelfennig, *The EU, NATO and the Integration of Europe. Rules and Rethoric* (Cambridge: Cambridge University Press, 2003), 18-19.

[11] Schimmelfennig, *The EU, NATO...*, 19;

[12] Schimmelfennig, *The EU, NATO…*, 21, author's emphasis;

[13] James G. March and Johan P. Olsen, *Rediscovering Institutions. The Organizational Basis of Politics* (New York: Free Press, 1989), 160;

[14] March and Olsen, *Rediscovering Institutions…*, 23;

[15] March and Olsen, *Rediscovering Institutions…*, 160-161;

[16] Moravcsik and Schimmelfennig, "Liberal Intergovernmentalism", 69;

[17] Moravcsik and Schimmelfennig, "Liberal Intergovernmentalism", 68;

negotiations, representation and diplomacy generate a consistent preference function[18]. However, this does not mean that domestic actors don't play an independent and significant role in the negotiations beyond the state because "multiple representation can be consistent with the rational actor model - as long as it is consistent with a preference ordering."[19] Thus, the liberal character of IG comes from the fact that it offers an interpretation of national preference formation which tries to take full account of the diversity of commercial, industrial, monetary and social interests in a state and "the readiness of the nation-state to negotiate agreements if the complex balance of different domestic interests requires it"[20]. As one of the analysts and admirers of Moravcsik's theory, Roger Morgan, observes, although the theoretician of liberal IG accepts that the idea of Europe –the vision of a European federation- has played some role in the integration process, Moravcsik insists that "the EC has been, for the most part, the deliberate creation of statesmen and citizens seeking to realize economic interest through traditional diplomatic means". The paradox is that these traditional means lead to a result which is very non-traditional indeed: the persistent widening and deepening of the EC/EU by "repeated transfers of sovereign prerogatives" [21].

From a liberal IG perspective, international cooperation can be explained by three processes: states define their preferences, then they negotiate agreements and they create or adjust institutions in order to secure certain outcomes[22]. Thus, Moravcsik considers that "EU integration can be best understood as a series of rational choices made by national leaders. These choices responded to constraints and opportunities stemming from the economic interests of powerful domestic constituents, the relative power of states stemming from asymmetrical interdependence, and the role of institutions in bolstering the credibility of interstate commitments"[23]. His perspective was sometimes criticized because it favours economic interests and explanations dominated by producers' interests. This critique seems legitimate taking into consideration that the supporters of liberal IG acknowledge that its ideal application on a concrete case is the Common Agricultural Policy (CAP)[24]. CAP is a policy which has a prevailing economic side dominated by the interests of the producers. Moreover, Moravcsik considers that state preferences regarding European integration have reflected mainly concrete economic interests rather than other general concerns like security or European ideals. However, Moravcsik and Schimmelfennig acknowledge that in non-economic domains, like foreign policy, the economic factor can be less important in calculations regarding a specific policy. Also, the authors admit that geopolitical interests had a role, albeit a secondary one, in European integration[25].

Concerning the relative bargaining power –considered by liberal intergovernmentalists a crucial factor in determining the outcomes of an international negotiation, they argue that it is determined by asymmetrical interdependence: the uneven distribution of the benefits of an agreement, and by the information about preferences and agreements[26].

The institutional framework is considered by liberal IG as an important element in facilitating positive sum negotiations[27]. Institutions help states to collectively arrive at a superior

[18] Moravcsik's theory of state preference formation resembles the logic of two-level games theory in foreign policy analysis. The seminal article for this theory is Robert D. Putnam, "Diplomacy and Domestic Politics: The Logic of Two-Level Games", *International Organization* 42, 3 (1988): 427-460.

[19] Moravcsik and Schimmelfennig, "Liberal Intergovernmentalism", 86, n. 4;

[20] Roger Morgan, "A European `society of states' - but only states of mind?", *International Affairs* 76, 3 (2000): 568.

[21] Moravcsik *apud* Morgan, "A European `society of states'…", 568-569.

[22] Moravcsik and Schimmelfennig, "Liberal Intergovernmentalism", 68-69.

[23] Moravcsik, *apud* Moravcsik and Schimmelfennig, "Liberal Intergovernmentalism", 69.

[24] Moravcsik and Schimmelfennig, "Liberal Intergovernmentalism", 77-79.

[25] Moravcsik and Schimmelfennig, "Liberal Intergovernmentalism", 70.

[26] Moravcsik and Schimmelfennig, "Liberal Intergovernmentalism", 71.

[27] Rosamond, *Theories…*, 142; Moravcsik and Schimmelfennig, "Liberal Intergovermentalism", 72.

outcome by reducing transaction costs and providing the necessary information in order to reduce state's uncertainty about each other's behavior and future preferences. Also, liberal intergovernmentalists claim to accept some of the assumptions traditionally attributed to neofunctionalism and historical institutionalism such as the fact that institutions can have unintended and unwanted consequences but also argue that the later theories overinterpret their consequences[28]. Moreover, Moravcsik and Schimmelfennig accept two limitations of liberal IG[29]. The first is related to the fact their theory explains best policy-making in areas where social preferences are relatively well defined. Thus, "the weaker and more diffuse the domestic constituency behind a policy and the more modest or uncertain are "the substantial implications of a choice, the less predictable are national preferences and the more likely ideological preferences and beliefs" may be influential. The second limitation acknowledged by the authors refers to the fact that in the case of both high transaction costs and asymmetrical information, supranational institutions will have greater influence.

As I have mentioned above, traditional IG were sceptical regarding advanced political integration, especially in the fields of foreign policy and security. These domains were considered as highly connected with the survival of the state and belonged to the deepest layers of state sovereignty. Thus, IG insisted that the analysis of these areas can be approached appropriately only through interpretation of intergovernmental negotiations by the schools of thought tributary to rational institutionalism.

In his analysis regarding CFSP, Koenig-Archibugi[30] argues that the integration, generally and specifically in the field of CFSP is decided in Intergovernmental Conferences, that lead to "grand" bargains, whose terms are written in the basic treaties of the EU. Regarding integration in the CFSP area, the European governments had different positions that influenced the duration of the negotiations. The author mentions the situation that occurred during the 1996-1997 IGC which lead to the signing of the Amsterdam Treaty, when EU foreign ministers or their representatives met more than twenty times to discuss the possible revisions of the provisions regarding CFSP in the Maastricht Treaty. Generally, the option for deeper integration in the case of the CFSP is related to pooling sovereignty (when states accept to take decisions that apply to all without the possibility of national veto) or to delegating sovereignty (the process through which states transfer their decisional power regarding an issue or a field to supranational institutions in the EU). Concretely, the pooling of sovereignty refers to accepting the qualified majority voting system in the Council of Ministers for the decisions in the CFSP field (or at least decisions regarding implementation) and delegating sovereignty means increasing the powers of the Commission and the European Parliament in CFSP, mitigating the intergovernmental character of the CFSP through the fusion of the three pillars and financing CFSP operations from the community budget instead of ad-hoc contributions from the states.[31]

Approaching the issues of state preferences, Koenig-Archibugi makes the observation that although, in the 1990', most states that wanted a supranational CFSP also wanted including defence in the EU's competences, this coincidence was not general: some states supporting the deepening of the integration didn't want to extend it to issues of defence and security and viceversa. This observation is confirmed in the case of France, that encouraged the creation of a European defence identity but opposed taking decisions on a supranational level in CFSP or in defence and security matters. The position of the UK, until 1998, was to oppose both undertakings. From 1998, the attitude of the British government approximated the French government's position: they did not oppose a role in defence for EU, but kept its reticence towards supranational procedures, favouring

[28] Moravcsik and Schimmelfennig, "Liberal Intergovermentalism", 75.
[29] Moravcsik and Schimmelfennig, "Liberal Intergovermentalism", 76-77.
[30] Mathias Koenig-Archibugi, "Explaining Government Preferences for Institutional Change in EU Foreign and Security Policy", *International Organization* 58, 1 (2004): 137-174.
[31] Koenig-Archibugi, "Explaining Government Preferences…", 140-141.

intergovernmental procedures. Koenig-Archibugi attributes the progress of CFSP to the convergence of French and British positions. By contrast, the Netherlands, during the 1990-1991 IGC, supported a supranational foreign policy but opposed the development of a European defence[32].

As I have mentioned earlier, the standpoint of rationalist institutionalism assumes that the agents act according to instrumental rationality and that the pre-eminent explanation is based on material factors. From here it can be deduced that governments would prefer different institutional arrangements because they have different interests and different resources. In the first interpretation, focusing on interests, governments support or oppose the creation of institutions or decision-making procedures if they believe or not that these will determine results that correspond to their exogenously determined interests[33]. Thus, in the context of the CFSP, states' opposition to supranational institutions is related to the concern that once introduced, the EU would take decisions that would be contrary to state preferences. Regarding the pooling of sovereignty, states might fear that the supranational institutions might have the tendency to privilege the preferences of a majority of member states, especially where the preferences of some states do not correspond with those of the majority.

The second interpretation, that stresses the distribution of resources (power) as an explaining factor of the variations in the interests of each state is usually associated with realist theories in international relations. From this perspective, the states whose power allows them to pursue an independent and effective foreign policy do not manifest the tendency to give up their autonomy in favour of supranational institutions. On the other hand, less powerful states are more interested in developing a more integrated foreign and security policy because of two reasons: 1. in the hope that their influence in global issues will rise when the EU will act as a global actor; 2. because a more robust institutional framework might constrain the more powerful states, whose foreign policy might become threatening, not to become a danger in the future.[34]

1. The constructivist approach, integration studies and the theorizing on CFSP

In this section of the paper I will emphasize the explanations provided by the constructivist approaches[35] regarding European integration in the field of foreign and security policy. In the first part of the section I describe the general characteristics and assumptions of the constructivist approaches in international relations and their most important versions. I will then try to present their relevance for integration theories and their explanatory value in the context of the evolution of integration.

Although they differ in some of their assumptions, the constructivist approaches exhibit some common characteristics. First of all, they question the claim of rationalist approaches to explain the socially constructed world solely through conventional procedures of rationalist research[36]. Another characteristic of the approaches discussed here is their scepticism towards "grand theories" that try to explain all social practices regardless of space and time[37]. Constructivism tends towards a rather contextualized theorization that does not claim to be a general theory of social sciences and most constructivists even refuse to call their explanatory model a "theory", preferring to consider it an analytical framework[38].

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[32] Koenig-Archibugi, "Explaining Government Preferences…" 140, n. 9.

[33] Koenig-Archibugi, "Explaining Government Preferences…", 143.

[34] Koenig-Archibugi, "Explaining Government Preferences…", 144.

[35] These approaches are often called "sociological institutionalism", defined as "a version of institutional research inspired by constructivism" (Risse 2009: 158). However, the approaches discussed here include a broader range of approaches that stress other factors besides institutions, such as Self/Other interactions – which may be included in the strand of poststructuralism/critical constructivism.

[36] Rosamond, *Theories…* ,172.

[37] Thomas Risse, "Social Constructivism and European Integration" in *European Integration Theory*, ed. Thomas Diez, and Antje Wiener (Oxford: Oxford University Press, 2009), 145.

[38] Christian Reus-Smith, "Constructivismul" in *Teorii ale relațiilor internaționale*, ed. Burchill, S. *et al* (Iași: Institutul European, 2008), 221.

The first assumption of constructivist approaches that I will present[39] refers to the importance that they assign to ideal or normative factors. Thus, "to the extent that structures can be said to shape the behaviour of social and political actors […] constructivists hold that normative or ideational structures are just as important as material structures"[40]. As Wendt argues: "this does not mean that material power and interests are unimportant, but rather that their meaning and effects depend on the social structure of the system"[41] to which they belong. Moreover, the normative or ideational structure in which the agent acts constitutes his social identity. This assumption is related to the fact that the sociological institutionalism approaches emphasize what I previously defined as the "logic of appropriateness". Unlike instrumental behaviour, the one guided by rules and norms differs through the fact that actors try to do the "appropriate thing", to determine the adequate rule for a given social situation. Concerning the analytical importance given to the non-material structure it can be argued that the constructivist approaches are often regarded as privileging structural rather than agent-based explanations. But this observation is only valid for some of the versions of constructivism, as we shall see below.

Another assumption of constructivist approaches is that identities structure interests which in turn influence behaviour. Unlike the approaches in rational institutionalism, the constructivists emphasize the fact that the interests and preferences of the actors are endogenous to processes of institutional interactions, emanating from them. Moreover, the constructivist author Bill McSweeney raises the argument that identity and interests are mutually constituted[42].

A third major assumption of constructivism is that agents and structures are mutually constituted – although an author such as Wendt is considered to privilege the structure. Thus, the majority of constructivists claim to share the structurationist perspective which emphasizes both the impact of non-material structures on identities and interests and the role of actors' practices in maintaining and transforming these structures[43].

The assumptions shared by the constructivist schools in international relations can be correlated with the ones in integration studies. The first observation I need to make in order to determine the assumptions of constructivism in integration studies is that even though it can be used to generate theoretical propositions and hypotheses that can be tested or supplemented with rationalist explanations of institutional effects, authors like Risse consider that constructivism does not present itself as a concrete integration theory, but rather as an ontological or meta-theoretical perspective[44]. The same author considers that the emphasis on the ideational, cultural and discursive origins of national preferences is complementary, rather than substitutable to agent-based rationalist approaches[45]. However, the extended use of constructivism in integration studies, if not as a theory but as an analytical framework, and the interest shown in integrating its assumptions by the representatives of other integration theories (Frank Schimmelfennig[46], Ulrich Sedelmeier[47]) can be interpreted as a confirmation of the theoretical and analytical value provided by this approach.

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[39] This presentation of the general characteristics of constructivist approaches draws on Reus-Smith, "Constructivismul".

[40] Reus-Smith, "Constructivismul", 215.

[41] Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999), 20;

[42] Bill McSweeney, *Security, Identity and Interests: A Sociology of International Relations* (Cambridge: Cambridge University Press, 1999), Ch. 7 especially 130.

[43] Reus-Smith, "Constructivismul", 216.

[44] Risse, "Social Constructivism…", 158.

[45] Risse, "Social Constructivism…", 146.

[46] Schimmelfennig, *The EU, NATO…*.

[47] Ulrich Sedelmeier, „Collective Identity", in *Contemporary European Foreign Policy*, ed. Walter Carlsnaes *et al.* (London: Sage, 2004).

In the field of European integration theories, constructivist approaches must be based on three foundations: to view the units on every level as social constructs, to asses the political significance of these units in the nature of the processes for which they provide containers and not to assume the primacy of any level[48]. As we will see in the next part of this section, these epistemological directions were more or less pursued in constructivist research regarding the EU. However, regardless of the privileged level of analysis (system, unit, or both), constructivist approaches take into consideration the fact that states' identities influence their interests and policies, even in the field of security, considered to be a part of high politics. In addition, changes in the collective identity of actors inside states can modify their interests in the international environment[49]. Thus, in the case of the EU, collective identities may affect the attitude of governments towards European treaty reform in two ways which are often complementary: governmental elites make choices on European integration on the basis of their identities and/or the public develops preferences to which the elites conform in order to gain votes. This last relation includes influences from both directions: even though elites are constrained by public opinion, the latter can be influenced by the discourses of the elites[50].

Koenig-Archibugi also considers that a supplementary explanatory factor (in addition to the identity of governmental elites and of the public), important for the perceptions on supranational integration in CFSP, is the constitutional culture of a state. The latter is defined as the image that a state has regarding its sovereignty and the legitimacy and practice of multi-level governance inside its territory. The author identifies two such cultures: one that conceives of sovereignty as unitary and indivisible and whose prerogatives are mostly centralized (France, UK), the other in which the prerogatives of sovereignty can and ought to be distributed between multiple territorial levels, according to the principles of subsidiarity or of comparative efficiency. The article of Koenig-Archibugi concludes that keeping the prerogatives of sovereignty at the level of the state is not a purpose shared equally by all states, because some of them have shown a willingness to promote strong forms of political integration in Europe[51].

Another direction of research in constructivist integration studies emphasizes the treaty reform process, a research subject traditionally dominated by liberal intergovermentalists. However, in the constructivist approach, the focus is rather on the structurationist perspective -as opposed to a liberal IG focus on actors with exogenously determined interests, and on accepting a larger category of actors exerting influence on the treaty reform process. The influence of structure refers to the established formalities and routine practices of intergovernmental conferences and to the path-dependent institutional developments but also to the discourses that constrain and define the preferences of the actors involved[52].

A different direction of research, sharing the same analytical framework, seeks to explain and interpret the enlargement of the EU in the context of the substantial financial cost involved by this process, especially in the last wave. This approach stresses that the enlargement to the countries of Central and Eastern Europe can be explained only by taking into consideration the acceptance of norms and of shared standards of legitimacy according to which the EU cannot reject the requests of membership from countries that invoke values like democracy and the free market. Such an approach that appeals to the explanatory power of ideational and normative factors is characteristic to Frank

[48] Thomas Christiansen, "Reconstructing European Space: From Territorial Politics to Multilevel Governance", in *Reflective Approaches to European Governance*, ed. Knud Erik Jørgensen (Basingstoke: MacMillan, 1997), 54;

[49] Koenig-Archibugi, "Explaining Government Preferences…", 145;

[50] Koenig-Archibugi, "Explaining Government Preferences…", 146-147;

[51] Koenig-Archibugi, "Explaining Government Preferences…", 166;

[52] Thomas Christiansen and Knud Erik Jørgensen, "The Amsterdam Process: A Structurationist Perspective on EU Treaty Reform", *European Integration online Papers (EIoP)* 3, 1(1999): 3-4;

Schimmelfennig[53]. Although he is rather a liberal IG his analyses try to find a "third way" between rationalist and constructivist research programmes. However, for Schimmelfennig the norms of democracy and free market do not constitute the identity of member governments of the EU, but are rather external constrains for governments that are preoccupied by their reputation on the international stage.

Another constructivist way to approach issues concerning the CFSP and enlargement is through reference to the construction of EU's identity in relation to a significant "Other". For example, the discourse about the EU as a normative or civilian power constructs the USA as its "Other"[54]. In a different line of thought, the EU's "Other" is not a spatial one, but a temporal "Other". As Ole Waever argues, it is "Europe's own past that should not be allowed to become its future"[55]. In this interpretation, the European past, characterized by militarism, nationalism and the balance of power as a norm of behaviour in international relations is the major securitization that the EU states operate. Scholars such as Rumelili reject this view arguing that internally located difference does not exclude difference located externally and that the latter can be a source of tension in the Self/Other interactions between the EU and its neighbours and prospective members[56].

A closely related research strand analyzes two opposite trends in the construction of the European polity. The first emphasizes the idea of "United in Diversity" and values like democracy, human rights, the rule of law, and social market economy. From this perspective, the European institutions seek to construct a European post-national civic identity whose values are sought and embraced by the ones who aspire to become members. Such a conceptualization of identity is inclusive to those perceived as being the "Other". A second construction of European identity is the more exclusive one that emphasizes the idea of "fortress Europe", with a common history and cultural heritage based on Judeo-Christian values. This last vision of Europe was brought forward by Euro-sceptics and right-wing politicians and became salient in the debates concerning immigration from outside the EU and Turkey's prospective membership in the EU[57].

The methods of research used by the above mentioned constructivist approaches include the analysis of the dominant discourses and practices adopted in the performance of identity and the analysis of the processes of socialization. From the perspective of these approaches, discourses can be seen as guiding political action towards appropriate behaviour in the context of an agreed environment[58].

In conclusion, the added value of constructivist approaches to European integration is threefold[59]. First of all, by accepting the mutual constitution of agent and structure, it can help us understand better the impact of Europeanization on the state. The fact that constructivism emphasizes the constitutive effects of laws, rules and policies, allows us to study how are actors' identities and interests shaped. Membership in the EU influences the way in which actors perceive themselves and are perceived by the others and involves the voluntary acceptance of a specific political order as legitimate[60]. Moreover, analyses from a structurationist perspective focus both on the way in which the global structural environment contributes to the emergence of an identity for the EU and on the

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[53] Schimmelfennig, *The EU, NATO…*.

[54] Helene, Sjursen, „The EU as a `normative' power: how can this be?", *Journal of European Public Policy* 13, 2 (2006): 235-251.

[55] Ole Waever, "The EU as a Security Actor: Reflections from a Pessimistic Constructivist on Post-sovereign Security Orders", in *International Relations Theory and the Politics of European Integration. Power, Security and Community*, ed. Morten Kelstrup and Michael Williams (London: Routledge, 2000), 280.

[56] Bahar Rumelili, *Constructing Regional Community and Order in Europe and Southeast Asia* (Basingstoke: Palgrave Macmillan, 2007).

[57] Risse, "Social Constructivism…", 153-155.

[58] Rosamond, *Theories…* ,120.

[59] Risse, "Social Constructivism…", 151.

[60] Risse, "Social Constructivism…", 148.

way that actors inside de EU define the global environment in order to give a reason for a cohesive identity of the EU[61]. Second of all, using constructivism we can investigate the degree to which the cohesion of the EU in international relations influences the perceptions of other actors about EU's actorness[62]. The third way in which constructivism can help us study European integration is through the discursive approaches that allow us to examine how the EU and Europe are constructed, how other actors relate to this structure and how a European public sphere is developed.

The dynamics of identities and interests inside the CFSP

In the next section I will make a short presentation of the evolution of the CFSP without going into details. Then, I will approach the analysis of the CFSP from the perspective of the assumptions presented in the previous sections and I will include relevant examples in the course of the evolution of CFSP.

The origins of the CFSP can be detected in the European Political Cooperation (EPC) which was started in 1970. Before this moment only cooperation inside international trade negotiations existed. The necessity of creating an instrument which would be more efficient than the EPC, for managing foreign policy and security, was illustrated by events such as the Gulf War, the wars in Yugoslavia and other external factors associated most often with the end of the Cold War. The essential characteristic of the EPC was its strictly intergovernmental structure and its weak institutionalization.

The entry into force of the Maastricht Treaty also meant the creation of CFSP. The latter was to be a part of the so-called pillar structure together with the European Communities -the first pillar- and Justice and Home Affairs (JHA)-the third pillar. Despite the criticism from the partisans of a more profound "communitarisation" of the CFSP, the Maastricht Treaty represented the moment when the CFSP was institutionalized as a sector of European policy. The importance of the TEU for the institutionalization and governance of the CFSP is illustrated by four effects that it had: it involved a greater coherence and rationalization of policy-making in this field; it made CFSP legally binding for the member states, including compliance mechanisms; it introduced several authoritative decision-making rules, such as qualified majority voting (QMV) –even if for a small number of issues- and allowed for a greater degree of autonomy for the organizational actors in the European foreign policy[63]. What is significant for the TEU is the explicit mention, in the Preamble, article B and article J.4.1 the necessity for the EU to assert its identity on the international scene that could manifest itself thorough a common defence policy, "which might in time lead to a common defence"[64].

The next treaty taken into discussion, the Amsterdam Treaty, included, besides the provisions related to the coherence of the CFSP and common interests, reforms in three other areas of CFSP: decision making, implementation and financing[65]. Regarding the first area, it was agreed upon codifying the doctrine of "flexibility" which permitted a state to abstain from any action inside the CFSP even if he was required to accept the EU decision and abstain from actions that might endanger it. Although this provision was an important exception from the rule of consensus, it didn't apply to decisions in the field of defense and didn't exclude the right to opposition from a member state that could thus block an action. Regarding implementation and representation, the Treaty of Amsterdam introduced the position of High Representative for the CFSP, which also held the position of secretary general of the Council of Ministers, but was subordinated to the EU Presidency.

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[61] Ben Rosamond, "Discourses of Globalization and European Identities", in *The Social Construction of Europe* , ed. Thomas Christiansen *et al* (Sage: Londra, 2001), 158-173.

[62] Rosamond, *Theories…* ,179.

[63] Michael E. Smith, *Europe's Foreign and Security Policy: The Institutionalization of Cooperation* (Cambridge: University Press, New York, 2004), 177;

[64] TUE, Article B.

[65] Smith, *Europe's Foreign and Security Policy…*, 227-231;

Regarding financing, the treaty provided for the first time that the EC budget will be the main source of finance for the CFSP, although the Council could unanimously decide otherwise.

After Amsterdam, the next significant treaty was Nice which entered into force on the 1st of February 2003. Even if the European Security and Defense Policy was a key subject in the discussions from Nice, and "although until that time the Western European Union was effectively merged with the EU, specific treaty provisions in this domain actually were quite few"[66]. A notable exception through which the ESDP was mentioned in Nice was the renaming of the "Political Committee" in the "Political and Security Committee" and charging it with exercising political control (under the responsibility of the Council) and strategic direction of crisis management operations. Another significant evolution in the Nice Treaty (determined by the controversy generated by the composition of the Austrian government in 2000) was allowing for a majority of four fifths of the member states in order to suspend certain rights for a member that violated EU's fundamental principles. Regarding the decision-making process for CFSP, Nice brought the evolution of the principle of "flexibility" into "enhanced cooperation" by basing it on provisions applied to JHA in Amsterdam. "Enhanced cooperation" was meant to safeguard the values and serve the interests of the EU whenever it manifested its identity as a coherent force on the international scene. However, using consolidate cooperation was limited because of the lengthy process of approving an action through this method and the fact that it did not apply to matters that might have military of defence implications[67].

The next important treaty for the European integration in all areas, not only CFSP, was the Lisbon Treaty. So let us note what were the most significant changes brought about by this treaty. First of all, it eliminated the pillar structure of the EU. However, if we take into consideration the fact that this structure referred to different sets of rules for decision-making, the second pillar is still in place. This is because although Lisbon extended the "community method" of decision-making to all domains of EU action, CFSP remained outside its area of application[68]. The Lisbon Treaty transformed the High Representative for CFSP, which only had the attribution to assist the Presidency, in High Representative of the EU for Foreign Affairs and Security Policy. He/She is charged with ensuring the coherence of external action and is supported in fulfilling this mission by the European External Action Service. Thus, the problems of the former Representative, which was evaluated as "a foreign policy spokesperson with no real resources or mandate"[69], were surmounted. However, a potential source of dispute may be the fact that the High Representative shares the function of external representation with the President of the European Council.

With regard to decision-making procedures, the Lisbon Treaty stipulates a bridging clause (*pasesrelle*) that allows for the European Council to extend, through unanimity, the area of QMV in the field of CFSP (but not in the field of Common Security and Defense Policy). "Thus, the Lisbon Treaty preserves a dynamic element in the CFSP by which the unanimity rule can be gradually restricted without needing to follow the procedure of treaty revision"[70]. Concerning implementation, a provision worth mentioning is the possibility to use enhanced cooperation in defence matters. Referring to the values and the identity of the EU, the Treaty formulates them as objectives that the EU should not only respect but also actively promote. Thus, we will have cases in which it will be necessary that the Common Commercial Policy "not only pursues trade-related objectives […] but takes into account and even contributes to other dimensions, such as human rights and sustainable development"[71].

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[66] Smith, *Europe's Foreign and Security Policy…*, 234;

[67] Smith, *Europe's Foreign and Security Policy…*, 235-236;

[68] Jan Wouters, Dominic Coppens, Bart De Meester "The European Union's External Relations after the Lisbon Treaty" in *The Lisbon Treaty EU Constitutionalism without a Constitutional Treaty?*, ed. Stefan Griller and Jacques Ziller (Viena: SpringerWienNewYork, 2008), 147-148;

[69] Smith, *Europe's Foreign and Security Policy…*, 258;

[70] Wouters, Coppens, De Meester, "The European Union's External Relations…", 163;

[71] Wouters, Coppens, De Meester, "The European Union's External Relations…", 148-149;

Identity: explanatory factor or epiphenomenon

In one of studies concerning the CFSP, Smith[72] argues that interests also depend on social interaction and discursive practices, so that member states of the EU can find cooperative solutions even without a hegemonic leader of quid pro quo negotiations. As I've seen, IG stresses the fact that states behave in terms of narrowly defined rational instrumentality and their positions regarding policies derive from internal concerns of governmental elites. Smith argues that rather than following this path, EU member states have learned to define some of their foreign policy preferences, even if not all, in terms of collectively determined values and purposes. This does not mean that member states started to behave irrationally, but rather that the shared purposes of the EU have become part of their interest calculations because of the evolution of EPC/CFSP. In the latter case, the main reason for the gradual transition from the logic of consequentiality to the logic of appropriateness is the fact that the EU's institutional mechanisms discouraged the formation of fixed national preferences on a rising number of issues. These mechanisms also socialized the involved elites in the direction of articulating a common European policy on these issues.

According to the logic of appropriateness, the decision-makers and policy-makers do not just calculate which strategy is the best in order to promote their interests in a given situation, but also ask themselves which is their specific role in that situation and what obligations prescribes that role. Thus, the formation of preferences -which actors may pursue strategically – is endogenous to social interaction and to the process of identity and social role formation[73]. From this perspective, highly institutionalized social environments condition actors to rely on values, ideas and shared knowledge when they make a decision. When institutions are missing or weak, as was the case with the EPC, states resort to egoistical decisions based on their specific foreign policy traditions. Thus, while rational institutionalist approaches can explain the intergovernmental origins and the initial limited purpose of the EPC, its expansion, impact and results require arguments based on constructivist assumptions.

Unlike cooperation on economic matters where institutions often are a rational instrumental response to the problem of incomplete contracting, political cooperation does not involve a clear result that can be easily measured by participant states[74]. Thus, the CFSP is a model for positive integration, which involves more abstract and symbolic purposes, a domain in which preference formation and perceptions on social standards are at least as important as strategic action. Moreover, the fact that the CFSP area does not have clear boundaries (because issues from different domains are included in its framework) the limits of intergovernmental explanations become even more significant. As argued by Smith[75], the fundamental principle of cooperation in the area of foreign policy is that UE member states must avoid adopting fixed positions on important issues without previous consultation with their partners. This principle suggests we cannot view cooperation in this area as a rational instrumental process in which states bring their predetermined, fixed positions and preferences to the negotiation table. Rather, the reason that underlies CFSP decision-making is the gradual institutionalization of communicative processes directed towards "learning by action" and creative, incremental adaptation.

Smith considers that this type of interaction, that substitutes the actor-centred rational instrumentality, can be identified through three criteria. First of all, the way decisions are made is different: debate is privileged over negotiation; negotiating favours is not the main objective and participants try to find solutions based on the common definition of the problem. Even when states show a preference for status-quo and most of the others favour collective action, those that oppose

[72] Michael E. Smith, "Institutionalization, Policy Adaptation and European Foreign Policy Cooperation", *European Journal of International Relations* 10, 95 (2004): 95-136.

[73] Sedelmeier, „Collective Identity".

[74] Smith, „Institutionalization…", 101.

[75] Smith, „Institutionalization…", *ibidem.*

may accept a solution without resorting to negotiations. The result is an increased number of such middle positions that reflect the will of the group as a whole, not the lowest common denominator determined by the status-quo states.

The second phenomenon that may indicate the transition towards the logic of appropriateness refers to agenda setting and leadership. As noted before, versions of rational institutionalism, consider that the most powerful states have the last word on foreign and security policy. In cases where the logic of appropriateness plays a greater role, power is defined in terms of arguments, language and ideas oriented towards collective action. Thus, assuming leadership may come from any legitimate actor among states or EU institutions, not only from those with a greater material power.

One last element, indicative for the existence of a substitute for instrumental rationality, is linked to changing the institutions and policies. Thus, this will depend not only on the discourse of the participants, but also on the inclusion of new actors in the system and on the expansion and redefinition of common values. This type of change may indicate that state interests are not necessarily determined solely by the domestic contexts and that they are more flexible than rational institutionalists argue.

As we have seen, with the Maastricht Treaty and then with the Amsterdam Treaty, the foreign policy system of the EU, represented until then by the EPC of the EC, started to develop from being just a forum of debates mostly decentralized to a system with its own cooperation culture which involved standards of behaviour, shared meanings and a common language. Maastricht bought about the extension of representatives ("CFSP counsellors") in the COREPER and more representatives from other institutions such as the Commission and the General Secretariat of the Council of Ministers. Then, the Treaty of Amsterdam created the position of High Representative for CFSP and increased the number of special representatives for certain problems. These provisions increased the impact of communication through formal (like the COREU) and informal networks and encouraged the formation of epistemic communities of experts[76]. This system, supplemented by the rule of consulting the other states before adopting a decision in order not to take them by surprise, lead to the institutionalization of the "coordination reflex". As Hill and Wallace note: "The liberal institutionalists' image of rational policy-makers bargaining with each other within established regimes leaves too little room for this *engrenage* effect [...] Officials and ministers who sit together on planes and round tables in Brussels or in each other's capitals begin to judge 'rationality' from within a different framework from that they began with"[77].

In addition, concrete actions collective and common declarations increased in number since Maastricht, including positions that did not necessarily reflect the interests of the most powerful states. Among the most efficient and significant collective action generated by the creation of the CFSP and defining collective interests in the EU was the Stability Pact for Central and Eastern Europe[78]. This involved the cooperation of the Commission and the member states in order to pressure candidate countries in the area to solve problems related to borders and minorities. The most important treaties and agreements generated by the Pact were the so-called "good neighbour" treaties between Hungary and Romania and Hungary and Slovakia. Aside from the Pact, there have been other common actions, "most of limited scope but with considerable political impact" which included support for the Middle East and former Yugoslavia peace processes and for the democratic transition in the Russian Federation and South Africa[79].

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[76] Smith, „Institutionalization…", 106.

[77] Christopher Hill and William Wallace "Introduction: Actors and Actions" in *The Actors in Europe's Foreign Policy*, ed. Christopher Hill (London: Routledge, 1996), 12.

[78] Fraser Cameron, "Building a common foreign policy: do institutions matter?" in *A common foreign policy for Europe? Competing visions of the CFSP* ed. Helene Sjursen and John Peterson, (Londra: Routledge, 1998), 68.

[79] Cameron, "Building a common foreign policy…", *ibidem*.

Sedelmeier[80] illustrates the impact of the EU identity through some notable examples. I mention here only three of the most significant. The first of these examples refers to the diplomatic sanctions imposed on the Austrian government of 2000 which included the Freedom Party lead by Jorg Haider. Although this example concerns the foreign policies of the member states rather than the foreign policy of the EU, the reaction is hard to explain without referring to the impact of the identity of the EU as a promoter and defender of democracy and human rights. The governments that initiated the sanctions might have had instrumental reasons, aiming not so much at Haider, but at the domestic party politics, in an attempt to discredit extreme-right parties or centre-right that accepted cooperation with them[81]. Even from this perspective, it is difficult to understand the participation of all member governments without taking into consideration the role of the EU in the field of democracy and human rights and the fact that this role conferred a strong legitimacy to the initiative. It would have been problematic for a government to refuse to participate since this could be perceived as a refusal to act according to the EU's identity. Thus, even from the perspective of an analysis that focuses on instrumental motives, the instrumental use of references to the EU's identity worked only because the role of the EU had become taken for granted. Moreover, argues Sedelmeier, this example illustrates that "instrumental 'norm entrepreneurship', motivated by domestic party political struggles, can contribute to 'norm emergence' at the EU level."[82]

Another example cited by Sedelmeier is the collective endorsement by the EU for the military intervention in Kosovo. From a rational-instrumentalist perspective this is hard to explain considering that some of the EU states are neutral and in many cases the public opinion was critical of the NATO intervention. "Some policy makers were concerned that the bombing campaign would be counterproductive to achieving the declared goals, while others were concerned about the negative precedents it might set for the credibility of international law and the role of the UN."[83] However, it can be argued that the members of the EU that could have opposed the military intervention consented to the declaration of endorsement made by the European Council in Berlin because this document justified such an action by referring to the fundamental norms of the EU's identity.

The third example concerns the decision to collectively promote the abolition of the death penalty. Thus, the decision is difficult to explain on the basis of material incentives: there are few rewards from the public opinion and it creates tensions with states with capital punishment, especially concerning extraditions. Sedelmeier explains this decision by emphasizing "the legitimacy that the EU's identity bestowed on the arguments of these advocates as an important resource."[84]

As we can see from these empirical examples, identity can be used successfully as an explanatory factor both for the interactions between member states and for their relations with outside actors. Even though in some cases promoting policies based on norms may be motivated by egoistical interests of some governments, it is less likely that these policies are adopted collectively by all governments in the absence of some characteristics of the EU's identity such as safeguarding democracy and human rights. "Thus, while identity-based advocacy might have been used instrumentally, such instrumental use only induces compliant behaviour because EU identity has acquired a certain degree of taken-for-grantedness among the member governments"[85].

[80] Sedelmeier, "Collective Identity", 123-140;
[81] Sedelmeier, "Collective Identity", 133.
[82] Sedelmeier, "Collective Identity", 134.
[83] Sedelmeier, "Collective Identity", *ibidem*.
[84] Sedelmeier, "Collective Identity", 135.
[85] Sedelmeier, "Collective Identity", 137.

Conclusions

The aim of this paper was to present the debate between two theoretical approaches of European integration in the field of CFSP: rational institutionalism and constructivism, and the main schools of thought that use their analytical framework. I have noted that the assumptions underlying the two approaches and the explanatory factors they each emphasize are often different although some theoreticians stress the fact that they are not incompatible and try to use the in a complementary way. I've also noted that some policies, attitudes and declarations emanating from the CFSP are better explained by referring to the interactions between factors such as the identity, values and norms of the actors than by emphasizing power and bargaining games in which the maximization of the benefits of the actors is sought.

Even if interests, material and negotiation power and interests defined according to these factors are useful starting points in analyzing the potential influence of states on early institutional evolution, power alone does not explain the final outcomes of this evolution or of the policies pursued inside the CFSP. Moreover, we cannot explain the evolutionary stages, some of them of major importance, of the CFSP only by referring to the logic of consequentiality. The latter must be supplemented with the logic of appropriateness and with the emphasis on the transformational potential of actors' identities and interests in the process of socialization inside the EU.

In accordance with authors such as Meyer and Strickmann[86] or Fearon and Wendt, I also argue for a pragmatic approach that stresses the interaction between changing material structures and ideas because "rationalism and constructivism are most fruitfully viewed pragmatically as analytical tools, rather than as metaphysical positions or empirical descriptions of the world"[87]. Or as Ole Waever put it, even if power politics can explain the initial emergence of cooperation in the European area during the Cold War they might not explain much in the present because "situations can obtain different supporting conditions later on"[88]. Thus, in order to grasp the full dynamics of the European project we need to investigate its social construction and its interaction with all relevant actors.

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[86] Christoph O. Meyer and Eva Strickmann, "Solidifying Constructivism: How Material and Ideational Factors Interact in European Defence", *Journal of Common Market Studies* 49, 1 (2011): 61–81;

[87] Fearon and Wendt *apud* Meyer and Strickmann, "Solidifying Constructivism…" 67;

[88] Ole Waever, "Insecurity, security, and asecurity in the West European non-war community" in *Security Communities*, ed. Emanuel Adler and Michael Barnett (Cambridge: Cambridge University Press, 1998), 75.

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INTERNATIONAL SECURITY RELATIONS AND POST-IMPERIAL ORDERS

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Abstract

This paper intends to investigate the relations between former imperial powers and new sovereign states succeeding an empire in the field of international security, particularly when involving the use of force.

Despite their stated attachment to the normative principles of what we usually call "Westphalian order", former imperial powers continue to interfere in the domestic affairs of these new states, especially those unable to exercise their sovereignty efficiently and legitimately. One could say that, by military interventions, these powers deny the sovereignty of weak states in the regions once under their control; but the preparation of these missions makes the actions not to be interpreted as expressions of an imperialist attitude.

I consider there are two major ideal-types that could better explain such interventions. In a power-oriented post-imperial order, the intervention of a former empire is the result of the projection of its national interests and identities. In a norm-oriented post-imperial order, the sense of moral responsibility of the former imperial power is the main reason for its interference. The intervention's legitimacy and suitability require domestic and international support.

This paper, grounded on a constructivist approach, intends to contribute to the understanding of international security issues in terms of a world shaped by actors' interests and identities and the dynamics of their relations. The identified ideal-types of post-imperial orders consider both material and cultural factors. The analytical elements that may link extremely different situations are the socially variable interpretations of past and present.

Keywords*: empire; hegemony; intervention; power-oriented post-imperial order (POPIO); norm-oriented post-imperial order (NOPIO).*

The term "empire" seems to have gained in recent IR literature an incredible spreading, its usage covering various interpretations of the contemporary social world, as for the expansion of the global capitalism, or the projection of American military and political power, or the leveling of political expectations worldwide, and so on. In spite of their different meanings, all the forms the term "empire" is used suggest the image of unity and of an (un)conscious march toward this unity, or the "imperialism". In this paper I use the term "empire" in a more narrow (and old-fashioned) way, as a territorial political entity.

Despite this precaution, to define an empire is not a simple task. In the last half of millennium, we have witnessed the progressive establishment of what it is generally called the "Westphalian" order, where the political space is divided into separate territorial sovereign states, interacting in an anarchical environment. At least since the end of the two World Wars, the dominant idea of the legitimate organizing principle of a sovereign state is the expression of the will of a political community shaped into a nation defined by the "self-determination" principle. It is precisely the claim of every nation to benefit from sovereignty that makes the system to be anarchic, in the absence of any authority capable to impose the order into the system, by power and legitimacy.

This conception is somehow misleading, because it is obvious that this legalistic point of view does not have an authentic correspondent in the political reality, for the contact between the nation-states. In fact, the supposed anarchy of the international realm should be considered in practice only

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in part, the states observing several ways of dealing with the anarchy. Many factors, material and ideational as well, contribute to the formation of a much more complex international realm, in particular due to the way the political entities understand and exercise the sovereignty, inside the borders and during their interactions with others. In a famous article, Alexander Wendt points out that the anarchy has multiple meanings, which appear from the interactions among states.[1] By supporting a constructivist perspective toward International Relations, I take into account the importance of the interactions among actors in defining their interests and identities, in a mutually constitutive relation between structure (anarchy) and actors. I thus consider that the meanings of "security" and "sovereignty" are socially constructed, dynamic, and interconnected.[2]

It is not my intention to investigate all the social meanings of the sovereignty and security that occur during interactions among political entities, from the shared sovereignty of EU member states to the establishment of some sort or hierarchy. In this paper I shall focus on the interventions made by the former imperial powers, mainly with military means, in the territories that used to be under their control.

The starting points for investigating such a theme are three empirical observations. Firstly, the weak states facing an external intervention that I envisage are mainly those that used to be part of an empire, now part of what is generally known as the Third World. Secondly, the former imperial power tends to be the main subject (if not the only one) of the intervention, so that it can be granted a special interest in conducting the operation. The question that I raise is why precisely the former empire is taking the initiative in dealing with the situation and the answer I suggest is that happens because of the special links that bond the two actors. I group such links in a "post-imperial order". Thirdly, I consider that these interventions can be divided into two major categories: those designated mainly to protect interests of the former imperial patron and those that have as the prime objective to protect the lives and properties of the people living in the countries affected by the failure of the state.

Based on these three observations, I suggest in this paper that the post-imperial orders imply that the former imperial powers are in particular interested in interfering in those weak states that used to be under their control. The relations among states succeeding an empire would thus have distinguishing features from other kinds of international links. In my opinion, these special relations between the former centre and subordinated units of an empire, the post-imperial identities and interests, could offer some good answers for the study of contemporary international security issues.

In order to investigate the post-imperial orders, the first necessary step would be a definition of the empire and to distinguish it from other forms of political dominance over alien territories. Once we identified the empire, it is possible to discuss the post-imperial order. The third section of the paper is dedicated to identification and definition of two ideal-types of post-imperial order that I call *power-oriented post-imperial order* (POPIO) and, respectively, *norm-oriented post-imperial order* (NOPIO). As I suggest in the final part of the paper, these two ideal-types may be used when discussing various post-imperial approaches toward international security.

As from the theoretical and methodological approach, as already said, the paper should be considered in the light of a moderate form of constructivism. By this, I consider the importance of material and ideational factors as well, a double determination relationship between agents and structure, that the identities and interests of the actor should be considered in a relation of co-determination, and so on. Also, due to the permanent social interactions, I take into consideration a dynamic perspective on the institutions and meanings.

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[1] Alexander Wendt, "Anarchy is what States Make of It: The Social Construction of Power Politics", *International Organization*, 46 (1992): 391-425.

[2] I tried to demonstrate this idea in Radu-Sebastian Ungureanu, *Securitate, suveranitate şi instituţii internaţionale. Crizele din Europa de Sud-Est în anii '90* [*Security, Sovereignty, and International Institutions: The South-East European Crisis of the '90s*] (Iaşi: Polirom, 2010).

Empire and hegemony

Usually, a military intervention (as the acts of inter-state war as well) can be interpreted as a denial of the sovereignty of the object of intervention. What I have in mind are the interventions made on the territory of weak states, unable to enforce the sovereignty they enjoy in an effective and legitimate way, but only in a formal or legalistic manner. In these particular cases, the intervention is not seen as the expression of an imperialist attitude, as long as it is not designed to lead to the construction of an empire.

In such cases, we should reconsider the meaning of anarchy as a characteristic of international relations. In the field of the security institutions, in the military dimension of the term, David Lake considers that there are some sorts of arrangements where the anarchy is replaced by some forms of hierarchy between two sovereign states. He identifies in this respect several increasingly hierarchic security institutions, such as the spheres of influence, protectorates, informal empires, and empires[3].

Even if I consider that Lake is right in identifying some forms of hierarchy in these cases, I think that the empire should be distinguished from other forms, even informal, of hierarchic organizations. In my view, the main concurrent of the term "empire" in this matter is that of "hegemon". Both of these two concepts imply a form of dominance of a political centre over some foreign subjects and territories, but in a different manner. As a specific difference from "hegemony", an empire would be defined by the legitimate monopoly of one centre of power to generate and interpret the rules of the system in a given space (considered in territorial and/ or cultural terms). On the contrary, in the hegemony case the simple recognition of the sovereignty of the other part implies that this actor is entitled in formulating and enforcing some specific rules on his own territory. In other words, in the case of an empire, the dominance of the centre is inner-directed, while regarding the hegemony the dominance of the centre is an outer-directed one.[4]

The previous claim can be sustained if we consider two major features of an empire, that being its vocation of universality and unity (anti-entropy) over the particularities of national order (most empires), of the component states (as the German Empire – the Second *Reich*, where the previous existing political units, as the Kingdom of Bavaria, preserved some elements of statehood), religious, linguistic, etc, order, and a consciousness of the self-assumed mission. This second dimension – ideology – also legitimizes imperial expansion. On the other hand, following the views of well-known scholars of different orientations, as George Modelski[5], Robert Gilpin[6], or Robert Cox [7], we could state that the hegemony is generally considered as the capacity of a political centre to produce the most performing rules and to impose them in the international system in its own profit in a competitive manner. As Peter Taylor puts it, a hegemonic state is a counter-imperial project[8].

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[3] David A. Lake. "Beyond Anarchy. The Importance of Security Institutions", *International Security*, 26 (2001): 132-133.

[4] According to Michael Doyle's well-known definition, an empire consists of the "effective control whether formal or informal, of a subordinated society by an imperial society" - Michael Doyle, *Empires* (Ithaca, NY: Cornell University Press), 1986,30. A different position is to consider several forms of exercising influence over subordinated societies beside the empire – dominions, suzerainty, and hegemony. A discussion on this topic can be found in Barry Buzan, Richard Little, *International Systems in World History. Remaking the Study of International Relations* (Oxford: Oxford University Press, 2000), 176-182. In my view, as I shall show, the sovereignty, norm monopoly, decision autonomy, responsibility and common project are main issues in differentiating an empire from other types of dominance, which I generally group in the hegemony family.

[5] George Modelski, "The Long Cycle of Global Politics and the Nation-State", *Comparative Studies in Society and History*, 20 (1978): 214-235.

[6] Robert Gilpin, "The Theory of Hegemonic War", *Journal of Interdisciplinary History*, 18 (1988): 591-613.

[7] Robert W. Cox, "Social Forces, States and World Order: Beyond International Relations Theory". In *Neorealism and Its Critics*, ed. Robert O Keohane (New York: Columbia University Press, 1986).

[8] Peter Taylor. In Christopher Chase-Dunn *et al.*, "Hegemony and Social Change – The Forum", *Mershon International Studies Review*, 38 (1994): 363-364.

These two positions – of an imperial or a hegemonic state – can be fulfilled by the same political centre, but not necessary. By taking a look at the roles played by Britain during, roughly, the 19th century, we would find out that it was a participant at the European balance of power (a great power among others), the political centre of its empire, but the world's hegemon, as long as she imposed international rules such as the gold standard, the anti-slavery and anti-piracy policies, the free trade, etc, norms to be observed not only by the small states, but also by her competitors in the imperial project. One could also say that even the imperialist project was also a norm, to be followed by every great power of the time with the ambition of being treated as such. The Italian or German claims of a right in building a colonial empire in the pre-War World I era are eloquent in this direction.

The difference between empire and hegemony appears even clearer if we take a closer look to the specific orders they create. For the hegemonic power, the order is considered to address some sovereign units, so that at least formally one could say that it faces an anarchic order. On the other hand, in the case of an empire a metropolitan power imposes an imperial order over alien societies/ territories in two major ways. The first is the material and legal superiority in violent means, even if in many cases a monopoly in this matter is lacking. Secondly, an empire is a common normative system, both formal and informal, even if some local particularities are allowed.[9]

The normative monopoly seems to be the most important defining feature of an empire, the claim of the legitimate violent means being only its necessary consequence. In this respect, the influential *Empire* of Michael Hardt and Antonio Negri is very suggestive: "The concept of Empire is presented as a global concert under the direction of a single conductor, a unitary power that maintains the social peace and produces its ethical truths. And in order to achieve these ends, the single power is given the necessary force to conduct, when necessary, "just wars" at the borders against the barbarians and internally against the rebellious."[10] The "natural" expansionism of the empire is in intrinsic normative logic, so that it "exhausts historical time, suspends history, and summons the past and future within its own ethical order. In other words, Empire presents its order as permanent, eternal, and necessary."[11] For the Euro-centric world, the very model of the unity is the Roman Empire. The memory of its magnificence, civilization and glory mobilized every European imperial project since Antiquity, and each of them tried very hard to present itself as the legitimate Roman heir.

Compared with the imperial order, the hegemonic normative space is significantly less defined, mainly because of the anarchic order it describes, and so are the manifestations of its power. "Compared to empire, hegemony is commonly seen as a shallower and less intrusive mode of control."[12] Usually lacking a formal responsibility for the domestic politics of the states where it exercises its dominance, the hegemonic power has more freedom in selecting the nature and range of the intervention. But in order to preserve the legitimacy of its predominance (as a "counter-imperial project"), it also has to self-restraint in exercising its power. As Hurrell explains it, "stable hegemony rests on a delicate balance between coercion and consensus, a balance between the exercise of the direct and indirect power by the hegemon on the one hand and the provision of a degree of autonomy of action and a degree of respect for the interests of weaker states on the other."[13]

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[9] It is a matter of investigation if the issue of collecting and redistributing the resources should be considered as a central feature of an empire. If the answer is no, then it does not fit the definition of the state, in its modern acceptation. The Holy Empire did not do it, but none doubted in its time about being an empire. The best understanding of the fact is offered by the constructivist approach, any given concept having several meanings that appear during the social interactions, and knowing chronological dynamics.

[10] Michael Hardt, Antonio Negri, *Empire* (Cambridge, MA; London: Harvard University Press, 2000), 10.

[11] Hardt, Negri, *Empire*, 11.

[12] Andrew Hurrell, *On Global Order. Power, Values, and the Constituency of International Society* (Oxford; New York: Oxford University Press, 2007), 262.

[13] Hurrell, *On Global Order*, 270.

By returning now to David Lake's classification of the hierarchic structures of the international realm, I believe that the first three forms (spheres of influence, protectorates, informal empires) could be considered as belonging to the family of hegemonic dominance. They are ordered according to the range of the involvement of the centre, being expressions of some sort of a soft, a medium and a hard hegemony in material, military terms. I tried to show that the empire is a different kind of dominance, and in what it follows I suggest that the post-imperial order can be seen as some sort of hegemony, but not necessary, only in those cases where the former metropolitan power imposes its own rules to the succeeding states.

In spite of the fact that there are authors convinced that a world-state is inevitable[14] or that empire is an immanent threat toward the freedom of the world's citizens[15], empirically one could observe that the fate the empires are facing seems to be their unravel (at least of the political units considered in this paper). It is now the moment to take a closer look to the relations built among the states that follow an empire or, in other words, to identify and investigate a post-imperial order, if possible.

Empire and post-imperial order

As I have shown, it is the intention of this paper to investigate and conceptualize the features and typology of the post-imperial orders. In this respect, I think that a brief comparative look to the British and, respectively, the Russian Empires could prove to be very fruitful. I am using the plural form when speaking about the Russian empire because I consider it in its both forms, Tsarist and Soviet. By doing so, I shall try to mark either the elements of continuity and specificity of both these two empires governed from Moscow.

There are at least two reasons for choosing them: firstly, they were the very embodiment of two different forms of imperialism, so that I formulate as a first hypotheses that the post-imperial orders that they generate would be quite different; secondly, they were the most powerful players in the imperialist game, and each of them managed, at the climax of their territorial expansion, to control roughly one fifth of the earth, so that the post-imperial orders that they eventually generated represented the widest spread.

The differences between a commercial, sea-born empire, on one hand, and a militaristic land-based on the other are quite known in IR theory. A classical geopolitical approach is visible in Dominic Lieven's commentary:

The contrast between British commercial and Russian military–dynastic empire overlaps with another distinction: the one between maritime and land empire. Since from the sixteenth century to the creation of the railway (and actually in many cases beyond) long-distance trade was far cheaper and quicker by water one reason for the overlap is clear. In the view of many scholars the contrast between maritime and land empire also entails the distinction between a far-flung collection of colonies in the former case, and a polity which is in embryo at least a unified state, and maybe even a potential nation-state. Added together, these contrasts are often summarized as the distinction between liberal, diffuse maritime power on the one hand, and autocratic, centralizing land empire on the other.[16]

Although Lieven's perspective is compelling, there are perhaps of making only two comments to add. First, the logics behind empire-building are quite different: in the British case, it was, for the most part of its history, an individualistic enterprise, where the state came lately into the scene. More or less, it was built on a bottom-up dynamic. For the Russian case, it was mainly a state-

[14] Alexander Wendt, "Why a World State is Inevitable", *European Journal of International Relations*, 9 (2003): 491-542

[15] Hardt, Negri, *Empire*.

[16] Dominic Lieven, "Empire on Europe's Periphery". In *Imperial Rule*, eds. Alexei Miller, Alfred J. Rieber (Budapest; New York: Central European University Press, 2004), 138.

guided effort, driven by territorial defense and expansion, so that it can be considered a top-down project.

The diffuse nature of the British Empire outlined by Lieven implies a much larger freedom for the colonies and territories[17] than for the Russian example. Even ideological, the British Empire envisaged in its late period its natural collapse as the moment when the indigenous people would be able of self-governing. The distinction between colonies and dominions is not only a matter of race, but also one of governmental aptitudes.[18] In the Russian example, the autocracy offered a much harsher political environment, so that the relations between the centre and the subjects can be considered strictly hierarchic.[19]

The second comment concerns the position of the centre inside the empire. Queen Victoria was Empress of India in her capacity of ruler of the United Kingdom, which had a distinct identity inside the empire, preceding, co-existing and succeeding it. His correspondent in Russia was "Emperor and Autocrat of All the Russias". Russia itself (Great Russia, distinct from White Russia – Belarus, and Little Russia – Ukraine) had not a distinct personality. Curiously, in Russian Empire's heir, the Soviet Union, the situation somehow perpetuated, at least at the level of ideological tools.[20] Russia *was* the empire, not (only) its core.

In these circumstances, Lieven's consideration of the Tsarist Empire as a "potential nation-state" should be considered with caution. This potential nation-state would have needed a nation, but a nation that contained the Russians in a larger political community. The Russians entered in nations' era not only without political instruments of building a "community of will", but, one can speculate, also without a socially relevant idea of imaging a history and a future separated from those of other such political entities.[21]

The Bolshevik Revolution, besides having as an immediate effect the dismantlement of the Tsarist Empire, brought a Marxist ideological dilemma in the issue of imperialism. On the one hand, there should be considered the self-determination right of the proletariat from the ancient exploiter, meaning the right to secession of the proletarians living on alien territories. On the other hand, the nation-state is, from a Marxist point of view, the expression of the interests of the exploiting upper-classes, and so the only legitimate country for the all the proletarians would be the Soviet Union. Eventually, the imperialist project won, and almost all the territories once part of the Tsarist Empire returned by violent means under Moscow's control.

The ideological factor had two important consequences for the imperial identity. Internally, it offered a much more powerful unifying tool in the hands of the political elite of the centre than the autocracy gave. Externally, while the Tsarist Empire was an accepted member of the international society, the Soviet Union, because of its revolutionary character, gained this status only in the eve of

[17] The histories of relations between London and the "white colonies", but also with the local rulers in India, are eloquent in this respect.

[18] See, for instance, the discussion of the inter-war period regarding India's capacity for gaining the dominion status.

[19] For a much detailed discussion over the social conditions in the British and, respectively, the Russian empires, see Lieven, "Empire on Europe's Periphery", 141-147.

[20] For instance, all the Soviet republics had their own Communist Party, except for Russia, where the Soviet Union's Communist Party (the "general" one) was acting. At individual level, it is also to note that many political leaders of the Soviet Union were born outside Russia. It is enough to mention in this respect the names of I. V. Stalin, a Georgian, and Nikita Khrushchev, a Ukrainian. Examples as such are indicators for considering that in the Soviet Union the Russian national political identity was to be subsumed to the imperial, Soviet, one.

[21] The above sentence should not be red as there was no Russian nationalism during the 19th century, but that it can not be compared with its contemporary counterparts in the terms of social relevance and political impact. For a good insight over the issue see, for instance, Alexei Miller, "The Empire and the Nation in the Imagination of Russian Nationalism". In *Imperial Rule*, eds. Alexei Miller, Alfred J. Rieber (Budapest; New York: Central European University Press, 2004)

the World War II. During the Cold War, the ideology was for the Soviet Union both a form of power, and an impediment in shaping social relations at international level.

The Soviet imperialist ideology was at least twice revised regarding its exclusive sphere of influence, the "external" or "informal" Soviet empire.[22] The first was represented by the moment when Moscow imposed friendly regimes in the satellite countries, in the period following the end of War World II. The second important moment came in the late 1960's, with the Brezhnev Doctrine. I should highlight the fact that the manifestations of projects in the political life should be considered as forms of hegemony. The imperialism is the ideology that made such policies possible, not the practices - a possible political unifying project that never came into fact, simply because the countries in question preserved their sovereignty. The perspective in its ideological dimension was formally ended with the announcement of the Sinatra Doctrine in 1989.

In brief, it can be said that there were some important differences between the British and Russian empires: maritime *versus* land, colonial *versus* territorial, liberal *versus* autocratic/ communist, state-core *versus* empire-core, etc. The brief comparative discussion above is not meant to exhaust the topic, but to offer a better understanding on two different kinds of relations that can emerge between the metropolis and its former alien subordinated units after the collapse of the empire. I intend to use this comparison in order to build two ideal-types of the post-imperial orders.

The ideal-types of the post-imperial orders

Part of the Weberian intellectual tradition of the Social Sciences, the constructivist approach underlines the importance of the comprehensive perspectives. Intellectual constructs as the ideal-types are meant to clarify the analytic effort of the researcher, even if the situations met in the real social, lacking the purity of the concept, can only approximate one pattern or another.

The main purpose of this paper is to offer a perspective on the involvement of the former imperial powers in their former colonies/ territories for a better understanding of some dramatic contemporary international security issues. I consider that some good answers can be found in the common past that provides special identities and interests.

In my view, these present special relations originating in the imperial past can be grouped in two main forms. In the first one, the attitudes, behaviors and policies of the former imperial power can be seen as designed to fulfill only its interests. The present sovereign states that used to be under its control are considered to be its "natural" backyard – if not in the empire, at least in its sphere of influence. Any external interference, particularly those regarding the hard security, are seen by the decision-makers of the former empire as menacing its influence, and consequently as unfriendly and veritable threats toward the international stability. In the relations established with the new independent states the former metropolis tends to act like a suzerain, and to replace the empire with a form of hegemony, mainly in its military dimension. The imperial dream is somehow still present in the most parts of the political class and inside the society as a whole, who tends to consider that period as the nation's "golden age". I name such a relations-complex (involving decision-makers, societies, states and other social actors) a *power-oriented post-imperial order* (POPIO).

In the second case, the former imperial power is somehow "ashamed" by its imperial past, in particular by the excesses, the most intrusive forms of its dominance of the life of its subordinated societies. If nothing can be made in order to remedy the errors of the past, a sentiment of responsibility toward the future of the former colonies becomes widespread in the society. The loss of the empire being accepted, the former imperial power also faces the failure of the claimed legitimate monopoly over the normative space. The imperial values should be replaced only by an even larger set (as the Human Rights doctrine), more universal, less controversial. In such a post-

[22] More considerations on this issue could be found, for instance, in Alexander Wendt, Daniel Friedheim, "Hierarchy under Anarchy: Informal Empire and the East German State". In *State Sovereignty as Social Construct*, eds. Thomas J. Biersteker, Cynthia Weber (Cambridge: Cambridge University Press, 1996).

imperial order, the external interference is accepted as long as the interventionist proves itself to be a valid interpreter of the norms. In this *norm-oriented post-imperial order* (NOPIO), the Civilized Other is accepted, desired, invited to observe, interpret and act.

In my view, one major difference between the two ideal-types of post-imperial orders can be seen as similar to those between multilateralism and bilateralism, but at the normative and, more important, the interpretative level. Thus, I extend John Ruggie's meanings of these terms from those interests and identities embodied in formal agreements[23] to encompass all kind of shared understandings and practices, many of them being visible only in the management of occurring crisis or other moments.

Some additional comments should be made. First, we could say that in a POPIO an empire's heir is considering itself a "genuine" nation state. The identities of such an actor are those shaped by the structural conditions of a state having to act in an anarchical environment. The new actor is supposed to have the usual interests of a nation-state in a Hobbesian world, where power and self-help are the governing principles of the relationships among sovereign entities. In a NOPIO, the universal project is preserved, but reconsidered – the failure of the normative monopoly does not meant that it has to be replaced by an egoistic set of values, but by a larger one, less ideological. The new identity being achieved, the possibility to make mistakes, the acceptance of the social change – all these would shape new interests toward the former colonies and territories.

I should also highlight the fact that these ideal-types refer to post-imperial orders, not actors. It is theoretical possible that the same former imperial power would build/ desire to build a POPIO in certain cases and a NOPIO in others. Such an observation could be considered illogic, or even hypocrisy, for certain theories, but the fact is consistent to the constructivist approach, where every actor knows a particular set of identities and interests, stable but not perennial. Generally speaking, certain stability in pursuing a specific post-imperial order is to be expected from each former imperial power (if we are not in front of a schizophrenic actor), but the exceptions would be not unavoidable. There are two situations, at least, to be noticed when such thing is possible: the evolution of the norms themselves and their socially recognized valid interpretation, on the one hand, and the situations when the actor would risk to act in a manner close to cognitive dissonance, so that it has to choose between becoming the "prisoner" of the norm, or to re-prioritize its identities and interests.

It is also possible to consider the two ideal-types as stages of the same process. Till now, there are too few examples in this field. As I shall discuss later, there are some indicators that one post-imperial order could replace the other. A constructivist perspective of this factor would take into consideration both material and ideational factors, continuous and slow changes of the interests and identities of the agent, and the dynamics of social structures. It should also be said that such process does not necessarily involve something inevitable or irreversible- the social-oriented approach rejects such a perspective. But if such a tendency exists, it should be discovered.

I consider that in the contemporary world the two forms of post-imperial orders coexist and produce social effects. In the next section of this paper I intend to comment some of their most visible manifestations and interactions in international security issues.

International security through post-imperial orders

It is a matter of empirical observations that in the last century the great powers progressively abandoned the imperialist projects and policies, in the conception considered here. Several explanations could be offered here, from the nature of military power (for instance, the significance of the nuclear factor) or the relative decrease of the importance of the territory till to the spreading of nation-state ideology, but it is not my intention to identify and investigate all of them. I want to point

[23] John Gerard Ruggie, "Multilateralism: The Anatomy of an Institution", *International Organization*, 46 (1992): 561-598.

out some changes in the political ideas governing the world. Martha Finnemore suggests that, in contemporary politics, "most states do not *want* more territory nor do they see force as an effective or legitimate means of obtaining it. More territory is no longer a marker of state success or state greatness".[24]

Finnemore's statement can be best understood in the context of her book. Attached to the constructivist approach, she underlines that the norms governing the international politics are in a permanent and continuous change. The argument is completed by saying that the above changes continuously produce new institutions of the world order, that exercise a structural pressure over all social actors. In my opinion, in a constructivist perspective the institutions and agents should be considered in dynamic co-determination relationship.

The fact that the great powers abandoned the imperialist policies does not mean that there are all considered in the same fashion. The interventions vary greatly in the terms of international support and legitimacy, and asking "why such a thing would happen?" is appropriate.

In domestic politics, the legitimacy of government is conferred by the objects of governing acts. By applying these observations to the international field, the legitimacy of an external intervention would be conferred by the two kinds of subjects involved: those who suffer it and the citizens of the interventionist state, to whom the decision-makers are responsible to. The anarchic nature of the international system – lacking a monopoly in issuing, interpreting and enforcing rules - makes such a judgment insufficient, so that the interventionist looks for some support of interpreting the rules even outside, from other nation states and from a inter-/ transnational public opinion.

POPIO

A POPIO could be considered today as the "wrong" way of understanding the international politics, due to the exclusivist claim of a single power to manage all the important matters in a self-designated sphere of influence. For instance, in Western opinion at least, Russia's treatment of the former Soviet space as her own backyard is usually considered both a threat to the address of international security and obsolete in its norms and practices.[25] Of course, one could say that this interpretation is only a form of the hegemonic power of the West in imposing its judgments on international level[26]. The correctness of this statement or finding a better explanation is not relevant to the aim of the present paper, since the fact that this position produces social effects is more important.

In my view, Russia's attempts to establish a POPIO are somehow predictable, because of the identity transformations she has suffered in the last twenty years. The end of the Cold War and the collapse of the Soviet Union were accompanied by the renouncement to the ideology, the imperial unifying factor. At that moment, Russia faced the imperative of building a state and even a supporting nation as soon as possible. As for her political identity in international relations, Andrei Tsykankov discovered in 1997 at least four different and colliding projects, each of them having its supporters in the political and academic circles: the international institutionalism, the defensive and offensive realism, and the revolutionary expansionism[27].

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[24] Martha Finnemore, *The Purpose of Intervention. Changing Beliefs about the Use of Force* (Ithaca, NY; London: Cornell University Press, 2003), 140; emphasis in original.

[25] A huge bibliography is dedicated to this subject in recent years. For a short and suggestive description, see Andrei P. Tsygankov , "Projecting Confidence, Not Fear: Russia's Post-Imperial Assertiveness", *Orbis*, 50 (2006), 677-679. An extended investigation over Russia's foreign policy can be found in Roger E. Kanet (ed.). *Russia – Re-Emerging Great Power* (Basingstoke; New York: Palgrave Macmillan, 2007).

[26] On Western normative influence in International Relations see, for instance, Anthony Pagden"Human Rights, Natural Rights, and Europe's Imperial Legacy", *Political Theory*, 31 (2003): 171-199.

[27] Andrei P. Tsygankov, "From International Institutionalism to Revolutionary Expansionism", *Mershon International Studies Review*, 41 (1997): 247-268.

Almost a decade later, Andrei Tsykankov considers that it is a mistake to look at Russia as to an imperialist power, but to treat her as a state looking after its own national interests, the Kremlin's policies being "post-imperial and largely defensive. They seek to pursue opportunities for economic growth and stability and to address remaining security threats"[28]. Russia is using more and more the instruments of soft power, in Tsygankov's view, designed to project influence, not power, in the former Soviet Union. For Tsygankov, "strengthening Russia's ties in the former Soviet region does not require revising existing territorial boundaries, depriving neighbors of their political sovereignty, or taking on the burden of an imperial responsibility, successful application of soft power weakens the appeal of Russia's traditional imperialists and strengthens security in the region"[29].

Translating Tsygankov's 2006 analysis in his own 1997 terms suggests that in the last decade the liberal and revolutionary approaches became less influential in Russia, and that now her behavior could be best understood in the terms of some sort of realism. I think that Tsygankov is right in his argument and I shall try to put it in a theoretical manner, which would consider today Russia a unitary nation-state actor pursuing its interests in the anarchic environment in a selfish manner. The analysis is supported by events and processes at both internal and external level. Internally, the two Chechen Wars, for instance, were designed to ensure the rule of the central government over the entire territory of the state – violently affirming the statehood. Externally, the opposition made toward the "colored revolutions" (in Tsygankov's terms) and their political outcomes, to NATO's expansion or the Georgian intervention are all meant to formulate a sphere of exclusive hegemony, not a new empire, or a POPIO in the terms suggested by this paper. Nevertheless, this kind of management the sphere of influence is rejected by Russia's interaction partners as brutal forms of (re)imposing the hegemony. The Georgian crisis in the summer of 2008 is eloquent in this respect. This case also offers a good example for a previous statement I have made that that in a POPIO the hegemon do not accept Others' intervention. It is also to be said that the Others do not consider Russia's norm interpretation as valid (the parallel between the statehood of Kosovo on the one hand and South Ossetia and Abkhazia on the other being rejected).

The above discussion directs me to the next subsequent question, related to the different interpretations of the interventions in weak states. If the military management of international security in a POPIO looks today like a morally condemnable enterprise, one should ask how other interventions can appear as much more desirable. In other words, what makes an intervention made in a NOPIO to be seen as more legitimate than that in a POPIO?

I think that in order to answer this question it is necessary to look closer at the establishment conditions of a NOPIO, and the Western experience in this respect would offer a good insight. For instance, at the end of World War II, the British political elite contemplated both the inevitable march toward independence of some of the most important colonies and territories of the Empire (namely India) and the ambition of being one of the major powers of the world, comparable with the United States and the Soviet Union. The solution was to replace the imperial order with a hegemonic one, so that the British decision-makers made appeal to an older instrument, the Commonwealth, formerly opened only to the Dominions, the "white" part of the empire.

The modern Commonwealth was not the natural successor to the old prewar Commonwealth that had been held together by ties of kith and kin, common ideals, and partnership. This updated version was a Whitehall device to protect old spheres of interest from competing influences, including from the USA, to offer the new members some off-the-shelf international status and prestige, certain benefits in economic, trade and military assistance, and to prevent the spread of communism.[30]

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[28] Tsigankov, "Projecting Confidence, Not Fear", 684.

[29] Tsigankov, "Projecting Confidence, Not Fear", 686.

[30] Krishnan Srinivasan,"Nobody's Commonwealth? The Commonwealth in Britain's Post-imperial Adjustment", *Commonwealth & Comparative Politics*, 44 (2006), 259.

Obviously, the United Kingdom faced the harsh pressures of the Cold War and had to renounce at the claims of being comparable with the two giants of the bipolar era. European empires were doomed in the nuclear age, crashed in the superpowers' collision. The threat of the communist expansion forced the European powers to search for the American security umbrella. As for the American strategy, even if the European colonies could prove important assets in the containment policy (the replacement of the French presence in Indochina after Dien-Bien-Phu, in 1954, by the American one), the post-colonial political identity of the United States was much too strong to sustain such a position for long period of times. The Suez Crisis in 1956 could be considered as the turning point of the United States' policy toward European empires, by deciding not to support them any more. The decolonisation was the major political process that accompanied the Cold War for political reason too, because

"[…] the Americans were coming round to the view that decolonisation was the best way to counter the spread of communist influence, and American pressure thenceforward became a factor in the independence timetable[31]

In brief, one could say that, under the structural combined pressures of both the Cold War conditions and the spread of nationalist ideas, the great European powers had to reformulate their empires, the British experience being accompanied by the similar experience of France, for instance (the Fourth Republic's *Union française* and *Communuaté française* of the Fifth Republic). Till now, it seems clear that the British and French Commonwealths could be interpreted as designed to embody the political exclusive sphere of influence of the former imperial powers or, in the terms of the present paper, as POPIOs. The question is how it comes that the POPIOs were transformed in a NOPIO?

NOPIO

I think that the fundamental reason of the explanation should be searched in the unique experience of the West in post-World War II era. Even if we consider Western Europe during the Cold War under a common and foreign hegemony, the main instrument of the American military presence in Europe – NATO – was an anarchic one, with decisions taken on consensus, unlike the similar Soviet instrument, the Treaty of Warsaw[32]. At the end of the Cold War period, the West noted that it formed a security community, whose member consider themselves linked together by mutual trust, based on common identities, values, meanings, norms and practices[33]. As for the European part of this security community, right at the end of the Cold War they institutionalized their relations even more, by forming the European Union.

The common identities, values, meanings, practices of the Western security community are, in my view, the very basis of the NOPIO in discussion. The European Union itself contributes to the building of this form of post-imperial order. Firstly, the shared sovereignty of the members is, I believe, conceivable only if a unity project based on common identities and interest, norms and meanings, is taken into consideration.[34] Secondly, this unity project is not exclusive for the Other.

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[31] Srinivasan,"Nobody's Commonwealth?", p. 262.

[32] Lake, "Beyond Anarchy".

[33] Emanuel Adler, Michael Barnett, "A Framework for the Study of Security Communities". In *Security Communities*, eds. Emanuel Adler, Michael Barnett (Cambridge: Cambridge University Press, 1998), 30-37.

[34] It should be noted that most discussion of a potential future "empire" (post-sovereign institutionalized form of political unity) are considering UN as the most used contemporary example (for instance, Hardt, Negri, *Empire*, 3-8). The sovereignty issue makes, I think, the EU a much more appropriate example. If so, one should also reconsider the imperial model in interpreting the EU. In spite of the common parallel between the EU and the Roman Empire, which is offering the very idea of European unity, I suppose that a more fruitful comparison would be with the Holy Empire. What do I have in mind is the permanent negotiation process among the political units, the relevance of the central

The aim of some of the most challenging component of the European project (the foreign and security policies, which directly address the meaning of the sovereign state) is to shape an European position in the international realm without denying the partnership with the United States, but making efforts to ensure that the transatlantic partnership is working, based, in spite of difficulties, on shared principles, meanings and responsibilities[35]. Special cautions are taken in this respect in particular by those EU members that are also NATO members[36]. I should note that the former imperial powers show the most visible interest in establishing an European international presence. I consider that this fact is due to their post-imperial identity, so that these historic responsibilities and interests define the NOPIO.

In my opinion, NOPIO should not be linked to a special international institution, as the EU. The EU independent external force projection has been very limited, in spite of the efforts made, and it should be noticed that the involvement is, till now at least, conceived in co-operation with other organizations such as NATO or UN.[37] This does not mean that the former imperial powers would fail to express their concern about the weak states that used to be under their control. For instance, Italia took initiative in solving the difficult situation of Albania in 1991 and later a UN mission in 1997, and so was France with regard to Lebanon in 2006. The instrument is less important than the objective. Moreover, the organisations established to embody the former selfish POPIO's have been transformed and become part of the NOPIO. It is enough to mention the present Commonwealth of Nations that can be compared only superficially with its ancestor (the *British* one) from the post – World War II period, but not in terms of the values, goals, and practices involved. The examples can continue in this respect, as the similar Francophone organisation, etc.

Domestic political interests should not be neglected when formulating the interventions, as the ones considered above. It is clear that the public opinion and immigrants from the former empire have their role in the crisis management. The public sensibility with regard to this subject and the presence of immigrants are precisely the signs of post-imperial order. What does it make a NOPIO is that the crisis management policies are grounded on responsibility and not on power interests. Multilateralism is also a key element of a NOPIO. Even if the regular allies and friends decide not to contribute to the operations (as the United States refused to interfere in Albania), they are consulted and offer the political support.

The last question I would like to address is the relationship between institutionalization and gaining the status of recognized norm generator and interpreter. In other words, if a post-imperial state like today Russia should became an institutionalized member of the West in order to consider her hegemony closer to a NOPIO than to a POPIO.

In my view, theoretically it is possible such a future evolution. A NOPIO is based on shared values, meanings and practices. In order to consider Russia's interventions legitimate in her former empire, they should be based on the norms and reasons as those of the West, that the Russian political system could be seen as a democratic one and that the decision-making processes are not

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power in discussing the empire, and so on. It is also one more element that entitles the comparison, the normative dimension. For the first part of its history at least, in the Holy Empire it was only one hierarchic institution that functioned, a heritage from the Roman imperial unity: the Romano-Catholic Church, the main source for rules and also their main interpreter. In the present-day European Union, all the political processes are to be shaped by the common normative space, having its core outside the negotiated interests, but the common accepted basis – Human Rights doctrine, etc.

[35] Hartmut Mayer "The 'Mutual', 'Shared' and 'Dual' Responsibility of the West: The EU and the US in a Sustainable Transatlantic Alliance". In *A Responsible Europe? Ethical Foundations of EU External Affairs*, eds. Harmut Mayer, Henri Vogt (Basingstoke; New York: Palgrave Macmillan, 2006).

[36] Jolyon Howorth, *Security and Defence Policy in the European Union* (Basingstoke; New York: Palgrave Macmillan, 2007).

[37] Hanna Ojanen, "The EU's Responsibility for Global Security and Defence" In *A Responsible Europe? Ethical Foundations of EU External Affairs*, eds. Harmut Mayer, Henri Vogt (Basingstoke; New York: Palgrave Macmillan, 2006).

indifferent to the positions of domestic public, the subject of the intervention and of the international partners as well. In brief, a post-imperial nation-state, as social actor, should become contemporary in the political ideas and alike in her interests and identities with others in order to be no longer considered the Other. By retracing the already suggested parallel with the security community theory, the institutionalized membership to the West is not required *per* se in order to consider Russia's predominance in her former empire as closer to a NOPIO than to a POPIO, but her observance of the socially recognized legitimate reasons and ways of exercising the influence.

On the other hand, it should be said that very different evolutions could be made possible by the dynamics and mutual influence of material and ideational factors. The very status of great power or the rejection on identity basis of the Western interpretations, domestic or external events, processes, phenomena, agents' actions, etc, could drive to policies of various natures – as, for instance, to preserve the POPIO, to transform it, even to give it up, and so on. In spite of a two-century old dream, the future of the social realm is still beyond the prediction capacities of its observers and interprets.

Conclusions

In this paper I tried to show in a constructivist approach that it is possible to consider some military interventions made by the great powers in weak states in the light of their imperial past. In this respect, I differentiated the empire from other forms of political dominance, and the most important element seemed to be the sentiment of unity and common project. When the empires collapsed, each of them generated a post-imperial order, that is to say special links between the metropolis and the sovereign states once under its control as well as special interests and identities.

The next step in the investigation of the post-imperial interventions was to take a closer look to the possible meanings of post-imperial orders. I defined in this respect two ideal forms. The first one, i. e. the *power-oriented post-imperial order*, is defined by the interests of the former political centre of the empire. It considers that the former empire is to be transformed in a sphere of influence of its own, where its special interests should be protected from any external influence, in particular in high politics. On the contrary, a *norm-oriented post-imperial order* is based on a special responsibility of the former imperial power. The interactions are based on the over-sovereign norms governing the social interactions. The external influences are not only allowed, but even desired, as long as the other interventionists are considered valid interpreter of these rules.

In my opinion, these two ideal-types of the post-imperial order could be useful analytical instruments in discussing contemporary international security issues. There are intended to allow the avoidance of misinterpretations of the political projects and ideas behind great powers' interventions in weak states. In empirical situations, these terms can suggest some possible future evolution of the international security problems. Theoretically, some entrenched meanings of important concepts of International Relations are to be reconsidered, such as sovereignty or anarchy. In a constructivist perspective, neither the world, nor the actors' interpretations stop. The continuous social interactions generate new understandings that are to be conceptualized and analyzed, and this is the reason of the above paper.

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CABINETS OPERATING RULES AND COALITIONN FORMATION IN CENTRAL AND EASTERN EUROPE

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Abstract
After the fall of communism in the late '80 in Central and Eastern Europe, due to the appearance of several political parties in each state, there was the need to form coalitions in order to provide support for the governments.
This paper aims to identify the institutional features that influence the coalition formation process using the rational choice institutionalism approach. In this case, the political parties, who seek to optimize their benefits in the government formation process, are constrained by the institutional environment. The institutional environment comprises the rules that determine how the governments are formed. Particularly, this paper aim is to identify how the cabinet operating rules affect the outcomes of the coalition formation process.
In order to do so, I will develop a quantitative analysis of 110 cabinets in Estonia, Latvia, Lithuania, Poland, Czech Republic, Slovakia, Hungary, Slovenia, Romania and Bulgaria formed after the first free elections subsequent to the communist fall until the beginning of 2010. These countries represent the post-communist states that joined the European Union, finalizing the democratization process at least from a formal point a view.
This cross-country comparison tries to explain how some institutional features influence the formation of coalitions in new democracies. This research is valuable due to the lack of this type of comparative studies on Central and Eastern European states.

Keywords: *coalition formation, institutions, cabinet operating rules, Prime Minister, cabinet*

I. Introduction

The classical theories on coalition formation were trying to explain the best formula that a coalition must have in order to form governments. Thus, Riker, Axelrod or De Swan had in mind different assumptions about parties' motivations regarding government formation and built models like minimal-winning coalition, minimal connected coalition or minimal policy distance in order to explain the best formulae of the coalitions. The problem with this kind of models is that they offer a large set of viable coalitions that there were not suitable for predictions.

Once the institutionalist theories regarding coalition formation were developed this type of problem was no longer present. The institutional approach tries to explain the social outcomes not only taking into consideration agent's preferences and the optimizing behavior, but also taking into consideration the institutional environment that will optimize human actions in achieving their goals and it will shape the agent's behavior.[1] These theories have as main subject of study the rational agent, like the rational choice theory, but in the case of the institutional approach, the agents' actions are constrained by institutions.

In the case of the coalition formation process, the rational agents are the political parties that seek to optimize their benefits in the government formation process and the institutions are the

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[1] Shepsle, Keneth, "Studying Institutions: Some Lessons from the Rational Choice Approcah" *Journal of Theoretical Politics*, 1 (2) (1989), 135; Peters, B. Guy, "El Nuevo Institucionalismo – La teoria institutional en ciencia politica", (Barcelona, Gedisa, 2003), 73

constrains imposed to the parties by the formal or informal rules characterizing a particular party system. In an article from 1994, Kaare Strøm, Michael Laver and Ian Budge identified five types of institutions that influence the coalition formation process: the ones that affect the cabinet formation, the ones concerning cabinets operating rules, the ones concerning the legislative rules, the ones concerning parties' politics of coalition and the ones concerning external veto players[2].

In this paper I shall analyze the way that cabinet operating rules as institutions affect coalition formation in ten states in Central and Eastern Europe. In order to do so, I develop a quantitative data analysis on the coalition formed in Estonia, Latvia, Lithuania, Poland, Czech Republic, Slovakia, Hungary, Slovenia, Romania and Bulgaria.

Although there are a number of case-studies on coalition formation in the states from Central and Eastern Europe area, there are not many cross-country comparisons on this area.

II. Cabinets operating rules in Central and Eastern Europe

Cabinets operating rules as constraints that affect coalition formation refers mainly to decision-making rules within the cabinet. Their source stays within the doctrine of collective cabinet responsibility. "There are three key elements of collective responsibility, which concerns the Cabinet as an entity. The *confidence* element requires that the Cabinet must have the confidence of Parliament to remain in office, and must resign if it loses a vote of confidence. […] The *confidentiality* element requires that the proceedings of, and advice to, the Cabinet shall be confidential. […] The *unanimity* element requires all members of the Cabinet shall publicly support the decisions of the Cabinet or resign."[3] In the states where this doctrine is powerful there are better chances to form coalitions that include parties with close ideological positions. Instead, if this doctrine is weak the parties with strong preferences concerning public policies are not likely to become partners into a governmental coalition.

Thus, we have states where cabinet decision making is treated collectively and states where ministers responsibility is individual.

The effects of different cabinet operating rules can be noticed at the level of cabinet party composition, but also, in the way that different actors may influence decision-making process concerning a certain bill. Thus, John Huber and Nolan McCarty (2001) draft two models of how different cabinet operating rules work. First of all, the authors assume the Prime-Minister's power to act unilaterally in demanding the Parliaments vote of confidence and, secondly, the necessity of the Prime-Ministers to obtain cabinet collective approval before demanding Parliaments' vote of confidence.

Huber and McCarty, in developing their two formal models, take into consideration two different examples of cases concerning operating rules. First, they take into consideration the example of Norway, where the Prime-Minister "can act unilaterally to make a vote on a particular policy a vote on the continued existence of a government. In such systems, if members of parliament adopt or threaten to adopt a bill that the prime-minister does not like s/he can make his or her preferred policy a question of confidence. This forces the parliament either to accept the prime ministers policy or to bring the government down."[4]

On the other hand, in order to develop their second model the authors take as an example Netherlands where the decision of demanding a vote of confidence from the Parliament stands within the collective approval of the cabinet. "In such countries, if the partners in government withhold

[2] Strøm, Kaare, Ian Budge and Michael Laver, "Constraints on Cabinet Formation in Parliamentary Democracy", *American Journal of Political Science*, Vol. 38, no. 2 (May 1994): 308-321.

[3] Palmer, Matthew, "Toward an Economics of Comparative Political Organization: Examining Ministerial Responsibility", *The Journal of Law, Economics & Organization*, Vol. 11, no. 1 (1995), 172

[4] Huber John and Nolan McCarty, "Cabinet Decision Rules and Political Uncertainty in Parliamentary Bargaining", *American Political Science Review*, Vol. 75, no. 2, (2001), 346

approval, the prime minister cannot make the final policy a confidence issue. Instead, either s/he must resign (if s/he does not support the policy) or the bill proposed in parliament is voted against the status quo, and a defeat results in maintenance of the status quo (but not government failure)"[5]. Thus, in systems like the one in Netherlands, the problem of choosing a strategy stands mostly with the coalition partners than with the prime minister, accordingly with their position on a certain bill.

The formal models proposed by the authors assume the interactions between two players, the prime-minister *P* and the coalition partner *C*, which is a pivotal member of the governmental majority. In the unilateral model (where the prime minister can ask for a vote of confidence without cabinet approval), in the initial stage the coalition partner proposes a bill which takes effect if *P* does not invoke a vote of confidence. The prime minister may react at the proposal of the bill by the coalition partner in of three ways: (1) he can accept it (end of the game with the bill as an outcome), (2) he can resign (end of the game, with the maintenance of the status quo as an outcome) or (3) he may invoke unilaterally a vote of confidence for the proposal of any other bill. If the prime-minister uses the vote of confidence, then the coalition partner may either accept or reject the bill proposed by *P*. If *C* accepts the bill proposed by *P*, than the outcome will be the bill proposed by *P*. If *C* rejects the bill proposed by *P*, the government must resign and the outcome will be the maintenance of the status quo[6].

With regard to the 'collective cabinet' (where the Prime-Minister must obtain the cabinet approval in order to invoke a vote of confidence), the game begins with the proposal of a bill by the coalition partner. The prime minister may (1) accept this bill or (2) make a motion in the cabinet that another bill preferred by him be treated as a question of confidence. If P makes the motion, than C will have to decide whether to approve it or to reject it in the cabinet. If C accepts the motion than the outcome will be the bill proposed by P. If C rejects the motion, the prime-minister may allow either for the bill proposed by C to be debated in the Parliament or to resign, the outcome being the maintenance of the status quo[7].

The models formulated by Huber and McCarty have implications on the government termination and also on coalition formation. Concerning the latter, the models particularly refer to the prime ministers party identity. According to Lieven de Winter, the outcomes of the coalition formation process are the party composition of the government, the prime ministers party identity, the general orientation of the government's policy-making agenda, the allocation of the ministerial portfolios and competences between the parties in the coalition and the identity of the actors that will be given these portfolios[8]. Thus, "if the prime-ministers have significantly more power to influence policy outcomes under unilateral cabinet decision rules, then the costs to the governing coalition of selecting a prime-minister with extreme preferences will be significantly greater in unilateral than collective systems."[9]

The number of studies concerning the way cabinet operating rules influence coalition formation is generally low[10]. The main reason for this is represented by the fact that the constitutions of the states do not specify a certain type of rules concerning the way that a cabinet must make a decision and so, is assumed that once the cabinet it is formed it will act as an unitary actor. As Huber and McCarty demonstrated, the individual or collective action of the cabinet's members may influence both the government termination and the coalition formation.

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[5] Huber and McCarty, Cabinet Decision Rules…, 346-347

[6] Huber and McCarty, Cabinet Decision Rules…, 347

[7] Huber and McCarty, Cabinet Decision Rules…, 347-348

[8] De Winter, Lieven, "The role of Parliament in government formation and resignation" in *Parliaments and Majority Rule in Western Europe*, edited by Herbert Doring, (Frankfurt: Campus, 1995), 116

[9] Huber and McCarty, Cabinet Decision Rules…, 353

[10] Müller, Wolfgang C., Torjbörn Bergman and Kaare Strom, "Coalition Theory and Cabinet Governance: An Introduction" in *Cabinets and Coalition Bargaining: The Democratic Life Cycle in Western Europe*, edited by Kaare Strom, Müller, Wolfgang C. and Torjbörn Bergman (Oxford: Oxford University Press, 2010)

Regarding the way cabinets in Central and Eastern Europe operate, the Constitutions of the states in this area are reserved concerning this problem. In order to identify cabinets operating rules in this area I have taken into account the constitutional provisions regarding the way that the cabinet functions.

The constitutions of Romania, Bulgaria, Poland, Estonia, Hungary and Slovenia are reserved concerning this problem. Thus, these constitutions only refer to the type of governmental acts that may be adopted, without mentioning the internal procedure of the cabinet[11]. Concerning the constitutions of Latvia, Lithuania, Czech Republic and Slovakia, it is explicitly mentioned the necessity of obtaining a majority inside the cabinet for all the acts of the government.[12]

Thus, we can distinguish between cabinets operating rules taking into consideration the way the decisions are made inside the cabinet. In the cases where the decisions may be made unilaterally by the prime-minister, we shall consider that the cabinets operating rules are individual, while in the cases where decision-making inside the cabinet assumes its collective approval – obtained through voting – we shall consider that the cabinets operating rules are collective. In table 1 we can observe the operating rules of the cabinet in the ten states studied.

Table 1

Cabinets operating rule	
Individual	Collective
Romania Bulgaria Poland Estonia Slovenia Hungary	Latvia Lithuania Czech Republic Slovakia

III. Research design and data collection

In this study I will analyze how the cabinets operating rules as institutions affect coalition formation in ten states in Central and Eastern Europe. In order to do so, I shall develop a quantitative data analysis on the coalition formed in Estonia, Latvia, Lithuania, Poland, Czech Republic, Slovakia, Hungary, Slovenia, Romania and Bulgaria.

I will do so in order to verify the hypothesis developed by Strøm et.al according to which in the states where cabinets operating rules assume the collective action of the cabinet members the coalitions that are formed will include parties ideologically close to each other, while in the states

[11] According to Article 108 of the Romanian Constitution available on-line at http://www.cdep ro/ pls/dic/site.page?den=act2_2&par1=3#t3c3s0a107 accesed on March 1st 2011, Articles 108 and 115 of the Bulgarian Constitution available on-line at http://www.parliament.bg/en/const accesed on March 1st 2011, According to Article 160 of the Constitution of Poland available on-line at http://www.sejm.gov.pl/prawo/konst/angielski/kon1 htm accesed on March 1st 2011, According to Article 96 of the Estonian Constitution available on-line at http://www.servat. unibe.ch/icl/en00000_ html accesed on March 1st 2011, According to Article 117 of the Slovenian Constitution available on-line at http://www.servat.unibe.ch/icl/si00000_ html accesed on March 1st 2011, According to Article 39/A of the Hungarian Constitution available on-line at pe http://www.lectlaw.com/files/int05 htm accesed on March 1st 2011

[12] According to Article 61 of the Latvian Constitution available on-line at http://www.servat.unibe.ch/ icl/lg00000_ html, accesed on March 1st 2011, Article 95 of the Lithuanian Constitution available on-line at http://www3.lrs.lt/home/Konstitucija/Constitution htm accesed on March 1st 2011, Article 76 of the Czech Constitution available on-line at http://www.servat.unibe.ch/icl/ez00000_ html, accesed on March 1st 2011, Article 118 of the Lithuanian Constitution available on-line at pe http://www.servat.unibe.ch/icl/lo00000_.html accesed on March 1st 2011,

where cabinets operating rules assume the individual action of the cabinet members the coalitions that are formed will include parties ideologically distant to each other.

Thus, I shall consider as independent variable the type of cabinet operating rule and as a dependent variable the type of coalition formed in each state. Concerning the independent variable, I shall note with *1* the states where cabinets operating rules assume the individual action of the cabinet members and with *2* the states where cabinets operating rules assume the collective action of the cabinet members. Concerning the type of coalition, they can be either compact, noted with, *1* and distant, noted with *2*.

In order to establish the type of coalition, I shall use as an index the ideological distance between the most distant parties from the government. In order to estimate the latter, I shall use the 'Rile' (Right-Left) score of the governmental parties using the formula:

$$D_{GP} = |GP_H - GP_l|$$

where D_{GP} represents the ideological distance between the governmental parties, GP_H represents the governmental party with the highest Rile score or, other way said, the Right-est governmental party and GP_l represents the governmental party with the lowest Rile score or other way said, the Left-est governmental party.

In order to establish parties' ideological positions on the Left-Right scale, there one of these methods can be used: expert surveys, mass surveys and content analysis of parties' manifestos. The first two types of methods represent indirect sources of data regarding to the ideological positions of the parties. The content analysis of parties' manifestos is a direct one because is focused on parties' documents.[13] The Rile Score used in this study is established by using this last method. In this paper, I shall use the data provided by "Comparative Manifestos Project" (CMP) for the period 1990-2009.

This method assumes the division of the text into phrases or sentence that have policy content and that are named coding-units. These coding-units are assigned to a particular policy domain and policy category included into a predetermined coding scheme. Once the coding-units are included in the coding scheme, their number is standardized taking as bases their total number. Afterwards, they are transformed in percentages and so their sum will always be 100%[14]. (Grecu, 2008: 124).

The method of establishing the Rile index used at CMP was developed in 1992 by Michael Laver and Ian Budge. They developed a factor analysis of the seven index variables, public policy areas in the scheme of categories, including 28 points of reference units or coding units. From this analysis two factors were extracted corresponding to the distinction between Left and Right. All of the reference units or index variables were corresponding to either factor of the "Left" or factor "Right", were included in this scale. The final scale was constructed by subtracting the size of "Left" in size "Right"[15]

Concerning the data collection, I used the Constitutions of the studied states in order to identify the type of cabinets operating rules.

I have used the study by Courtenay Ryals Conrad and Sona N. Golder[16] in order to identify the coalitions formed in the states taken into consideration in this study after the fall of communism until 2008 and official websites states for coalitions studied by early 2010. I corroborated these data

[13] Grecu, Răzvan, "Party Competition in Central and Eastern Europe: The Czech Republic, Hungary, Poland and Romania", (Phd Thesis, National School of Political and Administrative Studies, 2008), 124

[14] Grecu, "Party Competition in..., 124

[15] Dinas, Einas and Kostas Gemenis, "Measuring parties' ideological positions with manifesto data – A critical evaluation on the competing methods", *Party Politics*, OnlineFirst, published on December 3, 2009 as doi:10.1177/1354068809343107, 3

[16] Ryals Conrad, Courtney and Sona N. Golder "Measuring government duration and stability in Central Eastern European democracies", *European Journal of Political Research*, 49.

with the one existing in the database ParlGov. I excluded from this research the caretaker governments, single party majority governments and single party minority governments because cabinets operating rules as institutional constraints cannot be considered in their context. The types of coalition considered in this research are: minority coalitions, minimal winning coalitions and oversized coalitions.

Regarding the index, I used the Rile scores of the governmental party from the „Comparative Manifestos Project" database and I calculated the ideological distance of the governmental parties according to the formula mentioned above.

I.IV. Results

In this paper I analyzed 92 governments formed by coalitions in the ten studied states. They are found in table 2 where there are also mentioned cabinets operating rules.

Table 2

State	**Types of cabinet operating rules**	**Number of cabinets**
Bulgaria	1	3
Czech Republic	2	8
Estonia	1	8
Hungary	1	7
Latvia	2	17
Lithuania	2	7
Poland	1	13
Romania	1	11
Slovakia	2	9
Slovenia	1	9
Total		**92**

Thus, there are 54,3% (50 cabinets) from the studied cases that formed in states where cabinet operating rules assume the unilateral action of the Prime Minister and 42,7% (42 cabinets) from the studied cases that formed in states where cabinet operating rules assume cabinets collective approval.

Concerning the index used, the ideological distance between the most distant parties from the government, the 92 cases group themselves between 1,51 (the Slovakian governments lead by Vladimir Merciar between 12.01.1993-18.03.1993 and 17.11.1993-14.03.1994) and 75,67 (the Slovene government lead by Janez Drnovsek between 12.01.1993-29.03.1994). The mean of the ideological distances of the governmental parties is 21,17, while the median value in 17,79.

In order to do the division between the ideological compact coalitions and ideological distant coalition I took into consideration the average between the most extreme values of the index used, this value being 38,59. Thus all the coalitions whose value of the ideological distance between the most apart parties in the government is between 1,51 and 38,59 will be considered ideological compact coalitions and those whose value is between 38,59 and 75,67 will be considered ideological distant coalitions. We can observe their frequency in table 3.

Table 3

State	Types of cabinet operating rules	Types of coalition		Total
		Compact	**Distant**	
Bulgaria	1	3	0	3
Czech Republic	2	6	2	8
Estonia	1	8	0	8
Hungary	1	7	0	7
Latvia	2	14	3	17
Lithuania	2	7	0	7
Poland	1	10	3	13
Romania	1	11	0	11
Slovakia	2	9	0	9
Slovenia	1	5	4	9
Total		**80**	**12**	**92**

From the total of 92 studied cases, 87% (80 cabinets) fall within the category of ideologically compact coalitions and only 13% of studied cases (12 cabinets) fall within the category of ideologically distant coalitions.

From the 80 cabinets that fall within the category of ideologically compact coalitions 55% (44 cabinets) are coalitions that formed in states where cabinet operating rules assume the unilateral action of the Prime Minister and 45% (36 cabinets) are coalitions that formed in states where cabinet operating rules assume cabinets collective approval. Regarding the 12 cabinets that fall within the category of ideologically distant coalitions the proportion is equal between the two types of coalitions taken into consideration.

From the total of 50 cabinets that formed in the states where cabinets operating rules assume the unilateral action of the Prime Minister, 88% (44 cabinets) are ideologically compact coalitions while only 12% (6 cabinets) are coalitions that include ideologically distant parties. From the total of 42 cabinets that formed in states where cabinets operating rules assume the collective action of the cabinet approximately 85% (36 cabinets) are ideologically compact coalitions and only approximately 15% (6 cabinets) are ideologically distant coalitions.

The results of the quantitative data analysis confirms the hypothesis of Strom, Budge and Laver concerning the formation of compact coalitions in systems with collective cabinets operating rules, but not the part concerning the formation of coalitions in systems with cabinets operating rules that assume the unilateral action of the Prime Minister.

In order to verify this statement I correlated the two variables with regard to cabinet operating rule and the type of coalition. The results are found in table 4.

Table 4

		Cabinets operating rules	Type of coalitions
Cabinets operating rules	Pearson Correlation	1	,034
	Sig. (2-tailed)		,749
	N	92	92
Type of coalitions	Pearson Correlation	,034	1
	Sig. (2-tailed)	,749	
	N	92	92

Thus, it can be observed that the intensity between the two variables is very low, given the fact that the Pearson coefficient rather tends to 0. On the other hand, the fact that the value of the significance test of the correlation coefficient exceeds 0,1 demonstrates the fact that there is not a strong correlation between those two variables.

V. Concluding remarks

In this paper I analyzed how institutional constraints like cabinets operating rules influence coalition formation in ten states in Central and Eastern Europe. In order to do so, I took into consideration if the cabinet's members must approve Prime Minister's decisions in order to validate them or the Prime Minister can make decisions unilateral regarding the whole cabinet.

The analysis contains 92 cabinets that were formed through coalitions from Estonia, Latvia, Lithuania, Poland, Czech Republic, Slovakia, Hungary, Slovenia, Romania and Bulgaria. In this paper I verified if Strøm et al. hypothesis regarding cabinets operating rules applies on the studied cases.

Following the results of the quantitative data analysis we can invalidate the assumption that ideologically compact coalitions will rather form in countries where operating rules require Cabinets collective approval in the decision-making process, while the ideologically distant coalitions will rather form in states where cabinets operating rules require the Prime Minister's unilateral action in the decision-making process. Moreover, this analysis shows that in the studied countries ideologically compact coalitions tend to form.

Following the correlation analysis between the two variables we can say that first of all the intensity between them is very low and, secondly that between them there is not a strong correlation.

Thus, we can conclude that on the set of studied systems, institutions like cabinets operating rules do not influence the coalition formation process.

Appendix – Governmental parties ideological distance in Central and Eastern Europe 1990-2010

	Prime-Minister	Parties into coalition	Period	Ideological Distance
Bulgaria	Simeon Sakskoburggotski	NDS, DPS	24.07.2001-21.02.2005	18,72
	Simeon Sakskoburggotski	NDS, DPS, NPT	22.02.2005-22.06.2005	18,72
	Sergei Stanishev	BSP, NDS, DPS	16.08.2005-31.12.1998	21,10
Czech Republic	Vaclav Klaus	ODS, KDU/CSL, ODA	1.01.1993-1.06.1996	37,39
	Vaclav Klaus	ODS, KDU/CSL, ODA	05.07.2010-20.11.1997	17,72
	Vladimir Spidla	CSSD, KDU/CSL, US	15.07.2002-1.07.2004	16,89
	Stanislav Gross	CSSD, KDU/CSL, US	4.08.2004-30.03.2005	16,89
	Stanislav Gross	CSSD, US	31.03.2005-25.04.2005	16,89
	Jiri Pariubek	CSSD, KDU/CSL,	26.04.2005-	16,89

		US	2.06.2006	
	Mirek Topolanek	ODS,KDU/CSL, SZ	9.01.2007-15.03.2009	46,13
	Jan Fischer	ODS, CSSD	8.05.2009-	50,20
Estonia	Mart Laar	I, M, ERSP	21.10.1990-26.09.1994	24,72
	Tiit Vähi	KMÜ, K	17.04.1995-11.10.1995	21,01
	Tiit Vähi	KMÜ, RE	3.11.1995-20.11.1996	6,98
	Mart Laar	I, RE, M	25.03.1999-8.01.2002	32,39
	Siim Kallas	RE, K	28.01.2002-2.03.2003	14,66
	Juhan Parts	ResP, RE, RL	9.04.2003-24.03.2005	7,18
	Andrus Ansip	RE, K, RL	13.04.2005-4.03.2007	4,60
	Andrus Ansip	RE, IRL, SDE	5.04.2007-	16,03
Latvia	Valdis Birkavs	LC, LZS	8.07.1993-15.07.1994	11,45
	Maris Gailis	LC, TPA	15.09.1994-1.10.1995	16,69
	Andris Skele	DPS, LC, TB, LNNK/LZP, LZS/LKDS/LLDP, LVP	21.12.1995-20.01.1997	54,88
	Andris Skele	DPS, LC, TB, LNNK/LZP, LZS/LKDS/LLDP, LVP	13.02.1997-28.07.1997	54,88
	Guntars Krasts	TB/LNNK, LC, DPS, LZS/LKDS/LLDP	7.08.1997-8.04.1998	53,88
	Guntars Krasts	TB/LNNK, LC, LZS,LKDS	9.04.1998-3.10.1998	27,40
	Vilis Kristopans	LC, TB/LNNK, JP	26.11.1998-3.02.1999	18,78
	Vilis Kristopans	LC, TB/LNNK, JP, LSDA	04.02.2010-4.07.1999	21,69
	Andris Skele	TP, TB/LNNK, LC	16.07.1999-12.04.2000	3,98
	Andris Berzins	TP, TB/LNNK, LC	5.05.2000-5.10.2002	3,98
	Elinars Repse	TP, LC, TB/LNNK, JP	7.11.2002-5.02.2004	21,33
	Indulis Emsis	JL, ZZS, LPP	9.03.2004-28.10.2006	13,71
	Aigars Kalvitis	TP, ZZS, LPP, JL	2.12.2004-	13,94

			8.04.2006	
	Aigars Kalvitis	TP, ZZS, LPP	9.04.2006-7.10.2006	11,66
	Aigars Kalvitis	TP, ZZS, LPP, TB/LNNK	7.11.2006-5.12.2007	14,67
	Ivars Godmanis	LPP, TP, TB/LNNK, ZZS	20.12.2007-12.03.2009	14,67
	Valdis Dobrovskis	JP, ZSS, TP, LPP, TB/LNNK,	12.03.2009-	26,43
Lithuania	Gediminas Vagnorius	TS(LK), LKDP, LCS	4.12.1996-3.05.1999	14,54
	Rolandas Paksas	TS(LK), LKDP	1.06.1999-27.10.1999	5,71
	Andrius Kubilius	TS(LK), LKDP	3.11.1999-8.10.2000	5,71
	Rolandas Paksas	LLS, NS	30.10.2000-20.06.2001	11,07
	Algirdas Brazauskas	LSPD, NS	5.07.2001-24.10.2004	3,59
	Algirdas Brazauskas	LSPD, NS, DP, LVLS	14.12.2004-11.04.2006	3,59
	Algirdas Brazauskas	LSPD, DP, LVLS	12.04.2006-31.05.2006	9,06
Poland	Jan Olszewski	PC, WAK, PL	2.12.1991-4.06.1992	36,16
	Hanna Suchocka	UD, KLD, PCD, PL, PPG, PSL, WAK	11.07.1992-28.04.1993	35,31
	Hanna Suchocka	UD, KLD, PCD, PPG, PSL, WAK	29.04.1993-28.05.1993	35,31
	Waldermar Pawlak	SLD, PSL	26.10.1993-7.02.1995	2,52
	Jozef Olesky	SLD, PSL	6.03.1995-24.01.1996	2,52
	Wlodzimierz Cimoszewicz	SLD, PSL	7.02.1996-21.09.1997	2,52
	Jerzy Buzek	AWS, UW	31.10.1997-6.06.2000	19,01
	Leszek Miller	SLD, PSL, UP	19.10.2001-3.03.2003	39,58
	Leszek Miller	SLD, UP	4.03.2003-2.05.2004	3,69
	Marek Belka	SLD, UP, SDPL	24.06.2004-25.10.2005	3,69
	Kazimierz Marcinkiewicz	PiS, SRP, LPR	5.05.2006-10.07.2006	38,86
	Jaroslaw Kaczynski	PiS, SRP, LPR	14.07.2006-12.08.2007	38,86
	Donald Tusk	PO, PSL	16.11.2007-	3,69

Romania	Nicolae Văcăroiu	PDSR, PUNR	19.08.1994-1.09.1996	27,64
	Victor Ciorbea	CDR (PNȚCD, PNL, PAR), USD (PD, PSDR) UDMR	12.12.1996-5.02.1998	22,79
	Victor Ciorbea	CDR (PNȚCD, PNL, PAR), USD, PSDR, UDMR	6.02.1998-30.03.1998	22,79
	Radu Vasile	CDR (PNȚCD, PNL, PAR), USD (PD, PSDR) UDMR	15.04.1998-29.10.1998	22,79
	Radu Vasile	CDR (PNȚCD, PNL), USD (PD, PSDR) UDMR	30.10.1998-13.12.1999	22,79
	Mugur Isarescu	CDR (PNȚCD, PNL, PAR), USD (PD, PSDR) UDMR	21.12.1999-26.11.2000	22,79
	Călin Popescu-Tăriceanu	PNL, PD, UDMR, PUR	29.12.2004-3.12.2006	6,66
	Călin Popescu-Tăriceanu	PNL, PD, UDMR,	4.12.2006-1.04.2007	6,66
	Călin Popescu-Tăriceanu	PNL, UDMR	2.04.2007-30.11.2008	6,66
	Emil Boc	PD-L, PSD	22.12.2008-1.10.2009	17,86
	Emil Boc	PD-L, UDMR	23.12.2009-	7,95
Slovakia	Vladimir Merciar	HZDS, SNS	12.01.1993-18.03.1993	1,51
	Vladimir Merciar	HZDS, SNS	17.11.1993-14.03.1994	1,51
	Jozef Moravcik	DUS,SDL,KDH	16.03.1994-1.10.1994	24,97
	Vladimir Merciar	HZDS, SNS, ZRS	12.12.1994-26.09.1998	14,70
	Mikulas Dzurinda	SDK, SDL, SMK, SOP	30.10.1998-21.09.2002	12,31
	Mikulas Dzurinda	SDKU, SMK, KDH, ANO	16.10.2002-1.09.2005	37,96
	Mikulas Dzurinda	SDKU, SMK, KDH	2.09.2005-6.02.2006	37,96
	Mikulas Dzurinda	SDKU, SMK	7.02.2006-17.06.2006	37,96
	Robert Fico	Smer-SD, SNS, LS-HZDS	4.07.2006-	29,33
Slovenia	Janez Drnovsek	LDS, ZLSD, SKD, SDSS	12.01.1993-29.03.1994	75,67

	Janez Drnovsek	LDS, ZLSD, SKD	30.03.1994-26.01.1996	65,34
	Janez Drnovsek	LDS, SKD	27.01.1996-10.11.1996	65,34
	Janez Drnovsek	LDS, SLS, DESUS	27.02.1997-8.04.2000	41,58
	Andrej Bajuk	SLS/SKD, SDSS	7.06.200-15.10.2000	23,38
	Janez Drnovsek	LDS, ZLSD, SLS, DESUS	30.11.2000-12.12.2002	20,22
	Anton Rop	LDS, ZLSD, SLS, DESUS	19.12.2002-3.11.2004	20,22
	Janez Jansa	SDS, SLS, NSI, DESUS	3.12.2004-21.09.2008	20,20
	Borut Pahor	SD, ZARES, DESUS, LDS	21.11.2008-	18,54
Hungary	Josef Antall	MDF, FKGP, KDNP	23.05.1990-12.12.1993	15,18
	Peter Boross	MDF, FKGP, KDNP	21.12.1993-29.05.1994	15,18
	Gyula Horn	MSZP, SZDSZ	15.07.1994-24.04.1998	22,92
	Viktor Orban	FIDESZ, MDF, FKGP	8.07.1998-21.04.2002	12,21
	Peter Medgyessy	MSZP, SZDSZ	27.05.2002-24.08.2004	14,25
	Ferenc Gyurcsany	MSZP, SZDSZ	30.09.2004-23.04.2006	14,25
	Ferenc Gyurcsany	MSZP, SZDSZ	9.06.2006-30.04.2008	14,25

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- *** *Romanian Constitution* available on-line from http://www.cdep.ro/pls/dic/site.page?id=371 accesed on March 1st, 2011.
- *** *Polish Constitution* available on-line from http://www.sejm.gov.pl/prawo/konst/angielski/kon1 htm accesed on March 1st, 2011.
- *** *Slovenian Constitution* available on-line from http://www.servat.unibe.ch/icl/si00000_ html accesed on March 1st, 2011.
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DEVELOPING AN INSTITUTIONAL ANALYSIS FRAMEWORK IN STUDYING BUREAUCRATIC BEHAVIOUR IN GOVERNMENT AGENCIES FROM CENTRAL AND EASTERN EUROPE

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Abstract
The aim of this paper is to develop a comprehensive institutional analysis framework in studying bureaucratic behaviour in government agencies. Although the purpose is to outline a general framework for research, the focus will be on taking into account the specifics of the agencification process in states from Central and Eastern Europe. The paper is divided into three sections. In the first section I compare various neoinstitutionalist approaches in terms of analysing the processes and transformations in the institutional environment concerning government agencies as semi-autonomous bodies in state organization. I argue that the approach which has a greater potential in explaining the processes and transformations in the institutional environment in government agencies is rational choice institutionalism. The second section of this paper is focused on presenting several traditional bureaucratic models in studying bureaucratic behaviour, from the traditional approach to public choice ones, in order to determine their possible contribution in analysing officials behaviour in semi-autonomous agencies. Using these and the institutional analysis framework sugested in the first section of this paper I will focus on developing a model for studying bureaucratic behaviour in government agencies. The final section of the paper will be focused on the possibility of using the institutional analysis framework for studying bureaucratic behaviour in government agencies in Central and Eastern Europe and the challenges presented.

Keywords: *agencification, new institutionalism, bureaucratic behaviour, bureau-shaping models, government agencies*

Introduction

In this paper I focus on outlining an institutional analysis framework for government agencies in order to study bureaucratic behavior in these agencies. It should be noted that this study is part of a broader research on bureaucratic behavior and accountability in government agencies in Central and Eastern Europe. The aim in this study is to provide theoretical tools for understanding the agencification process in general and how the behavior of bureaucrats is shaped in such an environment.

I chose this topic due to its importance in understanding the complexity of the institutional design in the case of government agencies. Although there are several studies concerning the agencification process, they lack theoretical and methodological tools in order to establish a comprehensive analysis of bureaucratic behaviour in govenment agencies. In respect to the literature available on the agencification process, there are several empirical studies well known for focusing on how agencies are formed and how they are developing in Western democracies. Therefore, there is an abundant empirical data for consolidated democracies (i.e Pollitt and Talbot, 2004; Pollitt et al., 2005), but few on countries that face the democratization process. Hence, there are not many study cases for states from Central and Eastern Europe, and those that are available are more focused on legal, political or economic aspects than on institutional changes brought by agencification[1].

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[1] Beblavy, Miroslav, , „Understanding the Waves of Agencification and the Governance Problems They Have Raised in Central and Eastern European Countries", OECD Journal on Budgeting (2002); Hajnal, György, „Patterns of

Hence, in order to design a model for analyzing the behavior of bureaucrats in government agencies I will attempt to answer to the following questions: 1. What are government agencies and what are their characteristics?, 2. How to build an institutional analysis for government agencies?, 3. How to build a model for analyzing bureaucratic behavior in agencies, taking into account the importance of institutions in shaping actors' behavior?

1. An institutional analysis of government agencies

Conceptualization and features of government agencies

An approach able to provide a clarification of what constitutes a governmental agency must follow two directions, namely conceptualizing the term "agency" and a taxonomy of agencies.

Agencies in the current studies have been described in various ways such as quasi-autonomous public organizations, non-departmental public bodies, non-autonomous quasi-governmental[2].

Thus, the term *agency* received a multitude of meanings depending on the organizational culture, legal system and political system.[3] An argument that supports the idea that it is necessary to present a comprehensive and concise conceptualization of the term is brought by Pollitt and Talbot, which highlight two issues in such action. First, there can not be reached a universal legal classification as national legal systems vary substantially from each other. Thus, both agencies and autonomous bodies may present any possible combination between public law and private law. Secondly, it is difficult to achieve standardization of functional classifications of relations since the constitutional and political system varies between systems that have a tradition of ministerial accountability and the individual ministerial accountability and those who lack the concept, between systems where the appointing officials in autonomous public bodies is based on a political criteria and where this practice is less[4] .

Given the considerations above, I chose to use the approach of conceptualizing agencies following the characteristics proposed by Pollit and Talbot. According to the authors an agency is an organization which should have the following features:[5]

1. to be as far away from the main chain of central ministries or departments of government;
2. to perform tasks at the national level(eg service delivery, regulation, etc.).

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administrative policy pre- and post-NPM: An analysis of the institutional dynamics of Hungarian central government agencies", Paper presented for Third Biennial Conference: "Regulation in the Age of Crisis", June 17-19 2010, Dublin (2010); Van Thiel&CRIPO team, „The rise of executive agencies: comparing the agencification of 25 tasks in 21 countries", Paper presented at EGPA conference, 2-5 September 2009, Malta (2009); Pollitt, Christopher and Talbot, Colin, *Unbundled Government: A Critical Analysis of the Global Trend to Agencies Quangos and Contractualisation* (Ed.Routledge, 2004) ; Pollitt, Christopher et al., *Agencies: how governments do things through semi-autonomous organizations* (Palgrave MacMillan, 2005).

[2] Greve, Carsten. Flinders, Matthew. Van Thiel, Sandra, „Quangos- What's in a name?Defining quangos from a comparative perspective", *Governance: An International Journal of Policy and Administration*.12 (1999), pp.129-146; Christensen, Tom and Laegried, Per, *Autonomy and regulation: coping with agencies in the modern state*, Christensen, Tom and Laegried, Per (London: Edward Elgar Publishing, 2006); Pollitt, Christopher and Talbot, Colin, *Unbundled Government: A Critical Analysis of the Global Trend to Agencies Quangos and Contractualisation* (Ed.Routledge, 2004); Pollitt, Christopher et al., *Agencies: how governments do things through semi-autonomous organizations* (Palgrave MacMillan, 2005);Van Thiel&CRIPO team, „The rise of executive agencies: comparing the agencification of 25 tasks in 21 countries", Paper presented at EGPA conference, 2-5 September 2009, Malta (2009).

[3] Christensen, Tom and Laegried, Per, „Agencification and Regulatory Reform" in *Autonomy and regulation: coping with agencies in the modern state*, Christensen, Tom and Laegried, Per (London: Edward Elgar Publishing, 2006), 12

[4] Pollitt, Christopher et al., *Agencies: how governments do things through semi-autonomous organizations* (Palgrave MacMillan, 2005), 7-8

[5] Pollitt, Christopher. Talbot, Colin, *Unbundled Government: A Critical Analysis of the Global Trend to Agencies Quangos and Contractualisation* (Ed.Routledge, 2004), 5

3. employees are civil servants;

4. to be financed mainly from state budget;

5. to follow to a certain extent legal rules and public / administrative procedures.

Following these characteristics Pollit and Talbot support the idea that there are three central elements of the agency, namely: structural disintegration and / or creating their own organizations with specific tasks, contracting performance (here the reference is to the existence of a set of performance targets and a process of monitoring and reporting them), deregulation (or rather re-regulation) in respect to the control regarding hiring employees, the budget and other issues related to management[6].

The characteristics above provide a context in which to place the concept of agency. Given the difficulties in placing the term of agency in a comprehensive definition that would help in carrying out empirical research on a variety of possible cases, I chose to look at the term government agency within the proposed features and aspects outlined by Pollit and Talbot.

I will follow the same logic presented in the preceding argument to discuss the definition of government agency. The reason is that the purpose of this study does not concern offering a comprehensive conceptual framework on the term of government agency. For this reason I consider only the foundations necessary for understanding their significance in the governmental sector. Thus, I will discuss the features and elements proposed by Pollit and Talbot for agencies to establish the significance of government agencies.

Regarding the specific characteristics of agencies in general, they are also traits that correspond to government agencies. However, I consider it necessary to emphasize two important aspects.

On the first feature concerning being as far away from the main chain of central ministries or departments of government, in respect to the government agencies there has to be a discussion regarding their degree of autonomy from the ministry. Laegried and Christensen argue that these agencies have some degree of autonomy from the ministries in areas such as policy development, decision-making process, hiring employees, budget and management issues. This does not mean they are totally independent. The reason is that the government has the ultimate responsibility for the actions of the agency[7]. This observation is useful in analyzing the behavior of actors in government agencies, because it shows the importance of understanding the relationship between the bureau and the ministry and its impact on the behavior of bureaucrats. In other words, although government agencies are relatively distant from the ministerial ladder there may be penalties coming from the ministry in cases such as lower performance level. An example in this regard is the fact that in case of a low leve of performance the agency's budget may be decreased.

A second observation is related to the feature regarding the fact that employees of government agencies are civil servants. Although this is one of the characteristics of government agencies, it should be noted that in most cases the appointment of officials is more likely to be achieve on political criteria, given the ruling parties.

A question that remains is how to explain the elements central to the concept of agency for government agencies?

The concept of disruption of structure applies to ministries being divided into a central body and several government agencies that each meet a specific task. Structured change characteristics are generally as follows[8]: 1. creating a separate organizational structure that can be identified and has its

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[6] Pollitt, Christopher. Talbot, Colin, *Unbundled Government: A Critical Analysis of the Global Trend to Agencies Quangos and Contractualisation* (Ed.Routledge, 2004), 6

[7] Christensen, Tom. Laegried, Per, „Agencification and Regulatory Reform" in *Autonomy and regulation: coping with agencies in the modern state*, Christensen, Tom and Laegried, Per (London: Edward Elgar Publishing, 2006), 12-13.

[8] Pollitt, Christopher. Talbot, Colin, *Unbundled Government: A Critical Analysis of the Global Trend to Agencies Quangos and Contractualisation* (Ed.Routledge, 2004), 7-8

own name, 2. providing a single set of functions or a lower set of functions 3. functions are primarily of delivery, execution and providing, they are less related to policy-making, 4. establishing a "constitution" in the form of legislation, or at least a framework document which formally specifies the objectives of the organization and the institutional arrangements 5. appointment of a chief executive responsible for management, 6. differentiation of staff from the majority of civil servants; 7.establishing formal reporting arrangements concerning the activity of the agency, including a separate audit.

In terms of contracting performance government agencies there is to be seen on the one hand what is meant by performance and on the other what contracting involves. Performance involves a system of targets that are set, and reporting on the work of the agency (which may or may not be made public). A noteworthy aspect is that if the proposed targets are not achieved there are likely to be discussions, negotiations and consensus if possible, and unlikely to enforce only sanctions (when such actions are taken they are usually in regard to the executive chief and not the agency itself). The term contract is used in a broad sense, in other words, it is not necessary to have a formal contract. Rather, contracting may take the form of any set of performance objectives for the agency, which can be self-generated, required or on which an agreement has been reached, and put into a specific agreement, contract, plan or a type declaration[9].

The idea of deregulation, or rather re-regulation is one of the most important core elements of the concept of agency. To see what re-regulation means in government agencies we have to see why it appears and what it means. Regulation requires standard operating procedures and existing rules in the government apparatus to show how public bodies operate. Due to an increased level of regulation, public organizations are characterized by an excessive bureaucracy (red tape), which hampers the management and operation. Creating separate agencies from the central body involves a high degree of deregulation. This situation occurs also in regards to the government apparatus and creating such agencies leads to a deregulation process. It addresses various functions, including for example personnel, budget and some management issues. Deregulation may lead to release government agencies from the rules enforced by regulatory bodies or central bodies (ministries), or both. However, regulation of public administration can not be eliminated, nor can it decrease to a certain level without causing difficulties in terms of public accountability, probity or ethics. For this reason when it comes to government agencies, there is not so much deregulation, but rather re-regulation. In this respect, two strategies can be identified: external and internal deregulation. In regards to external deregulation, it can be achieved by granting the agency a degree of autonomy. The level of autonomy may increase in some cases as it is established in time a certain level of trust between agencies and ministries. Regarding domestic deregulation, it may occur within agencies as they reach a degree of self-regulation[10].

From the discussion concerning the characteristics and specific elements of government agencies I have emphasized the importance that norms and rules have in creating an agency and in the changes that appear when the agency is functioning. Thus, in the process of creating agencies the institutions have an exogenous character and after the creation of these agencies there are exogenous institutions, but also endogenous ones. The latter appear thanks to a certain degree of autonomy from the ministry and self-regulation.

The work undertaken so far provides the necessary conceptual basis for shaping a model of institutional analysis of government agencies.

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[9] Pollitt, Christopher. Talbot, Colin, *Unbundled Government: A Critical Analysis of the Global Trend to Agencies Quangos and Contractualisation* (Ed.Routledge, 2004), 14.

[10] Pollitt, Christopher. Talbot, Colin, *Unbundled Government: A Critical Analysis of the Global Trend to Agencies Quangos and Contractualisation* (Ed.Routledge, 2004), 12-13

1.2. Institutional analysis of governmental agencies

Given the considerations above concerning the characteristics and elements of government agencies and given the purpose to elaborate a model of institutional analysis it will be necessary to follow the preceding steps to achieve this objective.

A first step is to clarify why I have proposed as a model for the study of government agencies institutional one. I started with the idea that modern governance processes occurr within and through institutions[11], hence, in order to study government agencies we must understand the institutional context. Here I am concerned with the institutional context in which government agencies appear, and also with the impact of the changes that take place over time in the institutional context.

To address the two issues I will begin by clarifying what I understand by the term institution, then I will present different neoinstitutionalist approaches. Using these approaches I will explain the institutional context in which the process of creating agencies occurs, and then I will present the manner in which institutional changes occur in government agencies.

Regarding the concept of institution, in the literature concerning the term, there are two basic meanings given: the first meaning is organization, and the second is rule, norm, practice, routine, etc.[12].

For example, from North's perspective institutions are rules of the game in society or, more formally, they are constraints that shape human interaction[13]. North distinguishes between institutions and organizations stating that both institutions and organizations provide a structure for human interaction, but if we follow the costs that appear as consequences of the institutional framework, it will show that they are not its results, but those of organizations that have developed as a result of the existence of that frame[14].

Another meaning of the term institution is offered by March and Olsen. They define the institution as a collection of rules and organized practices, embedded in structures of meaning and structure of resources, which remain relatively unchanged and relatively resistant to the preferences and expectations of individuals and external circumstances[15].

Another conceptualization of the term is given by Ostrom in which the institution relates to concepts shared by humans and used in repetitive situations, organized in rules, norms and strategies[16].

Adrian Miroiu argues that different theoretical perspectives focus on one way or another to define institutions, hence if institutions are understood as rules, norms, practices, routines, etc. their ontological aspect is not yet defined, since an institution can be understood as a real nomative order, and also as a symbolic or cognitive one[17] .

Among the meanings given above I chose to look at the institution as rules, regulations, norms, practices, routines.

Once established the meaning given to an institution I will present some of the neoinstitutionalist approaches. I will focus on presenting them on three dimensions, creating institutions, change within institutions and the impact on actors' behavior. This method will allow a

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[11] Bell, Stephen, „Institutionalism: Old and New", in *Government, Politics, Power and Policy in Australia (7th ed.)*,ed. Woodward, D., (Longman,2002), 1

[12] Miroiu, Adrian, *Fundamentele Politicii.Raționalitate și Acțiune Colectivă*, Vol.II, (Ed. Polirom, 2007), 231

[13] North, Douglass, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, 1990), 3

[14] North, Douglass, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, 1990), 4

[15] March,James G., and Olsen, Johan P., „Elaborating the New Institutionalism", *ARENA Working Paper* 11 (March 2005), 4

[16] Ostrom, Elinor, „Institutional Rational Choice An Assessment of the Institutional Analysis and Development Framework in Theories of the Policy Process", ed. Sabatier, Paul (Ed. Westview Press, 1999), 37

[17] Miroiu, Adrian, Fundamentele Politicii.Raționalitate și Acțiune Colectivă, Vol.II, (Ed. Polirom, 2007), 232

better understanding of the institutional context during the process of agencification, and it will also allow an understanding regarding institutional change in this environment.

"New institutionalism" is a term used increasingly often in political science. Although the term new institutionalism is frequently discussed, in particular it is unclear what this means, the difference between a neoinstitutionalist approach and other approaches that are addressing the promises and challenges involved. Many of the new institutionalism ambiguities can be clarified by stating that it is not a unified body of thought[18]. In this respect, it was noted that various theoretical trends specific to the new institutionalism should be viewed as complementary and not competitive in terms of explaining political phenomena. None of these perspectives can fully explain all political action, nor intend to do so[19].

Different approaches claimed to be neoinstititutionalist ones can be generally grouped according to three schools of thought, namely historical institutionalism, rational choice institutionalism and sociological institutionalism.

Historical institutionalism appears in response to theories of politics and structural-functionalist ones that were specific to political science in the 1960's and 1970's and borrows elements from both. From group theory, historical institutionalists accept the idea that conflict between groups competing for scarce resources is the center of politics. They seek better explanations for the distinctions between national political outcomes and inequalities that mark them. Historical institutionalism theorists have also found an explanation in the sense that institutional economics and political organization structure conflict in order to favor certain interests and to demobilize others. Historical institutionalists have been influenced by how structural functionalism perceive the political arena as a system of interacting parts. Thus, they perceive institutional organization of politics or political economy as the principal factor structuring collective behavior and generating distinct outcomes[20].

The main argument supported by historical institutionalists refers to the fact that structure and policy choices are made during the creation of new institutions and they will have a permanent impact on the duration of its existence. Thus, the core principle of this approach is the existence of a "path dependency"[21]. Under this principle, historical institutionalists view change in the institutional environment as highly unlikely[22].

Another aspect worth mentioning is related to the dimension concerning the processes that translate the behavior of actors in structure and rules, in that historical developments produce a particular set of preferences of actors[23].

Historical institutionalists put considerable emphasis on the contingencies of history. Thus, the understanding of individuals in regards to specific events and developments is constrained by the important role played by chance[24].

Based on these general assumptions I intend to follow the three dimensions agreed at the begining: the creation of institutions, institutional change and the impact on actors' behavior.

As seen above, historical institutionalists do not put much emphasis on the manner in which institutions are created, but rather their persistence over time. In this context, Peters[25] suggests that

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[18] Hall,Peter A., and Taylor,Rosemary C. R.,"Political Science and the Three New Institutionalisms", *Political Studies* 44(1996), 936

[19] Peters,B.Guy, El nuevo institucionalismo. Teoria institucional en ciencia politica (Barcelona:Ed. Gedisa S.A, 2003), 14

[20] Hall,Peter A., and Taylor,Rosemary C. R.,"Political Science and the Three New Institutionalisms", *Political Studies* 44(1996), 937

[21] Peters,B.Guy, „Institutional Theory: Problems and Prospects", *Political Science Series* 69 (2000), 3

[22] Peters,B.Guy, „Institutional Theory: Problems and Prospects", *Political Science Series* 69 (2000), 6

[23] Katznelson, Ira and Weingast, Barry, Preferences and Situations. Points of Intersection Between Historical and Rational Choice Institutionalism (Ed. Russel Sage Foundation, 2005), 3

[24] Immergut, Ellen, „The theoretical core of the new institutionalism", *Politics and Society* 26 (1998), 19

the emphasis on incorporating ideas into structures that support the institutions can be viewed in terms of historical institutionalism as a definition of forming institutions.

In terms of institutional change, as noted above, it is unlikely. One argument in favor of this idea is that all historical institutionalism analysis assume the existence of sustainability over time concerning the effects of institutional and political choices. In other words, this approach explains better the persistence of patterns, rather than changing them [26].

Another aspect that is not fully developed in this type of approach is the relationship between actors and institutions. Peters suggests that the reason is the implicit assumption made by historical institutionalists that actors who choose to participate in an institutional arrangement accepts the constraints imposed by it[27].

The considerations made above show that historical institutionalism does not offer enough tools to shape a model of institutional analysis of government agencies. The argument for this idea is supported by the presence of obstacles in providing comprehensive explanations both in terms of creating institutions and institutional change. Moreover, such an approach is difficult to use because it can not provide a clear understanding of the behavior of actors as shown.

Hence, given the fact that historical institutionalism can not serve in shaping a institutional analysis framework for government agencies I will seek to explain the other two types of approaches, starting with sociological institutionalism.

Sociological institutionalism emphasizes that many institutional forms and procedures used by modern organizations have been adopted simply because they were most effective in those tasks. Rules and procedures should be regarded as specific cultural practices, to be assimilated in the organization, not necessarily to improve the effectiveness of formal results, but as a consequence of such processes associated with the transmission of cultural practices. Thus, they argued that the apparent bureaucratic practices should be explained in cultural terms[28].

When talking about institutional change in this approach it can be viewed in two ways. Thus, institutional change is seen as occurring either through institutionalization or by de-institutionalization. In other words, the process of institutionalization refers to adding more roles or features, such as firm adhesion to the prevailing cognitive frames of the institution[29]. Another way to look at institutional change is adapting to changes in the institutional environment. In this case, the challenges from the environment are recognized and the focus is in finding ways in which the institution will comply with external forces[30].

To see how the relationship between actors and institutions is seen within this approach I will start with the following statement: central to sociological institutionalism is the idea that action is closely linked to interpretation. Thus, when faced with a situation, one must find a way to recognize and respond to it, because there are default patterns in the institutional environment that provide the means to achieve this task. The relationship between individual and institution is built on a type of practical reasoning in which the actor uses existing patterns of action[31].

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[25] Peters,B.Guy, *El nuevo institucionalismo. Teoria institucional en ciencia politica* (Barcelona:Ed. Gedisa S.A, 2003)

[26] Peters,B.Guy, *El nuevo institucionalismo. Teoria institucional en ciencia politica* (Barcelona:Ed. Gedisa S.A, 2003), 101-102

[27] Peters,B.Guy, *El nuevo institucionalismo. Teoria institucional en ciencia politica* (Barcelona:Ed. Gedisa S.A, 2003), 103

[28] Hall,Peter A., and Taylor,Rosemary C. R.,"Political Science and the Three New Institutionalisms", *Political Studies* 44(1996), 946-947

[29] Peters,B.Guy, *El nuevo institucionalismo. Teoria institucional en ciencia politica* (Barcelona:Ed. Gedisa S.A, 2003)

[30] Peters,B.Guy, *El nuevo institucionalismo. Teoria institucional en ciencia politica* (Barcelona:Ed. Gedisa S.A, 2003)

[31] Hall,Peter A., and Taylor,Rosemary C. R.,"Political Science and the Three New Institutionalisms", *Political Studies* 44(1996), 947

A neoinstitutionalist perspective with roots in sociological institutionalism is that of March and Olsen, but it is rather considered belonging to a normative institutionalism approach. I chose to mention it, since its considerations are important. Thus, the two authors argue that there are two basic assumptions in the institutional approach. The first assumption is that institutions create elements of order and predictability. In other words, institutions shape, constrain and enable political actors to act in a "logic of the most appropriate action". The second assumption is that translating structures into political action and actions that lead to continuity and institutional change are generated by comprehensible routine processes. These processes produce recurring modes of action and organizational patterns[32].

Institutional change in March and Olsen's approach is not necessarily when there are external forces. Rather, there is internal pressure that can lead to institutional change, sustainable due to gaps between ideals and institutional practices. In addition, change may be governed by rules, institutionalized in specific units or sub-units, or it can be generated by interpreting routines or implementating rules[33] .

Another aspect worth mentioning is the relationship between actors and institutions. To understand this relationship, the authors stress that institutions provide codes of behavior. Thus, they believe that rules and practices specify what are the expectations and what makes sense in the community[34] .

Given the considerations above, we can say that sociological institutionalism approaches could provide a basis for shaping a model of institutional analysis of government agencies. However, I believe that such an approach would face some difficulties. First, considering the rules and procedures as specific cultural practices does not allow analyzing government agencies in countries in the process of democratization, since there is not a prima facie case in such practices. Another argument is related to the assumption that rules and procedures that are to be assimilated into organizations do not necessarily aim at improving the efficiency of the formal results, hence this assumption does not match the reality of government agencies. The reason is connected to one of the features mentioned regarding agencies, namely contracting performance. Thus, for example in a public agency whose task is reglementation, the assimilation of rules and procedures imply efficiency in terms of formal results. Hence, it is difficult to use this approach in building the analysis model proposed.

A third neoinstitutionalist approach is rational choice institutionalism. Institutional rational choice assumes that institutions are constructed by individual actors in the pursuit of rational goals and that these actors are involved in shaping and changing the institutional environment to serve their purpose[35]. Actors are seen as rational individuals with a fixed set of preferences and behave entirely instrumental in choosing the best alternative to achieve these preferences in a strategic manner. Thus, an actor's behavior is the result of a strategic calculus. This calculation is affected by the actor's expectations in relation to the behavior of other actors. Institutions shape such interactions by determining the structure and sequence of the alternatives available to the individual or by providing information and enforcement mechanisms that reduce the uncertainty regarding the behavior of other actors[36].

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[32] March,James G., and Olsen, Johan P., „Elaborating the New Institutionalism", *ARENA Working Paper* 11 (March 2005), 5

[33] March,James G., and Olsen, Johan P., „Elaborating the New Institutionalism", *ARENA Working Paper* 11 (March 2005), 15

[34] March,James G., and Olsen, Johan P., „Elaborating the New Institutionalism", *ARENA Working Paper* 11 (March 2005),9

[35] Bell, Stephen, „Institutionalism: Old and New", in *Government, Politics, Power and Policy in Australia (7th ed.)*,ed. Woodward, D., (Longman,2002), 6

[36] Hall,Peter A., and Taylor,Rosemary C. R.,"Political Science and the Three New Institutionalisms", *Political Studies* 44(1996), 946

Rational choice institutionalism features several perspectives, including models which explain institutions based on the principal-agent relationship, on game theory and models of institutions based on rules. Although different, these perspectives present a number of similarities: a common set of assumptions and the fact that they all starts from *tabula rasa*[37] .

In respect to the set of common assumptions, they are: 1. individuals are the central actors in the political process; 2. individuals act rationally to maximize their utility, 3. institutions are an aggregation of rules that shape individual behavior, 4. individuals react rationally to the incentives and constraints set by these rules, 5. most actors are expected to respond in the same fashion to similar incentives[38].

Regarding the fact that all of these perspectives start from tabula rasa, this assumption refers to the fact that the formation of institutions does not depend on past institutions or organizations. The result of the institutional design is determined by the nature of the incentives and constraints[39] .

In order to gain a better understanding of these perspectives I will present them briefly below.

Principal-agent models are based on the idea that interactions between individuals can be seen from this perspective, but can also be used in relation to the organizations as a means of understanding the interaction between groups of public sector institutions. An example are the studies on the budget of a public organization, where the the top official can operate as an agent for the bureau[40]. Such a model is quite difficult to use in shaping a framework of analysis for government agencies. Although it offers a better understanding of the interaction between actors, this model does not provide the analytical tools needed to study institutional design in the creation of agencies and provides minimal knowledge on their behavior of bureaucrats within the office except the for officials who could be regarded as agents in relation to the ministry under which the agency is located.

Game theory type models are based on the issues of compliance with rules and regulations. Game theory suggests a set of strategic choices (games) in which actors seek to ensure compliance by other actors they interact with, usually bureaucrats who are considered to be seeking a higher degree of freedom in their actions. The problem of those who are designing this game is to build an array of incentives to ensure the compliance of the bureaucrats. It is also necessary to find a solution to the problem of ensuring the compliance of the actors to their part in this arrangement. If this game is played only once desertion and non-compliance do not involve very high costs for any of the actors. To establish better cooperation between the actors and a greater degree of compliance game must be repeated several times[41].

Shepsle argues that models using game theory have some problems in regard to institutions. This approach has focused primarily on how the structure of the game affects the choices of the players, and only secondarily on the process by which equilibrium outcomes are reached (the institution is an expression of equilibrium). Of course there are important exceptions such as Axelrod[42], Shepsle[43], Shepsle and Weingast[44]. Thus, in most analysis using game theory the

[37] Peters,B.Guy, *El nuevo institucionalismo. Teoria institucional en ciencia politica* (Barcelona:Ed. Gedisa S.A, 2003), 71-72

[38] Peters,B.Guy, *El nuevo institucionalismo. Teoria institucional en ciencia politica* (Barcelona:Ed. Gedisa S.A, 2003), 71

[39] Peters,B.Guy, *El nuevo institucionalismo. Teoria institucional en ciencia politica* (Barcelona:Ed. Gedisa S.A, 2003), 73

[40] Peters,B.Guy, *El nuevo institucionalismo. Teoria institucional en ciencia politica* (Barcelona:Ed. Gedisa S.A, 2003), 77

[41] Peters,B.Guy, *El nuevo institucionalismo. Teoria institucional en ciencia politica* (Barcelona:Ed. Gedisa S.A, 2003), 78-79

[42] Axelrod, Robert, „The Emergence of Cooperation among Egoists", *The American Political Science Review* 75 (1981), pp. 306-318; Axelrod, Robert, „An Evolutionary Approach to Norms", *The American Political Science Review* 80 (1986), pp. 1095-1111

institutional arrangements are given, and the objective is simply to study the implications of those rules on the behavior and results. Secondly, the temporal persistence of the rules is not considered as part of the game because they are regarded as exogenous[45]. The main impediment is the difficulty of establishing the preferences of the actors involved in the formation of government agencies. Given these impediments, we considered that this model is not one that can be used in shaping the analytical framework of the agencies.

Models which view institutions as rules are based on the idea that rules are a means to prescribe, permit and constrain behavior. In this case institutions are regarded as the aggregation of rules, and member organizations agree to comply with them in exchange for the benefits they obtain as part of the structure. In this model rationality is distinguished by the fact that individuals can gain benefits from membership and are therefore willing to sacrifice certain latitude for their actions in exchange for these benefit. Among the most important of these benefits is a remarkable degree of predictability of the behavior of other actors[46]. Of the three models presented until now I think it has the potential to help in shaping the analytical framework of governmental agencies, as it allows easier handling of issues relating to development and change within institutions, unlike the first two perspectives which were mainly concerned with the interaction between actors and institutions. In consequence I will pursue the two issues in terms of rational choice institutionalism.

Regarding the emergence of institutions, Peters claims that they do not appear automatically because they are needed, but they have to be created [47].

Concerning institutional change the rational choice institutionalism perspective stipulates that an institution undergoes changes that are both endogenous and exogenous. Transformations that occur endogenously appear when rules and procedures are changed in a previously established manner, and exogenously when this happens as a result of an external factor or when there is a sudden change in the institutional environment[48].

From these arguments it results that the rational choice institutional approach has the potential to create a framework for the analysis of government agencies. The problem is that theoretical approach was shown to have potential to shape the analytical framework not in its entirety, but only through its general assumptions and models.

Given this situation we decided to follow the perspective of Krehbiel Diermier who propose viewing institutionalism as a methodology. The two authors state that institutionalism should guide the investigation as to which of a multitude of more or less stable features, which characterize collective choice arrangements are essential in understanding the behavior and outcomes of collective action[49]. In this respect, the authors suggest a method in four steps[50]:

1. The expression and maintenance of fixed postulates regarding the behavior of political actors in collective choice arrangements;

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[43] Shepsle, Kenneth A., „Studying Institutions. A Lesson Learned from the Rational Choice Approach", *Journal of Theoretical Politics* 1 (1989), pp.131-147.

[44] Shepsle, Kenneth A. and Weingast, Barry, „Structure-induced equilibrium and legislative choice", Public *Choice* 37 (1981), pp. 503-519

[45] Shepsle, Kenneth A., „The Rules of the Game: What Rules? Which Game?", Prepared for presentation at "The Legacy and Work of Douglass C. North: Understanding Institutions and Development Economics" (2010), 5

[46] Peters,B.Guy, *El nuevo institucionalismo. Teoria institucional en ciencia politica* (Barcelona:Ed. Gedisa S.A, 2003), 78-79

[47] Peters,B.Guy, *El nuevo institucionalismo. Teoria institucional en ciencia politica* (Barcelona:Ed. Gedisa S.A, 2003), 81

[48] Shepsle, Kenneth A., "Studying Institutions. A Lesson Learned from the Rational Choice Approach", *Journal of Theoretical Politics* 1 (1989), 141

[49] Diermier, Daniel and Krehbiel, Karl, "Institutionalism as Methodology", Journal of Theoretical Politics 15 (2003), 124

[50] Diermier, Daniel and Krehbiel, Karl, "Institutionalism as Methodology", Journal of Theoretical Politics 15 (2003), 128

2. Formal characterization of existing institutions;

3. Deduction of the behavior that occurs in institutional arrangements, taking into account the assumptions regarding behavior and the characterization of the effects of said behavior;

4. The derived implications must be evaluated using empirical data.

This perspective is perhaps most useful in analyzing the behavior of bureaucratic government agencies because it allows both the use of an institutional approach to explaining the context, but also a model of bureaucratic behavior in that context.

The way in which institutions emerge and change is important because as we suggested in the beginning, the emergence of the institutional arrangements of government agencies is exogenous – it is represented by legal rules which create the government agencies and establish rules for their operation – while, in time, the internal rules of agencies are defined without external intervention. Thus, conducting an analysis of the institutional processes of government agencies offers an explanation of the changes taking place within them. This approach is needed to complete the second step of the method proposed by Diermier and Krehbiel.

Once acquired this knowledge to create a framework for analyzing the behavior of bureaucrats in government agencies it will be necessary to expose the assumptions on the behavior given the existing institutional arrangement. In this regard, it will be necessary to start from a bureaucratic model.

Thus, in what follows I will present various bureaucratic models and I will choose one that corresponds to the collective choice arrangement given, namely the government agency.

2. Approaches to bureaucracy: models of bureaucratic behavior analysis

In order to asses bureaucratic behavior in government agencies I have chosen to use the organizational and public choice perspectives on bureaucracy, and will discuss possible general models of analysis.

One of the most important theoretical models of the organizational approach was developed by Max Weber in his theory of bureaucracy. This approach rests on ideal types, meaning that it lists the abstract or ideal characteristics of a bureaucratic organization. The model of bureaucracy proposed by Weber is based on the concept of authority. There are three types of authority according to the author: charismatic, traditional and rational-legal. Charismatic authority means that the power of a leader is based on his extraordinary ability to attract supporters and to interact with them. This type of authority is very unstable as it can disappear if the followers are disappointed by the charismatic leader. Charismatic authority can be observed in certain religious cults where one person draws supporters and requests their obedience by the force of his personality. The foundation of traditional authority is a set of persistent beliefs about who should be in control and is often associated with certain positions within an organizational hierarchy. The best example is monarchies, where the king or queen's power in derived from tradition and not from their skills, actions or behavior. Rational-legal authority designates power based on the rational application of a set of rules constructed by reference to information and expertise. In the case of rational-legal authority power belongs to the individual whose hierarchical position of authority is a direct result of the law and of the rules designed in compliance with the law[51].

Max Weber writes that "each holder of power is legitimated by rational norms and his power is legitimate insofar as it meets the standard. Obedience is to the norm rather than to the person"[52]. Weber proposes six principles for the bureaucratic systems derived from the concept of rational-legal authority, as follows:

[51] Hughes, Owen. *Public Management and Administration* (Tornonto:St. Martin's Press, 1998),27

[52] Weber, Max, *Economy and Society*, Ed. Roth, Guenther. Wittich, Claus (Berkley: University of California Press, 1968), 95

1. Authority is derived from the law and the rules designed in compliance with the law.

2. The principle of a clearly defined hierarchy. This principle refers to the existence of a clear system of subordination where the higher hierarchical levels control the lower levels.

3. Bureaucracy is a relatively closed system. Where possible, the bureaucracy must be isolated from external environmental influences, given that external disturbances can adversely affect its operation. Furthermore, bureaucracy is an impersonal system, separate from the private life of its employees. The administration of the bureau is based on written documents which are kept. The persons in public office, together with the necessary equipment and documents constitute a bureau. Public funds and the equipment needed for bureaucratic activities are distinct from the private property of the person who performs a public function.

4. Bureaucratic activity requires specialized education.

5. Bureaucratic activity is a career and not a secondary activity.

6. The administration of the bureau follows general rules which are stable and comprehensive. Knowledge of these rules is a special type of technical education which a bureaucrat possesses.

In short, the bureaucracy in Weber's vision is a system based on impersonal rules.

The main criticisms of the model of bureaucratic organization proposed by Weber come from public choice approaches and were formulated by theorists such as Downs, Niskanen and Dunleavy. According to the standard assumptions of the theory of rational choice bureaucrats seek to maximize their utility or, more precisely, will seek more power, prestige and security, or a higher income by using the hierarchical structure for their own benefit, in detriment of the organization's goals. Weber's model is based on the assumption that bureaucrats are not interested in financial gain and are motivated by ideals such as service to the state. From the perspective of rational choice assumptions this type of behavior is illogical[53]. Rational choice theorists believes that maximizing individual utility (individual ambition) may lead to results that are not in the interest of the organization. Niskanen[54] (1973) argues that individual ambition leads to each bureau trying to maximize its budget. Thus, bureaucrats' personal benefits will increase if they are part of a bureau which obtains a larger budget because a budget increase can be translated into increases in salaries, public reputation, power and number of employees[55].

Such an interpretation may explain why high-level bureaucrats tend to always request more resources for the structures they head. In turn, Ostrom believes that bureaucratic organization is ineffective because large bureaucracies: a) impose ever higher social costs on the beneficiaries, b) fail to adjust supply to demand, c) allow for the degradation of public goods because they fail to stop the process by which using a public good for one purpose prevents it from being used for other purposes, d) are becoming increasingly prone to errors and uncontrollable to the point that their actions deviate dramatically compared to the rhetoric on public objectives and e) can lead to situations where an action aimed at improving a situation actually exacerbates the problem[56].

Another approach regarding bureaucratic behavior is the one based on the assumptions of rational choice theory. One model of bureaucratic behavior which follows this approach is that of Anthony Downs. The author presents the bureau as a particular form of organization where the organization is seen as a system of consciously coordinated activities that has been created specifically to achieve certain goals. An organization is a bureau in Downs's perspective if it has four basic features:

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[53] Hughes, Owen. *Public Management and Administration* (Tornonto:St. Martin's Press, 1998), 47

[54] Niskanen, William A., *Bureaucracy: Servant or Master? Lessons from America* (London: Institute of Economic Affairs, 1973).

[55] Niskanen, William A., *Bureaucracy: Servant or Master? Lessons from America* (London: Institute of Economic Affairs, 1973), 23

[56] Ostrom, Vincent, The Intellectual Crisis in American Public Administration,(University of Alabama Press, 1974), 64

1. it is large, in other words members of the highest levels know less than half of the staff members;

2. the majority of the employees work full time and depend on their job in the bureau for most of their revenue;

3. the hiring, promotion and retention of the staff is based, at least formally, on a technical evaluation regarding their performance or their expected performance given the role they are expected to perform in the bureau rather than on predetermined criteria (religion, race, social class, etc..) or as a result of periodic elections by an external body;

4. The output of the bureau is not, for the most part, directly or indirectly assessed in open markets by means of voluntary quid pro quo transactions[57].

With this operationalization of the concept of the bureau, Downs defines a bureaucrat not only as a person working in a bureau, but rather as a person working for a large organization, who receives a salary from the organization – which represents most of his revenue - who is employed, promoted and maintained within the organization on the basis of his performance of his assigned task, and who produces results that can not be assessed on the market[58].

Downs' argument starts from the assumption that bureaucrats, like any other actors in society, are mostly motivated by their personal interests[59]. Following this assumption the author proposes three main hypothesis. The first hypothesis states that all bureaucrats seek to achieve their objectives in a rational manner, in other words the most efficient manner, given their limited capacity and the cost of information. Thus, bureaucrats seek to maximize utility. The second hypothesis refers to the fact that bureaucrats have a complex set of objectives which include items such as power, income, prestige, safety, loyalty (to an idea, institution, etc..), serving the public interest. The last hypothesis concerns the fact that the internal structure and behavior of each bureau is closely linked to interactions with the environment, each of these being interlinked with the other[60]. The three hypothesis proposed by the author lead to the conclusion that when it comes to analyzing bureaucratic behavior the institutional context in which they operate should be investigated. Thus, one must take into account the fact that bureaucrats seeks to maximize utility, the internal and external constraints on the bureaucrat's behavior as well as the impact of bureaucratic behavior on the office[61].

Another perspective on bureaucratic behavior is offered by Niskanen within the theory which describes the supply of goods and services by bureaus. According to the author bureaus are defined as those organizations that have both of the following characteristics: 1. employers and employees in these organizations shall not acquire any part of the difference between revenues and costs for personal gain; 2. part of the organization's income results from sources other than the sale of outputs[62] (Niskanen, 1994:15). In other words, the perspective proposed by Niskanen sees the bureau as a non-profit organization which is funded in part by loans or regular grants. The bureaucrat is thought to be a full time employee in a bureau, wether he is a public sector professional or directly appointed by the executive[63].

The approach proposed by Niskanen focuses on the relationship between the bureau and the environment, namely the governmental sector, and the consequences of this relationship on the bureau's budget and outcomes. The author points out that bureaus are specialized in producing goods and services in large quantities rather than demand per unit product (Niskanen ,1994:15-18). His argument is that bureaucrats try to maximize the total budget of the office during their leadership.

[57] Downs, Anthony, „A theory of bureaucracy", *The American Economic Reviw* 55 (1965), 439-440
[58] Downs, Anthony, „A theory of bureaucracy", *The American Economic Reviw* 55 (1965), 440
[59] Downs, Anthony, „A theory of bureaucracy", *The American Economic Reviw* 55 (1965), 439
[60] Downs, Anthony, „A theory of bureaucracy", *The American Economic Reviw* 55 (1965), 441-442
[61] Downs, Anthony, „A theory of bureaucracy", *The American Economic Reviw* 55 (1965), 444
[62] Niskanen Jr., William A., *Bureaucracy and public economics* (Ed. Edward Elgar, 1994), 15
[63] Niskanen Jr., William A., *Bureaucracy and public economics*, (Ed. Edward Elgar, 1994), 15-18, 22

The budget is subject to the constraint that it must be equal to or greater than the minimum total cost of supply as compared to the results expected by the body which finances the bureau[64].

The bureau shaping theory proposed by Patrick Dunleavy is built in opposition to the budget maximizing model proposed by William Niskanen. Dunleavy starts from the assumption that bureaucrats seek to maximize their personal utility when making official decisions. The general policy of a bureau is defined by a combination of individual decisions made by senior bureaucrats who act in it and their interaction with the structure the agency is subordinated to (interactions with the sponsor body). In general, the policy influence of the officials of the bureau is significantly structured according to rank, so that officials holding top-level positions will be the most influential. Structures acting as principal (sponsors) will depend to a considerable extent on the bureau (agent) in relation to information about the costs, benefits and results of the bureau, although they receive some general information from the public.

There are four reasons why rational bureaucrats should not act to maximize the budget: a) the collective action problems within bureaucracies have a considerable influence on the general behavior of the office, b) the extent to which the utility of the bureaucrats is associated with an increased budget varies depending on the different components of the overall budget and according to different types of agents, c) even if some bureaucrats act in order to maximize the budget, this process will continue only until an optimum level is reached and d) high-level bureaucrats try to maximize the utility of the type of tasks they carry out (work-related utilities) rather than the financial utility, in which case collective strategies for the remodeling of the bureau in which they work into other types of structures (agencies) may be the best alternative to achieve this goal. Whether high-level bureaucrats choose the modeling strategy or strategies to maximize the bureau's budget systematically vary depending on the type of bureaucratic structure[65].

Reasons for bureau shaping

Senior officials (who are in hierarchical positions where they can influence the policies of the bureau) acting to maximize their own welfare are mainly interested in securing a prestigious working environment and pleasant tasks for three reasons. The first reason is that high-level officials are less interested in financial components (income, job security) than lower-level officials, this is a general assumption of public choice literature. High-level officials are more interested in maximizing utility and non-financial status, prestige, influence and, in particular, the importance and interesting nature of the work they perform. Secondly, the design of the public sector imposes severe limits on the ability of officials to increase their financial utility (income) by using individual or collective strategies, whether it is the budget maximizing strategy or the use of discretionary funds for personal interest. The amount received as a salary is restricted by the use of a standardized cap. Thus, in public administration there are no consistent bonuses equivalent to the ones provided to the leadership of private corporations. In addition, general limitations imposed on the number of employees, centralized auditing systems, the prohibition of economic activities and the structure of careers are features that reduce the ability of government officials to pursue individual financial interests.

Similarly, non-financial but related benefits, such as company cars or equipment are also strictly controlled[66]. The third reason is the fact that utility maximization regarding the inherent characteristics of the tasks seems to be a major influence on how the bureaucracy works.

There is sufficient evidence that self-interested bureaucrats have strong preferences about the work they want to perform and the type of agency they want to work in. Clearly, there is a financial

[64] Niskanen Jr., William A., *Bureaucracy and public economics*, (Ed. Edward Elgar, 1994), 15-18, 42

[65] Dunleavy, P., *The bureau-shaping model in Democracy, Bureaucracy and Public Choice*, (Harvester Wheatsheaf, 1991), 97

[66] Dunleavy, P., *The bureau-shaping model in Democracy, Bureaucracy and Public Choice*(Harvester Wheatsheaf, 1991),117

component of the agenda of officials, an income level they wish to achieve, but there is a high probability that this component is not very important for officials which hold positions that allow them to make bureau policy decisions. In other words, senior officials have already reached the level of income they wanted to achieve so that the importance of this factor decreases the higher the hierarchical position. Consequently, rational officials want to work in small, collegial and elite bureaus who are close to the centers of political power and not to be in charge of large structures with many employees and large budgets, but with routine activities, with a conflictual environment and low status[67].

Collective strategies for bureau shaping

If officials want to maximize their utility regarding the characteristics of the tasks they perform the most effective strategy that is available is that of individual action, that is looking for jobs that bring them closer to the desired level and the desired agency.

However, once the individual alternatives are exhausted there are a series of collective strategies that can be used for shaping the bureau in order for it to become an increasingly accurate approximation of the type of elite agency, with has a friendly atmosphere and is close to the centers of political power. There are five ways to shape a bureau:

1. Major internal reorganizations. Changing the structure of the bureau on a regular basis may increase the degree to which it approaches the ideal of an elite agency that outlines policy directions. The number of posts dealing with public policy formulation increases, while the number of lower level positions that deal with routine activities is reduced and employees occupying these positions are separated from the upper levels. Sometimes this is a geographical separation.

2. Transforming internal practices. Senior officials (policy-level officials) want to maximize their work related utility and to increase their ability to control policies in a discretionary manner. The adoption of sophisticated systems of management and policy analysis (using electronic equipment for routine tasks, statistical models) can protect the bureau from criticism from rival bureaus, external partners and the structure they are subordinated to. There is also the tendency to change the composition of the staff, encouraging the employment of specialized professionals with technical expertise, which increases the agency's status and improves the nature of the tasks performed by members. The main feature of this strategy is the automatization or externalization of routine tasks allowing the use of staff for policy development tasks. After the completion of these changes the officials dealing with policy analysis tend to emphasize the collegial decision-making and teamwork methods which results in the dispersal of responsibility.

3. Redefining the relationship with external partners. In cases where the bureau interacts with external organizations on a regular basis, such as subordinate public agencies, subcontractors, organizations whose activity is regulated by the bureau or interest groups, these relationships can be readjusted so that the volume of routine tasks is reduced and the bureau's control over policy is maximized. The bureau tries to minimize its dependence on external organizations given that a high volume of control or management tasks can be a risk if the subordinate or external organizations refuse to cooperate. Replacing this type of tasks with a control mechanism which protects the bureau is usually a priority.

4. Competition with other bureaus. Bureaus always defend their ability to manage funds for subordinate bureaucratic structures. Government agencies at the same level compete with each other for responsibilities concerning the administration of lower-level bureaus and public policy areas that fit the profile of the agency type they wish to approximate.

5. Hiring external agents. The most radical alternative available to senior offices who want to redefine the functions of their agency comes from their ability to outsource functions inconsistent

[67] Dunleavy, P., *The bureau-shaping model in Democracy, Bureaucracy and Public Choice*(Harvester Wheatsheaf, 1991),118-119

with the ideal type of agency that senior officials want to approximate. Central government departments may transfer routine functions or activities to local government structures or such tasks can be transferred to the quasi-governmental agencies. The auxiliary functions can be outsourced to the private sector[68].

I believe that the model of bureaucratic behavior proposed by Dunleavy best fits the given collective choice arrangement, namely the government agency. One argument for this is that he refers to bureaus that have similar characteristics to those of governmental agencies. For example, in this model he shows that rational officials want to work in small, collegial and elite bureaus that are close to the centers of political power and not to be in charge of large structures with many employees and large budgets . This shows that the model can be applied to government agencies. The argument is that we can draw a parallel between the small, collegiate and elite bureau, that is not necessarily close to the main governmental hierarchy and the government agency which is usually positioned further away from the hierarchical structure of the central ministries and state departments. Another issue concerns the fact that self-interested bureaucrats have strong preferences regarding the type of work they want to perform and the type of agency they want to work in. This feature can be correlated with the fact that government agencies carry out public tasks at the national level.

In addition, the bureaus for which Dunleavy suggests this model are state financed and civil servants are employed, features also present in the case of government agencies.

3. Challenges in studying agencification and bureaucratic behaviour in Central and Eastern Europe

In terms of studying the agencification process in Central and Eastern Europe states there were difficulties regarding change in the government apparatus. To highlight this situation we should consider a brief description of the transition from a communist to a democratic regime in the countries from Central and Eastern Europe. It should be noted that the transition led to the significant changes on several fronts. On the one hand, the transition to a market economy led to significant changes in the structure and nature of the state, especially concerning privatization of public enterprises and also a public policy shift towards economic reform. On the other hand, there are political changes accompanying the process of democratization. In this context, concerns for economic and political reforms have prevailed in relation to achieving change in the government apparatus itself, particularly in relation to public administration. One argument in favor of this idea is offered by Barbara Nunberg who claims that public administration reforms have occurred at a much lower rate, a possible reason being the reluctance of foreign investors in supporting external programs to strengthen administrative capacity. This was largely due to the fact that attention was focused in particular on accelerating economic reforms, but also to some extent the appearance of a wave of anti-statist response to delegitimization of the communist state69.

In this context, in the countries from Central and Eastern Europe there are significant changes ocuring during the ongoing democratization process, these changes being incremental in nature. At the same time, there is the need to increase capacity for policy formulation and implementation of programs to strengthen and maintain the results produced by the aforementioned reforms. To achieve this goal the interest shifted towards producing changes in the government apparatus, specifically in regard to the transition from a centralized bureaucracy to a modern, efficient and focused one based

[68] Dunleavy, P., *The bureau-shaping model in Democracy, Bureaucracy and Public Choice*, (Harvester Wheatsheaf, 1991),119-121

[69]Nunberg, Barbara. Barbone, Luca. Derlien, Hans-Ulrich, *The state after communism: administrative transitions in Central and Eastern Europe* (World Bank regional and sectoral studies, 1999), 1.

on performance70. From these considerations it is noted that in order to propose an analytical model of bureaucratic behavior in the governmental sector it will be required to draw a clear and comprehensive view regarding the institutional environment and the processes and transformations that occur within it.

Taking these into account it is necessary to follow the emergence of government agencies and the specifics of this process in Central and Eastern Europe states.

First, as mentioned above the changes in the government apparatus were performed in a slower pace during the process of democratization. Secondly, a large part of public organizations in these countries inherited legal personality since the communist regime, which resulted in procedural and formal consequences. In these circumstances, the creation of government agencies in Central and Eastern Europe involved the creation of new autonomous organizations to respond to new functions, but also a significant increase in legally separate autonomous.[71]

The challenge of studying the behavior of bureaucrats in government agencies from countries in the process of democratization in these circumstances is twofold. While there is a series of empirical research embodied in case studies concerning government agencies in some countries in Central and Eastern Europe (Beblavy, 2002, Pollitt, Talbot, 2004; Pollitt, Talbot, Caufield, Smullen, 2005, Van Thiel & CRIPO team, 2009, Hajnal, 2010), they focus primarily on providing research tools and methods and less on shaping a clear and comprehensive theoretical framework. For this reason, the challenges of such a study leads to highlighting the similarities and differences in creating agencies between democratic states in relation to the ones in the process of democratization. Through this method there will be provided a better understanding of the complexity of the institutional environment. Moreover, such challenge of sketching a theoretical framework and outline a model involving the analysis of bureaucratic behavior will become more clearly defined.

Considering the challenges presented above in studying bureaucratic behaviour in agencies in Central and Eastern Europe states I consider that the method developed in this paper has a real potential. An argument in this sense is that by developing a institutional analysis framework for studying bureaucratic behaviour there are several aspects covered. First, it offers a strategy to create a formal characterization of the existing institutions in government agencies in general. Second, by viewing institutions as rules, norms and procedures it helps to highlight the institutional arrangements in the moment of creating the agency and the changes that occur in time. An important aspect possible to be observed is the process of auto-regulation which appears when agencies obtain a certain degree of autonomy. Hence, the approach suggested outlines exogenous institutional arrangements and how they shape the agencies when they are created and also endogenous ones which are established during the lifespan of the agency. These dimensions are important in tackling the challenges presented above in studying agencies from Central and Eastern Europe states.

Conclusions

This study shows that in order to create a framework for analyzing the behavior of bureaucratic governmental agencies two steps need to be taken.

A first step is the formal characterization of the existing institutions within government agencies. We have shown that it can be done by using the rational choice institutionalism type approaches. From this approach we found that the model which defines institutions as based on rules as having the best potential in characterizing the institutional context which corresponds with the formation and operation of government agencies.

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[70] Nunberg, Barbara. Barbone, Luca. Derlien, Hans-Ulrich, *The state after communism: administrative transitions in Central and Eastern Europe* (World Bank regional and sectoral studies, 1999), 1-2.

[71] Beblavy, Miroslav, „Understanding the Waves of Agencification and the Governance Problems They Have Raised in Central and Eastern European Countries" (OECD Journal on Budgeting, 2002), 121.

A second step regards the choice of a bureaucratic model that can be used in explaining bureaucratic behavior in government agencies, taking into account the institutional context in which they are placed. Completion of this approach has led to exposure in the behavior postulates on collective choice arrangement gives (government agencies).

In conclusion, to draw up a comprehensive framework for the analysis of bureaucratic behavior in government agencies is necessary to rely on a method to consider institutional arrangements as they occur and at a later stage of their operation, but to consider and a bureaucratic model to answer this question on the influence of institutional context to the internal and external rules of bureaucratic behavior.

The implications of using an institutional framework for analyzing government agencies in Central and Eastern Europe states are as suggested in the third section of the paper that the researcher is offered a comprehensive strategy in studying bureaucratic behavior. Also, the study shows that the challenges presented by researching bureaucratic behavior in agencies in Central and Eastern Europe states and the difficulties in finding common ground in this area are better faced if we are equipped with theoretical and methodological tools from an institutionalist perspective.

In this respect, as mentioned at the beginning of the paper, developing an institutional analysis framework in studying bureaucratic behavior in government agencies is a step for a future research concerning public accountability and bureaucratic behavior in agencies in Central and Eastern Europe. Hence, this study represents the foundation on which there will be conducted the research mentioned, that will put an emphasis on institutional arrangements and how they affect bureaucratic behavior in terms of public accountability.

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A FUTURE APPROACHES, SOCIAL ORGANIZATION AND THEIR ECONOMIC CONSEQUENCES OF THE INFORMATIONAL SOCIETY – KNOWLEDGE SOCIETY

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Abstract
The paper is the result of scientific study under doctoral thesis "Information Society and its Economic Effects" and contains seven sections:
-section 1: "Globalization, Development and Information Society";
-section 2: "The Impact of the "Digital Divide" and "Digital Inequality" Phenomena" ;
-section 3: "Information Society –Knowledge Society, Definition, Objectives and Strategies" ;
-section 4: "Social Structures and New Life Patterns in Information Society" ;
-section 5: "Virtual Organizations, Activities and Businesses" ;
-section 6: "Strategies, Programmes and Courses of the Information Society Approach" ;
-section 7: "The Economic Effects Foreseeable through the Implementation of Information Society–Knowledge Society".

Keywords: *Information Society, Knowledge Society, Society of Truth, Spirit, Conscience and Morality(STSCM), IT&C, Digital Divide, digital inequality phenomenon, SITM, LONG-LASTING SOCIETY, Tele Centre, Cybermarketing, TeleEducation, TeleShopping, TeleMedicine, e-goverment, e-commerce, e-banking, entertainment systems, teleshopping, telelearning, mobile telephony, virtual telecommunities,Telecottage, Electronic Village Hall, Community Telecommnications Center, Distance Education, Distance Learning, Open Learning, Open and Distance Learning, E-education, Virtual Organizations, virtual team, electronic business solutions (EBSP), leap-frogging.*

1. Section 1, entitled "Globalization, Development and Information Society", represents the level of knowledge and contains the description of the amplitude of the globalization phenomenon, the interconnections globalization-global economy substructure, the analysis of the phenomenon concerning the development of the electronic industry and IT&C and also the situation of the world countries facing the accomplishment of the Digital Economy and Information Society. Subsequently, the problematics concerning the world countries vs. the development tendencies of the IT&C field are presented. The conclusions that are presented in this section, concerning the phenomenon of globalization, refer to the following aspects: (a) the dramatic increase of the information transfer flow at the global level, at the same time with the exponential development of the IT&C components and the global substructure of telecommunications, among which the main part is played by the Internet system; (b) the massive increase of the international cash flows and ISD; (c) the significant increase of the international trade volume; (d) the rapid development of the global financial markets, considered to be a "weightless economy"; (e) the creation of "Porteris clusters", a new "digital geography", generated by innovation and technological clusters, actually made up of interdependent assemblies of competences, capability and local capacity; (f) the decrease in action and importance of the economically developed countries, in the favour of STNs and international bodies (UNO, IMF, Global Bank, OMC, OECD etc.), at the same time with the increase

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of the STN importance for the global trade; (g) the externalization of the activities of marketing, production and services, the creation of a new international financial and industrial structure; (h) the increase in number, applicative and restrictive force of the universally applicable standards; (i) the increase of legal and especially illegal migration of people and labour force, at the same time with the accentuation of "brain migration" to the most economically developed countries; (j) the optimization of the cultural relations at the global level, the informatic facilitation of the access to the universal cultural values, by implementing the concepts of "multiculturality", "mobility" and "interchangeability"; (k) the universality of the English language and Anglo-Saxon concepts. In this section, are also presented the drives of globalization: scientific and technological innovations and the ampleness of the development of the electronic industry (drive I), the implementation and generalization of the usage of Digital Economy (drive II), the present politics of a neo-liberal type, considered to be the motive power of the globalization phenomenon (drive III), and the implementation and generalization of the usage of IT&C (drive IV).

2. Section 2, "The Impact of the "Digital Divide" and "Digital Inequality" Phenomena" starts with the analysis of the "digital divide" phenomenon, regarded as the virtual distance between individuals, generally considered, or geographical areas, seen at various economic and social levels, from the viewpoint of the common perspective on their opportunities, depending on the access to the facilities provided by IT&C and the usage of the Internet system for the whole range of human activities. These reasons have led us to the solution of treating this phenomenon from the viewpoint of the following essential aspects: **(a) the "digital divide" phenomenon and its impact on the contemporary world; (b) the ampleness of the "digital inequality" phenomenon and (c) the effects of the "digital inequality" phenomenon.**

The conclusions concerning the "digital divide" phenomenon, refer to analysing the level of access to the communications technology, basing the "digital divide" phenomenon on the dynamics of access to the Internet system – competition is the key to the Internet access –, studying the cost of the access to the residential and business phone systems and the reason of the decline of the Internet access costs. In this section, are presented the analysis indicators of the "digital divide" phenomenon: the ethnic factor and division are apparent in "digital divide", the usage of the IT&C facilities and the Internet system by the industrial and business sectors, the access to the IT&C technologies and the Internet in the urban and rural regions, the access to the IT&C facilities and the Internet by the urban and rural regions, alternatives of access to the IT&C technologies (cable and satellite broadcasts and access). From the viewpoint of rendering the "digital inequality" phenomenon, we have presented the ampleness of the "digital inequality" phenomenon, its features, the present inequities in using the Internet, the differences in the on line usage capacity and the influence of the education level. The effects of the "digital inequality" phenomenon are rendered by the analysis of the population access to the Internet, the analysis of telephone usage, the analysis carried out in respect to age, the analysis of the access to electronic services and the usage of the Internet system in respect to the statistic indicators of population, at the same time with the usage of the Internet system at the level of governmental, corporatist and social structures (under the influence of some representative factors: the general usage of the Internet system, the usage of the Internet system in kindergartens, public libraries and communitarian centres, the typology of the equipment of access to the Internet, the type of the Internet provider, the analysis of the Internet usage at home/ outdoors, the accomplishment of the on line confidentiality and the promotion of competition and universal services.

3. Section 3, "Information Society – Knowledge Society, Definition, Objectives and Strategies", contains the analysis of the human society evolution, seen as a systemic complex of interpersonal relationships, a historically determined uniform assembly, resulted from mankind's activity to produce material goods and spiritual values, necessary for the individual and collective living. The Informational Society is strongly marked by the revolution in the IT&C domain, the

political actions and the innovative spirit. The revolution in the IT&C domain was foreseen by the predictions of the sociologist Alvin Toffler, concerning the society of The Third Wave, characterized by some defining elements: **(a) the complex phenomenon of knowledge; (b) the process of demassifying the markets, investments and production; (c) the essential role of the dynamic and continuous innovation flows; (d) the rapid and complete integration of the technical and economic systems; (e) the training of the digital technologies of information storage, transformation, processing and communication, seen, in their turn, by the quintet of data-knowledge-messages-images-sounds; (f) the usage of the technologies that will decisively determine the evolutions within all the fields of human civilization; (g) the complex and complete usage of the Internet system in non-academic fields, by involving a large number of users**.

The innovative policy and spirit imply the activity of innovation and usage of the essentially new ideas and concepts, seen as an integral part and coordinate of the present governmental and entrepreneurial policies; these policies lead to the general progress of society, by renewing, optimizing, transforming or converting the present techniques, technologies, products, components and services. There have appeared and been implemented new concepts and technologies, related to the field of socio-economic informatics and dedicated to the access of state institutions, companies and ordinary people to the networks of computers and distributed DB of all kinds. These transformations have generated new terms, in connection with that of information society, such as Information Technology-IT. Moreover, IT&C is present in many new fields: DB management, consumer services, office work, long-distance open learning, publicity, data and information transfer, commercial and bank transactions, insurance-reinsurance, telework, entertainment systems, teleshopping, telelearning, mobile telephony, medical services etc.

Information Society will ensure the democratization of the association, agreement and co-operation, by means of global data communications, public data and information transfer at a world level, on line co-operation by means of the Internet and/or other types of networks and IS[1] with a global character, with a view to achieving complex data processing, addressed to all the categories of professional/non-professional users. This society has as its main target the systematic improvement of people's living and working conditions, irrespective of their nationality, by development and intellectual stimulation, by indiscriminative and co-operative on line access to the IT&C facilities, by the access to the national and/or global data networks, to the Internet. The third millennium will bring the creation and effective usage of the knowledge society (SC), which will include the Information Society as well, given the fact that we can consider knowledge as the result of the action of some convergent factors – the semantics and action of information – for which reason the knowledge society will be based on IS-KS, which is a broader concept than SC, as a result of the primordial role granted to the tandem of information-knowledge in human society.

The concept of KS (knowledge-society) revolves around the society based on knowledge (knowledge-based society or knowledge-based economy).

Dependent on the phenomenon of knowledge, Knowledge Society has the following particularities: **(a) the extension and thorough study of scientific knowledge and the truth about knowledge; (b) the usage of knowledge management by organizational and technological knowledge; (c) the approach and implementation of technological knowledge production by the phenomenon of innovation; (d) the maximum dissemination of knowledge for all people, mainly by the Internet, electronic books and e-learning; (e) IS-KS is represented by the parallel concept named "the new economy"**, characterized by profound innovation processes, defined by the assimilation and transformation capacity of the innovative knowledge, for developing new products, services and symbols; innovation will be the powerful and profound determinant in SC, by aiming at increasing productivity in respect to the energetic, material and natural resources and the

[1] IS-information System

protection of the environment, for which reason, in this new society, the companies that bring technological innovation, on the basis of some proper and particular knowledge structures, will be favoured and determinant; the innovative companies will be created by the co-operation between the companies of different sizes and academies, private/governmental research institutes etc.; **(f) "the new economy" is focused on maximizing the influence and usage of the Internet system,** seen as the principal market for IS-KS, at the same time with increasing the importance of the value of assets, within which knowledge will play a special part; **(g) IS-KS will be of an ecologist type,** because it will lead to developing goods, services and symbols by scientific and technological knowledge, plus their combined management, with a view to implementing some technological and biological organizations and transformations, meant to save the accomplishments of the human civilization; **(h) IS-KS will be a new stage in the human culture**, given the fact that the culture of knowledge will become primordial, at the same time with the involvement of all the forms of knowledge (technical, economic, architectural, literary, artistic, philosophical etc.). In the future, mankind has to approach and think over the perspective of founding a society of the second generation, the society of truth, spirit, conscience and morality (STSCM).

Knowledge Society will be based on certain fundamental vectors, seen as instruments capable of allowing and ensuring the assimilation and transformation of the society into the Information Society, subsequently acknowledged by the acronym IS-KS. The technological and informational vectors of IS-KS are represented by the Internet, extended and developed in time and space, the e-book technology and the intelligent agents. The main managerial, cultural and social vectors are: the knowledge management for organizations of any type, kind or size, the management of moral usage of knowledge at a global level, the educational system based on the IS-KS methods (e-learning), the healthcare system at the social/individual level, studies of biological knowledge of genomic interest, the increase in using some fundamental factors of human knowledge, the protection of the environment, meant to ensure a LONG-LASTING SOCIETY, by increasing the usage of the management specific for knowledge.

The organizational and functional vectors of IS-KS are new methods concerning the development of the activities at home. The implementation of the e-activities of a virtual community type, Tele Centre, Cybermarketing, TeleEducation, TeleShopping, TeleMedicine, the implementation of the adaptations made by using computers, telephony or digital television, at home or at work, the information state.

IS-KS will be able to be achieved under the conditions of the existence of an "Information State" that will use the concept of "e-government", by means of which will be developed and used new technologies in the fields of data communication and information technology at a national, regional or global level, addressed exclusively to the functions of the state and oriented towards the information requirements of the citizen; there will be used the concept of "e-commerce" by which the techniques of e-purchase will be monitored, at the same time with the usage of some specific technologies and an adequate pan-European legal frame. The information state will dispose of an intelligent transport system, connected to a global system of modern transport, which ensures the technical and economic optimum and the general security, by rapid and reliable access to the new communication systems and pan-European/global digital services.

The citizens of this state will be provided with on line healthcare, the usage of some medical technologies of an intelligent type, the health condition monitoring at a national level, including the total access to BDD with a medical specificity or for monitoring the critical situations concerning the health condition of the population. The information state will be characterized by the concept of "e-participation", addressed to the people with disabilities, and by the access to the communication, media and information substructures for people with disabilities.

There will be implemented **home activities addressed to the citizen**: **(a) new forms of working (telecommuting, virtual office, telework etc); (b) e-activities (virtual community, TeleCentre, Cybermarketing, TeleEducation, TeleShopping, TeleMedicine etc).** The Internet

will be architecturally, operationally and functionally complemented by the satellite systems: Intranet and Extranet. The information state will act through the government, agencies, companies, social institutions, schools, universities, cultural institutions, churches, dwelling places etc. Information services, such as e-goverment, e-commerce, e-banking, entertainment systems, teleshopping, telelearning, mobile telephony etc. will be implemented.

The information state will be based on the idea of "Internet Society", which, in our opinion, will be a virtual construct, made of electronic media of transmission and operating systems of the "self-aware" type. The approach scale is universal, for which reason the information state will be connected with the universal political, economic and spiritual media, by activating a theoretically infinite number of computers used for providing on line data and information worldwide. Briefly, the information state will be characterized by new basic concepts, out of which we mention: cheaper Internet, e-research, e-security, e-education, e-working, e-accessibility, e-commerce, e-government, e-health, e-content, e-transport etc. The information state will be non-exclusivist, because it will provide a society for all the citizens initiated in handling data and information stored in various BDD in time and space and operational on various heterogeneous NC , at a national, regional, European or global level. IS-KS will be based on the market opened by the Internet system, for which reason we can talk about new connected concepts: Internet economy, new economy or digital economy.

The actual creation of the new economy takes into consideration the following elements: (a) knowledge becomes an economic factor, which leads to the increase of the importance and usage of the intangible assets within the production of economic value; (b) information in general and the Internet system in particular will significantly influence the companies in the market economy; (c) the development of a sustainable economy must be done only within IS-KS, by re-orienting the economic thinking. The new economy is characterized by some fundamental aspects: (a) creating the premises for the implementation of IS-KS and reaching a stage of an ecologically sustainable society; (b) creating and using knowledge in the economic field, especially by involving the innovation phenomenon; (c) the development of innovative companies, mainly created by joint-venture between companies-universities-governmental/public/academic research institutes. "Knowledge economy" is dependent on the increase of the role and ampleness of using the information concept.

In our opinion, it comes out that the "knowledge-based economy" has the following **features: (a) the focus on the electronic market of the Internet type[2]; (b) the legislative and economic encouragement to found companies that induce technological innovation on the basis of some proper and particular structures of knowledge; (c) the usage of knowledge management under the reign of the organizational and technological knowledge; (d) the prevailing completion of the production of technological knowledge by means of innovation; (e) the increase in importance of the value of intangible assets, especially of knowledge, at the same time with using these goods at full capacity, according to a new spirit; (f) the maximisation of the influence and usage of the Internet system, seen as the main market for IS-KS; (g) the development of some profound innovation processes, by means of the innovative knowledge capacity to assimilate and transform; (h) the development of new products, services and symbols; by the decisive contribution of innovation of all kinds, with the declared purpose to increase productivity in respect to the energetic, material and natural resources and the protection of the environment; (i) the creation of a society of the ecologist type, by implementing some technological and biological organizations and transformations, with a view to preserving the accomplishments of the human civilization; (j) the maximum usage of scientific knowledge and the truth about knowledge; (k) IS-KS will ensure the premises for a rapid approach of the society of truth, spirit, conscience and morality (STSCM)[3]; (l) the**

[2] Davidescu, N – Generalisable Programme-products, Concepts and Development Methods, Scientific Symposium, ASE, Faculty of Accounting and Management Information Systems, 1998

[3] SASCOM: the Society of Truth, Spirit, Conscience and Morality: STSCM

maximum dissemination of knowledge for all the citizens (the Internet system, electronic book, e-learning etc); (m) IS-KS will be a new stage in the human culture, by the predominance of knowledge culture and the involvement of all forms of knowledge; (n) the intense and intensive usage of knowledge, applied in the field of economics, especially by encouraging the phenomenon of innovation; (o) the provision of IS-KS sustainability in respect to the priorities of preserving a non-polluted environment; (p) the development of a new economic thinking and new economic rules, applied in accordance with the semantics and specific phenomenon of IS-KS accomplishment.

4. Section 4, "Social Structures and New Life Patterns in Information Society", approaches the time-space paradigm of IT&C, which will allow for every "user" to be connected to a SI[4] of a certain level, size and complexity; deep changes will take place within the fields of organization and work processes, by the introduction of some new social structures and life patterns. IT&C and IS-KS will induce fundamental changes within all the fields of the economic and social activity, by altering life and work style, at the same time with recording some beneficent influences on personal and social life.

IT&C will imply various changes of a physical, functional or organizational nature within all the structures of society, by changing the social structure, workday, work form structure, governmental, business, commercial, educational, informational and organizational structures[5].

The interaction between IT&C and the flexible work forms induces a triple perspective: organizational, temporal and spatial. The new work forms are influenced by IT&C through: work flexibility, the quantity of teleworking, the time vector, teleworking and voyages. There will emerge new forms of interior design, endowment with computing techniques and telecommunications, including the emergence of new transport solutions for eliminating the time and space restrictions of the telecommuters' circulation, with foreseeable implications, in time, on the dimension and structure of the transport systems. The influence of IT&C on social change leads, in our opinion, to the emergence and strong influence of social informatics, seen as the science that uses a finite set of concepts, technologies, CASE design instruments, Internet software facilities, computing systems-telecommunications of national nature, associated software-firmware technologies, specialized staff, elements that allow the design of IS and their usage in the field of IT&C, in interdependence and dynamic-functional connection with the social, cultural, institutional, organizational, managerial environment, the public access to information of social nature, scientific communication by e-journals, the public access to the Internet system, the usage of this system for performing some activities of social nature, e-activities (e-commerce, telework (for managerial and commercial purposes, telephone operators and offices etc.), telecommuting, cyberMarketing, teleShopping, teleEducation, teleMedicine etc.), new organizational structures (virtual office, virtual community, teleCentre etc.)[6].

Social informatics will impose e-commerce in respect to the classical markets, the possibility to facilitate the disappearance of the Gutenberg civilization and its replacement with the von Neumann civilization, the assertion of long-distance open learning, the achievement of an informational boom concerning e-journals, the global implementation of virtual libraries, the global generalization of the virtual government, including the development of various SIG types[7]. Major

[4] SI: Information System

[5] Rosca Gh. Ion, Marian Stoica, New Work Forms and Activities in the Knowledge and Infromation-based Society, in the volume "Information Society-Knowledge Society, Concepts, Solutions and Strategies for Romania", Expert Publihing House, 2001.

[6] Davidescu, N., Internet-Shopping Operations by Local Virtual Networks (VLAN), Informatic Opportunity for Developing Countries, 2005

[7] The Bologna Declaration of the ministers of education from 28 European countries and the majority of the candidate states, June 19th 1999

changes will occur in the community life and at the social level; competitive and efficient bidirectional relationships between IT&C, social informatics and social organization will be implemented.

In our opinion, social informatics will allow the multidisciplinary application of the design and usage of IT&C in a dynamic and functional interaction with the social, cultural, institutional, organizational, functional managerial environment etc. Social informatics will influence public life at a global level by the worldwide usage of the Web technology, by means of which people everywhere will access and get the information they need, in different forms and formats, in real time, at minimum costs and delivery time; the total replacement of the classical education by the active instruction with on line access to the Internet is to be expected. It will thus lead to the design and implementation of some IS based mainly on the facilities of the Internet system and IT&C, seen as technical-social-virtual networks (RTSV), which will ensure the development of some informational and electronic spaces, the generalization of e-journals, the extension of the discussion forums, electronic systems of teleconferences etc. It is expected to emerge practical solutions concerning the info-social-virtual cells of administration (CIVA), made of various elements, fundamentally based on the facilities of the Internet system: human structures, informational structures, organizational structures, managerial structures, training structures, information structures of the hardware type, information structures of the software type, usage techniques and methods etc. In our opinion, we can talk about various types of social access to the IT&C and Internet resources: social access at the personal, organizational, regional, departmental, political and scientific level.

Telecommuting is a multiply characterized concept: (a) telecommuting means "working a day or two per week in a secondary office or at home, being electronically connected to the headquarters"; (b) telecommuting is considered to be a long-distance work form; (c) telecommuting is working at distance, which means that a person can perform their work from a different place than the one where is/are the person/people who directly monitor them and/or pay them for the work they performed; (d) telecommuting is working at distance, combined with telework; (e) SCAQMD and TAC define telecommuting as "homework or work in a satellite work centre (an alternative workplace), by using means of electronic communication or of any other type for staying in touch with the regular workplace"; (f) "Telecommuting is homework or work in an alternative workplace, by using means of electronic communication or of any other type for staying in touch with the regular workplace, instead of the physical movement to a farther workplace".

The virtual office is a work system that allows the performance of activities in a distributed way in time and space, by changing the proportion between working at the headquarters and working in satellite spaces, at the same time with the intensive and extensive usage of the Internet-Intranet-Extranet systems by the employees, in many places and at different moments[8]. The notion of virtual office defines a series of domains based on the concept of telecommuting, being an alternative solution of various work patterns, with a relative degree of mobility of action at a certain stable workplace; the essential ways to reflect the virtual office in respect to the employee's amount of freedom: telecommuting with complete mobility, homework, telecommuting with flexible hours, semi-mobile telecommuting, random telecommuting and the telecommuting completely distributed in time and space.

Telework implies using IT&C and NC[9] with the purpose of replacing/reducing the standard work pattern performed by the big companies, by the fact that the telecommuters from various fields of activity (management, accountancy, financial audit, services etc.), physically and logically interact with people/goods in an insignificant proportion of the daily/monthly working hours. Conceptually

[8] Rosca Gh. Ion, Marian Stoica, New Work Forms and Activities in the Information- and Knowledge-based Society, in the volume "Information Society-Knowledge Society, Concepts, Solutions and Strategies for Romania", Expert Publihing House, 2001.

[9] NC-network Computers

speaking, telework has three components: flexwork, homework and telecommuting. In our opinion, telework is a spatial and temporal distribution method of a company by means of which is implemented the concept of "virtual organization", which is meant to allow overcoming the restrictions of time and space that exist in a standard way; telework can be regarded, in a complementary way, as a method used by the managers with a view to improving the performances of the companies and to adapting to the conditions provided by the environment.[10] Briefly, telework is a contemporary form to re-organize the organizational structures, by which the development of the "virtual organizations" is ensured.

The e-activity of the Cybermarketing type is based on the development of virtual marketing, which preserves the techniques specific for the classical marketing, but, besides, has a series of operational and analytical advantages, focused on specific methodology, interaction with the organization and client-orientation. Cybermarketing is objectively client-oriented and thanks to the facilities, costs and efficiency of the virtual world based on NC placed all over the world, the marketers have new opportunities and can address to new market shares, in accordance with the demands of the clients and global markets; in their turn, clients widely use the Internet services for obtaining information about the market, products, services, prices, delivery terms, financing systems, service, repairs etc. The main objective of the cybermarketing activity is providing the best conditions for making and developing some on line offers of products-services, by complying with the following parameters: (a) using the Web technology; (b) using the static/dynamic mathematical models specific for the pure theory of the marketing science; (c) using some diversified methods and models of message communication within the complex processes specific for cybermarketing; (d) implementing the best communication options.

The e-activity of the TeleEducation type is the technology of transferring information of a formative-professional nature, exclusively by the Internet-Intranet-Extranet systems, as a result of overcoming the factors related to time and space, in which the assimilation process gets focused on the learning phase, to the detriment of teaching and knowledge transfer process.[11] The e-education system has had a rapid development by the emergence of new technologies: (a) "Distance Education" and "Distance Learning" of the synchronous/asynchronous type; (b) "Open Learning"; (c) "Open and Distance Learning"[12].

E-education makes some fundamental demands: (a) to actually use the IT&C technologies in all the institutions of academic education; (b) to redefine teachers' activity and to change their attitude towards the e-education technology; (c) to change the structure of the teaching materials, to create and use virtual courses; (d) to change students' attitude towards the general approach to tele-education, the system of consulting the virtual materials and the virtual systems of preparation-examination; (e) to create and actually use some organizational structures that are new from the viewpoint of their role and functionality (virtual schools, high schools and universities, tele-education centres, tele-classes etc.); (f) to stimulate students'/graduates' desire for continuous study.

The e-activity of the Teleshopping type performs the selling and purchase of goods and services, know-how, software, firmware, by the massive, complete, efficient, operative and competitive usage of the IT&C elements and Internet-Intranet-Extranet services; due to extensively and intensively using the facilities of the Internet system, this activity could be also named

[10] Rosca Gh. Ion, Marian Stoica, New Work Forms and Activities in the Information- and Knowledge-based Society, in the volume "Information Society-Knowledge Society, Concepts, Solutions and Strategies for Romania", Expert Publihing House, 2001.

[11] The Bologna Declaration of the ministers of education from 28 European countries and the majority of the candidate states, June 19th 1999

[12] www forrester.com: the site of the Forestre Research magazines, which publishes articles in the field of e-learning

InternetTeleshopping. Teleshopping is structured in e-sub-activities[13]: tele-selling and tele-purchase. The social and psychological premises take into consideration the study of some dual coordinates: the social approach and the psychological approach, based on studying the social impact of teleshopping, its usage area, functioning mechanism at the macro-, mezzo- and microeconomic level, as well as establishing the strategies, methods and techniques of the social adaptation of the citizens to the new information technologies, overcoming the social conservativeness, including the elimination of the cognitive, social, informational, behavioural, emotional, traditional disabilities etc. The minimal structure of the systems based on Teleshopping must contain the following standard sub-systems: cybermarketing, presentation, input transactions, supply-transport, storage, distribution (output transactions), invoicing-deduction[14], computerized accountancy, IT financial accounting audit[15] and DB administration.

The e-activity of the TeleMedicine type is the technology that allows medical data exchange, by means of IT&C and the Internet-Intranet-Extranet services, with a view to increasing the quality, capability and capacity of the medical act, medical education of the citizens or provision of top-quality healthcare services; from another point of view, telemedicine is the process of using medical information and services, in conditions of professionalism, rapidity, selection, efficiency and cost-effectiveness of the IT&C conditions and the Internet-Intranet-Extranet services, by fully complying with the scenarios of modern medicine: (a) the implementation of a selective and professional monitoring of medical data; (b) the beneficent usage of IT&C in the field of modern medicine; (c) the instauration of a modern management addressed to increasing the rapidity, efficiency and quality of the medical act; (d) the provision of an information system meant to bidirectionally transfer medical data from one location to another.

The main objectives of telemedicine are: (a) to increase the evaluation quality of the medical act, medical diagnosis and long-distance treatment; (b) to virtually overcome the distances between the doctor-case-patient-treatment-post-treatment, by non-differentiating the close cases from the distant ones; (c) to provide a quality medical act, in the conditions of a minimum response time, information on the patient's state in a record time, providing treatment by means of the Internet-Intranet-Extranet systems and the interactive monitoring of the patient's post-operatory condition; (d) to increase the efficiency and accuracy of the medical act; (e) to provide medical treatment as close as possible to the patient's workplace/ residence; (f) to provide continuous professional training of the medical staff (doctors and nurses); (g) to provide a quality medical expertise, based on the data offered by means the Internet, in an appropriate time for patients, irrespective of the distance between the doctor and the patient; (h) to efficiently use the complete/insufficient medical resources; (i) to increase the response rate of the patients in difficulty; (j) to offer the possibility to ignore the time and space factors by means of the IT&C factor; (k) to ensure the security, protection and confidentiality of the data concerning patients' health condition.

In order to complete the IT projects of telemedicine, we propose a creation-implementation methodology, by covering the following stages: (a) Programming the accomplishment of the telemedicine IT project, elaborating the feasibility study, completing the business plan, contracting the necessary work to carry out the IT project, allocating the financial funds, establishing the beginning terms, local responsibilities, coordination from the specialized minister; (b). SITM[16] completion; (c). The stage of SITM implementation; (d) SITM current exploitation and (e). The development of new constructive versions of SITM.

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[13] Stoica Marian, Ghilic Micu Bogdan, Types of Work and Informational Activity, ASE Printing House, 2000, ASE Library, quota 122140.

[14] Rosca I, Em.Macovei, Davidescu, N., V.Raileanu, Financial Accounting Information Systems Design, E.D.P. ,1993

[15] Davidescu, N., IT Accountancy Handbook, Tribuna Economica Publishing House, 2002

[16] SITM: IT system of telemedicine

The technical and economic evaluation of the telemedicine IT projects is appropriate in the case of running complex telemedicine projects, carried out by many medical organizations, for which reason their acceptance and actual usage are imposed by the following requirements: (a) to use the IT&C substructure; (b) to maximize the security and confidentiality of the data concerning the patients, cases and treatments; (c) to have a medical licence; (d) to supervise the telemedicine policies; (e) to elaborate standards and protocols related to the medical field; (f) to obtain a maximum reliability during the actual work; (g) to sort out the economic, technical and legal aspects; (h) to adopt a payment system addressed to remote communities and to people with a minimum living standard.

5. Section 5, entitled "Virtual Organizations, Activities and Businesses", brings to the foreground the concept of virtual organization (OV), also known as e-organization. OV represents complex configurations of dynamically structured companies, geographically dispersed, with a variable degree of independence, which generate superior performances by adapting to the dynamics of home/international markets, as a result of strongly involving the IT&C facilities and the variability of the organization forms and manifestation typology of the network-like organization and the digital economy. OV is a system by means of which the component functional entities have potency and multiple superior capacities, due to a synergetic adaptive and dynamic phenomenon[17]. OV is based on several fundamental elements[18]: (a) objective; (b) connectivity; (c) technology; (d) delimitation; (e) information substructure and (f) meta-management. OV is a co-operative form, focused on common interests and agreements concerning dynamic businesses, in which the co-operative units provide the specific competences, which can be disseminated by means of some co-operation on the vertical and horizontal scale, so that, during the OV performances, it could be perceived as a unique homogenous and particular entity. OV has the capacity of self-organization, a phenomenon according to which the e-organization and its members dynamically and automatically interact, thanks to a mutual co-existence, based on the optimum balance between meta-organization and the creation of some socially acknowledgeable values[19]. The OV characteristics consist in adaptability, dynamics, organizational optimum, the involvement of common synergies. The minimum conditions for providing OV inter-operationality are the following: (a) the identification and attribution of a profitable business, compatible with the potential OV members; (b) the acknowledgement of synergic competences; (c) the co-operation and mutual trust of the OV members; (d) the possibility of the maximum usage of IT&C for rapid and efficient connection of the OV members; (e) the possibility to implement new virtual organization solutions: virtual teams, virtual projects, temporary/permanent OV, minimum/average/maximum virtualization, OV made of company networks, virtual industrial company, virtual corporation.

Virtual activities esentially contain virtual work and virtual team, elements focused on virtual work organization, regarded as an optimizing planning of business networks, meant to bring a maximum degree of virtualization in the form of OVs, being a basic component in the so-called "business network" system, by which we understand cooperative strategy elaboration and management, and innovative strategies quantification. Under such circumstances, there appear and develop the network organizations (OR), which have as essential objectives the creation and transfer knowledges, regarded in the sense given by IA. The ORs accomplish the role of creating an environment for social exchanges, being tributary to some fundamental principles that allow the

[17] Bogdan-Ghilic Micu, Marian Stoica, Virtual Organization, Economic Publishing House, 2004

[18] Rosca Gh. Ion, Marian Stoica, New Work Forms and Activities in the Information- and Knowledge-based Society, in the volume "Information Society-Knowledge Society, Concepts, Solutions and Strategies for Romania", Expert Publihing House, 2001.

[19] Stoica Marian, Ghilic Micu Bogdan, Types of Work and Informational Activity, ASE Printing House, 2000, ASE Library, quota 122140

conceptual definition of virtual work: (a) integration levels; (b) voluntary connections; (c) OR members; (d) multiple leaders; (e) cooperation. The OVs are able to develop strategic partnerships focused on the co-evolution of synergic community members, through business ecosystems; the "eco" attribute defines the efficient collaboration substructure of the OVs, from the viewpoint of attracting competences, skills and global opportunities, accomplishing objectives, lowering costs, permanent transformation, trans-frontier action, global presence.

The new developing tendencies of the OVs have led to the conceptualization of a business network model that holds some essential characteristics: client, dealer, integrator, business system and electronic services. The educational process in the OV is a strategic component, being given the fact that for having a value, the information must be processed in knowledge, after which they are translated into processes and results. Organizational education is the product of imposing some ideas resulted from the large spectrum of the following disciplines: management science, production management, strategy, sociology, organizational theory, cultural anthropology and informatics etc.; organizational education is perceived as a social construction that converts the information (data plus knowledge) generated at individual level, into explainable and operational actions usable for achieving purposes and objectives of the OV. The organizational education takes into consideration the process (education is a process with an unlimited time and space progress) and the effects (we take into consideration the elements accumulated by the study system). The education approach in OV is a process of tacit and outspoken information generation and spreading.

The virtual team (EV) is generated for carrying out some complex projects at the OV level and characterized by using some collaboration tools (telephone, e-mail, NC , DB of any type). The EV is a system of solving some social/particular character activities through the highest involvement of e-activities (e-commerce, telework, telecommuting, cybermarketing, teleshopping, tele-education, telemedicine etc.), of some new organizational structures (virtual office, virtual community, telecentre etc.) or of some new classical information concepts (SI, NC , SC, information processes, Internet, Intranet, Extranet, FS, WS, etc.). EVs are interdisciplinary work teams, inter-organizational or inter-sectorial, organized at the OV level, in order to accomplish some strategic objectives.

The specialized aid software for virtual system work is globally called "groupware", being addressed to providing on line multidisciplinary interactions in real time, by web-conference, e-mail etc.; groupware contains software support modules focused on the implementation of the following essential functions: (a) the dynamic and convergent administration of the electronic documents; (b) the interdisciplinary on line dynamics (electronic messenger, software instruments for simultaneous on line communication, conversation progress through typical Intranet system instruments); (c) the AI development (the automation of production flows, the computerization of the OV staff's training activities, the implementation of multimedia applications, virtual usage of writing boards, the usage of audio-video technology, the implementation of "virtual reality" typical elements).

The essential characteristics of the EV are[20] 1: (a) EVs are created according to the principles, structure, organization and management of the real teams; (b) EVs are partially made up of truly virtual elements; (c) EVs guarantees the finalization of the contracted projects; (d) the assignment of a maximum importance to the trust in the hired staff. EVs mainly use telework through which fixed costs may be minimized (rents, running costs, parking etc.); working in an EV may bring substantial benefits to commercial, bank businesses, insurances, local management units etc., by optimizing the communicational relationships between the client and the hired staff. Furthermore, the Internet paradigm eliminates the logical signification of geographical limits, time restrictions or national/regional aspects; the EV is the best example of no frontier community or time restrictions, the fundamental role resting with the construction, maintenance and development of the trust between the EVs members, regarded as a defining feature of virtual collaboration. Trust is associated

[20] Stoica Marian, Ghilic Micu Bogdan, Types of Work and Informational Activity, ASE Printing House, 2000, ASE Library, quota 122140

particularly with the security in usage of communication systems and between the EV partners. These EVs must dispose of an associated management controlled system, with the increase in importance of the OV's culture and values.

"Outsourcing" and electronic business refer, in the virtual context, to the specificity of electronic business and to the universal standards of electronic business for reporting, informing and analyzing.

There appears the orientation towards electronic businesses addressed to clients at a global level (AFE), derived from technological platforms that came from the OV's exterior or contracted from the exterior, through the phenomenon called "outsourcing"[21].

The "plug & play" abilities especially created for business software become available and ready to be delivered by service dealers – (ASP) or for electronic business solutions (EBSP). The successful AFE models can be applied to all the dimension areas of products, processes and distribution channels, if they deliver innovative and competitive solutions for clients; the organizational culture and the technological smart type synergies may bring high performances for the AFE through the efficient signalization of changes in the business model and through the activation of dynamic connection processes.

Evolutions towards a new AFE generation are recordd over the actual e-commerce paradigm level, towards a model delivered by AFE, focused on the solution of value chains and goods-services. These solutions use independent and ultra-fast applications and connections, meant to allow adaptation and connection to adding new connexions, at the same time with the possibility to delete other connexions in real time, on the basis of a well-balanced calculation model (EDM), which mixes the best solutions focused on NC , FS, or WS. The inter and intra-organizational design must consider the structure and the influence of cultural, strategic, technical, organizational or geographical agents, which will lead, in our opinion, to the definition of the next AFE strategies[22]: (a) AFE strategy conception; (b) knowledge management strategy; (c) self-control management strategy; (d) structural innovation strategy; (e) strategy of the income increasing economy; (f) performance control strategy; (g) organizational culture strategy.

The fundamental tendency of the OV development consists in moving towards the implementation of process - oriented network businesses; the OV's transformation into a network organization (OR) may be accomplished by giving a structure to the business relations strongly based on the IT&C usage and co-operation between internal/external partners, at the same time with the involvement of the highest abilities in information age.

The AFE's transformation into a network and the specification of the IT&C's role for the course of this complex process have as a starting point the OV's computerization degree, which describes the number of computerized charges at the OV's level through an integrated SI. The stages of carrying out the OV's computerization process are: (a) computerization of elementary functions; (b) computerization of functional domains; (c) integrated processes designing; (d) global integration at the OV level; (e) global integration and network substructure establishing.

The universal standards of electronic business for reference, informing and analysis, make the semiotic approach possible, while the business reference is seen as the "public reference of the financial and business company operation data"; there are two types of business reference: the internal and the external reference.

The origin of OV reference processes resides in the typical primary activities and operations that set the system of creation-supply of the financial reports. They are particularly used at a global level the GAAP, IAS and IFRS accountancy standards which present considerable layout and content differences; the financial statements have a different significance, which implies making some

[21] Business services and European Integration, 1999, ASE Library, quota 108713

[22] Stoica Marian, Ghilic Micu Bogdan, Types of Work and Informational Activity, ASE Printing House, 2000, ASE Library, quota 122140

conversions between the standards, with a view to guaranteeing the comparability between the financial reports obtained through various standards. Business globalization demands a similarity between the semantics of financial indicators and reports, even if these are obtained by applying some different standards of reference. The syntactical level considers the methods of registration, presentation and transfer concerning the financial informing, while the empirical and physical levels are ensured through the technical structure employed by AI developed on the Internet. The thesis proposes the usage of the XBLR electronic business standard.

The reference oriented on the XBLR standard employs the financial report concept created and compatible with the Internet/Intranet/Extranet systems[23]. XBLR is a system of reports, totally compatible with the capacities of the Internet system, being the result of some professional organizations' research, the most representative baing ICPA/IACP[24].

The "Electronic commerce" technology contains digital technologies and intelligent agents (software agents) used in the Internet e-commerce operations which are models of operation specific to the informatic applications of electronic commerce, techniques and associated methods. The concept of electronic commerce considers the financial and the operational commercial transactions through electronic methods, the electronic transfer and exchange of data, the transfers of capital, as well as the activities specific to the operations using credit cards.

The electronic commerce may be synthetically defined as the modern technology exclusively focused on businesses that may be automatically developed between consumers, organizations and dealers and that generate the automation of commercial processes, the increase of developing speed and service – product quality, the minimization of transaction costs and fixed prices, in terms of a maximum transparency, an acceptable security and a minimum response time, at the same time with offering some maximum possibilities of locating commercial data and exhaustive processing of all these, through the activation of the Internet/Intranet/Extranet systems and the utilization of the NC , at the same with the involvement of some competitive informatic technology and new models of e-commerce (B2B, B2C, C2C, C2B, G2C, G2G, non-business, collaborative) and with the maximum security of the transacted data.

The purpose of the electronic commerce consists in integrating the networks of businesses, corporations, governmental agencies, independent dealers/ clients/ collaborators into a unique community, able to determine the unique management, communication and controllability, with the help of the local NC , no matter what hardware/software platforms are used at the local level; the integration demands to stock the data on a digital format, at the same time with the necessity of ensuring the quality of the used human resources.

The electronic commerce mainly includes the informational processes of selling-purchase, products-services-information barter, through the NC and the Internet/Intranet/Extranet systems, trained as a follow-up to using some dedicated components[25]: (a) on line component; (b) communications' component; (c) services' component; (d) business processes component. The electronic commerce minimally contains the following elements[26]: (a) typical substructure; (b) e-commerce users; (c) dedicated AI; (d) typical payment methods; (e) principles and solutions regarding the design of dedicated informatic applications; (f) creation of Web-BD interfaces; (g) implementation of some typical e-commerce models; (h) utilization of some e-commerce standards; (i) involvement of some methods and techniques for the informatic applications of the e-commerce type; (j) specificity of data security in e-commerce systems; (k) legislation specific to the e-

[23] Intranet Product Site, http://tips.iworld.com/_frames.shtml/main/html

[24] ICPA/ IACP: American Institute for Public Accountants

[25] Stoica Marian, Ghilic Micu Bogdan, Types of Work and Informational Activity, ASE Printing House, 2000, ASE Library, quota 122140

[26] Rosca, Ion Gh., Cristina-Mihaela Bucur, Carmen Timofte-Stanciu, Octavian Paiu, Mirela Visean, Electronic Commerce. Concepts, Technologies, Applications, Economic Publishing House, Bucharest, 2005

commerce operations. The concept of e-commerce has determined the emergence of some other complementary notions, such as the e-business and the mobile-commerce.

The digital technologies and the intelligent agents (software agents) used in the on line e-commerce operations contain elements of hardware, software, firmware, IA, communication systems, standards, norms, security, specific websites and legislation systems associated to the domain etc. The e-commerce systems use two models of on line commerce: B2B and B2C.

The operation models specific to the informatic applications of electronic commerce are the following[27]1: (a) Business-to-Business (B2B), Business-to-Client (B2C), Consumer-to-Consumer (C2C), Consumer-to-Business (C2B), non-profit organizational businesses (non-business), intra-organizational businesses (Intra-Business), Government-to-Citizen (G2C), Government-to-Government (G2G), Government-to-Business (G2B) and collaborative. These models are described in details in the contents of the thesis.

The manageable element in payment systems consists of electronic money ("digital cash"/"electronic cash"), considered as electronic transactions accomplished through any type and architecture of NC , used in the transfer of financial funds or of electronic payments between partners, seen as societies, and the OFBM; the electronic money may be seen in two manners: as a debit or as a credit, while the concept of digital cash is used as a different currency and the transactions associated to this type of cash are perceived by means of an external exchange market. The electronic money is of the following categories[28]: (a) credit/debit card; (b) e-cash; (c) digital checks; (d) electronic coupons and tokens; (e) bank checks; (f) smart cards. The basic features of the electronic money are: (a) on line authorization; (b) issuer's nature; (c) transferability; (d) money format; (e) loading variants; (f) valuing financial currency data. The OFBM accredited to manage the AFE, the dealers, the issuers and the intermediary firms actually meet different types of risks, among which the most important refer at the next elements: (a) transaction abandoning; (b) risk of fraud; (c) message modification; (d) operation errors; (e) duplication/ spoliation of devices; (f) theft. The typology of electronic payment systems is given by: (a) on line payment systems using electronic currency (e-Cash); (b) payment systems using smart/ debit card; (c) payment systems using electronic checks; (d) payment systems focused on bank cards through the SET option (Cyber Cash); (e) payment systems using micro-payments with memorized debit/ smart card sums[29]. The domains of activity associated with the systems based on electronic money are: (a) effective electronic transactions (depositing and payment operations); (b) obtaining, collecting and operating; (c) clearing.

The economic implications that the creation of the electronic commerce applications implies, contain, in our opinion, the elements that refer to the stages of creating the informatic applications of on line commerce, the economic-financial establishment of e-commerce projects through the E-commerce Business Plan and the SWOT analysis, the intention of creating projects of on line commerce through the Cash Flow report, the use of synthesis financial-accounting indicators of the e-commerce companies through the "Balance Sheet", the offer of dividends to the e-commerce companies' shareholders through the "Shareholders' Equity" report.

We suggest that the e-commerce systems' implementation should be made by taking the following steps: (a) establishing the implementation strategy, (b) selecting the e-business solutions with respect to the companies' typology, (c) choosing the model and the architecture of implementing the BD, (d) quantifying the demands for creating the electronic commerce websites, (e) implementing e-commerce applications of the B2B type, (g) the economic and financial

[27] Intranet World Online site, http://www.internetworld.com

[28] Stoica Marian, Ivan Ion, E-activities in Information Society, Economic Publishing House, 2002, ASE Library, quota 122184

[29] www fv.com: the site of the First Virtual payment system by cards with a value stored on smart card/debit card

implementation of the e-commerce systems projects through the E-commerce Business Plan and the SWOT analysis. We foresee for the "start – up" companies the use of e-commerce Business Plan and the SWOT method, by following the next stages: (a) defining the SWOT analysis usage steps; (b) identifying the target market segment; (c) establishing the analysis indicators of the e-commerce business; (d) determining the security segment; (e) calculating the level of cost-effectiveness; (f) making a synthesis of the e-commerce business plan; (g) establishing the contents of the e-commerce business plan (mostly containing the description of the e-commerce business, the marketing plan, the operational plan, the management and the reorganization of the business, identification and analysis of the SWOT's risks, the financial plan); (h) monitoring the activity of the e-commerce companies: the cash flow from investing activity[30], the cash flow from financial activity, the effective discounted net cash flow (DNCF) statistics of the on line commerce project (TFNND), the cash flow statistics, the synthesis financial accountable indicators of the e-commerce companies through the balance sheet.

6. Section 6, entitled "Strategies, Programmes and Courses of the Information Society Approach", starts with the description of the RNSI project, which determines the implementation in the National Society of Romanian Post Office of a computerized network created for "pay desk" operations with national practicability; the RNSI network will computerize periodical and random activities specific to the National Society of Romanian Post Office. The regular activities computerized through the RNSI will consist of payments of toll and tax, payments for water and sewage services, payments to the suppliers of electric power and thermal energy, gases, sanitation, and will consist as well of the creation of some payments for commercial services (such as the selling of products and services, the progress of some saving and consignment operations, the FBM services, the selling of insurance products and pensions, the transactions for mutual/investment funds etc.); the payment to the providers of fixed and mobile phone communications, Internet services, radio-TV, CATV programmes, of local-urban-interurban transport services, associations, the payment of some leagues-clubs dues will also be computerized. The RNSI will ensure the payment of individual fees for postal services, contravention fines, registration taxes/ stamps, entry/ participation taxes, as well as payments for renting/ making reservations for trip tickets, hotel suites, tourism agencies, sell/ reservation of concert - show tickets, lottery tickets etc. The random computerized activities through the RNSI will be the distribution of owner/ investor certificates or the distribution of subventions at different economic moments, the census of the population or the organization of referendums on various topics.

We further describe the main projects, systems and services computerized in Romania among which we mark: the informatic services of information dissemination, the project called "The Implementation of Evaluated Technologies of Communications", the information system concerning the labour force, the information system for the electronic referendum, the informatics system concerning the public acquisitions (e-ap), the project concerning the creation of on line video conferences, the informatic project concerning the creation of "Cyber Centres", the information system concerning the customs services, the information systems dedicated to management processes modernization, the information systems for invoicing with the help of web technology, the project called "The Implementation of Digital Data Funds and The Creation of Digital Libraries", the information integrated systems of the local public administration, the government focused on the IS-KS ("e-government") and the computerization of the FBM domain. This computerization of domain is focused on the following objectives: payment methods computerized through the electronic currency, the use of SWIFT system, the systems of the dealer account and the electronic checks, the use of smart cards, the operation of FBM transactions using electronic money (it implies the use of

[30] www.corpvs.org: the site of CORPVS for accounting and legal consulting, contacts with lawyers, notaries, taxation consulting and consulting for owner associations etc

some technologies exclusively dedicated to the IS-KS: ATM, electronic wallet, virtual wallet and e-cash), the implementation of the electronic wallet card manageable in the European Community (CAFÉ), the implementation of the virtual store, the use of digital signature in the FBM and the financial accounting domains, "the electronic office holder" (electronic- banking, Internet-banking, mobile-banking, UniBank, e-Bank) and the TeleBanking services.

For each of these computerized systems and services, the Ph.D. candidate integrally presents some original solutions that consist in principles, objectives, utilized concepts, roles, computerized functions and processes, direct advantages, long term anticipations, constructive premises[31], informatic solutions and suggestions, constructive versions, beneficiaries, the applicability area etc.

This section continues to describe the concept, features, functions and the system's functional variants, the international standards and principles of e-learning worldwide accepted. In our opinion the complete definition for the e-learning system may be: the system that allows learning that concentrates on information technologies, being the system able to deliver information (data, knowledge, media etc.) on all types of hardware systems (any type of computers, NC , Internet, Intranet, Extranet) and software tools (BD, BC, BF, BG, indexes etc.), by means of technical data supports (hard-disk, floppy-disk, memory-flash, video-cassette, CD etc.), with a view to implement an on line learning system (on line learning/ web learning), and with the implication of some actors (teacher, tutor, instructor, pupil, student, master, doctor, trainee etc.) and some classical education systems (schools, high schools, universities, national academies, research institutes etc.)

The characteristics of the e - learning systems are: (a) providing multiple interactions between learning and informatics; (b) using the IT&C coupled with other informatic elements; (c) the possibility of trans-academic and trans-national relation with other educational actors; (d) providing the minimum time of assimilation, distributed training, low costs of the operative working, style and productivity in the assimilation processes, learning efficiency, group learning possibility, but only through an organized national/international system, (e) access to the information stored and applied in a large variety of formats and appearances, in the form of data, knowledge, media.

The main purpose of the e-learning system is to ensure an integrated initiative meant to determine the implementation of the following key-functions: (a) the implementation of an e-learning system in the areas of management, business and competitive development; (b) the adequate implementation of some direct programmes of LeaderShip and Business Management; (c) the creation of a programme exclusively associated with the development of functionality, efficiency and modernization of the client company executive which will regard the centre of the managerial competences by activating a strategy game based on the company's initiatives, anticipations and fundamental changes, parallel to the possibility of applying the e-learning processes; (e) the formation of a professional management-decision making team; (f) on line support for the employees of the beneficiary company, for the managers and the functional services employees (it is carried out through the dynamic, continuous and real time interaction with the instructors of the organization which delivers relied services for the e-learning processes).

The e-learning implementation models are based on the IS-KS educational system paradigm focused on three e-learning implementation models: distributed rooms (dri), independent education and long-distance open education. The international worldwide accepted standards of e-learning are the ADL, IEEE, IMS (the fundamental pilot-standards of the Advanced Distributed Learning), which are described in detail in the thesis.

The defining elements of the e-learning standards and norms initially refer to the e-learning standard objectives: (a) elaboration and spreading for the public interest of the e-learning standards which will be used in designing, implementing and unitarily exploiting the e- learning systems; (b) the designing firms, dealers and clients of the e-learning systems must develop the specific activities

[31] www forrester.com: the site of the Forestre Research magazine, which publishes articles and reviews in the field of e-learning

of design, implementation and exploitation through harmonization and collaboration, in order to maximize de use of e-learning systems; (c) we propose founding a worldwide council of designers, dealers and e-learning system users which will have to deal with mutual arrangements integrally accepted by the actors who operate in the activity of on line learning; (d) the members of this worldwide council (hereafter called "Council") must support the activity of this global organization through the following actions concerning the guarantee of the conformity between the council's technical directives, the international newly designed e-learning and AI standards, at the same time with the accomplishment of the co-work between the council, auditors and users. The specific principles applied in the design, implementation and unitary exploitation of the e-learning systems are: (a) the usage of some concepts, global standards and solutions of designing, creating, implementing and exploiting, accepted by the council's members; (b) levelling the usage of international on line learning standards; (d) development of some unitary e-learning concepts (UC, US, OE etc.); (e) unitary training of specific demands (reuse, reproducibility, neutrality of informing methods, interoperability and maintenance, personalization, compatibility, completeness, formalization, pedagogical flexibility, clear classification of educational objects, life cycle etc.).

The design of on line learning systems focused on the strategic correlation between the business's objectives, the system's infrastructure and the staff training results' evaluation must start from the premise that in the actual process of instruction, the companies' staff exclusively operates with hardware, software and firmware instruments, for which reason the creation of these systems must be based on four important elements of the instructional design, the large dimension systems' development and implementation[32]: (a) performances' quantification in relation with the accomplishment of the business objectives; (b) establishment of the objectives and the instructions specifications; (c) the design of the e-learning system, the creation and check of the e-instruction results.

This section also contains the use of the Six-Sigma methodology, the preoccupation for recovering the investment of e-learning systems, the steps to follow in the quantification of the cost-performance proportion, the paradigm implementation and the on line learning advantages, the specific requirements of the e-learning applications and the on line learning advantages, as well as the viewpoint of the national project concerning the computerization of the education process.

7. Section 7, entitled "The Economic Effects Foreseeable through the Implementation of Information Society–Knowledge Society" contains the description of some effects that we consider IS-KS will be able to generate and that will have or not a beneficent role on mankind. It has been observed a number of **14 effects that include in their turn other effects**. The synthesis of these effects is the following: **(1) general economic effects; (2) digital business organizations in virtual organizations, in the context of digital economy and IS-KS; (3) initiation of some alternative economic systems and the comparative and competitive advantage that the electronic commerce generates; (4) the change of the game's rules in the prices fixation at the same time with the electronic commerce influence on the consumers in the age of globalization and IS-KS; (5) the emergence of the cybernetic consumer and the role of the Internet-Intranet-Extranet tandem; (6) the change of the competition's character in IS-KS, at the same time with the emergence of a new tendency towards monopolization and fusion in the field of IT&C; (7) the diversification of the electronic markets, media manipulation and Internet subculture; (8) the maximization of the role of intangible assets and their management, as well as the amplification of the role of knowledge and knowledge management; (9) the influence of the creative work and new perspectives concerning the work in e-economy, as well as the change of the character of the financial markets and the emergence of "competent money"; (10) the emergence of the**

[32] www forrester.com: the site of the Forestre Research magazine, which publishes articles and reviews in the field of e-learning

creative age and economy, at the same time with the maximization of the intellectual property's area and influence; (11) perspectives of the "leap-frogging" division and the "next generation" networks; (12) the economic, social, juridical and psychological effects of the new labour forces; (13) the economic effects of the electronic commerce applications; (14) the initiation and application of some innovation policies, integrated at the level of the European Union (the Lisbon Strategy and the Barcelona Objective).

IS-KS, the defining of some IS dedicated to IS-KS, the legislation specific for the IS-KS's design, creation and implementation and the characteristics of the new forms of work, the specificity and typology of the e-activities, the social, economic, juridical, psychological effects of the IS-KS. There are also presented the fundamental elements for the chosen theme, among which we mention the virtual organizations and activities, the "outsourcing" and the virtual businesses, the e-commerce technology, the electronic payments or the economic implications of carrying out the applications of electronic commerce.

The development of a pertinent inference is employed to specify the globalization's multiple senses, the concept of a system, to define the Internet's contribution, the reasons concerning the opportunity and the creation of the IS dedicated to the IS-KS implementation, the new forms of work, the concepts relative to the virtual community, the virtual organization, the virtual activities, the "outsourcing" and the electronic businesses in the virtual context, the payments made in the systems of electronic commerce or the economic implications of carrying out electronic commerce applications in the IS-KS.

The global number of people with superior education and experts increased, but mankind has more problems. If refer to the TeleMedicine technology, be may acclaim that there are multiple opportunities, complex medicines, but in fact, people suffer from health problems. In the same context, the extremely efficient and competitive e-commerce technology, has not generated richness for the majority of the inhabitants of Earth, the major part of Mankind being poorer and poorer.

On the contrary, mankind has recorded so many problems, that the dream to live in IS-KS or STSCM becomes almost utopian, although, on the whole, the technologies necessary to the complex and total computerization of the human society have been conceived or the e-education Technology can rapidly generate the long awaited lift up in the superior education of individuals, given the fact that there are people who read very little, watch TV a lot or have a minimal degree of knowledge flattened by the massive access to the Internet; writers to write in the last 50 years were many, yet study goes worse and worse. People are obsessed and tired of other occupations, such as the increase of the billionaires and millionaires reported to a global level or to nations, while the number of true values continuously and surely, alarmingly decreases. In addition to that, Mankind has complex ethnic and religious problems consuming the financial, human and spiritual resources, the latter ones having the possibility to be used, as an optimistic alternative, to the approach and insertion of IS-KS and STSCM.

Mankind considers, through the organisms with mondial calling, objectives regarding welfare, happiness or cooperation, but records problems most of the times insuperable and to the highest extent unsolvable. Mankind has found, after important efforts, the way to achieve welfare, but it does not know how to obtain a global context axed on cooperation, commerce, information and knowledge, elements which scale off the opportunity of achievement of STSCM, axed on a society of second generation, which will demand pretentious edges called truth, spirit, conscience and morality. Humans have conquered the outer space, since they reached the Moon or other planets, but they did not succeed in getting the profound cognition of all defining elements of peoples and ethnics; we could support the idea that humans have remarkable accomplishments regarding the cognition of the structure of the atom and global atmospheric climate, but they do not have arguable results concerning the cooperation of any type and nature. A fortiori, mankind desires to create a DURABLE SOCIETY of second generation, -STSCM-; in this regard it learned to make ample and utopist plans, on the background of some global achievements with a minimal degree of complexity,

while mankind hurries without preparing before and waits for the favorable moment to implement IS-KS and IS-KSOM, as long as it is optimally necessary. By means of IS-KS, mankind will use computers at a global level, due to some global systems, suggested in the thesis, it will possess multidimensional and exhaustive information, but it will have to solve problems concerning intercontinental, interregional, interreligious or interracial communications. Problems concerning the role and application of great personalities, the discharge of the possibity to obtain important and rapid profits, the atrophy of superficial and petty relations between individuals, leaders or nations will have to be rapidly, totally and ultimately solved, in parallel with the existence of the times when the necessity of sincere actions among global actors has to become omnipresent.

On the contrary, mankind will be able to find enough time to solve all the difficult problems, in order to trip rapidly and soon the IS-KS coordinates; in the present context, the nations of the world have to start qualitative actions and projects regarding qualitative mutations of all types and categories.

Prima facie, the factors of decision of mankind will have to act in such a way so that the entire world might be seen as one person, and a certain person be seen as the entire world; moreover, mankind does not need to regret the faults of the past, because these belong to the past. We mush be happy they happened, because this is the only way the nations of the world can be convinced that the effective achievement and operation of the IS-KS and STSCM characteristics and performances will be approached with trust, hope and optimism. We consider that mankind does not have to bustle much, given the fact that the global events favorable to the global development, causa finalis, IS-KS and STSCM, will be accomplished when human society least expects, considering that "everything happening has a reason"(Garcia Marques, Reflexiones).

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CULTURAL IDENTITY AND CITIZENSHIP. THE CASE OF THE ROMA MINORITY IN ROMANIA

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Abstract
My paper focuses on the intersection between the Roma cultural-identitary construction and the political concept of citizenship, trying to reveal if such an approach can prove itself helpful in providing a better understanding of the unilaterality of the majority-Roma relationship. By unilaterality I understand the particular model in which the Roma-Romanian relationship has structured itself overtime. It mainly consists of a segregationist view that stresses the majority's responsibility with the minority's integration process and the failures to promote a partnership with the minority. This approach tends, in my opinion, to treat the minority in absentia, producing therefore the well-known effects of the so-called "Roma problem". On the other hand, the idea of empowering the Roma minority is also seen as being fundamentally within the majority's attributions, therefore contradicting the very essence of the concept. My approach seeks to apply a theoretical framework developed first by Gramsci and later by Boudieu to this particular situation. Thus I hope to be able to provide a better understanding of both the history and the present of majority-minority relations and to highlight possible directions or outcomes relating to the dichotomy of integration/communitarian privacy in the case of the Roma minority.

***Keywords**: Roma minority, cultural identity, citizenship, Gramsci, Bourdieu*

Motto: „Large scale immigration, within a society so *well fettled* as ours, can only be positively perceived provided that the immigrants have a solid background and that their religion and race do not prevent them from marrying and mixing with members of the host-population „
The Royal Commision on Population, 1949[1]

I. Introduction

I came up with the idea for this paper on the basis of an event that took place not so long ago on the streets of Bucharest: coming back home one afternoon I saw an elder Roma woman, poorly dressed, going from one passer-by to another and addressing them. People were reluctant, turned their head away or even changing their path. I couldn't hear what the woman was saying to the others, but the situation seemed to confirm the supposition that she was begging. I went about my way until I inevitably got in her path: "Would you happen to know which is the way out of the passage that gets me to the University bus station?". I pointed her to it and went about my way home somewhat displeased with the fact that, although I often bear witness to such contexts, although I try to learn about what is commonly known as "The Roma Problem", I have not succeeded in finding appropriate answers to such otherwise legitimate questions as: What are the causes to such rejections? To what does this "Roma Problem", which is ever more frequently mentioned in Romania and Europe, amount? Can it be conceived in terms of "solutions"?

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[1] Apud Ferréol, Gilles (Ed.), *Cetățenie și integrare socială* (*Citizenship and Social Integration*) (Bucharest: INI Publishing, 1999), p. 54.

The main categories of answers usually arise either from the domain of a genuine mythology (both popular and academic), unavoidably leading to the constitution of a stereotypy which is completely useless scientifically and whose main discursive feature is in most cases negative with respect to the perception of the Roma, or from an academic field which thrives in hyper-specialization and value-bias. We are talking here about a positively meant bias, in the sense of political-correctness, but which produces (probably) involuntary justifications of the popular models – such as, for example, explaining crime through the lack of education or through extreme poverty, labeling Roma as the most genuine expression of poverty, derived from the discriminating politics and attitudes by the majority on historical level[2].

In other words, the most common claim regarding the Roma "problem" would be that all its stereotypical and prejudgemental *avatars* derive from a history of misunderstanding, misperception and refusal by the Europeans to understand the *other*, situation inexorably leading to the marginalization of an entire ethnic group, placing it outside of the *politeia*, fact that also brought about the waiver on its civic and political integration[3]. This commonly held approach, starting from the acknowledgement of the secular repression of the Roma, also sets forth a compensative formula, conceived of as a mixture of multiculturalism and cosmopolitan illuminism, attempting to stress the importance of the cultural dimension but on the basis of the assertion of education (which is thought of not as mere alphabetization, but in its civic and political dimension as well) as representing the link which is needed in order to ensure a solid base for the cohabitation of Roma and majority, whatever such may be. This pluralistic formulation, in the purest sense of the word, which aims at bringing the Roma on the common ground of the shared socio-political values, is still hindered by the persistence of a segregationist *forma mentis*, both with minority as with majority, abided by its very long use. The Roma, on the other hand, seem not to prefer integration and participation within the societies they reside in, instead choosing the closed environment of their own communities, fact usually explained in the same terms of majority-originated segregation.

At the same time, this type of strategy is, in my opinion, fallaciously designed, as it throws all responsibility on the shoulders of the majority ethnic group, while treating the Roma *in absentia*. Here lies the very core of this paper, which *aims at studying whether the cross-point between the cultural-identity construction of the Roma and the political concept of citizenship can offer suggestions with regard to the unilaterality of the relationship between the majority ethnic group and the Roma.*

II. Thesis and theoretical perspective

As such, my paper aims at observing the intersection of two distinct conceptual pathways: cultural identity, on the one hand, citizenship, on the other, while attempting to analyze the extent to which their superposition could offer a clearer picture of the socio-political problems the Roma have to face, not only in Romania, but on the European level as well. More to the point, our main concern would be the extent to which the historical construction of the Roma identity, as considered from a relational-subjectivist perspective, can, once subjected to the modern civic and political concepts, carries forth within this intersection area the element or the elements leading to the alleged insolvability or persistence of the Roma "problem". This paper was not intended as an attempt at reconciliation between the multicultural and the liberal-pluralist theories, but rather as a political and

[2] These historically determined conditions determine Emanuelle Pons to say that in Romania "the Roma loose on account of their mentality and analphabetism, leading to a lack of knowledge with respect to the rights and facilities they, as any other citizen, are entitled to in keeping with the law". According to this logic, the centuries of exclusion are the ones that keep Roma parents from letting their children "to attend school" - – Pons, Emmanuelle, Țiganii din România – o minoritate în tranziție (The Gypsy in Romania – A Minority in Transition) (Bucharest: Compania Publishing, 1999), p. 157.

[3] István Pogány, The Roma Café.Human Rights and the Plight of the Romani People (London: Pluto Press, 2004), p. 2.

historical analysis of the two aforementioned dimensions, on the basis of a *conceptual framework* established by Gramsci and fundamentally developed by Pierre Bourdieu. Therefore, I will follow the interdependent evolution of citizenship and nationality in the modern western societies through the construction of a cultural-political model indigenous to this context, by combining the conceptual apparatus developed by Antonio Gramsci –especially the concept of *hegemony*- refined with Pierre Bourdieu's contribution, namely the concept of *habitus*[4] and his theory on the administration of the symbolical goods[5].

In the second stage, I will subject this entire conceptual framework to the specificities of the Roma cultural identity, as it has been shaped by the relations between the minority and the majority ethnic groups in the last hundreds of years, thereby attempting to identify the causes leading to the aforementioned unilaterality-feature with respect to the Roma integration process in the contemporary political societies.

III. Historical Construction of Citizenship

Modern societies regard citizenship as the cornerstone of their specific socio-political inclusion, any form of civic participation being conditioned by acknowledgement (either by birth, or by attainment through *ius sanguinis* or *ius solis*) of the citizenship or nationality[6]. Modern citizenship is understood in opposition with the old forms of socio-political inclusion – related to the membership within specific socio-economical organizations, such as guilds or states that were inherently very selective in nature, essentially depending on the inherited social status[7] - as an extremely inclusive formula, and not by the mere fact that it eliminates the traditional membership criteria, but by the fact that it replaces these with the formal and universalistic view of certain specific political values, resulting in rights and obligations supported by the core-unity of the centralized national state. Citizenship is thereby equally attributed to all individuals, but only provided their being members of a nation-state[8]. This form of inclusion which is grounded on the fusion between state and nation – later on also ideologically framed – can be traced back to the French Revolution in 1789, when the state, which had been already centralized by the absolute monarchy, becomes also ideologically labeled with the concept of nation. The most pertinent example is probably the 1789 Universal Declaration of the Rights of Man and of the Citizen that establishes the right of every individual to belong to a nation, while at the same time asserting the sovereignty of the nation resulting in the sovereignty of the law[9]. At the same time, a second element which is relevant to the subject matter of this paper, brought about by the citizenship and its correlative rights is the establishment of the ownership right (and its protection) as being essentially related to the development of the political system, element that will implicitly differentiate among the citizens

[4] Defined as „systems of transferable long term dispositions, structured structures predisposed at functioning as structurating structures, that is as generative and organizing principles of practices and representations that can be objectively adapted to their purpose, without requiring the conscious determination of the purposes and the explicit mastery of the operations needed to attain them" – Bourdieu, Pierre, apud Cuche, Denys, Noțiunea de cultură în științele sociale (The Notion of Culture in Social Sciences) (Iași: Institutul European Publishing, 2003), p. 119. Also see Bourdieu, Pierre, Economia bunurilor simbolice (The Economy of Symbolical Goods) (Bucharest: Meridiane Publishing, 1986), pp. 84-85.

[5] I also find Jürgen Habermas' contribution to be of use, especially with regard to the historical construction of citizenship and its relation to the nation - Habermas, Jürgen, The Inclusion of the Other: Studies in Political Theory (MIT Press, 1998).

[6] Halfmann, Jost, „Citizenship, Universalism, Migration and the Risks of Exclusion", în The British Journal of Sociology, Vol. 49, No. 4 (Dec., 1998), pp. 513-533.

[7] Idem, p. 514.

[8] [8] Idem.

[9] Touchard, Jean, Histoire des idées politiques (Paris:PUF, 1970), Vol. 2, p. 461. The law being the fundamental institution defining the aspects of citizenship.

between "active" and "non-active" (or *passive*, as the historians would have it) with respect to their involvement in the political life.[10]

The final stage of this nation - citizenship dialectic resulted in the emergence of a civil society which is capable of politically dominating the state[11]. Citizenship and political nation are inextricably linked, reciprocally influencing each other along their evolution. As Miroslav Hroch has put it, constructing a nation has three indispensable requirements: 1. The memory of a common past, regarded as the "destiny" of the group in cause, 2. A dense network of linguistic and cultural relations that facilitate a high level social communication rather within the group than outside of it and 3. *A concept of in group equality of all its members organized as civil society*[12]. As this latter aspect is definitive of national citizenship, it reflects the two main European models for nation formation, which, put in a nutshell, would sound something like this: "the nation creates the state", respectively "the state creates the nation".

Obviously both claims are empty of real substance, representing mere conceptual constructs that can be useful in identifying the *type of ideological discourse* elaborated by some political and cultural elite that ushered the fusion of the two concepts in a single one, namely that of the nation-state[13]. That which previously bore the name "People"-in all its correlative expression forms prior to the age of nations: serfs, krüner (old german name for the inhabitants of the city of Braşov - Kronstadt), subjects, clergy etc.- has been redefined according to certain criteria as *nation*, perceived as a group which is wider and more comprehensive than any other form of community, permanently homogenous and only superficially divided by status, class, residence or (less frequently) ethnic boundaries[14]. The citizenship is a civic-political concept associated with that of nation, that tends to follow a similar constitutive pathway, thereby representing *a concept of its time*- in keeping either with the French model of the civic nation synthesized in Renan's thesis of the "daily plebiscite"[15], or with the German ethno-cultural one grounded by Fichte, which is mainly voluntaristic and grounded on the concept of "educability"[16]. Citizenship is antinomically conceived with respect to the local and localist-centrifugal culture, as an access way to the "universality" of the nation as centripetal and unitary whole with respect to the common civic and political values which are definitive of the identity of the individual and of the community. Seen in these terms, citizenship was also conducive to a certain model for making politics and conceiving the political, which resulted in the creation of the very western European tradition of thought, criticized by Kymlicka from his liberal position for being difference-blind[17].

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[10] A distinction which has been fiercely criticized ever since its beginning, on the grounds of its limitative view on political inclusion - Sutherland, D.M.G, The French Revoluton and the Empire, The Quest for a Civic Order, (Oxford: Blackewll Publishing, 2003) p. 83.

[11] Idem, p. 382.

[12] Hroch, Miroslav, „From National Movement to the Fully-formed Nation: The Nation-building Process in Europe", în Balakrishnan, Gopal (Ed.), Mapping the Nation (New York and London: Verso, 1996), p. 79, .

[13] See Habermas, Jürgen, The Inclusion of the Other: Studies in Political Theory (MIT Press, 1998), p. 105. Also see Benedict Anderson's contribution, Imagined Communities. Reflections on the Origin and Spread of Nationalism (London: Verso, 1991), revised edition, pp. 6-7.

[14] Greenfeld, Liah; Chirot, Daniel, „Nationalism and Aggression", în Theory and Society, Vol. 23, No. 1, (Feb., 1994), p. 79.

[15] Apud Girardet, Raoul, Naţionalism şi naţiune. (Nationalism and Nation) (Iaşi: Institutul European Publishing, 2003), p. 19.

[16] Idem.

[17] Ethnic, gender etc., conceiving the political in idealized terms that imply citizens with common lineage, language and culture. Even in the cases in which the respective schollars were living in multy-language empires ruling over numerous and various ethno-linguistic groups, such as the Habsburg/Autro-Hugarian Empire, their claims about the politeia were still made in terms of the cultural homogenity corresponding to the Greek city-states - Kymlicka, Will, Multicultural Cityzenship. A Liberal Theory of Minority Rights (Oxford: Clarendon Press, 1995), p. 2.

The ideological artisans of the nation state and of national citizenship are, in the case of the West (corresponding to the "state creates nation" model) lawyers[18], diplomats and military officers belonging to the royal administration, actors of the weberian style rational state bureaucracies[19], while for the Central and East European space, they were writers and historians, intellectuals in general, that "formed the grounds on which some such as Cavour and Bismark realized state unity by propagating the more or less imaginary notion of the unity of the cultural nation"[20]. The construction of nation and nationalism "reflects choices made by its (*ideological*) architects and not an 'objective reality' of some sort"[21]. We are speaking here of a certain class of intellectuals that, either after, either before the actual fact and its correlative political decision, they ideologically brought about the national identity and consciousness as political symbolical goods[22], which were consciously integrated with the collective habitus by the use of symbolic violence[23] in view of attaining specific political objectives.

In nuce, citizenship as a western political concept, despite its universalistic aspirations resulting from its correlative rights, must be considered primarily in historical terms, namely in light of the evolution of the nation as its political assertation, be it civic-individualistic (as in the Anglo-Saxon case), civic-collectivistic (the French case) or ethnic-collectivistic (the German and the East-European model par excellence)[24].

Secondly, the duality citizenship-nation objectively represents the intellectual creation of some particular social groups, reflecting the ideologically grounded construction of some concepts that were destined for assimilation in the habitus of various social classes and groups for the purpose of its modification in accordance with the aim of creating a society which is wider and more inclusive. At the same time, the particular view on citizenship as an avatar of the nation leads to an explanation of the first part of the problem of this paper, namely explaining the integrative responsibility felt by the majority group with respect to the Roma minority in the sense of subjecting it to the "ideological treatment" with respect to education, rights etc. or even the multicultural passion that tries to double this process. However that which this first section of my paper does not account for is why the Roma appear to be so resentful and uncooperative with respect to the efforts that the majority ethnic group make for their sake, why the relation between the two groups seem to unfold, as I was previously saying, in the absence of the Roma.

IV. What is a Roma?

Some time ago, during a meeting regarding the stereotypes related to the Roma in general, Roma women in particular I witnessed a fierce debate between a few of the Roma women participants on the subject of Roma identity. More exactly, how can one tell a "true" Roma? The dialogue ended before the listener or the participants could retain any clear notion on the grounds of which to answer this real challenge. Obviously, a similar question can be asked abut the Romanians as well – how can one identify a real Romanian? The answer is simple – it is not necessary, he/she

[18] For example, speaking of the political system that emerged after the French Revolution, Sutherland stresses the fact that the administration –especially the elective one- was dominated by lawyers, although the membership right belonged to the nobility as well – Sutherland, idem, p.84.

[19] Habermas, op.cit., p. 105.

[20] Idem.

[21] Greenfeld &Chirot, idem, pp. 83.

[22] Bourdieu, Pierre, *Economia bunurilor simbolice* (*The Economy of Symbolical Goods*) (Bucharest: Ed. Meridiane, 1986), p. 31

[23] by association to the state political power, in the sense of symbolic violence i.e. „any authority that succeeds in imposing meanings and imposing them as legitimate", definition that establishes the relative autonomy and relative dependence of the symbolic relations along their interaction with the power relations - Bourdieu, Pierre, Passeron, Jean Claude, *Reproduction in Education, Society and Culture Theory* (London: Sage Publications, 1996), p. 4.

[24] Greenfield&Chirot, idem, p. 82.

does it by him/herself. The Romanians (for example) have the apparently trivial notion of personal origin, that is conscious, voluntary and clearly defined. The Romanians are backed by those national traits that facilitate identification: common language, shared history, common territory, *a concept of in group equality among all the members of the group organized as civil society* etc., to which the aspect stressed in Renan's definition can also be added – the will of living together. I believe that here lies the answer to the second part of the question I asked at the end of the last section.

The first step must consist in identity definition and in this case I would rather go with a subjective-relational model, that is time changing[25]. Therefore, by observing the diachronic evolution of the dynamic of the relations between the Roma ethnic group and the nationals of the various European states, we can find that they follow a line that has physical extermination at one end (for example the Roma holocaust – *Porajmos*[26]) and extreme tolerance at the other, especially present during the Middle Ages. The history of these relations revolves around a *deaf struggle* whose main actors are the political authority (feudal or modern) explicitly seeking first the sedentarization and later the assimilation, or even extermination[27] of the Roma and, on the other hand, the Roma minority, perpetual rambler, caught in an eternal cat and mouse game with the authorities, preserving their life style at any cost – from lying and forgery[28] to seeming surrender to the indigenous normative codes – legal or otherwise. Could we point out a specific identity element during all this period? At a first glance, we could say that nomadism –therefore the lifestyle- could be such an element, thereby representing the very key to understanding the Roma identity. But history also shows us that Roma chose not once to become sedentary when and where favorable conditions were met. In my opinion, their nomadism can be regarded not as a mere aspect of their identity, but as a consequence of some other element, which is much more important with respect to the specific nature of the Roma identity: the *legal system*. Along their history, the most frequent request by the Roma populations in relation to the authorities concerned the acknowledgement and observance of their judicial and jurisdictional autonomy, namely the acknowledgement of the Roma communities' right to solve transgression and crime issues according to their own practice, even if the accused had not committed their deeds within the Roma community but in that of the indigenous population[29]. But while in the feudal period, corresponding to the traditional state, such requests could appear reasonable, the emergence of the modern sovereign state after Westphalia and the English Revolution made such claims appear as being fundamentally undermining with respect to the legitimate authority, therefore anti-systemic. We can therefore infer, as a first step, that one of the most characteristic Roma identity features, also relevant to our discussion, is the claim of *romany*

[25] See Barth, Fredrik, *Ethnic groups and Boundaries . The Social Organization of Culture Difference* (Boston: Little, Brown&Co, 1969), especially pp. 9-39; 117-134.

[26] See especially Lewy, Guenter, *The Nazi Persecution of the Gypsies* (Oxford University Press, 2000).

[27] The problem regarding the physical elimination of the Roma does not emerge during the nazi period, its roots run much deper – for example in 1714, in the Mainz Archibishopry the summary execution of all dishonest gypsies and drifters it is declared, without any trial, based solely on their forbidden life style: in 1725 Friedrich Wilhelm II imposes a decree by which in Prussia all gypsies above 18 –men and women- could be hanged without trial. Such examples can also be found in the Netherlands, Spain or Great Britain - Fraser, Angus, *Țiganii* (*The Gypsies*) (Bucharest: Humanitas Publishing, 2008), p. 169.

[28] As in the case of the „Great Scheme" or *o xonxanó baró* in Romani – counterfeiting the documents needed for getting through the customs during the Middle Ages and taking on identity as an „Egyptian" in order to obtain favors with the local population by posing as a pilgrim - Fraser, Angus, idem, pp. 73; 75-98.

[29] For example the right of free pass given by Sigismund King of Hungary to Ladislau, the King of the gypsy in 1423: "we hereby expressly command our loyal subjects here present to support and shelter the aforementioned King Ladislau and his gypsy subjects, without any resistance or confinement. Should any quarrel or problem arise among them, none other than the same Ladislau shall have the right to judge and forgive" - Fraser , Angus, idem, p. 88. There are many more such cases and they are not restricted to any geographical or temporal frame. Also see Weyrauc, Walter O., *Gypsy Law. Romani Legal Traditions and Culture* (Berkeley&Los Angeles: University of California Press, 2001), especially Chap. 2 Weyrauch, Walter O.; Beli, Maureen Anne, „Autonomous Lawmaking: The Case of the ‚Gipsyes'", pp. 11-87; Cap. 6: Fraser, Angus, „Juridical Autonomy among Fifteenth and Sixteenth Century Gypsies", pp. 137-149.

precedence over the local legal systems. And this element inexorably opposes the Roma to the Western political and legal constructs, especially those related to citizenship, conceived as an expression of a structured system of legal norms implying rights and obligations. This element however does not fully account for the absence of the Roma from the official decision processes regarding their own situation, for example, or for the reluctance in basically assuming their rights as citizens.

Secondly, as I have previously attempted in showing, citizenship represents a construct which can be understood only in relation to the concept of nation and its corresponding evolution. And here we are forced to come back to the issue we discussed in the beginning of this section: considering that, by virtue of the way in which the main features of the European *politeia* evolved in time, state authority can answer to claims made only by clearly defined and identifiable groups, stating their claims through leaders which are found to be legitimate by the system, *what are the Roma* with respect to their potential relation to the institutions of the majority ethnic group?

Some may think it is easy to identify someone who is Roma, by race traits for example: Roma have darker skin. But not all Roma correspond to this taxonomy and, on the other hand, Sicilians or Turks are not Roma. Obviously, they have a common language, fact that would make them discernable – notwithstanding the fact that there are a lot of persons who claim to be Roma but who don't speak Romani, the Romani language is nothing but an immense collection of dialects that would render the understanding between, say, a Swedish *Tattare* and a Turkish or Spanish Roma almost impossible[30]. Also, the cultural identity features – from clothing, religion to music belong to a similar tendency towards extreme variety (from traditional Balkanic gypsy music to the Spanish flamenco, for example), to which we must also add the preconceptions of the majority ethnic group with respect to them[31]. The message of such a fragmentary community can be neither coherent, nor intelligible for the institutions of the majority.

V. Conclusions

Briefly put, the Roma population did not undergo a process of cultural unification and identitary reconstruction as the Europeans did, therefore lacking a specific identity which is capable of manifesting itself politically, as in the case of the other European minorities. And this aspect derives from the fact that the Roma still lack, while the other European nations do not, a legitimate intellectual class acknowledged as such by the very Roma community, capable of producing the kind of cultural and ideological goods assumable by the Roma habitus with the clear purpose of producing political effects. The Roma intellectuals which presently constitute their interface with the majority ethnic group are not the organic product of their own community, thereby reflecting its characteristics in their ideological production, but the results of the assimilation of the values of the majority group[32] and therefore the Roma manifestation within the civil society is next to null. Adding to that the informal persistence of the old *romanya* "legal" system, fundamentally producing a rejection by the Roma of the rights and obligations involved with citizenship and membership to the state, I consider that our study has also attended the last of the elements which are required in answering the problem at hand – the non-participation by the Roma to a dynamic, constructive and mutually beneficial relationship to the majority ethnic group. The answer lies mainly in the specific nature of some of the defining characteristics of Roma culture – traditional judicial autonomy directly opposing the European

[30] See Fraser, idem., pp. 17-54; Matras, Yaron, *Romani. A Linguistic Introduction* (Cambridge University Press, 2004), especially Chapter 2.

[31] Saul, Nicholas; Tebbutt, Susan, *The Role of the Romanies. Images and Counter-Images of Gypsies'/Romanies in European Cultures* (Liverpool: Liverpool University Press, 2004), pp. 53-118.

[32] Bearing in fact the distinct name of *Romanized*.

construct of national identity – and, secondly, Roma community's incapacity in producing an authentic intellectual class capable of becoming involved with the discussions with the majority ethnic group and also producing, on ideological level, the desired identity project, compatible with the European civic and political thought and capable of discussing its fundamental values.

From this perspective, the greatest chance of the Roma could be the launching of a real debate over the European citizenship, offering the Roma leaders the opportunity to propose a reconfiguration of the concept of citizenship in such a way as to include their community as well. The partnership with the majority ethnic group, that I mentioned in the beginning of this paper, can only be realized from *equal positions*.

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THE PARTNERSHIP BETWEEN CHINA AND INDIA AFTER 2005

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Abstract:
In 2010 China and India celebrated 60 years of diplomatic relations. Both countries are fast growing economies, which are increasing military spending that is why they are the two main powers in Asia. China and India fought a war in 1962 and still have disputed land borders. Economy and military spending are not the only elements that should be observed when we talk about these countries. Another important element is Pakistan's role in the region. India disclosed its concerns regarding especially the closeness between China and Pakistan in security and nuclear matters. Resources, disputed land borders and Pakistan's role are the three elements that make the relationship prone to difficulties. Both could choose to cooperate - by finding common interests and instruments to obtain these interests or could choose to have a difficult and unpredictable relation. The main purpose of this paper is to analyze the relationship between China and India after 2005, when they have signed the "strategic partnership", which creates the legal framework for cooperation to see if they have the same relation when it comes to regional issues as when it comes to global problems. The second propose is to explain the differences or the similarities between their behaviour. In the first part I'll focus on the economic dimension and on how increasing cooperation in this sector can promote a stable and comfortable foundation for both of them. In the second part I'll explain how they relate to land borders disputes. In the third part I'll present the current situation between Pakistan and China and on the other hand between India and Pakistan. In the last part I'll identify and interpret the causes that are leading to similar or different actions.

Keywords: *China, India, Pakistan, South Asia, security.*

Introduction

As India and China are emerging as regional and global powers they are changing the perceptions regarding Asia's security. Their relation, which has been a difficult one for a long time can explain matters regarding the security problems for the whole region. This paper will discuss the relation between India and China, showing the difference between how they approach the economic and trade relation and how they respond to the security matters. Important actors, whose relations to China and India should be discussed as well are Pakistan and US. Pakistan has been supported by China for a long time with the main purpose to balance India's growth. On the other hand, US have tried to improve its relation with India, mainly after 9/11 seeing in India a partner in fighting terrorism. The second reason was US's interest in gaining an ally in Asia.

This subject is important because will show how the security matters influence the institutional framework in which these states act and how they perceive each other. To present their relation I'll identify the areas in which there are likely to cooperate and share mutual interests and matters in which they have suspicions regarding the other's intentions.

The paper will focus on analyzing of the essential documents, such as Joint Statements and official's speeches. Other sources utilized include papers from Chinese and Indian perspectives**.**

The China – India Partnership

India and China both have emerging economies, nuclear weapons and expanding military budges. They are increasing their influence in Central and Southeast Asia[1] while developing their

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hard-powers capabilities and that's why they are named rising powers[2]. In their recent history, China and India have experienced a complex relation. They shared a mutual background in 1940-1950 which left them with unresolved border issues. Their territory is the first dimension where China and India do not agree. After they fought a war in 1962, India and China were left with world's longest disputed border line; China is claiming 92.000 km that now belong to India. The first claim is on India's western part, on Aksai Chin in the northeaster section of Ladakh District, in Jammu and Kashmir. The second claim is on the Arunachal Pradesh state, in eastern part where is the monastery that has the most important role in choosing the new Dalai Lama incresing the area's symbolic role[3]. In the same time this position is of major importance for China's influence over Tibet. India has claimed that should receive the parts that the British Empire had occupied on Chinese territories. After defeating the Indian forces, China withdraw 20 km further from the McMahon Line to what was called „the line of actual control" in the Eastern sector and 20 km behind its latest border in Ladakh, called "the line of actual control" in the Western Sector[4]. Since the 1980s there have been mutual efforts to recognize the Line of Actual Control (LAC), which now defines the border[5]. The officials from both countries don't seem to agree on what part of the border they actually need to debate. While Chinese Prime Minister, Wen Jiabao was visiting India in December, the state-owned Chinese media referred to the border as nearly 2,000 km. The Indian ambassador, S Jaishankar had another opinion and said that „We have a long common border of 3,488 km"[6]. After Wen Jiabao`s visit, China and India agreed to sign a joint statement by which reaffirmed their support for a peaceful solution to this problem. They continue to approve the Agreement on Political Parameters and Guiding Principles for Settlement of the Boundary Question agreed in 2005 and the process of negotiations being undertaken by the Special Representatives with the aim to offer an „acceptable solution"[7]. For now, their goal is to maintain peace on the border.

Others saw China and India as becoming *Chindia*[8]. *Chindia* indicates a form of cooperation in which interdependence is so deep that the relation between the two parts can only be a peaceful one. Its primarily meaning refers to an economic coalition, but can refer to trade and economic development, energy, environment, social advancement and security matters[9]. That's why through cooperation in the economic area, China and India could improve their partnership in other matters like security or energy sector.

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[1] Malone, David M., and Rohan Mukherjee. "India and China: Conflict and Cooperation." Survival (00396338) 52, no. 1 (February 2010): 137-158. International Security & Counter Terrorism Reference Center, EBSCOhost (accessed February 2, 2011).

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[3] Holslag, Jonathan. "The Persistent Military Security Dilemma between China and India." Journal of Strategic Studies 32, no. 6 (December 2009): 811-840. Political Science Complete, EBSCOhost (accessed February 2, 2011)

[4] "Indo-China War of 1962," Global Security, http://www.globalsecurity.org/military/world/war/indo-prc_1962 htm, (accessed February 1, 2011).

[5] Vivek Raghuvanshi,"India, China Tackle Border Dispute", Defense News, http://www.defensenews.com/story.php?i=5251289&c=ASI&s=TOP, (accessed February3, 2011).

[6] ''Chinese media knocks off 1,600 km from China-India border", The Times of India, http://timesofindia.indiatimes.com/india/Chinese-media-knocks-off-1600-km-from-China-India-border/articleshow/7128410.cms, (accessed on February 3, 2011)

[7] India, Ministry of External Affairs, „Joint Communiqué of the Republic of India and the People's Republic of China", bilateral documents, December 16, http://meaindia nic.in/mystart.php?id=530516879 (accesed February 4, 2011).

[8] Holslag, "The Persistent Military Security Dilemma between China and India." 810-2.

[9] Coates, Breena E. "India, Chindia, or an Alternative? Opportunities for American Strategic Interests in Asia." Comparative Strategy 28, no. 3 (July 2009): 271-285. International Security & Counter Terrorism Reference Center, EBSCOhost (accessed February 3, 2011).

The second problem they have refers to terrorism. India and China announced their opposition against any form of terrorism and their commitment to countering terrorism including by supporting implementation of UN resolutions[10]. One of the mentioned resolutions, 1267 lists as terrorists JuD and Hafiz Saeed. Hafiz Saeed founded Jamaat-ud-Dawa (JuD) and is the master of Mumbai terror attacks. But China has not agreed to add Masood Mazhar, founder of terror group Jaish-e-Mohammed to the terrorist list[11]. The document doesn't mention the Mumbai terror attacks or Pakistan's role in countering terrorism in the region. China signed in April 2005 a treaty with Pakistan - Treaty of Friendship, Cooperation and Good-neighbourly Relations between the People's Republic of China and the Islamic Republic of Pakistan (Treaty) - by which mutual support is provided for protecting their national sovereignty and integrity. In the China-Pakistan Joint Statement signed after Pakistani President, Asif Ali Zardari visit to China, Pakistan considered its relation with China as „the cornerstone of its foreign policy"[12] . It seems that this document signifies an alliance between China and Pakistan. The Treaty mentions a close cooperation between Defence Ministers and between the two armies[13]. Another legal document was established in 2006, when the Framework Agreement on Cooperation between the Defence Ministry of the People's Republic of China and the Defence Ministry of the Islamic Republic of Pakistan was signed. Their Treaty suggests that common problems should be addressed by mutual cooperation under a bilateral and multilateral framework, in order to maintain regional peace, stability and security. China seems to sustain Pakistan's involvement in Asia's institutional framework and has welcomed Pakistan's membership in ASEM, while expressing its willingness to work together in other organizations such as SAARC, ACD, ARF, SCO and ASEM[14]. In the 208 Statement, Pakistan recognizes and supports the one-China policy. Pakistan and China announced that they'll cooperate not only to maintain stability in the region, but also to increase their trade and economic relations[15]. The most important problem for India is China's nuclear assistance to Pakistan. If India will perceive this as a threat, an arms-race could start between Pakistan and India because both of them will want to increase their power to ensure their security. On the other hand, China might be interested in maintaining India busy with Pakistan so it could sustain its influence in the region.

China also has close relations with Myanmar, Nepal, Sri Lanka and Bangladesh[16]. Nepal and Burma have been considered buffer states between South and East Asia and that's why is important to see if the balance in this region was changed in some way[17]. If their role will increase through some instruments provided by China, then the balance can be challenged. China's increasing pressure in these countries can be perceived as a threat to India because it offers China a greater role in the region. When China entered SAARC, in 2005 as an observer, Pakistan saw this as an opportunity to counterbalance India's role in South Asia[18].

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[10] India, Ministry of External Affairs, „Joint Communiqué of the Republic of India and the People's Republic of China", bilateral documents, December 16, http://meaindia nic.in/mystart.php?id=530516879 (accesed February 4, 2011).

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[13] Pakistan, Embassy of the People's Republic of China in the Islamic Republic of Pakistan, „Joint Statement Between the People's Republic of China and the Islamic Republic of Pakistan", November 25, 2006 http://pk.chineseembassy.org/eng/svhjt/t282202 htm, (accessed February 4, 2011).

[14] Embassy of the People's Republic of China in the Islamic Republic of Pakistan, „Joint Statement Between the People's Republic of China and the Islamic Republic of Pakistan".

[15] „Full text of joint statement between China and Pakistan", China View.

[16] Malone, D. M., and Mukherjee, R. „India and China: Conflict and Cooperation," 145.

[17] Holslag, J. „The Persistent Military Security Dilemma between China and India," 813-5.

[18] Zhao, Hong. "India and China: Rivals or Partners in Southeast Asia?." Contemporary Southeast Asia: A Journal of International & Strategic Affairs 29, no. 1 (April 2007): 121-142. International Security & Counter Terrorism Reference Center, EBSCOhost (accessed February 2, 2011).

The last sensitive domain between them concerns the so-called One China policy. The One China policy affirms that Taiwan and Tibet is part of China. India's support for this policy hasn't been mentioned on the joint statement because India wanted Chinese to recognize One-India policy which states that Jammu and Kashmir are part of India just as Taiwan and Tibet are part of China. China's visas policy for those Indian states has irritated India. Chinese agreed to have official talks over that matter[19]. This is the first time since 1988 that the one-China policy is not included in a joint statement between China and India. However, officials have mentioned that India does recognize Tibet Autonomous Region as part of China[20]. It seems that this is the area where the relation between China and India is different from that between China and Pakistan, because India didn't mention the one-China policy as Pakistan did. Since 1988 India and China have managed to separate the border issue from other bilateral matters[21].

In the same statement they managed to identify a few areas were they were found on the same side. The first refers to China's support for a permanent seat for India in the UN Security Council while sustaing a stronger role for the Security Council. Premier Wen Jiabao reaffirmed China's position through the following statement "China attaches great importance to India's status in international affairs as a large developing country, understands and supports India's aspiration to play a greater role in United Nations, including in the Security Council"[22]. Strengthening India's role in the region is motivated by the fact that both of them have „common interests and similar concerns on major regional and international issues"[23] should engage in a greater cooperation through multilateral forums. Some of these common interests refer to climate change, the Doha Development Round of WTO, energy and food security, international financial and economic reform are a particular focus for closer cooperation. Although climate change has been recognized as a common thereat, India doesn't want to reduce its emissions until industrialised countries don't take more serious actions and China has the same opinion reaffirming the need for "common but differentiated responsibilities"[24]. As Indian Prime Minister, Manmohan Singh declared the industrialised countries have polluted for a century while the third world countries have just beginning to use their "share of the global atmosphere"[25]. As emergent economies they both are on the same side and will only sign a climate deal when a common global per capita emissions target has been established[26]. Their argument must be considered because you can't expect to have the same actions against climate change if you don`t take into consideration their objections. Industrialised countries should make sure that they'll find a way to convince the emergent economies that they will not lose if they'll agree on cutting their emissions.

Another sector where India and China have a strong partnership is the economic one. Economy, as the most approachable sector for cooperation is used to mediate between both of them. That's why India and China have signed a trade agreement, which will increase their economic

[19] Indrani Bagchi ,"India declines to affirm 'One China' policy", The Times of India, December 17, 2010, http://timesofindia.indiatimes.com/india/India-declines-to-affirm-One-China-policy/articleshow/7114778.cms, (accessed February 10, 2011).

[20] India rebuffs China with "One-China" policy omission, TibetanReview net, December 19, 2010 http://www.tibetanreview net/news.php?cat=10&&id=7976, (accessed February 10, 2011).

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[22] Indrani Bagchi, India declines to affirm ´One-China Policy`, The Times of India, December 17, 2010, http://timesofindia.indiatimes.com/india/India-declines-to-affirm-One-China-policy/articleshow/7114778.cms, (accessed on Februry 5, 2011).

[23] India, Ministry of External Affairs, „Joint Communiqué of the Republic of India and the People's Republic of China".

[24] India, Ministry of External Affairs, „Joint Communiqué of the Republic of India and the People's Republic of China".

[25] William Antholis, "India and Cilmate Change", Wall Steet Journal, July 29, 2009, http://online.wsj.com/article/SB124787011359360457 html, (accessed on February 6, 2011).

[26] Antholis, "India and Cilmate Change".

change up to 100 billion dollars by 2015. Although it had rejected a regional trading arrangement with China, India has asked for a greater access for its products and services on Chinese market. Foreign secretary Ms Nirupama Rao said that „there is a big imbalance in the trade and that we would like a little more market access in areas like pharma, agro-products and IT services…please take this message to China"[27]. They agreed to „establish a Strategic Economic Dialogue to enhance macro-economic policy coordination, to promote exchanges and interactions and join hands to address issues and challenges appearing in the economic development and enhance economic cooperation"[28]. As in the environmental sector, they encourage a pluralist management for economy's recovery and for greater cooperation in the G20 framework aiming to improve "global economic governance" and assure „balanced development and shared benefits"[29]. Beside G20, another institution that should influence cooperation between China and India is BRIC.

In the last years China had another reason to improve its relations with states from different regions, especially those from Southeast Asia and it has close ties with Myanmar, Nepal, Sri Lanka and Bangladesh[30]. The reason was its fast economic growth - China needed resources and these resources were attainted from very different regions from South America - Venezuela, Brazil - and from Africa. Not only that the trading has been improved, but China has become the most important donor and investor in Africa. India and China are in the same time competing for export markets.

Because they are neighbours in Asia share a mutual interest in the stability, prosperity and security of this region. India and China are committed to cooperation on a cross-regional, regional and sub-regional process in Asia. The multilateral framework for this aim includes East Asia Summit, the Asia-Europe Meeting, the Shanghai Cooperation Organization, the Russia-India-China trilateral cooperation mechanism and the South Asian Association of Regional Cooperation (SAARC). The Indian Prime Minister stated that „A strong partnership between India and China will contribute to long-term peace, stability, prosperity and development in Asia and the world".[31] Their future cooperation will influence not only Southeast Asia, but the whole Asia-Pacific region. This argument for multilateralism has already been used by India with its Look East Policy. Through this policy – which began in 1991, after the end of Cold War - India wanted to develop a new relation with the ASEAN states because needed new resources and new markets to supply Soviet Union's collapse, which was its trading partner[32]. India has been trying to become a global economic actor through this policy.

China and India realised their important role in Asia and signed two significant agreements. One in 2005 and is called Strategic and Cooperative Partnership for Peace and Prosperity and Political Parameters and Guiding Principles for Settlement of the Boundary Questions and the second in 2008, Shared Vision for the 21st Century. Last year China and India celebrated 60 years of diplomatic relations. Their new partnership was based on India's independence and China's liberation[33]. They have even declared 2011 as "Year of India-China Exchange" aiming to increase the relation between their civil society organisations, youth, media, scholars, think-tanks. They decide to improve confidence building measures through a mechanism of regular exchange of visits

[27] TibetanReview home page.

[28] India, Ministry of External Affairs, „Joint Communiqué of the Republic of India and the People's Republic of China".

[29] India, Ministry of External Affairs, „Joint Communiqué of the Republic of India and the People's Republic of China".

[30] Malone, D. M., and Mukherjee, R. „India and China: Conflict and Cooperation", 145.

[31] Bagchi, India declines to affirm ´One-China Policy`.

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[33] "On India-China Relations."Vital Speeches International 3, no. 1 (January 2011): 6-8. Academic Search Complete, EBSCOhost (accessed February 9, 2011).

between Heads of State-Government, a telephone hotline between the Prime Minister of India and Chinese Premier and a future mechanism of annual exchange of visits between the two Foreign Ministers.

China's recent announcements that will build two new aircraft carriers and that already has one - Varyag - under construction will allow China's People's Liberation Army-Navy Marine to patrol South China Sea, Western Pacific and Indian Ocean (Sharma, 2011). Of course, China's increasing capabilities are worrying India as the Indian Ocean is an important subject for India's national interest mainly because 95% of its exports are shipped through Indian Ocean. India used naval diplomacy for this region and signed cooperation agreements with all island states in the Indian Ocean. India used soft power to increase its influence in the region when has offered to help those countries in their humanitarian crisis. India was active in Africa too when in 2004, was involved in African Summit in Mozambique[34].

A threat for India is China's arming. India has already developed 3500 KM Agni-III that might be operational by 2011 and is supposed to test 5000 KM Agni-V within a year. Agni V will allow India to hit any city in China and Pakistan. After this test the Chinese press was asking about how India will use its growing power.

India established a new framework for cooperation with other countries, including France, US and Russia[35]. All the actions that India has made in the last years, regarding its military capacities - including a nuclear deal with USA and the launch of its first nuclear submarine, display a realistic approach on the security problems in the region. Russia supported the submarine building and the aircraft carriers that were brought by India. The Indian missile defence system may use Russian GLONASS system to improve the hitting capacity and may use the American GPS for defence purposes and is working on improving its GPS system[36]. We should view these steps through regional lens. In 2010 it was an increase of 34% for the Indian defence budget[37]. This means that India spends between 3% and 3.5% of its GDP on defence more exactly 32.7 billion dollars.

Indian military doctrine has included asserts as: two front simultaneous wars with both China and Pakistan and a pro active war strategy which could allow army's fast mobilisation. For this fast mobilisation the Indian army aims to obtain the capacity to get into the enemy's territory within 96 hours. For this T-90S tanks and upgraded T-72 M1 tanks are going to be used[38]. The carrier that has been brought from Russia is aimed to obtain the interdependence that army, navy and IAF need. India's actions have already been perceived by Pakistan as hostile and it has asked for the right to use nuclear energy for civil purpose. The stability in South Asia may depend on these perceptions. Pakistan's defence budget, thou lower than India's budget it also has the help provided by the

[34] Holslag, J. „The Persistent Military Security Dilemma between China and India", 825.

[35] See also India, Russia to ink defence deals worth $ 4 billion, Associated Press of Pakistan, Mar 4, 2010, http://www.app.com.pk/en_/index.php?option=com_content&task=view&id=97718&Itemid=1, (accessed on February 10, 2011)

and India to sign nuclear, Gorshkov deals with Russia, The Times of India, Mar 11, 2010,

http://timesofindia.indiatimes.com/india/India-to-sign-nuclear-Gorshkov-deals-with-Russia/articleshow/5671801.cms, (accessed February 13, 2011).

[36] NIS Glonass Signs Agreement With Indian Company, Russia Avia, Aug 28, 2010,

http://www russianavia net/index.php#state=NewsDetail&id=3221, (accessed February 15, 2011).

[37] Laxman K Behera, Budgeting for India`s Defence: An Analysis of Defense Budget 2010-11 and the likely Impact of the 13th Finance Commission on Future Defense Spending, Institute for Defense Studies and Analyses, Mar 3, 2010,

http://www.idsa.in/idsacomments/BudgetingforIndiasDefence2010-11_lkbehera_030310, (accessed February 15 2011).

[38] Indian Army Wants to Add Another 1,000 T-90S Tanks by 2020, Defense Industry Daily, Aug 20, 2008,

http://www.defenseindustrydaily.com/indian-army-wants-to-add-another-1000-t90s-tanks-by-2020-pdated-02697/, (accessed February 15 2011).

Coalition Support Fund for its support of the operations in Afghanistan[39]. If Pakistan will want to consolidate its capabilities then this should be seen as a very reasonable action. Is through this actions that the danger of escalation may be identified. Although India's foreign secretary, Nirupama Rao met Pakistani foreign secretary, Salman Bashir on 25 of February, 2010 no progress was made between the two states[40]. The meeting even brought more accusations from the both sides: Pakistan blamed India for supporting the militants and terrorists in Afghanistan. On the other hand India asked for a greater effort on the part of Pakistan in punishing those guilty for attacks in Mumbai in 2008.

China and India both have major treaties with third parties India with US and China with Pakistan which ensures their stability and increase their power. A Strategic Partnership with India was analysed by the Bush administration in 2001 and in 2004 the U.S.-India 2004 Next Steps in Strategic Partnership (NSSP) tool announced cooperation in civil nuclear technology as a main goal of India – US relation. In 2005 president Bush announced that he will work to obtain "full civil nuclear energy cooperation with India"[41]. In 2008 the Congress approved the document called United States-India Nuclear Cooperation Approval and Non-proliferation Enhancement Act. The Act could justify China's intention to supply Pakistan[42]. While their bilateral relation is a positive one, India and US both want to have a special relation with China based on cooperation.

Conclusions

As long as China and India aspire to become the most important powers in the region, US seem to have an important role in making sure that none of them will obtain this. In the meantime India's defence budget has not been debated by the civil society and its goals might therefore be questioned. China and India both have major intern problems. For India is the major poverty issue, although is the world's largest democracy, while China is an authoritarian state who lacks internal legitimacy[43]. India is prone to be a status quo power while China might become a revolutionary power. The power that China and India are gaining leads them to seek resources and maybe methods to dominate the region. First and foremost, they both are facing the same challenges in climate change and security matters. The most likely issues of cooperation will continue to be trade and economic matters. They face a border issue that seems far from being clarified. At a South Asian level China and India don't agree on Pakistan's role. China supports Pakistan through economic measures strengthening its role as India's neighbour while India, on the other hand used it relation with US to increase its presence in the region. On a global level, China has a more stable economic growth although it is limited by its authoritarian regime and India might have more values in common with the West states. China has tried to increase its global role primarily through economic measures. Despite their economic and trade cooperation, China and India's relation should not be viewed through the lens of neo-liberalism but more through a realist perspective.

After his visit in India, in December 2010, Chinese Premier said: "The China-India boundary question has a historical legacy. It will not be easy to resolve this; it requires patience. Only with sincerity, mutual trust and perseverance, we can get a fair, reasonable and mutually acceptable

[39] Pakistan, Embassy of The United Staes Islamabad, Press Release, U.S. Continues Coalition Support Fund Reimbursements, May 26, 2010. http://islamabad.usembassy.gov/pr-10052603 html, (accessed February 15, 2011.

[40] Sandeep Dikshit, I have come to bridge differences: Salman Bashir, The Hindu, Feb 25, 2010, http://www.thehindu.com/news/national/article112940.ece, (accessed February 15, 2011).

[41] Kerr, Paul K. "U.S. Nuclear Cooperation with India: Issues for Congress: RL33016." Congressional Research Service: Report (December 17, 2009): 1-43. International Security & Counter Terrorism Reference Center, EBSCOhost (accessed February 16, 2011).

[42] Kerr, Paul K. "U.S. Nuclear Cooperation with India: Issues for Congress: RL33016.", 10.

[43] Coates, B. E. „India, Chindia, or an Alternative? Opportunities for American Strategic Interests in Asia", 275.

solution"[44]. India can be US's important partner for stability in South Asia in the meantime China can use Pakistan to balance with India's rising. Anyway, it is certain that the both countries maintain a realistic approach[45] to their relation increasing their military spending because they don't have that mutual trust. However, their relation can still be improved through cooperation in a larger institutional framework such as SAARC or ASEAN.

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WOMEN'S AUTONOMY AND THE FAMILY IN RECENT ROMANIAN POLICY-MAKING

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Abstract

In my paper I aim to provide an analysis of the relation between women's autonomy and the family in Romanian recent policy-making. I will focus primarily on policies developed by the Romanian state after Romania's integration in the European Union with regards to the family and family-related policy domains.

My analysis will focus on several variables: 1. the theoretical instruments available for analyzing women's autonomy in relation to state policies 2. the understanding of the family in Romanian policy-making 3. the interplay between women's autonomy and the family and how policy-making influences the relation between the two. The analysis will take into consideration the specific Romanian socio-political context in terms of economic conditions, ideological influences and gender relations.

Political theory is no stranger to the issue of individual autonomy. In my paper I will focus on recent feminist political theories on gendered accounts of autonomy. These accounts modify the understanding of autonomy and focus on conditions and aspects of autonomy relevant to women's lives and experiences. The current financial crisis and recent developments in Romanian policy-making will be analyzed in terms of how they affect women's autonomy. Since much of Romanian policy-making still avoids including gender and gender relations into its explicit justifications, provisions and evaluation, referring to the family as a basic social unit, the gendered consequences for women's autonomy of such an approach need to be understood and acknowledged.

In my analysis I will use both Romanian and European recent policy papers, as well as recent data obtained through social research.

Keywords: *Women's autonomy; family; Romanian policies; feminist theory*

Introduction

Autonomy is what Gallie would call an essentially contested concept. Essentially contested concepts are the ones "the proper use of which inevitably involves endless disputes about their proper uses on the part of their users" [1]. Political theorists have long debated its meaning or its "proper use" and no end to the debate is in sight. If anything, feminist political theory has added to the fire and produced its own set of interpretations. This is not an article focusing on these theoretical debates to great depth[2].

Rather my aim in terms of the political theories of women's autonomy is to identify the main accounts proposed by feminist theorists. I will do this by focusing on two main accounts and how each would relate to the family, and specifically on how it interprets the relation between women's autonomy and the family.

The final part of the paper is then dedicated to identifying how policy-makers in Romania understand such a relationship, implicitly or explicitly, by analyzing recent Romanian policies. I will focus on explicit family-oriented policies, although conceptions about the family and autonomy are present in many areas of policy making.

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[1] Gallie, W.B. "Essentially Contested Concepts", in *Proceedings of the Aristotelian Society*, New Series, Vol. 56 (1955 - 1956), 169

[2] For my own in depth analysis of the current debates n autonomy see Alice Iancu Alice Iancu *A Conceptual Approach to Social Exclusion*, PhD. Thesis, Bucharest, National School of Political and Administrative Studies, 2010 (unpublished)

1. Women's Autonomy- theoretical overview

A minimal and general account of autonomy

Autonomy is a concept mostly associated with the liberal theoretical tradition. A simple general approach would describe liberalism as tied to three basic principles:

1. Only individuals matter[3]. Social arrangements, institutions and policies are to be evaluated starting from the effect they have on individuals[4]. Also, "the only information *directly*[5] relevant for evaluating alternative political and social arrangement is information about their impact on individual human beings"[6]. If, for example, some cultural practices or privileges would facilitate or allow discrimination against women or a deprivation of their rights, than the institutional arrangements should use this as a tool for assessment and not the culture's presumed values or social prominence.

2. The second principle constitutes what Johnson names "the equality stipulation" [7]: Everybody counts as one, nobody as more than one[89].

3. The third principle refers to the fact that individuals are considered to have agency, where "By an "agent" I mean a being who is capable of conceiving values and projects, including projects whose fulfillment may not be within the range of the being's immediate experience"[10]. This does not presuppose the idea that people will act in an altruistic fashion, for example, but that they are capable of it because of the values they hold, not merely because they feel like it.[11].

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[3] In light of recent communitarian and feminist critics, it is also useful to state briefly that such considerations about the individuals as a criteria for evaluation do not presuppose anything about the individuals themselves. In Johnson's words, such an approach is based on individuals' intrinsic value because they are individuals, not on their character. While some liberal theorists do speculate about either the desired or the actual character or nature of the individuals, these in no way constitute a condition of their value. See Johnson, David,: *The Idea of a Liberal Theory. A Critique and a Reconstruction,* (Princeton: Princeton University Press, 1994), 19

[4] One of the methodological consequences of this is that social exclusion is evaluated by aggregating exclusions at the level of individuals. This is already one of the principles informing the choosing of relevant indicators of social exclusion (Atkinson, Cantillon, Marlier and Nolan, 2003, p. 29)

[5] Author's emphasis

[6] Johnson, David,: *The Idea of a Liberal Theory. A Critique and a Reconstruction,* (Princeton: Princeton University Press, 1994), 22

[7] This could also be referred to as *basic equality.* A basic egalitarian account maintains "the idea that at some very basic level all human beings have equal worth and importance and are therefore equally worthy of concern and respect" (Baker,Lynch,Cantillon,Walsh, 2004, p. 23). Essentially, it is "a rather minimalist idea" (Baker,Lynch,Cantillon,Walsh, 2004, p. 23). Liberal approaches to equality, apart from generally subscribing to the basic conception of equality, widely vary in terms of which are the important inequalities and how they should be addressed. What is distinctive about this approach is that it does not take every type of equality as being unfair and it more readily accepts the idea that certain inequalities are unavoidable. A liberal approach is distinguished by some theorists from the *equality of condition* approach, aiming to eliminate what it deems significant inequalities (Baker,Lynch,Cantillon,Walsh, 2004, pp. 24-46).

[8] Johnson, David,: *The Idea of a Liberal Theory. A Critique and a Reconstruction,* (Princeton: Princeton University Press, 1994), 21

[9] I also see it as a precaution against arguments that liberalism *strongly* prefers some sort of individuals, in terms of character, for example, over others. By "*strongly* prefers" I mean that this preference comes to determine the way political principles and institutions are conceived and would end up directly or indirectly favor some individuals over others, leading to unequal access to rights or privileges within the political arrangements.

[10] Johnson, David,: *The Idea of a Liberal Theory. A Critique and a Reconstruction,* (Princeton: Princeton University Press, 1994), 22

[11] Johnson offers two illustrations of what in fact are two different aspects of agency: acting because of values and engaging in projects that are not about one's own experiences. For example saving somebody from drowning because of a feeling of sympathy is not an instant demonstrating agency. However, saving that person because one thinks human life is of value and worth the risk is an action illustrating agency. People can also engage in projects that would be fulfilled beyond their lifetime, like achieving gender equality. Because an agent is passionate about this she engages in research or activism regarding one particular subject, even though she will not experience the fulfillment of

There have been many liberal accounts focusing on autonomy, starting from John Stuart Mill. Mill's concern for autonomy was based on a concern for individual liberty, understood as self-determination. Mill's account of autonomy lists both the characteristics one needs to be considered autonomous as well as the conditions one needs to become autonomous. In *On Liberty* the main critique and the main argument is meant for society as a whole and for penalties of society "of law or opinion."[12] that impede individual autonomy[13]. Since Mill liberal accounts have been developed by a variety of theorists. These accounts focus on what is needed for individual autonomy, that is, on the necessary conditions, may these be absence of coercion, education or some type of resources.

1.2. Feminist Accounts of Autonomy

Feminist theorists have not been particularly enthusiastic in the face of liberal autonomy[14], as it has been traditionally understood. However some believed the concept of autonomy holds great potential for gender research. Two strands of feminist research regarding autonomy can be identified: one liberal strand, maintaining much of the more traditional accounts and applying them to women's experiences, and one strand focusing on relational autonomy[15], a vastly modified concept compared to the mainstream liberal ones.

The liberal strand encompasses feminist theorists who have argued for a renewed attention on the concept of autonomy, some in the particular context of Eastern Europe[16]. Marilyn Friedman argues for autonomy's value invoking several arguments: it is useful for social criticism and contestations of the status quo, it allows for greater expression of women's many voices and experiences and it promotes mutual individual respet for autonomy[17]. Autonomy is essentially based on self-reflection and freedom of the individual to both reflect on her desires and choices and

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the project. See See Johnson, David,: *The Idea of a Liberal Theory. A Critique and a Reconstruction,* (Princeton: Princeton University Press, 1994), 22-24

[12] Mill, John Stuart "On Liberty" in John Stuart Mill On Liberty edited by Bromwich, David and Kateb, George (New Haven: Yale University Press, 2003), 78

[13] On discussing the tyranny of society over individuals Mill argues that

"its means of tyrannizing are not restricted to the acts which it may do by the hands of its political functionaries. Society can and does execute its own mandates: and if it issues wrong mandates instead of right, or any mandates at all in things with which it ought not to meddle, it practices a social tyranny more formidable than many kinds of political oppression, since, though not usually upheld by such extreme penalties, it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself." See Mill, John Stuart "On Liberty" in John Stuart Mill On Liberty edited by Bromwich, David and Kateb, George (New Haven: Yale University Press, 2003), 76

[14] At this point a distinction needs to be made between liberal methods of knowing and liberal principles or to express this more clearly, between liberal epistemic preferences and liberal political morality. Methodological individualism is a method of knowing and of researching. It designates a particular unit of analysis (individuals) and whatever other traits are assigned to that unit, they are secondary to the main principle. I will quote Lukes more extensively here since he insisted precisely on this idea and his account is prior to any care-oriented feminist criticism on the matter :"Methodological individualism, therefore, is a prescription for explanation, asserting that no purported explanations of social (or individual) phenomena are to count as explanations, or as rock-bottom explanations, unless they are couched wholly in terms of facts about individuals" See Lukes, Steven, 1968: "Methodological Individualism Reconsidered", in *The British Journal of Sociology*, Vol. 19, No. 2 (Jun., 1968), 121.

[15] For my own more in depth analysis of relational autonomy see see Alice Iancu *Relational Autonomy: New Perspectives in the Care/Autonomy Debates,* in *Perspective Politice,* Year III, Vol. III, no. 1, 2010, 13-26.

[16] See Cornell, Drucilla. *At the Heart of Freedom. Feminism, Sex and Equality,* Princeton: Princeton University Press,1998; Friedman, Marilyn,: *Autonomy, Gender, Politics*, New York: Oxford University Press, 2003; Friedman, Marilyn. "Autonomy and Male Dominance" In *Autonomy and the Challenges to Liberalism New Essays*, edited by John Christman, and Joel Anderson, 150-173. Cambridge:Cambridge University Press.; Friedman, Marilyn. "Autonomy, Social Disruption and Women," In *Relational Autonomy. Feminist Perspectives on Autonomy, Agency and the Social Self*, edited by Catriona MacKenzie and Natalie Stoljar, 35-51 . New York: Oxford University Press, 2000; Miroiu, Mihaela : *The Road to Autonomy (Drumul catre autonomie),* Iaşi: Polirom Publishing, 2004.

[17] Friedman, Marilyn,: *Autonomy, Gender, Politics*, (New York: Oxford University Press, 2003), 56-73

to act upon the desires and choices one believes to be important to one's self[18]. Such freedom is referred to by some researchers as a "space" for our own self definition[19]. Accounts of self-reflexivity may emphasize reason, imagination, empathy or any combination of the three.

The liberal feminist theories of autonomy and the relational autonomy perspective have a radically different outlook on the family. The liberal strand is more prone to skepticism regarding the family, as it often constitutes one of the many social institutions perpetuating women's subordination. Mackenzie underlines for example how socialization can disrupt autonomy on three different levels: by shaping our beliefs, by determining our skills and abilities and by restricting a person's actions[20].

Friedman identifies four strategies that an individual could use in the face of domination: to outright resist the impositions, to pretend to accept them but secretly resist, to detach from the oppressive environment or change one's preferences and develop "adaptive preferences"[21]. The last option comes at a high cost: "This measure, however, results in social isolation, something that many people find unbearable."[22]

The relational autonomy strand stems from the main feminist critique of liberal autonomy, one that argues that the very concept of autonomy is based on a male-modeled subject, disconnected from others[23], and that this inherently causes it to fail when addressing women's lives and experiences, particularly care-taking activities, in need of re-evaluation and valorization, including political and financial valorization[24].

Mostly what matters here is that the self is socially constituted, therefore it cannot be taken as forming and existing separate from others "the focus of relational approaches is to analyze the implications of the inter-subjective and social dimensions of selfhood and identity for conceptions of individual autonomy and moral and political agency." [25] Such an approach values the family, or at least it's potential, highly and tends to see the relationship between autonomy and the family less in terms of conflict and skepticism. Rather it focuses on potentialities- the potential of the family to strengthen autonomy and the other way around. Autonomy is socially taught and learned and thus institutions contributing to this learning need to be supported and valued. Caring especially is seen as intrinsically linked to autonomy[26].

These two strands of feminist theorizing on care and autonomy entail common relevant dimensions, rather the interpretation is different. They do not function as dichotomous categories. Neither one of these approaches values the family as it functions in a patriarchal society. They both reject it, albeit in a different ways. The liberal feminist approach pays particular attention to obstacles in the way of autonomy such as coercion, manipulation or lack of information. The relational

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[18] Friedman, Marilyn,: *Autonomy, Gender, Politics*, (New York: Oxford University Press, 2003), 7

[19] Cornell, Drucilla. *At the Heart of Freedom. Feminism, Sex and Equality*, Princeton: Princeton University Press,1998, 43

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[26] Clement, Grace, *Care, autonomy, and justice: feminism and the ethic of care*, (Westview Press, 1996), 35

perspective focuses more on how the patriarchal family can be modified in a way that values women's work and takes into account that interdependence is a basic human reality. The focus of some dimensions is thus what is clearly different, not the dimensions they address themselves. Figure 1 illustrates the dimensions in focus for each approach and their interpretation.

Relevant Dimensions of the Family	Liberal Autonomy Feminism Position Variables	Relational Autonomy Feminism Position Variables
A. Power relations	Freedom from manipulation	Relations should reflect mutual valorization of human interdependence
	Freedom from structural or individual coercion	Relations should reflect empathy and interdependence
	Decision-making and acting on one's choices should be free and not impeded on account of gender…	Decision-making and acting on one's choices should be free and the result of empathic communication and negotiation
B. Education	Equal Education	Education for both men and women should promote care and care-taking activities and an interdependent understanding of the self
C. Division of Work	The quality and quantity of work should be distributed in an equitable fashion- in terms of financial pay, social prestige, effort and knowledge	Care-taking activities and women's activities in general should be valued both financially and socially
D. Resources	General equal access to resources	Resources should be allocated to care-taking activities and care-takers

1. The Family-Autonomy Dilemma: Recent Romanian Policy Making

What exactly are we talking about? The Romanian Family during Transition

Romanian family life and family structure remain deeply patriarchal. This is reflected in the division of work, power and resources within the family. Romania presented similarities with other countries within the post-communist region, including the prevalence of nationalist and traditional rhetoric[27]. Since my purpose here is not to offer a comprehensive account of the present Romanian family, I will focus on briefly illustrating the key variables identified in Figure 1.

A. Power Relations

Freedom from manipulation By manipulation I name actions that obscure or falsely represent women's choices. Women in Romania face manipulation in public discourse and in the public education system. Both manuals and teachers contribute to the entrenchment of gender

[27] Lukic, Jasmina; Regulska, Joanna; Zavirsek, Darja "Introduction" in *Women and Citizenship in Central and Eastern Europe*, edited by Lukic, Jasmina; Regulska, Joanna; Zavirsek, Darja (USA: Ashgate Publishing Company, 2006), 6

stereotypes[28]. The traditional discourse was often framed as a reaction against previous communist gender policies and it meant "to drive women back into their "natural/domestic roles and "re-give" them their reproductive rights"[29]. The rhetoric supporting "caring mothers" and "income-earning fathers" has been probably one of the most disconnected discourses from actual empirical reality, since the reality is that few Romanian families could have a decent living with only one income, even if they intended to[30]. Almost one in five Romanians lives in poverty, according to 2008 ratings[31] more women than men, with some groups of women particularly vulnerable. Data taking into account the present Romanian political and financial crisis, as well as the Government's latest policies, is yet to be available. What is clear is that this traditional rhetoric ignored or devalued women's significant presence on the labor market in the communist years and since, and disregarded the obvious absence of a "traditional" reality, with most Romanian households needing two incomes to live above the poverty risk threshold. Thus the return to a "traditionalistic" rhetoric simply meant that women took on a double burden and faced additional barriers in the market (both cultural and resource related, especially in terms of time), while men were "freed" from domestic responsibilities.

Women in Romania rarely have access to different types of discourses or to data illuminating the actual consequences of the choices presented to them. Public rhetoric, in the media or advertisement is only traditional in relation to household tasks and power. It is far less traditional in relation to sexual representation of women: available attractive women's bodies are highly present. The types of women that Romanian women very rarely see in the media are the students, the professional and active women. Women in the Romanian media are wives, lovers and mothers and they take up their roles within the family with no apparent contestation.[32]

Freedom from structural and individual coercion By structural coercion I refer to those institutional, social and cultural factors that severely reduce the number of reasonable alternatives available to women. One example would be that women after divorce have a higher chance of difficulty in founding a new family, especially since they are the ones taking care of children resulting from previous marriages. In this case "Blackmail about divorce" is favoring the man and the feminization of poverty among one-parent household confirm this reality."[33] By individual coercion I refer primarily to the use of any type of violence (symbolic, verbal, and physical). Available data shows a rising trend in domestic violence against women in Romania and an overall significant level of violence in general, with four new cases reported every 24 hours[34]

Decision-making While gender-based hierarchies might often manifest themselves more or lest subtly, Romanians explicitly endorse them. The usually associated dichotomy public/man and

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[28] Stefanescu, Doina-Olga *The Gender Dilemmas of Education (Dilema de gen a educatiei), (*Iasi: Polirom Publishing, 2003), 87-152

[29] Magyari Vincze, Eniko, *Gender Regimes and Women's Citizenship*, in Lukic, Jasmine, Regulska, Joanna, Zavirsek, Darja (eds.).*Women and Citizenship in Central and Eastern Europe*, (USA: Ashgate Publishing Company, 2006), 31

[30] In absolute numbers Romanians have the lowest income in the EU. See The Research Institute for Quality of Life (Institutul de cercetare a calității vieții) *Quality of Life in Romania 2010* (Calitatea vieții în România 2010), http://www.iccv ro/node/190, 11.

[31] Ministry of Labour, Family and Social Protection, National Strategic Report on social Protection and Social Inclusion 2008-2010, 6

[32] Mihaela Miroiu *What do we usually "Learn" about men and women in the Media?* (Ce "învățăm" de regulă despre bărbați și femei din mass-media?), in Laura Grunberg (coord.) *Mass-media on the Sexes. Aspects of Gender Stereotypes in Romanian Media (Mass media despre sexe. Aspecte privind stereotipurile de gen în mass media din România)*, (Bucharest: Tritonic, 2005), 125-128

[33] Pasti, Vladimir, 2003: *The Last Inequality (Ultima Inegalitate)*, Iasi: Polirom Publishing, 119

[34] Gandul Newspaper *Domestic Violence on the Rise: 128 dead within the family in 2010, compared to 115, last year* (Violența domestică, în creștere: 128 de persoane omorâte în familie în 2010, față 115, anul trecut), http://www.gandul.info/news/violenta-domestica-in-crestere-128-de-persoane-omorate-in-familie-in-2010-fata-115-anul-trecut-7749238

private/woman breaks down in terms of decision-making. Women are "private" in their work, not in terms of power. In 2000 38.5% of men and 27.6% of women stated that men should *lead*[35] in the family. Only 57% of men agreed that women are "the rulers in the home". 85.8% of men and 85.1% of women believe that the man is the head of the family. 82.1% of men and 74.8% of women believed a woman should follow her man[36]. The numbers are telling and they indicate a deep hierarchy within the family in terms of decision making.

B. Education

Equal Education The horizontal segregation in the education system, leads to women and men gaining different skills. Statistically, young women graduate mainly from high-schools while young men graduate mainly from vocational schools. Women who fail to go to the university are practically pushed towards a housewife status or towards very low-paid jobs. This translates into differences in their marketable skills, making it so that failing to continue with a higher education degree after graduating from high-school, drastically diminishes women's chances of getting a well-paying job or of getting a job at all[37]. Vertical segregation reveals lower access of women in postgraduate studies. Women enter the educational system in higher numbers but end up in fewer numbers at the MA or PhD levels[38]. The content of the education supports gender stereotypes, as mentioned earlier.

C. Division of Work In terms of care, traditional rhetoric and the lack of institutionalized care[39] implied a worsening of women's double burden. A national-wide research showed that in 2000 70% to 80% of all households task were performed by women [40]. For men, traditional gender roles meant they were only marginally regarded as having caring responsibilities within the family (other than earning an income). A significant part of women with dependents in their care declare they have no income, thus raising the question of how or if access to the labour market is made available to them[41]. While men and women may declare that in principle domestic work should not be segregated on account of gender, in fact actually work is segregated as such[42].

D. Resources Within the family and outside it, women have fewer resources. In the market they face the gender pay gap, horizontal and vertical discrimination leading to inequalities of income. Children in the household lead at the European level to lower incomes for women "if one compares the **employment rate of women and men with children** under 12 to care for, this gender gap is

[35] emphasis mine

[36] Gallup Institute *Gender Barometer,* , 2000, http://www.gallup ro/romana/poll_ro/releases_ro/pr030411_ro/pr030411_ro htm

[37] Pasti, Vladimir, 2003: *The Last Inequality (Ultima Inegalitate),* Iasi: Polirom Publishing, 168-172

[38] Data obtained through a national-representative survey conducted as part of the CNCSIS (National Centre for Scientific Research in Higher Education) Project No.964 *Gender, political interests and European insertion*

[39] Romania has seen in the last decade a decrease in hospital beds, day-care centres and kindergartens and this contributed to an increase of women's care-work responsibilities. For example, from 1991 to 2006 the number of state-funded kinder gardens more than halved) See Băluță, Oana "The Gender Dimension of Reconciliation Between Work, Family and Private Life" in *Equal Partners. Equal Competitors*, coordinated by Oana Băluță, (Bucuresti: Maiko, 2007), 114-116

[40] Gallup Institute *Gender Barometer,* , 2000, http://www.gallup ro/romana/poll_ro/releases_ro/pr030411_ro/pr030411_ro htm.

[41] According to the data obtained through a national-representative survey conducted as part of the CNCSIS project *Gender, political interests and European insertion* (developed by the National School of Political Studies and Public Administration and coordinated by Prof rd. Mihaela Miroiu), 61per cent of women living in a household with dependants declared that they do not have their own income; in households with no dependents only 38per cent of women declared the same thing

[42] Pasti, Vladimir, 2003: *The Last Inequality (Ultima Inegalitate),(* Iasi: Polirom Publishing, 2003) 119

almost doubled. Also, the employment rate of women falls by 12.4 points when they have children, but it rises by 7.3 points for men with children reflecting the unequal sharing of care responsibilities and the lack of childcare facilities and work-life balance policies"[43]. In terms of resources within the family, the early transition years showed that resources within the household were gendered: television sets, for example, took precedence over vacuum cleaners or other items that would have eased women's work[44]. Gender differences in income were clearly influenced by state policies since the 1990. Then policies reflected what Miroiu calle "state's men, market's women"[45]

After this brief presentation it becomes apparent that no dimension of autonomy is addressed for women in Romania in relation to the family, may it be from a liberal autonomy standpoint or from a relational autonomy standpoint. Romanian family remains deeply hierarchical. Care work is not valued (since it is not correlated with gain of resources or power and status within the family) and is rarely shared. Women's avenues of contestation and freedom from coercion are reduced. In Romania women are subjected to public discourses loaded with gender stereotypes.

No actual conditions for autonomy are fulfilled. Self-reflection, lack of cohersion or the valuing of their own autonomy are absent for women in Romania, thus failing any liberal feminist test. Care work and women's work in general is devalued, unpaid and set on a lower scale of evaluation, thus failing the relational autonomy test. Women learn about and internalize patriarchal structures within Romanian families, not empathy, interdependence and mutual valorisation. All this however has not deterred some Romanian social researchers, after reviewing some of the same data presented here, to conclude "The important thing is that the majority of women, not only the majority of men, believe that housework and childcare are their duty, which demonstrates the *complete and voluntary acceptance*[46] of this role identity within the family"[47]. However such statements show the gender blindness in Romanian social research, not the autonomous choices of women. The next section will address how/if the same gender blindness is present at the public policy level during the last year.

Romanian Recent Policy Making- Ignoring Gender as Much as We Can

Since an official updated strategy of the Government is yet to be made public, I will focus in this part of my analysis on policy measures undertaken, public declarations of political representatives and older policy papers (when available). Data continues to be scarce and difficult to pinpoint.

In Romania law 202/2002 art.2 stipulates "The measures for promoting equal opportunities between women and men and eliminating direct and indirect gender based discrimination are applied in the field of labor, education, health, culture and information, decision making process, as well as in other fields regulated by special laws."[48]. However the responsible state agency for monitoring and promoting its implementation, the National Agency for Equal Opportunities for Women and Men, has been disbanded in 2010.

In policy areas related to **education** no progress has been made in terms of gender stereotypes and no sign of future progress exists. In relation to ensuring women's **freedom from coercion and violence** the Romanian state's already questionable commitment to addressing it actually decreased, the National Agency for Family Protection was also disbanded in 2010, while at the same time domestic violence is increasing.

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[43] *Report from the Commission to the Council, The European Parliament, The European Economic and Social Committee and the Committee of Regions Equality between women and men — 2009,* Brussels, 27.2.2009, p. 4.

[44] Pasti, Vladimir, 2003: *The Last Inequality (Ultima Inegalitate),* Polirom Publishing, Iasi, 133-134

[45] Miroiu, Mihaela : *The Road to Autonomy (Drumul catre autonomie),(* Iași: Polirom Publishing, 2004), 266

[46] my emphasys

[47] Raluca Popescu *Calitatea vietii de familiei în România,* 2003, http://www.iccv ro/sites/default/files/calitatea-vietii-de-familie-in-romania.pdf, 26

[48] Law 2002/2002 *www.iwraw-ap.org/resources/documents/GE_Romania.doc*

In terms of **manipulation in public discourse** 2010 proved a most illuminating year. It was a complicated year for Romanian policy-makers and political representatives. Romania faced a political and financial crisis. The response was to implement massive budget cuts, especially in domains where women work. It was also a time for a brand new discovery in Romanian political discourse: the working woman became a hot topic. If throughout transition terms such as "women's emancipation" and "women's careers" were largely absent from public discourse, in 2010 Government representatives and the Romanian president embraced them.It soon became apparent that state feminism had not conquered Romanian politics, but rather pragmatic budget cuts were making their mark on political discourse.

In mid 2010 the Romanian Government cut both the parental leave period and child-support benefits, and Government representatives and the president invoked the necessity of budget cuts. The Labour Minister Ioan Botiş declared „our goal is the reintegration of mothers in the labour market"[49]. President Băsescu declared „my wife returned to work three months after having our children"[50]. What both the Government and the President ignored was that 1. The cuts were announced with only a few weeks beforme being implemented, thus severly affecting families and pregnant women's plans. 2. Women lacked access to affordable child-care and thus adequate altertatives. Mr. President's wife had had her children in a time where child-care state facilities were double in number. Although official prior documents stated that child-care facilities were a state priority it "During 2008 – 2010, the development of family policies shall focus on promoting measures to encourage women's participation on the labour market by developing child care facilities and developing day-care centers to ensure the return of mothers to their jobs"[51], in reality little if any progress has been made in this area. Private facilities are almost unreachable for the majority of the population. Finally after much debate, at the end of 2010 a new law was adopted instating an optional system- parents could have the option of both a shorter and a longer child-care leave, with different paying options. Other cuts, such as the state benefit given to new families on getting married were also cut and payments ceased[52]. The Labour Minister Ioan Botiş declared that additional benefit cuts were intended for families, such as the cut for families with children having low „behavior grades"[53], meaning below 8.

What transpired in 2010 was how political representatives think about childcare and mothers in general. First, even from older policy documents what was clear was that **the division of care work** and **the hierachy within family decision-making** is supported by the state. Women's care work within the family was clearly expected by the state to be unpaid and apolitical**: „**Most of the dependant elderly benefit from the care services provided inside the family. This reality raises numerous problems that need to be solved. Most family carers are women, wives or daughters. Many

[49] *Press Declarations of Labour Minister, Ioan Botis, at the End of the Govenrment Meeting (Declarații de presă susținute de ministrului Muncii, Ioan Botiș, la finalul ședinței de Guvern)* http://www.gov ro/declaratii-de-presa-sustinute-de-ministrului-muncii-ioan-botis-la-finalul-sedintei-de-guvern__l1a111119 html

[50] *Basescu on the « Countries of mommies and little babies » Băsescu, despre țara „mămicuțelor și bebeluşilor"* http://www.gandul.info/news/basescu-despre-tara-mamicutelor-si-bebelusilor-de-ce-nu-l-a-desemnat-pe-geoana-sa-primeasca-onorurile-militare-si-cum-face-ponta-pe-fata-mare-7793737

[51] Ministry of Labour, Family and Social Protection, *National Strategic Report on social Protection and Social Inclusion 2008-2010*, 26

1.[52] Ministry of Labour, Family and Social Protection *Report on the activity of the Ministry of Labour, Family and Social Protection in the field of social inclusion, January-September 2010*, http://www mmuncii ro/ro/articole/ 2010-12-10/raport-privind-activitatea-ministerului-muncii-familiei-si-protectiei-sociale-in-domeniul-incluziunii-sociale-in-perioada-1-ianuarie--30-septembrie2010-2001-articol html, 13

[53] "Behavior grades" are grades Romanian children receive in school measuring how well-behaved they are. This is an overall grade and is separated from other grades. The range is from 1 to 10. How exactly such grades reflect on Romanian children's freedom of exercise in contestation and debate with authority figures such as teachers, especially girl's contestation of social norms, is something that could be studied in the future to much use.

carers are in their turn elderly persons and may become dependant. The family care is ensured mainly in the rural area, where the traditions and moral values are maintained to a higher extent."[54]

The prime-minister himself, Emil Boc, just as mothers in Romania were protesting cuts in their benefits, advocated for „christian-democratic values" and argued for a system based on personal responsibility and a merger of liberal economy and christian-democracy[55]. Even if he was careful to mention that solidarity still is important, there was an obvious move in Romanian political discourse towards a clear and transparent reduction in the already low politization and public valorization of care work. It became clear such work is viewed by the government as designated to the family, which means the women in the family, since the „traditional values" invoked by policy makers maintain both **the division of labour within the family and hierarchy in decision-making.**

Conclusions

Women's autonomy is not accounted for by Romanian policy-makers within any of the dimensions of analysis set forth by feminist political theorists. Both liberal feminist autonomy and relational autonomy reveal that women's autonomy is absent from Romanian policy-making.

Even more, the current Romanian policies not only fail both feminist accounts of women's autonomy, they fail even the first minimal principle of liberalism stated at the beginning of this paper „only individuals matter". While invoking liberal economy Romanian policy-makers use the term „liberal" as they please, since not even a minimal understanding of liberalism would endorse the promotion of „christian-democratic values" at the expense of women's autonomy, as Johnson's account presented previously shows. And while the financial crisis provided policy-makers with a pretext for not politicizing and valueing women's care work, and for ignoring the patriarchal make-up of the Romanian family- deeply hostile to women's autonomy, recent policy-making has not come as a surprise. Public policies and public discourse in Romania had not favored women's autonomy much in the past. 2010 just allowed for a greater transparency of the disconnect between women's lives, on one hand, and the policies that affect them, on the other.

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[54] Ministry of Labour, Family and Social Protection, *National Strategic Report on social Protection and Social Inclusion 2008-2010,* 60

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MACROECONOMIC POLICY GUIDELINES IN THE EUROPEAN UNION COUNTRIES

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Abstract
In recent years, some European Union countries have made progress in economic convergence plan, but in others some special challenges took place. Economic and financial crisis has intensified some of the problems faced by these countries, causing undesirable developments. Measures taken by Member States differ from state to state, depending on the economic reality of each.

Keywords: *inflationary phenomenon, convergence criteria, sustainability, price stability, macroeconomic policies*

Introduction

This paper covers a brief analysis of the macroeconomic policies in the European Union countries in terms of the economic convergence process and the progress in achieving economic convergence in the new EU Member States. The economic convergence presents specific features depending of the countries and their seniority as a Member State of European Union.

We consider important the theme of this article because the convergence criteria are intended to ensure balanced economic development within the EU, and preventing any tension in the Member States. Adopting euro would be a stabilizing force, but it is possible that adopting euro by new Member States is too fast after their entry into the EU, as required by the euro changeover criteria are too strict, and somewhat inappropriate for emerging economies in accelerated growth. Also, the euro is still a potentially unstable monetary system, and the last thing any of the countries of Eastern Europe needs is more instability.

We try to answer to the issue of this article following the analysis made on the progress in achieving economic convergence. Some countries were analyzed in terms of economic convergence progress, but in other countries there were some problems, resulting mainly by increased inflation.

The relation between the paper and the already existent specialized literature is that in theory all Eastern European countries integrated in the EU should prepare to become members of the euro zone. For many years politicians and the money markets have seen the memberships of the euro area as a force for stability in countries still struggling to remove the legacy of decades of state planning. Investors are eagerly waiting the changeover, but the changeover is pushed to a distant future in most new Member States.

Convergence criteria

Overall, in recent years, an increase of the phenomenon of inflation in all new Member States has been reported. Poland and Slovakia are the only ones that recorded levels below / to the reference value. The main risk posed by developments in inflation expectations is affected, with repercussions in the medium and long term, through induced side effects.

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Factors that have contributed to increased inflationary pressure in the new Member States were: (internally: private consumption growth, labor shortages, adjustments in administered prices and indirect taxes, external: increasing food and energy prices). The evolution of inflation is different, and each country has a different trajectory, due to their "model" of the domestic economy. The worst developments were recorded in the Baltic countries and Bulgaria, and on future developments of this variable, there are no optimistic views.In Hungary there was a moderation of inflation in 2008, while inflation in recent years remains quite high.

Measures to reduce the phenomenon of inflation in these countries should move towards the implementation of monetary policy oriented towards price stability, accompanied by fiscal measures to support the non-inflation. Of great importance is the promotion of structural reforms to improve productivity of production factors, and conditions in the labor market.

To achieve the convergence criterion on inflation in the old Member States was particularly important to adopt a monetary policy geared to price stability, which lead to stable exchange rates, slower growth in labor costs and even reduce them, and reducing budget deficits. Also, fiscal policy was needed to temper rigid-driven inflationary pressures easing of monetary conditions in order to meet the convergence criteria necessary for joining the E.M.U. Therefore, inflation depended in the old Member States on the credibility of the strategy implemented by the authorities and the default fiscal policies and structural reform to improve the functioning of labor and goods market.

Analyzing the evolution of nominal convergence indicators in the old member states it has been noted that in addition to the interest rate criterion, which has not been exceeded, all countries have passed at least once a benchmark for other indicators.

A definitive conclusion is that the new Member States are entering a world that works with completely different expectations and entering with the same step is sometimes quite difficult.

During the period April 2005 - March 2009 average interest rates on long-term in the new Member States have not exceeded the reference values (except Hungary and Romania). Maintaining average interest rates on long-term product value is determined also by the increasing growth and current account deficits, rising inflation and risk perception on a continuing weak economic expansion in the case of Hungary.

In the subject of the exchange rate in the Baltic countries involved in MRS II, the central parity has not suffered a significant devaluation in recent years.

Bulgaria, Romania, Czech Republic, Hungary and Poland are still not in MRS II.
According to Fitch Agency, Estonia will not adopt the euro before 2012, Bulgaria, Latvia and Lithuania not before 2013, Hungary not before 2014 and Romania not before 2015. On the other hand, a Reuters poll in April, it was estimated that Romania will be the last State of the candidates who will adopt the single currency.

It is possible that the euro embracing by new Member States, could be a little soon after their entry into the European Union, because the criteria imposed on the changeover, are too stringent, and difficult for emerging economies.

The new European Union member states will adopt sooner or later the European single currency, the necessary condition being rated criteria listed in the Treaty of Maastricht.

For monetary integration to be sustainable, it is necessary to achieve real economic convergence with the euro area countries, with the possibility to make it long term. In this context, it is important to long-term vision of convergence. Follow the short term, using discretionary measures (to make progress "artificial" for short), will not only hinder real integration potential of these economies with the euro area, but it really could seriously undermine macroeconomic stability in those countries.

Macroeconomic policies

National macroeconomic policies, monetary and fiscal are "modeling" tools of the process of nominal convergence, a process meant to sustain real convergence. The main objective of monetary

policy strategy, price stability, supports the nominal inflation criterion, and the national central banks focus on the issue of maintaining or reducing, as appropriate, the inflation expectations, contributes to the nominal long term interest rate criterion.

Countries that have opted for the strategy of targeting the exchange rate had initially succeeded in stabilizing inflation expectations at lower levels (after they have experienced hyperinflation). Nonsynchronisation of business cycles of these countries, with those of the euro area and that the ECB's monetary policy is not always the best for countries that have anchored to the euro currency, explains why some countries in the region have experienced levels of real interest rates close to zero or even negative. These low levels of interest rates have boosted credit growth, domestic demand and hence the current account deficit. Monetary policy in these countries has compensated the lack of interest rate as a mean of limiting interest rate and credit demand pressures through application of discretionary measures and administrative measures in this direction.

In countries that have adopted inflation targeting, in these days of increasing international mobility of capital flows, the advantage of an independent monetary policy is questionable, even if the nominal exchange rate against the euro is flexible. Financial liberalization and technological progress have contributed to the development of global speculative operations, "carry trade" type, through which it can transfer liquidity from one country to another. If a country maintains its interest rates at relatively high level to reduce inflationary pressure, this situation induce large capital inflows in the short term, with repercussions on the exchange rate.

In the current global financial crisis, the new Member States may be the target of speculative attacks by "investors" foreign (non-financial institutions) aimed at obtaining liquidity in these markets, then transferring it to the "mother country".

The main challenge for monetary policy in those states in the next period is not only a nominal criteria at a given time, but especially to maintain over time, a situation which should reflect the sustainability of economic convergence with the euro area countries. The challenge, of course, is not confined to monetary policy, but also takes into account fiscal policy and structural reforms in the economy of the new European Union member states.

Baltic countries' experience shows that current account deficits that coexist with high rates of economic expansion, not necessarily lead to major imbalances in the economy. As long as there is a significant correlation between the size of foreign reserves and current account deficit is not cause major corrections on the exchange rate.

The high level and trend of widening current account deficits in the new Member States, as well as associated external financing needs, the rapid expansion of bank credit and external debt risk amplification generates a sudden stop of capital inflows, followed by a downturn economic.

In the new Member States, although there have been important steps to implement measures to provide better integration of labor market and social policies, it appears that the results are below expectations.

It is noted that in all new Member States, the labor market has suffered a series of structural changes. The labor force was concentrated on attractive areas were seen in the greater flexibility of wages and lower employment.

In the current financial crisis and global economic growth rate and inflation in the new Member States has adversely affected the evolution of real incomes and employment. In this manner, more than the modest steps taken by governments, those of a gradual increase in the minimum wage and average salary, will not be found in a statistical increase. Drastic measures, of income reduction on different social groups and increasing taxation, accompanied by inconsistent policies, led to an economic and social chaos in a number of EU countries, and also in Romania.

As a result of the restriction of activities in Western European countries and even in the U.S. who have been along time net user of workforce coming from Central and Eastern Europe, the immigrant population has faced massive layoffs, are determined to return to the countries of origin, thus leading to increased unemployment in the new Member States.

Given current conditions, it is imperative that the Governments of the Member States to take urgent measures to combat the negative influences, with long term impact. This can be achieved only by promoting economic and social policies consistent, tailored to the needs and problems of each country.

In determining the scope, it is desirable to enforce the role of economics in relation to politics, thus ensuring a better redistribution of public financial resources, especially targeted towards support for priority areas of expenditure (education, health and employment).

It is important to realize that the transition countries path through this period of economic crisis, will generate different costs and these are the realities of economic, political and social development of each.

Overcoming the crisis can only be done by accepting and respecting the rules of market economy by stimulating savings and loan recovery, focusing on individuals and businesses to restore confidence in banks, monetary and fiscal policies consistent with that motivate investors to engage in infrastructure projects.

In all new Member States, the most important and urgent measures be taken to strengthen tax, intended to lead to inflationary pressures on the demand and macroeconomic imbalances and structural problems of the labor market. Measures taken to increase the quantity and quality of labor supply, quality adjustment should include training to labor market needs, developing training programs and incentives that lead to regional mobility. It requires that wage settlements in labor productivity reflect the realities of the labor market and developments in competitor countries.

Fiscal policy has an important role in bringing the work of evasion, by providing a sustainable tax system, while ensuring that tax cuts are accompanied by expenditure restraint.

Such measures, coupled with an effective monetary policy will contribute to a sustainable environment of price stability and to promote competitiveness and increasing employment of labor. The authorities of each Member State should consider fulfilling the convergence criteria by achieving this goal sustainable.

Conclusions

Following the analysis made we conclude that in some countries we found progress in terms of economic convergence, but in other countries there were some problems, mainly resulting in increased inflation.

Sustainability is crucial when we analyze the degree of fulfillment of the convergence criteria. Adopting the euro is an irrevocable process and must be sustainable convergence, will not be valid only within a certain time. In order to achieve a high degree of sustainable convergence, the efforts by all member countries should be intensified, particularly in regard to the necessity of achieving and maintaining price stability and achieving and maintaining the optimal level of public finances.

In order to achieve a more complete resolution regarding this issue, the future researchers should analyze the evolution of all nominal convergence indicators of evolution for a period of three years for the new Member States that have not yet adopted the single currency and the related benchmarks.

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THE MANAGEMENT OF THE FLOW OF INFORMATION IN MILITARY ENVIRONMENT. NATO - NOW AND TOMORROW!

GEORGE MARGARIT NEGRU*

Abstract
The strategy of the North Atlantic Treaty Organization (NATO) is composed into a document known as „The strategic Concept for the defence of the North-Atlantic area". The first concept was developed between October 1949 and April 1959 considered that the Alliance „established a strategy of operations at large scale for territorial defence ". The New Strategic Concept „NATO 2020: Active Engagement, Modern Defence'' implies more than analysis, strategies, but reshaping of what it is today and what will be tomorrow. In the „knowledge based society'' of the XXIst century - 2nd decade, the flow of the information seems to be crucial. Who can predict the next path of the direction to follow? ... How to do it better? ...

Keywords
Management, information, security, strategy, knowledge.

1. Introduction

Motto:

„*ANIMUS IN CONSULENDO LIBER*''[1]

The organizations, no matter what are their objectives, what them treats and in which domain are situated, in our opinion have to have first of all a perceptive organisational aim.

Secondly, the aim of the institutions has to be achieved by a disciplinary status and coherence.

Thirdly, plans and policies of each institution must be alive through the vision of the managers and leaders, both the team members in the same time.

Nonetheless, the role of the information, doesn't matter the brand or the domain of the organization, is crucial.

More than this: the management of the flow of information able tailored is one of the arts of dealing with the success achieving on the „ markets''.

Nations, alliances, organisations, institutions depends on the information and on the behaviour of how the information is managed in order to be useful.

In the military environment information has one of the top positions in the entire system of evaluating the „battle field''.

Successful use of this strategic resource, information, in conditions that have already become recognized "right time, right place, and right people" is to achieve the objectives.

Inside the organizations such as the military, along with specific knowledge of tactical, command and control, the new realities of the XXI century with its new paradigm of approaches arising from asymmetric events that occurred, as opposed to those of the past century have imposed a multidisciplinary treatment based on technical knowledge, information, as well as those in communication, negotiation, creation and management of a team, adaptability, continue understanding of global processes, and the political-military trends and strategies.

Information is one of the fundamental elements for the existence and the future of an organization that operates in a global society, in which everybody exchanges information with each

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[1] ("l'esprit libre dans la consultation";"in discussion a free mind") according to http://www nato.int/multi/animus htm, Motto of the NATO, accessed on 03rd of June 2010.

other. To do this, is needed to quickly process extremely large volumes of information, distribute them in an effective and efficient, while ensuring their safety, security and protection (especially in the military).

As a part of our history, the North Atlantic Treaty Organization (NATO) represents an example of organisation that until now, starting from it's beginning, has lived with new challenges and dynamic engagements, dealing in a relevant treatment of the information, and managing a performing flow of the information system.

The New Strategic Concept[2] of the Alliance established and agreed in Lisbon, Portugal in November 2010, named ,,NATO 2020: Active Engagement, Modern Defence'' implies more than analysis, strategies, but reshaping of what it is today and what will be tomorrow.

This military and political document has the ability in our opinion that is relevant for the explanation of the next decade in our Euro-Atlantic, and democratic nation's lives.

It became a clear certain fact that "information is power ".

Handling, securing, protecting and using it for the preserving of the values and principles of democracy and human rights, peace between nations it is a necessity and an art.

In the actual perspective the world has to face at many situations, threats challenges, and in our geopolitical space NATO has an important role in this environment. At the question ,,- How the Alliance can predict, avoid, and/or deal with all these?'', in our opinion, one of the answers consists is the possession of a good management of the flow of information and an analyzed policy in it's new strategic concept.

2. The flow of the information. Risk management. Military considerations.

Improving the management of the flow information from executive personnel to decision making and policy makers, on one hand, and at the horizontal level between the workers and collaborative personnel, on the other hand, is a key focus for many organizations, across both the public and private sectors.

The majority of organisations is eager on to dispatch integrated information management system and enhance environment.

Valuable information management is not undemanding. There are numerous aspects to integrate into systems, a substantial variety of information needs to meet, and to direct into the flow, following specific path and exactly ways, but also multifaceted organizational and cultural issues to address.

However, some effects of the strategy and objectives are more difficult to achieve, or are not achieved just because of the specific characteristics of distinct patterns and systems.

Thus, when the organization can not assume that the objectives and therefore can not perform, it is necessary and appropriate to an analysis of the factors that have contributed in a negative way and prevented the smooth running of things.

The management of the information it is being focused by a variety of features, including a request to develop the effectiveness of company processes, the difficulty of conformity policy and the wish to deliver new services. In some situations, information management has to ask the deploying of new technology solutions, such as content or electronic document management systems, data bases or IT[3] applications and solutions.

[2] http://www nato.int/cps/en/natolive/official_texts_68580 htm accessed on 15th of February 2011.

[3] Information technology (IT) is the acquisition, processing, storage and dissemination of vocal, pictorial, textual and numerical information by a microelectronics-based combination of computing and telecommunications. The term in its modern sense first appeared in a 1958 article published in the *Harvard Business Review*, in which authors Leavitt and Whisler commented that "the new technology does not yet have a single established name. We shall call it information technology." – in accordance with http://en.wikipedia.org/wiki/Information_technology accessed at 19th of February 2011.

„Risk management is the identification, assessment, and prioritization of risks – as it is defined in ISO 31000[4] as the effect of uncertainty on objectives, whether positive or negative - followed by coordinated and economical application of resources to minimize, monitor and control the probability and/or impact of unfortunate events or to maximize the realization of opportunities.'' [5]

A risk analysis of any kind, either at an individual or an organization to address the phenomenon requires understanding, knowledge, identification, assessing and countering the negative effects, and establish mitigation options and opportunities avoidance, prevention and / or disposal.

Thus, the question is: „- What is a risk?".

„ In the classical sense of decision theory, risk is identified as an element that appears uncertain but potentially permanent process of social and human activities which are damaging and irreversible effects''.[6]

To be successful, an institution must be prepared to solve problems of risk management, would ever occur. An effective risk management is an essential component of any *successful management strategy*.

Also, a measure of seriousness and responsibility of an institution is given the way they develop procedures for identifying and analyzing information about potential risk

The flow of information, as a process, implies the communication as a course of action.

Also, the management of the flow of information realizes the centralization, the evaluation, the filtration of information in order to sort them and to disseminate the information for decision. This is done in the same time with the insurance of the presence of the analyze elements and prediction results.

The strategic image is obtained with the principal instrument that sustain the political and military decision process, the totality of data and information from de security perspective, and not only, domain that ensure the optimal level of knowledge at the decision makers level.

So, efficient information administration is not simple. There are many systems to put together, a massive variety of dealing requests to meet.

As we already told, the information flow is about communication. A kind of system can be considered de IT that is the transporters of the data. The information flow is the amount of information that travels between sender and recipient. The information flow is characterized by content, purpose, frequency, length, speed, reliability, and cost.

The Internet was founded in 1969, following a program of the U.S. Department of Defense, and it is known as the ARPANET[7]. The project was funded by Advanced Research Projects Agency. Designed in order to automatically spread the network information traffic when there are problems connecting or transmitting information systems needed to keep. The network running the ARPANET was primarily to establish a system that works even when major components of the them were inoperable.

The risk management of the information in the military environment is treated with very high attitude. In this regard, as an example, on 6 and 7 Oct 2010, the NATO Command and Control Centre of Excellence have hold information and knowledge management workshop together with

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[4] According to http://en.wikipedia.org/wiki/ISO_31000 accessed at 19th of February 2011, *ISO 31000* is intended to be a family of standards relating to risk management codified by the International Organization for Standardization. The purpose of ISO 31000:2009 is to provide principles and generic guidelines on risk management. ISO 31000 seeks to provide a universally recognized paradigm for practitioners and companies employing risk management processes to replace the myriad of existing standards, methodologies and paradigms that differed between industries, subject matters and regions.

[5] http://en.wikipedia.org/wiki/Risk_management accessed at 19th of February 2011.

[6] Prof. univ. dr. NICOLAE ROTARU, *Managementul riscului* (curs esențializat), Academia Națională de Informații – MISN, București, 2009.

[7] http://www.dei.isep.ipp.pt/~acc/docs/arpa--1 html accessed on 15th of February 2011.

Spain. Experts from the Centre's sponsoring nations and other NATO entities examined a sort of information and knowledge management themes, including success stories, proposed concepts and future developments.

The experts approached the subjects in military operations, because the Alliance today faces daily challenges in efficiently managing an increasing amount of information and knowledge. Effective management of this information and knowledge can help to increase commanders' and military personnel's situational awareness, enabling them to make better decisions with a greater understanding of a particular context.

In that forum was initiated the sharing national approaches to information and knowledge management and reviewing NATO's information management practices and guidance. Also, the groups of participants explored key topics of the issues.[8]

Saying that this is an aspect which it can't be avoided in the risk management discussions; the protection of the classified information. In this regard at national level we can emphasise that the provisions are in line with the NATO and European Union (EU) directives.

The precondition for access to classified information is why holding a security clearance, corresponding to the category and classification level of information that is required to have access.

The categories of classified information to which access is conditioned by the possession of a security clearance document are:

- national classified information;
- NATO classified information;
- EU classified information.

The equivalence of national classified information on grading with the EU to NATO classified information classified is given in the table below:

National - Romania		**NATO**		**EU**
Strict Secret de Importanță Deosebită	⟷	NATO Top Secret	⟷	Tres Secret EU
Strict Secrete	⟷	NATO Secret	⟷	Secret EU
Secret	⟷	NATO Confidential	⟷	Confidentiel EU
Secret de Serviciu	⟷	NATO Restricted	⟷	Restreint EU

Without having an equivalent value system of classification of documents, as described above, under the Romanian Law no. 182/2002 on the *protection of classified information*[9] (published in Official Gazette no. 248 April 12, 2001), we would be able to discuss about the existence of cultural difference in security risks and data protection.

One can conclude that there is an equivalent, such as that described above, may be one of the levers necessary to avoid the existence of disparities and differences in organizational culture. In the absence of working procedures in the field of security incidents could occur, some unwanted effects to the national interests and / or the prospect of partnership alliances.

[8] http://www nato.int/cps/en/SID-3385CC18-1C820A78/natolive/news_66729 htm?selectedLocale=en accessed on 18th of February 2011.

[9] „LEGEA nr.182 din 12 aprilie 2002 privind protecția informațiilor clasificate'' published in Romania in „Monitorul Oficial nr. 248/12 aprilie 2002'' in accordance with http://www.cdep ro/pls/legis/legis_pck.lista_mof?idp= 8084 accessed at 20th of December 2010.

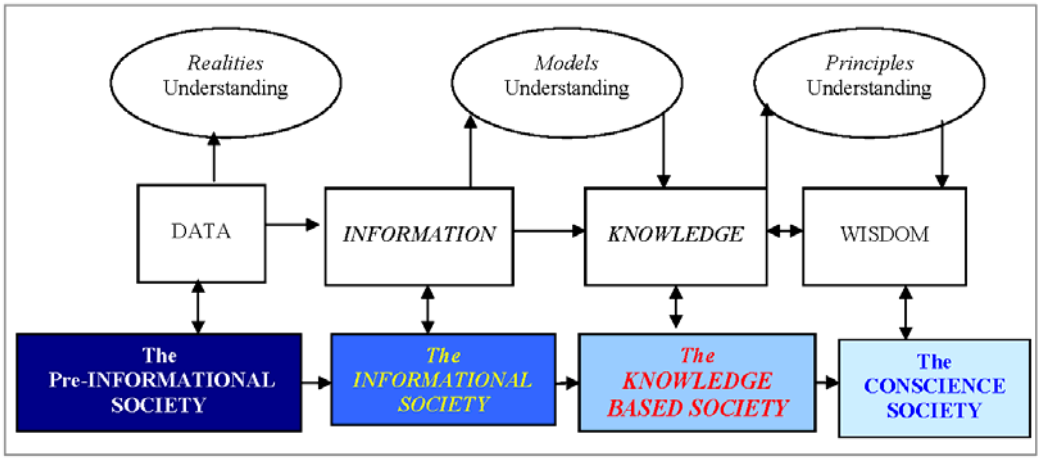

Figure no.1

Information era features that distinguish it from previous ones are: the emergence of information-based society, organizations are dependent on information technology in specific activities (management accounting, human resources records, etc) place transformation of work processes to enhance productivity, business success is largely determined by the efficiency with which information and communication technology is used, information and communication technology is increasingly embedded in many products and services.

As an example of information flow it can be seen in the picture below (figure no.1) that depicts the phases of the evolution of concepts and society, and the path to wisdom and conscience society.[10]

The word "information'' is generally used to define many aspects of the spectrum in which the communication of information and knowledge which ,, pyramid''[11] (hierarchy) is shown in figure no. 2.

Taking into consideration the military aspect of the topic of this paper and the tactical level, we can focus at one of the types of information flow, as depicted in the next figure no.3.[12]

[10] http://www.uvvg ro/studia/economice/plugins/p2_news/printarticle.php?p2_articleid=201 accessed at 10th of February 2011.

[11] Constantin ALEXANDRESCU, Gelu Alexandrescu, Gheorghe BOARU, *Sisteme informaționale – Fundamente teoretice*, Editura Universității Naționale de Apărare, București, 2009, pp.105, 106

[12] http://www.globalsecurity.org/military/library/policy/army/fm/6-0/appb htm accessed at 19th of February 2011.

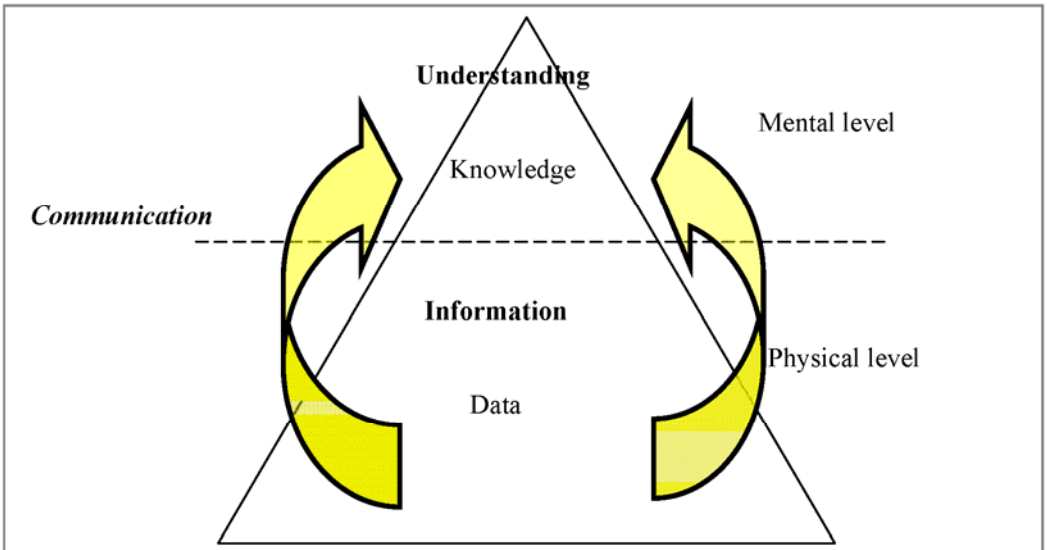

Figure no. 2

Figure no. 2

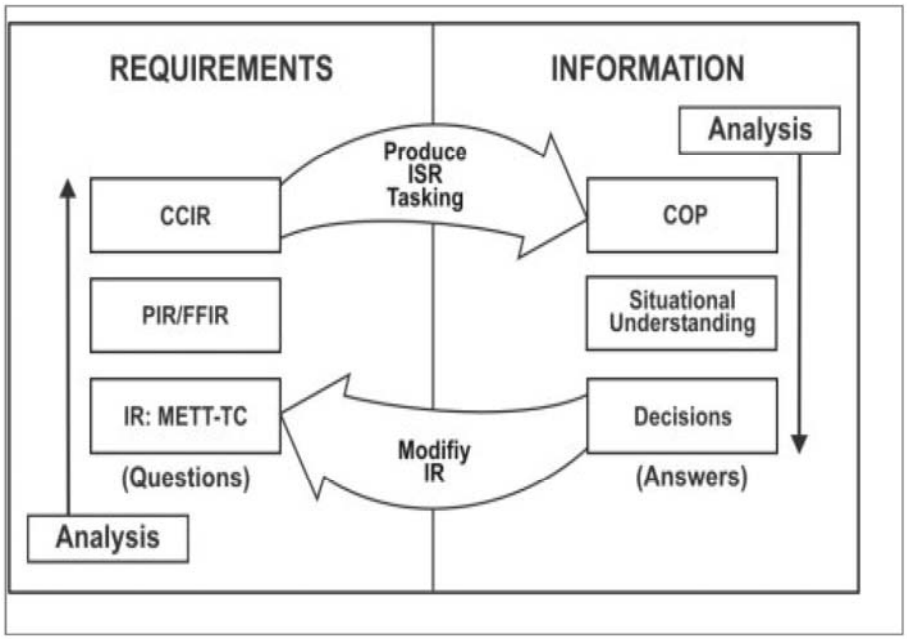

Figure no. 3

So, CCIR = *Commander's critical information requirements* are elements of information required by commanders that directly affect decision making and dictate the successful execution of military operations.[13]

PIR = *Priority intelligence requirements* are those intelligence requirements for which a commander has an anticipated and stated priority in his task of planning and decision making.[14]

FFIR = *Friendly forces information requirements* are information the commander and staff need about the forces available for the operation.[14]

COP = all information, collectors should focus, as much as possible, only on data needed to determine the information required to build the *Common Operational Picture*.[15]

METT-TC = mission, enemy, terrain and weather, troops.[16]

ISR = intelligence, surveillance, and reconnaissance.

IR = the joint definition of *information requirements* includes only intelligence requirements.[17]

Information management is a *dynamic process* that supports military leaders in the rapid and harmful operational situation.

Based on the information available, throughout operations, the answers to the CCIR, contribute to the assessments that are introduced in the decisions by the staff officers, military leaders and commanders.

These decisions and assessments generate fresh questions that address the changed situation and future command decisions. And the cycle is continuing.

The information flow can be better understand in military environment, at a glance, watching at the next picture (figure no.4) where is illustrated the relationships among the cognitive hierarchy, IR and CCIR.

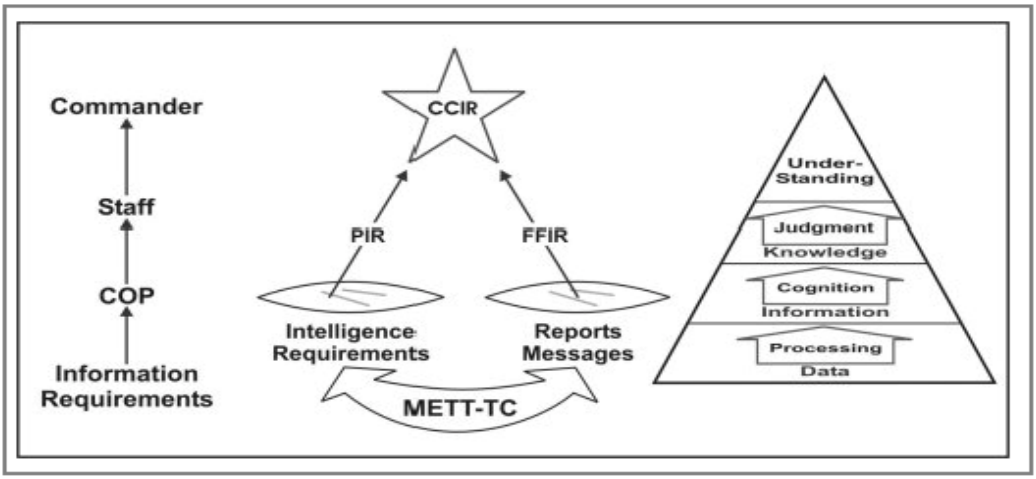

Figure no. 4

[13] According to *FM3-0, Operations*, 14 June 2001, published at http://web7.whs.osd mil/corres htm and http://www.globalsecurity.org/military/library/policy/army/fm/ 6-0/bib htm#fm3-0 accessed at 19th of February 2011.

[14] According to JP 1-02, *Department of Defense Dictionary of Military and Associated Terms*, available online at http://www.dtic mil/doctrine/jel/doddict/.

[15] http://www.globalsecurity.org/military/library/policy/army/fm/6-0/appb htm#figb-2 accessed at 19th of February 2011.

[16] Idem 15

[17] Idem 15

The chain of command demonstrates where meaning is added to data as the C2 (Command and Control) system processes it. The C2 system collects data from various sources to answer IRs.

And this is, let say, at the tactical and operational level in military environment. For the strategic and political level we can analyze the strategic concept of NATO a little bit later on.

The power of information consists in the fact that the political and military actions are necessary directions based on knowledge.

All the leaders that obtain information have the responsibility to do not ignore them, to analyze them and it must remove any lack of knowledge for the developing of the decision process.

„*When the information are precise and appropriate the chances for the decision makers to have a prompt reaction are raised, and some threats, just intuited, are eliminated. Also, some particularities of the risk factors are better understood and it confers to the decision act a value of the proportions*.''[18]

„*Thus, with all the asymmetric threats, from the nations actors and non-nations, can consists the most important and probable security risk, NATO has to have the capacity for conducting operation of highest intensity, in order to react for much robust and unexpected threats*.''[19]

„*The time, between the risk and threat anticipation and the execution of a course of action, must be shortened*.''[20]

„*One of the last important factor of the waste of the time is the bad functioning of the informational system*.''[21]

Combining the four quotas above we can summarise and emphasize the fact that the speed of the receiving, analyzing and taking the decisions is critical in good flow of information system and the decision making process in military environment and not only.

The New Strategic Concept NATO

The strategy of the North Atlantic Treaty Organization (NATO) is consists into a document known as „*The strategic Concept for the defence of the North-Atlantic area*". The first concept was developed between October 1949 and April 1959 considered that the Alliance „*established a strategy of operations at large scale for territorial defence* ".

The New Strategic Concept (NSC) „*NATO 2020: Active Engagement, Modern Defence*'' implies more than analysis, strategies, but reshaping of what it is today and what will be tomorrow.

„*For more than 60 years, NATO has proven itself as the most successful alliance in history. It's defended the independence and freedom of its members.[…] At no time during these past six decades was our success guaranteed. Indeed, there have been many times when skeptics have predicted the end of this alliance. But each time NATO has risen to the occasion and adapted to meet the challenges of that time. And now, as we face a new century with very different challenges from the last, we have come together here in Lisbon to take action in areas that are critical to the future of the alliance.*''[22]- said the president of the United States of America, HE, mr. Barack OBAMA, after de Summit in his press conference at Lisbon, Portugal.

After analyzing of the NSC it can be observed that the document contains the policies and the new principal directions of the Alliance that will be exposed in the next stage of this paper.

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[18] - unofficial translation from Stan PETRESCU, *About intelligence and power*, Editura Militara, Bucuresti, 2009, p.445

[19] - unofficial translation from Cristea DUMITRU, Ion RONCEA, *The war based on the net /the chalange of the information era in the battle field*, Editura Universitatii Nationale de Aparare Carol I, Bucuresti, 2005, p.17

[20] Idem 23, p.18

[21] - unofficial translation from Peter DRUCKER, *The effective Executive*, Editura Meteor Business, Bucuresti, 2010, p.65

[22] http://www.whitehouse.gov/blog/2010/11/20/president-obama-nato-and-today-we-stand-united-afghanistan accessed at 02nd of February 2011

The Heads of State and Government of the Allied nations determined that *NATO will continue to play its unique and critical position in ensuring the common defence and security* approved the document that will guide the next phase in NATO's evolution, so that it continues to be effective against new threats, *with new capabilities and new partners* as it is described below:

- it reconfirms the connection between all NATO nations to defend one another against attack;
- it commits the Alliance to prevent crises, manage conflicts and stabilize post-conflict situations;
- it offers to the Allied partners around the globe more political engagement with the Alliance, and a substantial role in shaping the NATO-led operations to which they contribute;
- it commits NATO to the goal of creating the conditions for a world without nuclear weapons – but reconfirms that, as long as there are nuclear weapons in the world, NATO will remain a nuclear Alliance;
- it restates our firm commitment to keep the door to NATO open to all European democracies that meet the standards of membership, because enlargement contributes to our goal of a Europe whole, free and at peace;
- it commits NATO to continuous reform towards a more effective, efficient and flexible Alliance, so that the taxpayers get the most security for the money they invest in defence;
- the citizens of NATO countries rely on the Alliance to defend Allied nations, to deploy robust military forces where and when required for the security, and to help promote common security with thr partners around the globe.

The *core tasks and principles* as them have been established in the Lisbon NATO Summit are:

1.NATO's fundamental and enduring purpose is to safeguard the freedom and security of all its members by political and military means. Today, the Alliance remains an essential source of stability in an unpredictable world.

2.NATO member states form a unique community of values, committed to the principles of individual liberty, democracy, human rights and the rule of law. The Alliance is firmly committed to the purposes and principles of the Charter of the United Nations, and to the Washington Treaty, which affirms the primary responsibility of the Security Council for the maintenance of international peace and security.

3.The political and military bonds between Europe and North America have been forged in NATO since the Alliance was founded in 1949; the transatlantic link remains as strong, and as important to the preservation of Euro-Atlantic peace and security, as ever. The security of NATO members on both sides of the Atlantic is indivisible. We will continue to defend it together, on the basis of solidarity, shared purpose and fair burden-sharing.

4.The modern security environment includes a broad and evolving set of challenges to the security of NATO's territory and populations. In order to assure their security, the Alliance must and will continue fulfilling effectively three essential core tasks, all of which contribute to safeguarding Alliance members, and always in accordance with international law:

a. ***Collective defence***. NATO members will always assist each other against attack, in accordance with Article 5 of the Washington Treaty;

b. ***Crisis management***. NATO has a unique and robust set of political and military capabilities to address the full spectrum of crises – before, during and after conflicts;

c. ***Cooperative security***. The Alliance is affected by, and can affect, political and security developments beyond its borders. The Alliance will engage actively to enhance international security, through *partnership* with relevant countries and other international organisations; by contributing actively to arms control, non-proliferation and disarmament; and by *keeping the door to membership in the Alliance open* to all European democracies that meet NATO's standards.

5. NATO remains the unique and essential transatlantic forum for consultations on all matters that affect the territorial integrity, political independence and security of its members, as set out in Article 4 of the Washington Treaty.

6. In order to carry out the full range of NATO missions as effectively and efficiently as possible, Allies will engage in a continuous process of reform, modernisation and transformation.

The Security Environment

Today, the Euro-Atlantic area is at peace and the threat of a conventional attack against NATO territory is low. That is an historic success for the policies of robust defence, Euro-Atlantic integration and active partnership that have guided NATO for more than half a century.

However, the conventional threat cannot be ignored. Many regions and countries around the world are witnessing the acquisition of substantial, modern military capabilities with consequences for international stability and Euro-Atlantic security that are difficult to predict.

The proliferation of nuclear weapons and other weapons of mass destruction, and their means of delivery, threatens incalculable consequences for global stability and prosperity. During the next decade, proliferation will be most acute in some of the world's most volatile regions.

Terrorism poses a direct threat to the security of the citizens of NATO countries, and to international stability and prosperity more broadly. Extremist groups continue to spread to, and in, areas of strategic importance to the Alliance, and modern technology increases the threat and potential impact of terrorist attacks, in particular if terrorists were to acquire nuclear, chemical, biological or radiological capabilities.

Instability or conflict beyond NATO borders can directly threaten Alliance security, including by fostering extremism, terrorism, and trans-national illegal activities such as trafficking in arms, narcotics and people.

Cyber attacks are becoming more frequent, more organised and more costly in the damage that they inflict on government administrations, businesses, economies and potentially also transportation and supply networks and other critical infrastructure; they can reach a threshold that threatens national and Euro-Atlantic prosperity, security and stability. Foreign militaries and intelligence services, organised criminals, terrorist and/or extremist groups can each be the source of such attacks.

Key environmental and resource constraints, including health risks, climate change, water scarcity and increasing energy needs will further shape the future security environment in areas of concern to NATO and have the potential to significantly affect NATO planning and operations.

Defence and Deterrence

The greatest responsibility of the Alliance is to protect and defend our territory and our populations against attack, as set out in Article 5 of the Washington Treaty. The Alliance does not consider any country to be its adversary. However, no one should doubt NATO's resolve if the security of any of its members were to be threatened.

Deterrence, based on an appropriate mix of nuclear and conventional capabilities, remains a core element of our overall strategy. The circumstances in which any use of nuclear weapons might have to be contemplated are extremely remote. As long as nuclear weapons exist, NATO will remain a nuclear alliance.

The supreme guarantee of the security of the Allies is provided by the strategic nuclear forces of the Alliance, particularly those of the United States; the independent strategic nuclear forces of the United Kingdom and France, which have a deterrent role of their own, contribute to the overall deterrence and security of the Allies.

Security through Crisis Management

Crises and conflicts beyond NATO's borders can pose a direct threat to the security of Alliance territory and populations. NATO will therefore engage, where possible and when necessary, to prevent crises, manage crises, stabilize post-conflict situations and support reconstruction.

The lessons learned from NATO operations, in particular in Afghanistan and the Western Balkans, make it clear that a comprehensive political, civilian and military approach is necessary for effective crisis management. The Alliance will engage actively with other international actors before, during and after crises to encourage collaborative analysis, planning and conduct of activities on the ground, in order to maximise coherence and effectiveness of the overall international effort.

To be effective across the crisis management spectrum, the Alliance will enhance intelligence sharing within NATO, to better predict when crises might occur, and how they can best be prevented.

Also, in this direction, further develop doctrine and military capabilities for expeditionary operations, including counterinsurgency, stabilization and reconstruction operations will be established.

Promoting International Security through Cooperation

Arms Control, Disarmament, and Non-Proliferation

NATO seeks its security at the lowest possible level of forces. Arms control, disarmament and non-proliferation contribute to peace, security and stability, and should ensure undiminished security for all Alliance members.

The Alliance will explore ways for our political means and military capabilities to contribute to international efforts to fight proliferation.

National decisions regarding arms control and disarmament may have an impact on the security of all Alliance members. We are committed to maintain, and develop as necessary, appropriate consultations among Allies on these issues.

Open Door

The door to NATO membership remains fully open to all European democracies which share the values of our Alliance, which are willing and able to assume the responsibilities and obligations of membership, and whose inclusion can contribute to common security and stability.

Partnerships

The promotion of Euro-Atlantic security is best assured through a wide network of partner relationships with countries and organisations around the globe. These partnerships make a concrete and valued contribution to the success of NATO's fundamental tasks.

Dialogue and cooperation with partners can make a concrete contribution to enhancing international security, to defending the values on which our Alliance is based, to NATO's operations, and to preparing interested nations for membership of NATO. These relationships will be based on reciprocity, mutual benefit and mutual respect.

Cooperation between *NATO and the United Nations* continues to make a substantial contribution to security in operations around the world.

An active and effective *European Union* contributes to the overall security of the Euro-Atlantic area. Therefore the EU is a unique and essential partner for NATO. The two organisations share a majority of members, and all members of both organisations share common values. NATO recognizes the importance of a stronger and more capable European defence. For the strategic partnership between NATO and the EU, their fullest involvement in these efforts is essential. NATO and the EU can and should play complementary and mutually reinforcing roles in supporting international peace and security.

NATO-Russia cooperation is of strategic importance as it contributes to creating a common space of peace, stability and security - NATO poses no threat to Russia.

Reform and Transformation

Unique in history, NATO is a security Alliance that fields military forces able to operate together in any environment; that can control operations anywhere through its integrated military command structure; and that has at its disposal core capabilities that few Allies could afford individually.

NATO must have sufficient resources – financial, military and human – to carry out its missions, which are essential to the security of Alliance populations and territory. Those resources must, however, be used in the most efficient and effective way possible.

So, all these values and objectives are universal and perpetual, and determine the defence through unity, solidarity, strength and resolve.

3. Conclusions

Information is one of the fundamental elements for the existence and the future of an organization that operates in a global society, in which everybody exchanges information with each other. To do this, is needed to quickly process extremely large volumes of information, distribute them in an effective and efficient, while ensuring their safety, security and protection (especially in the military).

But in personal or in organizational communication, who receives the information, may understand it or not!

The risk analysis of the flow of the information can be based not only on purely cultural aspects, but also based on elements from organizational, marketing, communication diplomatic representation, military, cultural semiotics and symbols.

Handling, securing, protecting and using it for the preserving of the values and principles of democracy and human rights, peace between nations it is a necessity and an art.

Understanding the risks, de principles of the avoidance of these, and an effective applicability in the information analysis process can improve in real way the quality of the flow of information.

The power of information consists in the fact that the political and military actions are necessary directions based on knowledge.

All the leaders that obtain information have the responsibility to do not ignore them, to analyze them and it must remove any lack of knowledge for the developing of the decision process.

One of our conclusions is the fact that in the ,,knowledge based society'' of the XXIst century - 2nd decade, the information is crucial.

A well organized, administrated and executed flow of the information could and can conduct to decisional supremacy, first of all, secondly, to a celerity of command act – both in military and politically panels, and thirdly to the reduction of the reaction time for execution of the decision makers and leaders direction and patterns to follow.

The speed of the receiving, analyzing and taking the decisions is critical in good flow of information system and the decision making process in military environment and not only.

Maybe is very difficult to forecast the future, but at least the leaders can and should be prepared and well structured in order to do not be surprised and to have a reply for defend the democracy and to do this in a better way.

The Strategic Concept is an official document that outlines NATO's enduring purpose and nature and its fundamental security tasks. It also identifies the central features of the new security environment, specifies the elements of the Alliance's approach to security and provides guidelines for the adaptation of its military forces.

So, the political leaders of NATO, are determined to continue renewal of our Alliance so that it is fit for purpose in addressing the 21st Century security challenges. NATO is firmly committed to preserve its effectiveness as the globe's most successful political-military Alliance. The Alliance thrives as a source of hope because it is based on common values of individual liberty, democracy, human rights and the rule of law, and because our common essential and enduring purpose is to safeguard the freedom and security of its members. These values and objectives are universal and perpetual, and determine the defence through unity, solidarity, strength and resolve.

While the world is changing, NATO's essential mission will remain the same: to ensure that the Alliance remains an unparalleled community of freedom, peace, and security with shared values.

In summary, combining a good flow of information from military environment, and not only, with the biggest politically and military Alliance New strategic concept, create us the opportunity to emphasize the need of having a good partnership between information and strategy in order to better cope with the XXIst Century challenges.

Post-scriptum of this paper:

….the world is changing in a hustle dynamics with large events….*Jasmine* Revolution, „bloody velvet'' Egyptian Revolution, and Libyans unrest, but Humankind, be careful with the Nature, … earthquakes, tsunamis! Unfortunately…..Japan is today! What will be and how will be the day of tomorrow?

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THE PUBLIC OFFICER - THE ACTIVE SUBJECT OF A CRIME

NICOLETA-ELENA BUZATU[*]

Abstract
The present study intends to analyze the active subject of the crime committed by an individual - the public officer, for example - during his daily duty program or with reference to the attributions he has versus the public office he holds, in the light of the regulations provided not only by the Penal Code in force but also by the future New Penal Code, as, among the important amendments it provides, the definition of the public officer is also mentioned. In the case of such a trespassing, the active subject shall hold the quality of a public officer the way this quality is regulated by the Penal Code, even if the definition is much ampler as compared to the one given by the Statute of the Public Officers. According to Art 147, paragraph 1 Penal Code, a public officer is any individual who permanently or temporarily exercises - irrespective of his/her rank or of the way this office was appointed, a paid or unpaid task of no matter what nature or importance - in the service of a department Art 145 refers to. The regulation proposed in perfect agreement with the solutions offered by other international legislations and conventions in the domain, the definition of a public officer refers to the individual who - permanently or temporarily appointed, paid or unpaid - shall exercise attributions specific to the legislative, executive or judiciary powers, a function of public dignity or a function of any other type - alone or in a group - within a self-governing management of another economic agent or of a legal person with a whole or a greater capital, or belonging to a legally declared person capital or to a legal person considered to be of public utility - attributions connected with the object of the latter's activity.

Keywords: *office, public officer, crime, responsibility, accountability.*

1. Introduction

The public officer is considered to be the juridical institution of the Public Law - in general - and of the Administrative Law - in particular; this type of institution has finally established its authority at the end of a continuous dispute between doctrine, jurisprudence and regulation.

This kind of dispute is to be met with not only in the practice of some European countries boasting with an efficient public administration, in spite of the differences existing in their specific juridical systems, but also in the Romanian doctrine, jurisprudence and legislation, irrespective of the fact that it appeared and developed as a coherent system later than in other countries, that is after the constitution of a unitary Romanian national state.[1]

The term 'public office' is frequently used in the vocabulary of the specific public law as it is connected with the activity carried on within the public administration department. Any public authority is defined by three attributes: competence, personnel, and material and financial means.[2]

The public officer is being defined by art 2, paragraph 2 of the Statute of the Public Officers[3], as the *person appointed in a public office in conformity with the law.* Yet, *the person removed from the public office and maintained in the reserve body of the public officers can keep his/her attribute of a public officer* - art 2, paragraph 2, second thesis of the Statute.

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[1] For more details see Mircea Preda – *Administrative Law. General Part*, III[rd] edition, (Bucharest: Lumina Lex Printing House, 2006), p. 64.

[2] Ion Rusu – *Administrative Law*, (Bucharest: Lumina Lex Printing House, 2001), p. 259.

[3] Law No 188 of December 8, 1999 regarding the Statute of the Public Officers, published in the Official Gazette No 600 of December 1999, republished.

Unlike the regulation stipulated by the Statute of the public officers, the Romanian Penal Code in force grants a larger interpretation to what the public officer really means. In conformity with art 147, paragraph 1 Penal Code, a "public officer" can be *any person who permanently or temporarily, irrespective of title or of the way he/she was appointed in the office, can exercise a task of any type- paid or unpaid - in the service of a unit art 145 refers to.* "An officer" is supposed to be *the person mentioned in paragraph 1, as well as any employee who develops an activity in the service of another legal person, other than the one stipulated by the above mentioned paragraph.*

The word "public" is defined in art 145 of the Penal Code and refers to *whatever regards the public authorities, public institutions or any other legal persons of public interest, the administration, the use and the exploitations of the public goods, public services and any kind of goods that, according to the law, are considered to be of public interest.*

In the regulation presented by the New Penal Code, in agreement with the solutions regarding other international legislations and conventions in the domain, the "public officer" will be the *person who - permanently or temporarily, with or without payment -: a) exercises attributions specific to the legislative, executive and juridical power; b)exercises an office of public authority or of any other public nature; c) exercises solely or within a group - in the case of a self-governing management company, in the case of an economic agent or in the case of a legal person having total or greater official capital or in the case of a legal person known to be of public interest - attributions connected with the carrying out of their respective purposes. Still, with respect to the penal law, a public officer is also considered to be that person who exercises a public office service for which he/ she was appointed by the public authorities, or who is subjected to the control and supervision of these public authorities until the fulfillment of the respective public service.*

Consequently, different from the Statute - in the vision of the Penal Law - for the condition of a public officer to exist, it is not relevant the title of his task, neither the way of his being appointed in the office, but it is sufficient that the active subject of the transgression to generate such a task in the service of a public authority, public institution or another legal person of public interest.

2. Paper content

The importance of the public officer for a present time Romanian developing state of law resides in the fact that in his/her quality of an instrument through which the administration achieves its attributions and public authority prerogatives, the public officer is the one who, after Romania's adherence to the European Union, will substantially contribute to turn into practice the values of the European Union, to guarantee the fundamental rights of the citizens - among which the right to a good administration and the right to a good governance.[4]

The transgression is a behavior act forbidden by the incriminatory norm, an act committed by a person, breaking his/her own obligation of not committing it, against the social value whose titular a person is. Such persons involved in a juridical report of a penal conflict are subjects of a transgression.

In other words, the subjects of the transgression are those individuals involved in the commitment of a crime, by either committing the act or by bearing its consequences derived from the very transgression.[5] The specialized literature makes a distinction between the active and the passive subject of a transgression.

The natural person shall also meet a series of general, cumulative conditions, such as: *the required legal age* from which a person can appear in a penal court is 14; *responsibility* - that is the

[4] Verginia Vedinaș – *Considerations on the Draft of Law for the Modification and Completion of Law No 188/1999 regarding the Statute of Public Officers*, in RDP no. 2 (2006), p. 68.

[5] See Constantin Mitrache and Cristian Mitrache – *Romanian Penal Law. General Part* VIIth edition, (Bucharest: Universul Juridic Printing House, 2009), pp. 120; Costică Bulai – *Penal Law. General Part* (Bucharest: All Printing House, 1992), p. 81.

person's ability to conscientiously coordinate his/her will in connection with the above mentioned conditions;[6] *the free will and action* - meaning that the person could have had the opportunity to freely decide the committing of the deed.

As the New Penal Code stipulates, the active subject of a transgression is the natural or legal person who commits a transgression and is asked to respond in front of a penal court. Art 135, paragraph 1 of the New Penal Code stipulates: "*Any legal person - with the exception of the state and of the public authorities - is demanded to appear in a penal court for the transgressions meant to achieve the activity in view, or those committed in the name of the legal person's interest.*" Any transgression makes the committer become a subject of the respective transgression, or a transgressor proper. Any person who commits a transgression - an already committed one or a punishable attempt to which he is a participant as either the author or the accomplice or instigator - is considered to be either an active subject of the transgression or a transgressor, as stipulated by art 174 of the New Penal Code.

The name of an active subject of a transgression characterizes his/her anti-legal attitude that breaks the provisions of the law and the social discipline with his/her dangerous behaviour and creates an irreducible conflicting situation that makes him/ her responsible in front of the penal court.[7]

The active subject for whom a special condition is necessary to be carried out is called a qualified active subject or a circumstantiated active subject.

The existence of certain transgressions is conditioned by the quality of the active subject of the transgression, alongside with the fulfillment of the other conditions, among which: office abuse against the interests of the person, office abuse in obstructing certain rights, office abuse against public interests, office negligence, abusive behaviour, negligence in keeping state secrets, conflict of interests, receiving or offering bribe, denunciation of professional secrets, fraudulent management, dilapidation, stealing or destroying documents, forging official documents, defalcation of funds, etc. In the case of all these transgressions, the active subject shall be a public officer, as stipulated by the Penal Code, even if the area is much larger that the one delimitated by the Statute.

The legal ground is given by art 140 Penal Code that provides that whenever the penal law makes use of the terms includes in Title VIII of the Penal Code, their meaning derives from these articles. In practice the exceptions of non-constitutionality of the dispositions included in art 147 of the Penal Code were abolished, but not rejected by the Constitutional Court.

In as far as the Administrative Law is concerned, the public officer is considered to be the person who was appointed in a public office. The person whose office attributions ceased - from imputable reasons - still keeps the quality of a public officer, continuing to be a member of the public officers reserve body. In its addenda, Law No 188/1999 presents a list of all public offices, although it is far from being exhaustive. On the other side, some norms that regulate the activity of certain categories of persons do not grant them the quality of public officers, as for example the teachers; still, in the view of the penal law, all these categories are considered to be public officers. The Labor Law does no longer make a difference between employee and officer, as in the period between the two World Wars. The employee is the natural person who works on the ground of an individual labor contract. [8]

The quality of a public officer involves the existence of an office responsibility - as a factual case - or, is the consequence of a concluded labor contract with a unit, in the virtue of which the subject exercises his/her real office attributions. His/her responsibility can be permanent or temporary; what it matters is the fact that the respective person shall become part of the work team of

[6] George Antoniu – *On the Transgressor, the Transgressing Act and Culpability*, in RRD no. 8 (1969), p. 80.

[7] Alexandru Boroi – *Penal Law General Part. In the Light of the New Penal Code* (Bucharest: C.H. Beck Printing House, 2010), p.152.

[8] Răzvan Popescu – *Elements of Penal Law*, (Bucharest: Universul Juridic Printing House, 2008), p. 108.

one of the units provided by art 145 and subject to the inner order rules regulating the organization and the discipline of the respective activity.[9]

In order to define the quality of a public officer, the title of his/her duties or the modality of his/her being appointed (appointment, repartition, election or contest) is not relevant.

It is sufficient for the active subject of a transgression to exercise a certain duty in the service of a public authority, public institution or of any legal person of public interest. At the same time, there is not at all relevant the validity of the labor report, and there is not necessary any labor contract or appointment in the office; it is sufficient for his/her exercise the respective office be a factual reality related to the required attributions. In such a case, the tacit or expressed agreement of the unit-staff is compulsory in as far as the person can exercise the attributions of the respective office.[10] Those persons who have certain duties within one of the units art 145 refers to, have the quality of being public officers irrespective of their being paid or not.

By considering art 2, paragraph 2, these I and II we draw the conclusion that in the conception of the Statute, the persons who hold offices by nomination have not the quality of public officers and, consequently, they are not applied the provisions of the Statute. In the same way, the provisions of the Statute are not applied to all persons appointed in a public office, because art 6 enumerates a series of categories of persons who, although belonging to the public authority or to administrative public institutions and are appointed in the office, they are not considered to hold the public offices, and so, they do not have the quality of a public officer.

For example, the magistrates, the teachers, the employees working in the cabinets of the high officials in the basis of their personal proposals and agreement (secretariat, protocol, administration, maintenance, supply, guardianship as well as other categories) and employed in the personal apparatuses of public authorities and institutions, but who do not exercise public authority prerogatives, are not submitted to the regulations of the Statute of Public Officers.

There are commentaries within the doctrine in connection with the definition of the public officer as reported to certain categories of professions - liberal professions - as: lawyers, notaries, doctors, etc. Mention shall be made that a distinction shall be made between those lawyers who have only the quality of being members of the Bar - on the ground of which they are enabled to exercise the profession of a lawyer - and those lawyers elected in the leading staff of the Bar. In the meaning of the legal provisions, only the latter category can be considered active subjects of office transgressions. As for the doctors, the penal doctrine considers - corroborating the provisions regarding the medical assistance with the penal provisions - that only those doctors who work in the State sanitary network are public officers, as stipulated in art 147, paragraph 1, of the Penal Code. As for the quality of a public notary to be considered a public officer, the penal doctrine underlines the fact that although they exercise services of public interests, they are in the service of neither public nor private unit.[11]

The New Penal Code[12] opted for the assimilation of the natural persons who exercise a profession of public interest that requires a special qualification from the part of the public authorities and which is submitted to their control (notaries, bailiffs, etc). Although these persons are not public officers proper, they are invested with a public authority, granted to them by a State competent authority and are submitted to their control; this justifies for their being assimilated to the category of

[9] Ilie Pascu and Valerica Lazăr – *Penal Law. Special Part*, (Bucharest: Lumina Lex Printig House, 2004), p. 314.

[10] Olivian Mastacan – *The Penal Responsibility of the Public Officer*, 2nd edition, (Bucharest: Hamangiu Printing House, 2008), p. 28.

[11] Olivian Mastacan – *op cit.*, p. 30.

[12] See the Justifications of the New Penal Code.

public officers. As it resides from the content of the special part, then when certain incriminations are not compatible with the statute of the above mentioned category, or when their being confronted with a certain incriminating text was not meant, it was particularly provided the non-appliance of the text regarding the above mentioned persons.

3. Conclusions

If correlating all branches of Law, one can underline the fact that a public officer - in the light of both penal and administrative law - excludes the quality of an employee. The penal law term about the public officer includes both the public officer proper and the employee who exercises an office task that is, that of a private officer. So, the Penal Law includes all persons who perform any kind of activity on the ground of an individual labor contract or work-report; the definition of a public officer includes all the persons who exercise a public task in the frame of public authorities, public institutions or legal persons of public interest, irrespective of the way they were appointed or of their being paid or unpaid. The definition of the public officer given by the Administrative Law is not to be confounded with the one given by the Penal Law which is much ampler. The Penal Law, for example, admits the status of a public officer for certain persons, irrespective of the conditions imposed by the Administrative Law; the Administrative Law speaks, for example, about a "legal appointment" as compared with the Penal Law that speaks about the "indifferently how he/ she was appointed." The Administrative Law presupposes competence and a certain authority, as compared to Penal Law that presupposes only a "no mater what task." The Administrative Law requires that the person should be a member of the administrative body, while the Penal Law admits "any person," that is unsalaried.

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THE DECISIONAL TRANSPARENCY IN PUBLIC ADMINISTRATION

OCTAVIA MARIA CILIBIU[*]

Abstract
The principle of decisional transparency is one of the principles of good administration, fundamental principles of public administration and it is enshrined in the law of many European Union member states, including our country. In their work the public authorities must show transparency reflected by the active involvement of citizens in administrative decision as its primary beneficiary. The citizen information, consultation and his stimulation to participate actively in the elaboration of draft normative acts for their preparation and before that by bringing them to public knowledge, are tasks of the public authorities which exceed the limit of the obligations imposed by internal rules and are significant efforts to modernize the public administration and rallying to the administrative structures.

Keywords: *transparency, public administration, information, citizen, decision*

Introduction

This study aims to address the issue of decisional transparency in public administration issues, one of the principles of good governance, fundamental principles of government.

Research of issues decisional transparency in public administration is topical and important in several respects.

First, the importance of our country's status is determined by the European Union member state and European law enshrines the principle (Treaty on European Uniunuu Regulation no. 1049/2001 of the European Parliament and the Council of 30 May 2001 on public access the European Parliament, Council and Commission, the Treaty establishing the Constitution for Europe). Also, transparency in government decision making is established, the law of many Member States of the European Union.

Secondly the research is important to demonstrate openness and transparency of public administration to manage those.

Thirdly transparency in government decision-making leads to confidence in the strength and importance of normative acts. Public confidence in the legal compliance results, with positive consequences on economic development and maintaining cooperative relationships between government and society.

Research is important in terms of developing national doctrine.

Scientific research was done based on research of national legislation, European legislation and the implementation of transparency in some public authorities law and literature approach.

Transparency in government decision-making approach is based on the value of the work of specialists in administrative law, public administration, most authors on the importance of transparency going on in government decision-making, the general rule being that government policy should be an open and transparency. I agree with this view given the fact that transparency in government decision-making is the most important premise of a democratica and accountable governance.

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Paper content

Transparency in government decision-making involves opening the government to manage the authorities by informing the people on matters of public interest, public consultation on draft laws and their right to participate actively in taking administrative decisions and in the process of elaborating normative acts. Transparency of decision "means the degree of openness for an election or a check"[1].

Openness and transparency in public administration serve two specific purposes. On the one hand, they protect the public interest as they reduce the risk of maladministration and corruption, and on the other hand, they are essential to protect individual rights because it provides the necessary reasons for administrative decisions, and help the parts concerned to exercise their right to appeal[2].

It is desirable to provide transparency of public administration, participation in decision making in an appropriate manner, of persons whose rights and interests are at stake, communication to those interested in the criteria for making decisions, reasoning required decisions etc.[3].

„Change is not possible without difficulty, even in the worst prospect of better. Currently, Romania faces many changes and the responsibility is shared"[4].

As a general rule „gouvernment policy should b eone of openness and transparency"[5]. In their work public authorities must show transparency reflected by the active involvement of citizens in administrative decision as its primary beneficiary.

The principle of transparency in government decision-making is a mechanism by which the right to information provided by art. 31 of the Constitution is exercised.

Citizen information, consultation and his stimulation to participate actively in the elaboration of normative acts projects for their preparation and before that by bringing them to public knowledge, public authorities are responsible for obligations beyond the boundaries imposed by internal rules and approaches are significant efforts to modernize public administration and rallying the administrative structures.

Transparency of decisions is necessary to show even more in the local public authorities as, in accordance with the principle of subsidiarity, these authorities are closest to the citizen[6].

Transparency of decisions is any social mechanism in a democratic society to ensure effective participation of citizens and legally recognized organizations in public life and completes the formal process of election or designation of representatives of institutions and public authorities[7]. This mechanism is regulated in Romania by Law no. 52/2003 on decisional transparency in public administration [8], with subsequent amendments[9].

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[1] Sigma Papers, no. 27, Emil Bălan quote in *Instituţii Administrative*, Publishing C. H. Beck, Bucureşti, 2008, p. 32 and Ioan Alexandru quote and collaborators in *Dreptul administrativ în Uniunea Europeană*, Publishing Lumina Lex, Bucharest, 2007, 332.

[2] OCDE 1999, *European Principles for Public Administration*, Sigma Papers, no.27, Publishing OECD, 13, www.sigmaweb.org

[3] **Emil Bălan**, *Drept administrativ şi procedură administrativă*, Publishing Universitară, Bucharest, 2002, 253.

[4] **Richard Linning**, *Tranparenţă şi guvernare*, International Seminar „Transparency and participation for the government closer to the citizen", 5-6 december 2005, SNSPA Bucharest.

[5] **Ioan Alexandru** and collaborators, *Dreptul administrativ în Uniunea Europeană*, Publishing Lumina Lex, Bucharest, 2007, 336.

[6] **Lucia Catană**, *Transparenţa decizională în practica autăritoţilor publice locale*, International Seminar „Transparency and participation for the government closer to the citizen", 5-6 december 2005, SNSPA Bucharest.

[7] **Victor Alistar**, *Transparenţa decizională în administraţia publică românească*, International Seminar „Transparency and participation for the government closer to the citizen", 5-6 december 2005, SNSPA Bucharest.

[8] Publisched in the Official Journal of Romania, Part I, no. 70/3.02. 2003.

[9] Last modified by Law no. 242/2010, publisched in the Official Journal of Romania, Part I, no**.** 828 of 10 December 2010

Law transparency throughout the project

In November 2000, IRIS Center Romania started the project "Transparency in government activity" that addresses both central and local government.. At the central level there were held numerous meetings and seminars attended by public institutions, business representatives and NGOs in order to obtain amendments to the draft proposed legislation.

Since December 2001 IRIS Center has begun consultations with the Ministry of Public Information on the drafting of this bill. It was brought to the public on 16 April 2002 by means of a press conference. On April 22, 2002, the Ministry of Public Information with IRIS Center organized a public debate on the bill presented by the Ministry. In addition to the amendments made in the debate, IRIS Center Romania and Transparency Association sent in writing to the Ministry of Public Information, a series of suggestions to improve the draft law[10].

The main purposes which the law aims to achieve are:

- Increasing the accountability of government for the citizen.
- Stimulating the active participation of citizens in administrative decision-making process.
- Increasing transparency throughout government.

Law on transparency of decisions addresses to: citizens, NGOs and business associations.

The principles governing decision transparency in public administrastion are: informing the people on matters of public interest, public consultation on draft legislation and active participation of citizens in the decision-making process and in developing legislation.

Prior information is that the government authority must publish a notice of the contents of a draft law (including Background Notes, the Explanatory Memorandum, Approval Report, the full text of the draft, the date and the deadline by which suggestions or amendments can be submitted). The notice must be published on the Authority website and at its headquarters and transmitted to central or local media (if applicable) at least 30 days before submitting the project for consideration, approval and adoption. The authorities must send the notice to the legally constituted associations which have requested this in advance.

Public consultation on draft legislation takes place through the establishment of a period of at least 10 days from the date the notice was published in which citizens and legally constituted associations may submit written proposals, suggestions and opinions worth recommendation which have to be taken into account when finalizing the final text and sending it for approval and adoption.

Active citizen participation takes place through public debates on the project submitted to transparent procedure. The public authority is obliged to hold a public debate where a legally constituted organization or another public authority requests it in writing. Discussions should be recorded and made public through the minutes of the meeting. The final decision on the recommendations and suggestions in the consultation or public debate belongs entirely to the public authority.

Law transparency of decision should not be confused with the law on access to public information. Transparency law does not give citizens the right to make final decisions on regulations that would be adopted, this belonging to government authorities who will decide whether or not to include draft regulations information and suggestions.

Article 12 of Law no. 52/2003 introduces an obligation for all public authorities to draw up an annual report on the transparency of the decision containing the following information: the number of recommendations received, the total number of recommendations included in draft legislation and the content of the taken decision,the number of participants in public meetings, the number of debates organized publicly on the draft regulations, where state authority was sued for obeying the law, its own assessment of partnership with citizens and their associations legally established, the number of public meetings and incentive closed restricting access.

[10] Romanian Association for transparency and Pro Democray Association , *Ghidul transparenței decizionale în administrația publică*, Publishing Tranger Printing , Bucharest, 2006, 6.

Implementation of the Transparency Act in 2009 to some public authorities:

Public Authority	No decisions adopted projects	No. projects brought to public knowledge no decision.	No. recommendations from citizens and associations legally constituted	No. recommendations included in the draft decision	No. meetings	No. public hearings	No. person participating in the meeting	No. public debate	No. participants in the debate	No. actions for breach of Law 52/2003
Arad City Hall	85	77	69	19	30	30	474	8	241	0
Ilfov County Council	207	207	0	0	12	12	-	-	-	0
Hunedoara County Council	203	203	-	-	15	15	300	-	-	0
Olt County Council		-	-	-	13	13	650	-	-	0
Botoşani County Council	228		0	-	21	21	180	-	-	0
Ialomiţa County Council	86	86	72	9	11	11		7	-	0
Bacău City Hall	441	441	4	2	26	26	15, 20/meeting	1	-	0
District 4 City Hall	124	6	0	0	16	16	600	4	-	0
Suceava County Council	12	-	33	33	-	-	880	0	-	0
Tg-Jiu City Hall	430	-	2	0	13	13	300	-	-	0

* Data are taken from reports made by public authorities, published on their websites, and where it is – there is no information.

The observed low level of active participation of citizens in decision making, but public authorities and lack of properly prepare the annual report on transparency of decisions, there are no certain information in the report heading.

Despite the crystallization of a formal framework that can ensure transparency in decision making and access to information of public interest, there is still in Romania a state of inertia in the fieldof citizens' involvement in decisions affecting the public interest. The local government gives us many examples[11].

[11] **Emil Bălan**, *Transparenţă vs. opacitate în administraţia publică*, International Seminar „Transparency and participation for the government closer to the citizen", 5-6 december 2005, SNSPA Bucharest.

Transparency law provides for three types of mechanisms to punish those who neglect their obligations:

- the possibility for citizens to challenge government authority in court, if it violates the rights provided by law.
- the possibility of official sanction restricting the full exercise of rights provided by law by citizens.
- the possibility of penalizing those persons participating in public meetings that do not comply with them.

Knowledge of public administration to citizens and their participation in decision making for public administration has some advantages[12], as follows:

- restores and builds trust between government and citizens;
- helps the administration to identify community needs faster and with greater satisfaction for citizens;
- provides free information to the public administration regarding the decisions to be taken;
- leads to community consensus and not to conflict;
- government and citizens are able to jointly address problems and opportunities in a much more creative way.

Article 5 of the Law sets out exceptions in applying the Law of transparency. Thus, there has been a consultation process for developing legislation that provides information on national defense and public order, the strategic, economic and political interests of the country as well as information on personal data.

Treaty on European Union enshrines the concept of transparency in the art. 1, para. 2, stating that "this treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly and as closely as possible to the citizens"[13].

Transparency of decision making in European institutions is guaranteed by the provisions of Regulation no. 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to the documents of the European Parliament, Council and Commission[14].

The beneficiaries of this regulation are all citizens of the Union and any natural or legal person, resident or having their headquarters in a Member State (Article 2, section 1).

Transparency helps to ensure better participation of citizens in the decision-making process, ensuring greater legitimacy, effectiveness and accountability of government towards the citizens in a democratic system. Openness contributes to strengthening democratic principles and fundamental rights, as defined in Article 6 of the European Union Treaty and the Charter of Fundamental Rights of the European Union (section 2 of the preamble of the Regulation).

Regulation no. 1049/2001 establishes the principle according to which the documents held by an institution that is prepared or received by it and in its possession, in all areas of EU activity should be accessible to the public. Are there, however, exceptions to this principle as follows:

The institutions shall refuse access to a document where disclosure would undermine the protection:

(a) the public interest as regards:

- public safety
- defense and military issues
- international relations
- the financial, monetary or economic politics of community or of a State Member

[12] Romanian Association for transparency and Pro Democray Association, *Ghidul transparenței decizionale în administrația publică*, Publishing Tranger Printing , Bucharest, 2006, 14.

[13] Enhanced version of the Treaty on European Union publiched in the Official Journal of al UE C115 of 9. 05. 2008.

[14] Published in the Official Journal L 154 of 31. 05. 2001.

(b) privacy and integrity of the individual, especially in accordance with data protection legislation.

The institutions shall refuse access to a document where disclosure would undermine the protection:

- Commercial interests of a natural or legal person, including intellectual property;
- Court proceedings and legal advice;
- the purpose of inspections, investigations and audits, unless an overriding public interest in disclosure of that document.

Access to a statement from an institution for internal use or received by an institution and an issue on which the institution has not yet taken any decision is denied if its disclosure would seriously undermine the decision-making institutions, unless there is an overriding public interest in disclosure of that document.

A Member State may request the institution not to disclose a document originating from that without its prior consent

Requests for access to documents shall be made in writing, including electronically, in one of the languages of the Member States and in a sufficiently precise way to enable the institution to identify the document. The applicant is not obliged to give reasons for the request (Article 6, section 1 of the Regulation). Whenever an application is not sufficiently precise, the institution shall ask the applicant to clarify and assist in this purpose, for example by providing information on the use of public registers of documents.

The deadline for resolving the request for access to documents is 15 working days from the date of filling. The institution may grant access to documents requested and provide such documents, or reject in whole or in part the request, pointing out reasons for rejecting the applicant, and also informing him about his right to enter a confirmatory application asking the institution to reconsider its position.

Confirmation request is nothing more than a purely administrative appeal, an administrative gracious appeal and settled gracefully within 15 working days after filling the application. In case of rejection of all or part of the application the Regulation establishes the remedies available to it the applicant, that of the appeal court and / or complaint to the European Ombudsman.

On this occasion we must mention the words addressed by Mr. Nikiforos Diamandouros, during his reelection to the post of European Ombudsman: “I will ensure that EU citizens will take full advantage of the Treaty of Lisbon. It is the right to good administration, the right of access to EU documents and the right to engage in dialogue with EU institutions. For me it is extremely important to strengthen "service culture"within the EU administration, this approach include greater transparency and fair, impartial and speedy civic affairs”.

European Ombudsman examines coplaints about maladministration in EU institutions and bodies. Most complaints received by the Ombudsman refers to the lack of transparency in EU institutions.

Before the Ombudsman investigate the complaint of an authorized plaintiff regarding the maladministration within a European institution or body must meet the criteria of admissibility. These criteria, laid down in the relevant articles of the Statute of the European's Ombudsman[15], read as follows:

- Author and subject of the complaint must be identified, the author may request that the complaint remain confidential [Article 2 (3) of the Statute];
- The Ombudsman may not intervene in cases pending in court or bring into question the merits of a decision [Article 1 (3) of the Statute)];

[15] Adopted by decision of Parliament on 9 march 1994 (JO L 113, 4.5.1994, p. 15) and amended by its decisions of 14 march 2002 (JO L 92, 9.4.2002, p. 13) and of 18 june 2008 (JO L 189, 17.7.2008, p. 25).

- The complaint must be filled within two years from the date on which the facts justifying the applicant are brought to the attention of [Article 2 (4) of the Statute)];

- The complaint should be preceded by appropriate administrative approaches to the institution or body concerned [Article 2 (4) of the Statute)] and

- For complaints about the working relationship between institutions and bodies and officials, their internal administrative channels have to be exhausted to resolve the claims or administrative complaints before submitting the complaint [Article 2 (8) of the statute)].

Article 195 of the EC Treaty provides that the Ombudsman "conducts inquiries for which they claim to be appropriate." In some cases, there might not be sufficient grounds for the Ombudsman to initiate an investigation, even if the complaint is admissible. For example, if a complaint has been considered as a petition by the Committee on Petitions of the European Parliament, the Ombudsman considers that there is normally a justification for an investigation of the Ombudsman, unless new evidence is submitted.

For example, in total, 42% of eligible cases handled in 2007 were considered unjustified to start an investigation.

Since the establishment of the Ombudsman institution, the situation of complaints relating to transparency, including refusal of information is as follows.

Year	No. complaints registered	No. investigations initiated	% investigations relating to transparency, including refusal of information
1995[16]	298	131	22%
1996[17]	842	207	14%
1997[18]	1181	196	30%
1998[19]	1372	170	40%
1999[20]	1577	201	32%
2000[21]	1732	223	42%
2001[22]	1874	204	41%
2002[23]	2 211	222	41 %
2003[24]	2436	253	34%
2004[25]	3.726	351	36%
2005[26]	3.920	338	55%
2006[27]	3.830	258	73 %

[16] The anual report on the activities of the European Ombudsman in 1995, p. 14, www.ombudsman.europa.eu.

[17] The anual report on the activities of the European Ombudsman in 1996, p.8, p.17, www.ombudsman.europa.eu.

[18] The anual report on the activities of the European Ombudsman in 1997,p.12, p.30, www.ombudsman.europa.eu.

[19] The anual report on the activities of the European Ombudsman in 1998, p.15, p.26, www.ombudsman.europa.eu.

[20] The anual report on the activities of the European Ombudsman in 1999, p.15, p.22, www.ombudsman.europa.eu.

[21] The anual report on the activities of the European Ombudsman in 2000, p.17, p.22, www.ombudsman.europa.eu.

[22] The anual report on the activities of the European Ombudsman in 2001, p. 17, www.ombudsman.europa.eu.

[23] The anual report on the activities of the European Ombudsman in 2002, p. 22, www.ombudsman.europa.eu.

[24] The anual report on the activities of the European Ombudsman in 2003, p. 24, www.ombudsman.europa.eu.

[25] The anual report on the activities of the European Ombudsman in 2004, p. 24, www.ombudsman.europa.eu.

[26] The anual report on the activities of the European Ombudsman in 2005, p. 24, www.ombudsman.europa.eu.

[27] The anual report on the activities of the European Ombudsman in 2006, p. 23, www.ombudsman.europa.eu.

2007[28]	3.211	303	71%
2008[29]	3.406	293	36%
2009[30]	3.098	335	36%

In order to ensure the democratic nature of the European Union and the Union closer to citizens, there are set a series of principles of functioning of the Union [31], including the principle of transparency.

At European Union level, the measures to enhance transparency and openness, clearly underline the importance of these two principles[32], on the European Transparency Initiative (ETI-European Transparency Initiative), introduced by the European Commission launched on 3rd, March 2005 and adopted the 9th, November that year to increase transparency, openness and accountability of governance processes of the European Union, noting that "transparency has passed from being a subject of public debate on the priority agenda of European politicians, achieving a highest possible degree of openness and transparency is one of the main objectives of the Commission in the period 2005-2008".

In May 2006 the Commission published a Green Paper on European Transparency Initiative which was intended to initiate a debate with stakeholders on how to improve the transparency of EU funds, to increase consultation with civil society and create a framework for the role of lobbies and NGOs in European Union decision-making by institutions.

ETI concept itself was developed in response to the need to "reconnect Europe with its citizens and put an end to both physical and mental differences that make it difficult for people to understand what Europe does and why it matters". ETI objectives therefore were "to increase openness and accessibility of European Union institutions, having the power to increase the use of European Union budget and to make European Union institutions more accessible to the public" with the intent to promote transparency in European Union decision making.

The principle of transparency is reflected in the Treaty establishing a Constitution for Europe art. I-50 - Transparency of procedures of the institutions, organs and bodies of the Union. Paragraph 1 of this Article provides that "In order to promote good governance and to ensure the participation of civil society, institutions, bodies and agencies working Union respecting the highest principle of openness." Also, " any citizen of the Union or any natural or legal person residing or having its registered office in a Member State has the right to have access to the institutions, organs and bodies of the Union" (par. 3, art.I-50).

The treaty establishing a Constitution for Europe provides on art. 1 - 47 the participative democratic principle which states that institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society. In order to ensure consistency and transparency of European Union action, the Commission shall carry out broad consultations with the concerned parties.

Lack of transparency in decision-making, among other shortcomings of the regulatory activity, leads to low confidence in the strength and importance of company laws. Absence makes the rules consultations to be frequently modified or replaced, and this causes a sharp legislative instability.

Confidence in the legal framework will result in a greater degree of compliance with positive consequences on economic development and maintaining cooperative relations between your government and society.

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[28] The anual report on the activities of the European Ombudsman in 2007, p. 20, www.ombudsman.europa.eu.

[29] The anual report on the activities of the European Ombudsman in 2008, p. 16, www.ombudsman.europa.eu.

[30] The anual report on the activities of the European Ombudsman in 2009, p. 16, www.ombudsman.europa.eu.

[31] **Ion Gâlea, Mihaela Augustina Dumitraşcu, Cristina Morariu**, *Tratatul instituind o Constituţie pentru Europa*, Publishing All Beck, Bucharest, 2005, 93.

[32] **Emil Bălan**, *Instituţii administrative*, Publishing C. H. Beck, Bucharest, 2008, 23.

Conclusions

Research of the principle of transparency in government decision-making results highlight the importance of this principle for both public administration and citizens, the principle of transparency in government decision-making leading to improved citizen-government relationship.

Transparency in government decision-making is one of the values that have an impact on the democratic process, the most important premise of a democratic governance. In any democratic state should encourage transparency in government decision-making, lack of transparency leading to maladministration.

In the future, require increased transparency in public administration, ensuring the maximum level of transparency as the degree of transparency is much higher public administration is closer to citizens, the principle of transparency in government decision making closer to citizens and public administration leads to removing any corruption or suspicions thereof. Transparency in government decision-making is a principle of proximity, helping to improve the quality of the administration the benefit of citizens.

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THE JURIDICAL REGIME OF SANCTIONING THE PERFORMANCE OF AN ACTIVITY FOR THE BENEFIT OF THE COMMUNITY

NICOLAE GRĂDINARU[*]

Abstract
The sanctioning of performing an activity for the benefit of the community is always established alternately with the fine or penalty and certain deeds that constitute contraventions are sanctioned. This sanction may be applied only by the court.
The activity for the benefit of the community is performed in the field of public services, for maintaining the places of recreation, parks and roads, for maintaining the cleanliness and hygiene of the localities, for conducting activities for the benefit of hostels for the elderly and children, for the orphanages, nurseries, kindergartens, schools, hospitals and other social-cultural establishments.
It is prohibited to oblige the child to perform an activity involving risks or is likely to affect his/her education or to harm his/her health or his/her physical, mental, spiritual, moral or social development.

Keywords: *offense, community service activities, irrevocable, supervising the execution, contravention, working programme.*

Introduction

Contravention imprisonment was introduced into the Romanian legislation by Decree no.329/1966 on sanctioning some deeds that constituted contraventions to the rules of travelling by train.[1]

It has first appeared as an exception to the common law, but then more regulations regarding the law stipulated the punishment of certain deeds with contravention imprisonment, although Law no.32/1968, which was the framework law on the contraventions regime, this sanction was not taken in the system of contravention sanctions.

Among the concerns of finding some alternatives to the sanctions involving deprivation of liberty on short term, which could protect the offender from imprisonment was Law no.82/1999 on the replacement of contravention imprisonment with the sanction of obliging the offender to perform some activities for the benefit of the community.

By GO no.2/2001 on the juridical regime of contraventions, both contravention imprisonment and performing some activities for the benefit of the community were stipulated as the main sanctions.[2]

Due to the dysfunctions reported in the practice of the courts of law on the application and enforcement of these sanctions, this area was covered by special law, GO no.55/2002.[3]

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[1] Decree no.329/1966 on sanctioning some contraventions regarding the rules for travelling by train, published in Of.B. (Official Bulletin) no. 21/03.05.1966, repealed by Law no.158/2004 concerning the declaring of certain normative acts as repealed, published in the Of.G. (Official Gazette) no. 467/25.05.2004.

[2] GO no. 2/2001 on the regime of contraventions, published in Of.G. no. 410/2001, Law no. 180/2002 published in Of.G. no. 268/2002, amended through GEO no. 108/2003 published in Of.G. no. 747/26.10.2003, Law no. 526/2004 published in Of.G. no. 1149/06.12.2004, Law no. 182/2006 published in Of.G. no. 443/23.05. 2006, Law no. 352/2006 published in Of.G. no. 640/25.07.2006, GO no. 8/2006 published in Of.G. no. 78/27.01.2006, Law no. 353/2006 published in Of.G. no. 640/25.07.2006, Law no.293/2009 published in Of.G no.645/01.10.2009, Law no.202/2010 published in Of.Gno.714/26.10.2010.

In the ordinance it is stipulated that the sanction of the performance of an activity for the benefit of the community can be provided only in laws or ordinances of the Government, through which certain deeds constituting contraventions shall be established and sanctioned.[4]

The sanctioning of performing an activity for the benefit of the community is always established alternately with the fine or penalty and certain deeds that constitute contraventions are sanctioned. This sanction may be applied only by the court.

The activity for the benefit of the community is performed in the field of public services, for maintaining the places of recreation, parks and roads, for maintaining the cleanliness and hygiene of the localities, for conducting activities for the benefit of hostels for the elderly and children, for the orphanages, nurseries, kindergartens, schools, hospitals and other social-cultural establishments.

The local council establishes through a decision the fields of the public services and the areas where the offenders will perform activities for the benefit of the community.

The mayor is required to carry out the mandate of execution.

The sanctioning of performing an activity for the benefit of the community is carried out after the working programme, or, according to each case, the school programme of the offender, for a period between 50 hours and 300 hours, maximum of 3 hours a day, and during the non-working days of 6-8 hours per day.

If the offender has the opportunity to execute the penalty every day of the week, and local public authorities, through the persons empowered, are able to supervise the offender's activities, the maximum duration of the working time cannot exceed 8 hours per day.

The sanctioning of performing an activity for the benefit of the community can also be applied to minors, if the crime was committed at the time they reached the age of 16 years. The activity is performed on a period between 25 hours and 150 hours.

It is prohibited to oblige the child to perform an activity involving risks or is likely to affect his/her education or to harm his/her health or his/her physical, mental, spiritual, moral or social development.

The procedure of applying the sanctions

In the case of contraventions for which the law provides for sanctioning with the fine alternately with sanctioning the performance of an activity for the benefit of the community, if the fact-finding agent considers that sanctioning with the fine is sufficient, he/she applies the fine in accordance with the provisions of the GO no.2/2001 on the contraventions regime.[5] If, in relation to the seriousness of the crime, it is considered that the fine is not sufficient, the fact-finding agent shall write a fact-finding report on the contravention and shall submit it, within 48 hours, to the court of justice.

The jurisdiction belongs to the court in whose district the offence was committed.

The president of court fixes an emergency term, citing the offender and the fact-finding agent.

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[3] GO no. 55 of 16/08/2002 on the juridical regime of sanctioning the performance of an activity for the benefit of the community and contravention imprisonment, published in the Official Gazette no. 642 of 30/08/2002, approved by Law no. 641/2002 published in the Of.G. no. 900/11.12.2002, amended by GEO no. 108/2003 published in Of.G. no. 747/26.10. 2003, Law no. 42/2007 published in Of.G. no. 163/07.03.2007, GEO no. 78/2008 published in Of.G. no. 465/23.06.2008.

The dispositions of the ordinance is supplemented by the provisions of the Code of Civil Procedure.

[4] Example - Law no. 61/1991 to sanction the acts of violation of some rules of social coexistence, of the order and public order, republished in Of.G. no. 387/18.08.2000, with subsequent amendments.

[5] GO no. 2/2001 on the contraventions regime, published in Of.G. no. 410/2001, Law no. 180/2002 published in Of.G. no. 268/2002, amended by the GEO no. 108/2003 published in Of.G. no. 747/26.10.2003, Law no. 526/2004 published in Of.G. no. 1149/06.12.2004, Law no. 182/2006 published in Of.G. no. 443/23.05. 2006, Law no. 352/2006 published in Of.G. no. 640/25.07.2006, GO no. 8/2006 published in Of.G. no. 78/27.01.2006, Law no. 353/2006 published in Of.G. no. 640/25.07.2006, Law no.293/2009 published in Of.G no.645/01.10.2009, Law no.202/2010 published in Of.Gno.714/26.10.2010.

The bench is composed of a single judge.

The offender can be assisted by the defender.

If the offender is a minor, legal assistance is required. The court calls for the summoning of the parents or of the legal representative of the minor.

Participation of the prosecutor is required.

The court considers the legality and reliability of the reports or minutes and delivers one of the following solutions:

a) applies the sanctioning with the fine;

b) applies the sanctioning of performing an activity for the benefit of the community, if it considers that the application of the contravention fine is not sufficient or the offender does not have material and financial means to pay it;

c) cancels the minutes or the report.

If a person has committed multiple offences, found through the same report or minutes, in case for all the facts or only for some of them it has been stipulated the sanctioning of performing an activity for the benefit of the community, the sanctions added without being able to exceed the overall maximum established by the law.

These provisions shall apply as appropriately and in the situation in which the concurrent contraventions were found through different minutes or reports.

The decision through which the sanction was applied for the performance of an activity for the benefit of the community is irrevocable.

In all cases, the court may, by resolution, determine the nature of the activities to be performed by the offender for the benefit of the community, based on data provided by the mayor of the locality where he/she has his/her domicile or residence, taking into account his/her physical and mental skills, as well as the level of professional training.

The enforcement of the sanctions

The sanctioning of performing an activity for the benefit of the community is placed into execution by the court of law by issuing a writ of execution.

A copy of the decision, with the writ of execution, shall be communicated to the mayor of the territorial-administrative unit and to the police station in whose territorial range the offender is domiciled or resident, as well as to the offender.

The writ of execution shall be made in 4 copies and include:

- the court which issued it;
- the date of the issue;
- number and date of the decision that is being executed;
- the personal data on the offender: name, date and place of birth, domicile and residence, if necessary, and the personal code number; - the length and nature of the work to be performed by the offender.

The sanctioning of performing an activity for the benefit of the community is executed within the range of the administrative-territorial unit in which the offender resides or has his/her domicile.

The mayor is required to carry out the writ of execution.

In carrying out the writ of execution, the mayor establishes a once the type of activity to be performed by the offender, the conditions under which he/she executes the sanction, as well as the working hours, making the unit where the activity shall be performed aware of the measures taken.

When establishing the type of activity to be performed by the offender, the mayor will take into consideration the professional training and the offender's health, evidenced by documents issued according to the law.

It is forbidden to establish for the offender the performance of work underground, in mines, in the subway or in other such places with a high risk in performing activities, as well as in dangerous

places or which by their nature can cause physical suffering or can produce damages to the person's health.

The sanctioning of performing an activity for the benefit of the community is executed in accordance with the rules of labour protection.

If the public service within which the offender performs work was granted to a company entirely owned or partly private, the counter value of the performed activities is paid at the territorial-administrative unit's budget in whose range the sanction is being executed.

The mayor, in carrying out the obligation to bring out the writ of execution, establishes the type of activities, the conditions under which it is done and the working programme of the minor.

The supervision of the enforcement of the sanctioning the performance of an activity for the benefit of the community is ensured by the mayor of the locality or by the mayors of the sectors of Bucharest, through authorized people, helped by the police stations, in whose territorial range the sanction is being performed.

The division of tasks and the coordination of the actions undertaken by the persons authorized by the mayor, as well as the ways of granting support by the police units in order to enforce the surveillance of the execution of performing an activity for the benefit of the community is done with the help of a program of supervision and control established by the mayor, with the agreement of the police unit in whose territorial range the offender is domiciled or resident. A copy of the program remains in the local authority's evidence and in that of the police unit with territorial competence.

Providing work for the benefit of the community is executed on the basis of guiding rules on work established by the mayor, making it possible to exercise control, at different time intervals, by those authorized with supervising the execution of the sanction.

The unit from the public service field in which the offender is executing the sanction is forced, at the mayor's request, to communicate the data and information required on the execution of the sanction.

The offender shall go immediately, but no later than 3 days after receiving the writ of execution, to the mayor of the administrative-territorial unit in whose range the offender is domiciled or resident, for being registered and for executing the sanction.

The beginning of executing the sanction consisting in performing an activity for the benefit of the community is made no later than 5 days after receiving the writ of execution.

The mayor has the obligation to provide records of the sanctions applied to the offenders and of the execution of the sanctions to enforce the sanctions, under this ordinance.

If the offender, malevolently, does not go to the mayor for being registered and for executing the sanction, avoids the execution of the sanction after the beginning of the activity or fails to fulfil the duties incumbent upon him/her at the workplace, the court, upon the mayor's notification, of the police units or of the unit's management at which the offender was required to go and provide community service activities, may replace this sanction with the sanction of the fine.

The execution of the sanction of performing an activity for the benefit of the community is prescribed within 2 years from the date of the remaining irrevocable of the court's decision that applied the sanction.

If until the enforcement of the writ of execution of the sanctioning of performing an activity for the benefit of the community or if during the execution of the sanction of performing an activity for the benefit of the community an irrevocable conviction decision has occurred concerning a freedom-privative, with execution, the contravention sanction shall not be executed anymore.

The fine is executed under the provisions on the enforcement of budget claims.[6]

[6] GO no. 92/2003 on Tax Procedure Code published in Of.G. no. 941/29.12.2003, approved by Law no. 174/2004 published in Of.G. no. 465/25.05.2004, republished in Of.G. no. 560/24.06.2004, as amended by GO no. 47/2007 published in Of.G. no. 603 of 31/08/2007, GEO no. 19/2008 published in Of.G. no. 163 of 03/03/2008, GEO no. 192/2008 published in Of.G. no. 815 of 04/12/2008.

Against the measures taken on the content of the activities, on the conditions under which it is being performed, as well as to the way in which the supervision is carried out, the offender may make a complaint, which is submitted to the mayor or, according to each case, to the police station to whom belongs the police officer who is in charge with the surveillance of the activity.

The complaint together with the verification of the issues apprised are submitted, within 5 days of registration date, to the court in whose district or range the sanction is being executed.

The complaint shall be settled within 10 days of its receipt.

If the court finds that the complaint is based, it provides, if necessary, the modification of the activity or of the surveillance measures.

The decision of the court shall be irrevocable and shall be communicated to the mayor or to the police unit to which the offender has lodged the complaint, as well as to the offender.

Conclusion

Under the provisions of Article 9 paragraph 5 from GO no. 2/2001, the contravention fine could have been replaced in case of non-payment, with a sanction for performing an activity for the benefit of the community, but this measure being subject to the consent of the offender[7] was never applied because no one ever gave their consent in this sense, they did not have incomes and were expecting for the prescription to intervene.

If the offender does not pay the fine within 30 days, the court shall replace the fine with the mandatory sanction to provide a community service activity, with his/her consent.

The replacement of the contravention fine with a sanction to perform an activity for the benefit of the community was subject to the consent of the offender, which lead to his/her exoneration of any other sanction, assuming that he/she did not have enough income that could be pursued, and closely connected to, under the conditions shown, the annulment of the contravention imprisonment is likely to deprive the state of the power of coercion to ensure the compliance with law.

This conditioning on the offender's consent is liable to deprive of efficiency the penalty imposed for committing an antisocial deed, with the consequence of violating the stipulations of Article 1. (5) from the Romanian Constitution, according to which "In Romania, the observance of the Constitution, of its supremacy and of its laws is mandatory."

In this respect there are also the similar provisions requiring the offender's consent to performing an activity for the benefit of the community which are found in Article 1 (3), Article 8 Paragraph (5) letter b) and Article 13 of Government Ordinance no. 55/2002 regarding the juridical regime of the sanction on performing an activity for the benefit of the community.[8]

These texts have the following content:

Article 1 paragraph (3): "The sanction on performing an activity for the benefit of the community can be applied only if there is consent of the offender."

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[7] GO no. 2/2001 on the contravention regime, published in Of.G. no. 410/2001, Law no. 180/2002 published Of.G. no. 268/2002, as published by the GEO no. 108/2003 published in Of.G. no. 747/26.10.2003, Law no. 526/2004 published in Of.G. no. 1149/06.12.2004, Law no. 182/2006 published in Of.G. no. 443/23.05. 2006, Law no. 352/2006 published in Of.G. no. 640/25.07.2006, GO no. 8/2006 published in Of.G. no. 78/27.01.2006, Law no. 353/2006 published in Of.G. no. 640/25.07.2006, Law no.293/2009 published in Of.G no.645/01.10.2009, Law no.202/2010 published in Of.Gno.714/26.10.2010.

[8] GO no. 55 of 16/08/2002 on the juridical regime of sanctions for the performance of an activity for the benefit of the community and on the contravention imprisonment, published in the Official Gazette no. 642 of 30/08/2002, approved by Law no. 641/2002 published in the Of.G. no. 900/11.12.2002, amended by GEO no. 108/2003 published in Of.G. no. 747/26.10. 2003, Law no. 42/2007 published in Of.G. no. 163/07.03.2007, GEO no. 78/2008 published in Of.G. no. 465/23.06.2008.

Article 8 paragraph (5) letter b): "(5) The court considers the legality and reliability of the minutes or report and delivers one of the following solutions:

b) the application of the sanction on performing an activity for the benefit of the community, with the consent of the offender, if it considers that the application of the contravention fine is not sufficient or that the offender does not have the material and financial means to pay it;

Article 13: "In all cases, after taking the consent of the offender, the court of justice, by resolution, determines the nature of the activities that will be performed for the benefit of the community, based on data provided by the mayor of the city where the offender has his/her domicile or residence, taking into account his/her physical and mental skills, as well as his/her professional training level."

In this regard the Constitutional Court through Decision no. 1354/2008[9] found that the phrases "***with his/her consent***" in Article 9 of the Government Ordinance no. 2 / 2001 on the juridical regime of contraventions, as well as the phrases "***only if there is the consent of the offender***," "***with the consent of the offender***" and "***the taking the offender's consent***" of Article 1 paragraph (3), Article 8 paragraph (5) letter b) and, respectively, Article 13 of Government Ordinance no. 55/2002 regarding the juridical regime of the sanction on performing an activity for the benefit of the community, as amended by Government Emergency Ordinance no. 108/2003 on the abolition of contravention prison are unconstitutional.

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[9] Decision no. 1354/2008 of the Constitutional Court, published in the Official Gazette no. 887 of 29/12/2008.

THE EVALUATION OF THE INTERNET USAGE HABITS OF PUBLIC EMPLOYEES IN KASTAMONU

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Abstract
Changes in the last 10 years in information technology have increased the use of computers and internet. The changes brought about fundamental changes the way we do business and behave in social life from communication and reaching information to daily habits. Effective use of the information technology, which has become the main condition of being competitive at work, has required all employees in public and private sectors to improve themselves in the computer and internet usage. In addition, the public sector also encourages the use of internet via e-government applications. Thus, the computers and internet play a big part in the work of public sector and its employees as well.
The usage of computers and the internet in working places not only have changed the way we do business also have changed some ethical rules and issues. They brought some complicated problems for people, organizations and states. Online fraud, carelessness, negligence, viruses, system crashing, broadcasting personal information are among the most well-known ethical problems related to computers and internet and caused by employees. In addition to these, personal use of computers and internet by employees for their private usage during working hours create another problem.
The objective of the study is to reveal the internet usage habits and behaviors of public employees at work, using a field research that was carried out in Kastamonu that is a city of north of Turkey. It is especially of interest how and for what purposes the chat programs, which encourage the use of internet, are used. The results are analyzed from the point of view of public ethics. The data is collected from the state servants in Kastamonu and is analyzed on SPSS statistic program.

Keywords: *Ethic, Internet, Instant Mesa, public ethic, information technology*

I. Introduction

Today, to reach and have information technologies is easier than before because of technological advances. Everybody in every class and age in society is using computer and internet. When the Turkish Statistical Institute's databases are investigated, we see remarkable results. According to the Turkish Statistical Institute's databases, the rate of computer usage of people between 16-74 ages is 38% and the rate of the internet usage is 35% in 2008 (tuik.gov.tr,2008). These increasing rates show the same levels with the rates of the usage of computer and the internet in businesses. Especially, the developments in services sector have been positively affecting the usage of computer and the internet or vice versa.

Computers, the internet and e-mail are modern communication techniques used in businesses to communicate and to deliver information rapidly to the workers and customers. By using these new technologies, current works will be finished so quickly and correctly that productivity will be better than before. As a matter of fact that many firms and companies are now using computers and the internet as a standard and necessity. In this sense, the opportunities the internet provides are increasing day by day are affecting individuals' daily life. The internet as a communication interface

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has become widespread and people started to reduce face to face communication and increase the usage of digital media. This process is seen not only between two people or group also between workers who work in the same workplace.

Also, with the increasing role of the usage of the computer and internet, doing jobs both in workplace and at home and the spreading of home-offices and teleworkings have made workplace-free working much easier. But this development has caused some discussions in terms of ethics in the work life. Our job environments generally offer the cheap, fast and easy internet. So, we can carry on any task which we started at home,at our workplace, or we can we can continue any task we started at workplace, at our home. For that reason, our private jobs and works related to business, will possibly be intermixed and be done both at workplace and home. For instance, while a teacher can be prepared for courses and enter students' marks from the internet at home, s/he can use the internet for his or her private investigations through internet at school. (Hartman, 2001:8). Because of online medium's difficulties, both private and public sectors' workers are going to be subjected some restrictions because controlling this process is not easy. Therefore, the way to deal with this process in an ethical point of view and the way for it to organize differs from one sector to another and from a profession to another. In this study, we generally examined the data of public servants.

II. Paper Content

1. The Ethics of Public Management and the Usage of the Internet

Ethics is defined as philosophy and science of morals and also considered as a discipline that tries to determine what is right and what is wrong (Arslan, 2001:7). In addition to that, ethics is completely related to the rules that explain or advice people what to do or what not to do. In this sense, the ethics of public management firstly means that public workers' behaviors should be in accordance with laws, the codes of ethics and rules and secondly it means that they should act by taking the individual and moral assets as reference (Özdemir, 2008:182).

Especially, the item 12 of the code 657 (The Civil Service Act) explains and organizes the individual responsibility of the state workers. Also, the item 125 arranges disciplinary punishments for the state workers and behaviors and actions which require disciplinary punishments. Namely, the items mentioned in the code 657 are related to the ethics.

Emergence of the ICT and the Internet, not only offered a lot of opportunities for the people and states, but also created some problems. Especially, the usage of the internet and ICT with the private aims is an important one. According to the investigations, done in different countries, 90% of the workers also use the internet in the workplace for private aims and its cost for companies is about 50 billion Euros. The private usage of the internet can be restricted since it takes work time of the workers and causes some problems such as virus and software and hardware in computers (Okur, 2005:48).

Also, one of the most important aims is the communication by using e-mail and other methods on the internet. Gallup is an investigation company, has done a survey related to e-mail usage and it shows that a worker spends his or her time between 49 minutes and 4 hours for e-mail transactions and the most of these e-mails are about private life or humour (Keser, 2005:65).

When we look at the state workers in the state workplaces, there is no any direct restriction about the subject mentioned above. On the other hand, in the item 125 of the code 657 it is explained that "using the official car, tools and such things which belong to the state for private aim requires disapproval punishment". Therefore, the usage of the computers and the internet which belong to the state instuitions can be commented in the same manner.

However, putting the issue in order technically requires some regulations in the related codes and instructions which explain the rules of working in the state institutions. Insomuch as that, some public institution use their special packet software belongs to the state. It is not applicable or legal to use some extra software which belongs to the workers. In the same manner, the private internet usage

is possible by workers in the public institutions. This may be restricted by using some methods such as filtration and blocking so that state workers can enter only some sites which are allowed by the institution.

Moreover, the workers can be traced as online by using logs which save what the user does or clicks or computers can be checked after work hours. But, tracing the usage of the net or checking the computers mean the intrusion of the privacy of private life which is not a good behavior and can't be acceptable in terms of ethics and laws. Also, while trying to determine the faults or wrong transactions on online medium, it is possible to be an offender.

As a result, that kind of restrictions or prohibitions may not be put for every public worker or may not be necessary for all workers. Some of the workers make analysis as decision makers and they have high education level, qualifications and position. For that reason, it is not practicable to restrict or forbid the internet and computer for qualified workers since the productivity and motivation will go down. Consequently, some measures should be considered regarding the functions of the department, the qualifications of the workers and the type of the occupations.

There are a lot of reasons which increase and encourage the usage of the internet and computers for the workers of public institutions privately. One of the reasons is virtual chat which provides communication with other people around the world and on the internet. According to the Turkish Statistics Institution's investigation, 70% of internet freaks use it for instant messaging programs such as windows live messenger and skype (tuik.gov.tr, 2008:1). They may use the internet not only for the benefit of their works but also for individual aims. That is why, it needs to be investigated whether they use for work or for individual aims. After the determination of the usage aims, some restrictions can be done without prevention of the workers' independency and work necessities. For example, virtual chat which is one of the means of communication is much cheaper, faster and than the other means so that it increases the productivity and the efficiency. For that reason, every public institution should investigate in that way to regulate the internet usage by workers in the public institutions. But the regulation should be in terms of the departments, functions and qualifications otherwise it may harm the productivity and efficiency in the public institutions.

2. Research

2.1.1 General Framework of The Research

The Aim of The Research

To determine the tendency of the usage of the internet and instant messaging softwares by the government employees in Kastamonu and to associate this topic with the ethic of the public in this context is the aim of this work.

2.1.2 Content and The Limit of The Research

The related research has been done upon nearly 1000 people chosen among 10.120 public servants who work in Kastamonu city through the method of exemplification. Among these surveys, 300 of them which are received and approved for evaluation are included for the work. The research has been implemented on the workers who are in the boundaries of Kastamonu city. The reason is that, we want to form a judgement revealing the ethical behaviour related to this topic in this city. Also it is possible that, it can have similarities with the other cities as a lot of public servants in this city have come from different cities. On the other hand, the effect of the place they live shouldn't be disregarded.

2.1.3 The Method of The Research

Qualitative method has been used for the research. An survey for of the 19 questions has been executed on the test subjects. Multiple questions have taken place in the survey form. The first six questions include personal information, seven questions of the remaining 13 includes the usage of computer and internet; six of them are related to the usage of instant messaging softwares

1.2 Analysis of the Research

2.2.1 Demographic Results

Table1: The Gender of Respondents

Sex	**Valid Percent**
Male	74,7
Female	25,3
Total	100,0

¾ of the respondents of the research are males and ¼ of them are females.

Table 2: The Age Range of Respondents

Age	**Valid Percent**
20-30	8,7
31-40	44,0
41-50	39,7
51 and over	7,7
Total	100,0

Considering the age range, %84 of the respondents are middle ages.

Table 3: The Graduation of Respondents

Graduation	**Valid Percent**
Primary School	2,0
Secondary School	3,3
High School	39,0
College	50,3
Undergraduate	5,3
Total	100,0

When considering their educational state, they are to a great extent high school and college graduates. The percentage of university graduates are lower than expected.

Table 4: The Marital Status of Respondents

Marital Status	Valid Percent
Married	86,0
Single	14,0
Total	100,0

The respondents of the survey are majorly married. This is parallel to the age range.

Table 5: The Tenure of Office of Respondents

Tenure of Office	Valid Percent
1-5	12,7
6-10	15,0
11-15	13,7
16-20	19,7
21-25	20,7
More than 25	18,3
Total	100,0

Tenure of office of the respondents are similar to each other. But nearly %50 of them have 16 years of service.

Table 6: The Titles of Respondents

Title	Valid Percent
Civil servant	66,7
Chief	10,0
Asistant manager	1,3
Manager	3,0
Worker	19,0
Total	100,0

2/3 of the respondents are civil servants. Also almost %20 of them are workers. Consequently %85 of the respondents have lower titles.

2.2.2. The Results Related to The Usage of Computer at Workplace.

Table 7: The Usage of Computer at Workplace

Do you use computer at your workplace?	Valid Percent
Yes	94,3
No	5,7
Total	100,0

A great ratio as %94 of the employees use computer at workplace as expected.

Table 8: The Usage Status of Computers

The status of the computer been used	Valid Percent
Institution computer given for personnel use	81,4
Institution computer given for joint use	15,8
Personnel computer used at work	2,7
Total	100,0

Nearly %82 of the workers use computer given for personal use. This lets most of the employees feel comfortable when using internet and instant messaging software.

Table 9: The Usage of Computer at Home

Do you use computer at your home?	Valid Percent
Yes	74,3
No	25,7
Total	100,0

%74 of the respondents use computer at home too. This result shows that the respondents are interested in using computers.

Table 10: The Status of Internet Connection at Workplace

Is there an internet connection at your workplace?	Valid Percent
Yes	98,0
No	2,0
Total	100,0

%98 of the respondents have internet connection at their workplace. This shows that usage of internet is widespread and can cause some ethical problems.

Table 11: The Status of Internet Restriction at Workplace

Is there any restriction on the internet used at your workplace?	Valid Percent
Yes	34,0
No	66,0
Total	100,0

It is interesting that nearly 1/3 of the internet connection at workplaces have got restrictions. Public institutions are also gradually being sensitive about these regulations.

Table 12: The Places That Are Connected to Internet

Where do you usually connect the internet from?	**Valid Percent**
Home	33,1
Workplace	65,2
Internet Cafe	0,7
Other	1,0
Total	100,0

A major part like %65 of the respondents connects the internet usually from home. This makes it necessary to arrange some regulations related to the usage of internet.

Table 13: The Length of Connection of Internet at Workplace

How often use the internet at your workplace?	**Valid Percent**
0-2 hours	51,6
3-4 hours	32,5
5-6 hours	2,4
More than 6 hours	13,5
Total	100,0

The length of the usage of internet at workplace is usually less than 4 hours for %84 of the respondents. This makes the half of the working hours taking the 8 hours of working into account.

Table 14: The Purpose of Internet Usage

What is the main purpose of your internet usage?	**Valid Percent**
For work and professional use	76,8
To gather information about personal interests	7,2
For e-learning	1,7
Only for communication	2,7
To read the news	11,6
Total	100,0

The purpose of the internet usage is usually for work and professional use. So, this result shows that internet is used in accordance with its aim.

2.2.3. Results Related To The Usage Of Instant Messaging Software

Table 15: The Ownership of Instant Messaging Account

Do you have instant messaging account?	**Valid Percent**
Yes	78,9
No	21,1
Total	100,0

%79 of the respondents have instant messaging accounts.(msn,yahoo etc) This show that employees use internet for social reasons when needed.

Table 16: The Frequency of Instant Messaging Usage

How often do you instant messaging?	Valid Percent
Every time I use my computer	11,7
Everyday but not often	23,0
Sometimes	16,7
Only when I need to	48,5
Total	100,0

%48 of the ones who have instant messaging accounts mentioned that they used instant messaging software when needed. However the ones who use it frequently have a ratio of %35 which cannot be undervalued.

Table 17: The Purposes of Instant Messaging

What is the main purpose of chatting?	Valid Percent
For personnel problems	27,2
For my profession and business	61,9
For meeting new people	2,1
Other	8,8
Total	100,0

As instant messaging is carried out for professional and business reasons, it may not be necessary to restrict it. However this ratio is not satisfactory. Its being used for different purposes may make it necessary to restrict it.

Table 18: The Instant Messaging Environment

With whom do you usually chat with?	Valid Percent
With my family members	24,3
With my colleagues	55,2
With my relatives	3,8
With my friends	15,9
With a person who I met in the internet	,8
Total	100,0

%55 of the respondents mentioned that, to a great extent, they this software in order to talk to their colleagues. The result is parallel to the result that they use instant messaging software for professional and business purposes.

Table 19: The Time for Instant Messaging at Workplace

When do you chat at your workplace?	Valid Percent
When I am working	21,3
After finishing my work	51,0
Only in breaks	7,9
I never chat at work	19,7
Total	100,0

Nearly %79 of the employees either don't instant message or they instant message after finishing their work. Consequently, as this won't impede the job, it can be seen positive.

Table 20: The Status of Instant Messaging Restriction at Workplace

Are there any restrictions about chat at your workplace?	Valid Percent
Yes	24,3
No	75,7
Total	100,0

%24 of the respondents mentioned that there are restrictions related to the usage of internet and instant messaging software. This result is a lower ratio compared to the restriction of internet usage. Perhaps, because instant messaging programs are used for communication, they are not restricted.

2.2.4. Results of Cross-Tabulation and Mann Whitney U Tests

2.2.4.1. The Relationship Between Personal Features and The Purpose of The Usage of The Instant Messaging Software

Table 21: Gender and Purpose of Internet and Instant Messaging Usage

	For work and professional use		For personal interests		For e-learning		Only for communication		To read the news	
Gender	Internet	Inst. Mes.	Internet	Inst. Mes.	Internet	Inst. Mes.	Internet	Inst. Mes.	Internet	Inst. Mes.
Male	74,4%	61,5%	8,2%	27,4%	2,3%		2,3%	8,4%	12,8%	
Female	83,8%	63,3%	4,1%	26,7%	,0%		4,1%	10,0%	8,1%	

It's seen that women use internet for work and profession a bit more than the men, taking the gender into account for the purpose of the internet usage. On the other hand, men use internet for researching about personal interests, education, education and reading the news more than the women do. As for the instant messaging software, they are used less for professional reasons compared to the internet usage, however, it brings up an interesting result that both groups use instant messaging software to get information about their personal interests.

When we subject the related factors to Mann Whitney U test, the value of Asymp.Sig (2 tailed) for internet usage is 0,112 and for instant messaging it is 0,994. This, as a result shows that,

taking the gender factor into account, there is no significant difference between internet and instant messaging software usage.

Table 22: Age and Purpose of Internet and Instant Messaging Usage

	For work and professional use		For personal interests		For e-learning		Only for communication		To read the news	
Age	Internet	Inst. Mes.	Internet	Inst. Mes.	Internet	Inst. Mes.	Internet	Inst. Mes.	Internet	Inst. Mes.
20-30	61,5%	54,2%	15,4%	33,3%	,0%		7,7%	8,3%	15,4%	
31-40	80,2%	65,5%	7,6%	25,0%	,8%		,8%	7,8%	10,7%	
41-50	76,3%	61,8%	5,9%	28,1%	2,5%		4,2%	7,9%	11,0%	
More than 50	77,8%	40,0%	,0%	30,0%	5,6%		,0%	30,0%	16,7%	

Taking the age and the instant messaging usage into account, generally all the age groups use it for work and profession. However, the interesting result is that, the employees who don't use internet for personal interests may prefer instant messaging software. Also, it is again interesting that none of the respondents of 20-30 age range use internet for educational purposes. Despite that fact, that ratio is high among the ones over 50.

Table 23: Graduate Level and The Purpose of Internet and Instant Messaging Usage

	For work and professional use		For personal interests		For e-learning		Only for communication		To read the news	
Graduate	Internet	Inst. Mes.	Internet	Inst. Mes.	Internet	Inst. Mes.	Internet	Inst. Mes.	Internet	Inst. Mes.
Primary School	83,3%	75,0%	,0%	,0%	,0%		,0%	25,0%	16,7%	
Secondary School	71,4%	,0%	14,3%	57,1%	,0%		14,3%	28,6%	,0%	
High School	75,2%	69,1%	8,8%	23,5%	3,5%		3,5%	4,9%	8,8%	
College	76,2%	59,5%	6,6%	28,2%	,7%		2,0%	10,7%	14,6%	
Undergraduate	93,8%	68,8%	,0%	31,3%	,0%		,0%	,0%	6,3%	

When we look at the relationship between the usage of internet and instant messaging software in parallel with the graduate level, we see that undergraduates use them for work and profession much more than the others do. Also we see that instant messaging software is used by the secondary school graduates remarkably for personal interests. Consequently the usage of differs according to the graduate level and this, from the institutional angle makes it necessary arrange some regulations.

2.2.4.2. Institutional Features and Results Related to the Usage of Internet and Instant Messaging Software

- Considering both the usage of instant messaging account and the people who are messaged, we see that %74 of talks realized for exchange of vocational knowledge, to a great extent. This result shows that instant messaging software is used mainly for work and exchange of vocational knowledge with colleagues.
- When considering the title, purpose of internet and instant messaging software usage and their usage length doesn't differ significantly.

• Considering the tenure of office, as long as the tenure of office increase, the frequency of internet usage varies. In other words, it is possible to act more comfortably.

• Considering the restrictions related to both the usage of computers and the internet together, it is mentioned by the %86 of the respondents that there is unrestricted connection and there is no restriction related to instant messaging. So, the regulations in the institutions are parallel to each other.

• %30 percent of the ones who connect internet mostly at home, use internet mostly for more than 6 hours at workplace. This result should be dwelt on from an ethical point of view.

III. Conclusions

The result of the research study is that it is inevitable to use computer and internet nowadays. In so much as that, almost all of the test subjects use internet at work place and more than %80 of the respondents have instant messaging account. These results, therefore, as we mentioned before, cause some ethical problems.

In this context, ethic is the science that tries to determine what is right and what is wrong and so, at first sight, it seems that it is wrong to use internet for personal reasons at workplaces. However we can see some positive effects when we deeply think about it. It has been determined that the usage of internet for personal interests makes the employees concentrate on their job, otherwise they lose their enthusiasm for their jobs. Consequently, it is beneficial for employers to show flexibility for their employers. (Okur, 2005;71). A similar idea must be valid for the government employees too, because the internet environment gives different opportunities to the individuals. Reading the news, having information about a topic, could make the public service be realized better.

However, taking the research results into account we see that government employees use internet instant messaging software for work rather than personal interests. So, if restrictions take place, they won't be used for these purposes either and it will cause productivity fall. Also when they physiologically feel that their right is taken away this will affect their productivity in a negative way.

At the same time, if the instant messaging software is nonstop online and they correspond, it leads to great advantages. However even the usage of it for their personal interests might be effective to decrease the work stress of the employees. Because sharing the problems relaxing effect for people.

The results also show that the majority of the workers (%51) chat after finishing their work. In this context, the right thing that should be done is checking whether the employees have done their assigned duties or not. Also, this can make the employees who want to have more free time for them to work faster and more effectively. So it can be taken as a way of rewarding.

Also, as long as it doesn't affect the performance, there is no restriction or prohibition in most of the public corporations which also support our idea. Insomuch as that, if there were any negative effects, there would absolutely some restrictions.

At the same time, in accordance with the age, gender, tenure of office and title, the internet and instant messaging software usage may have some differences. Especially regarding the age group, it is possible that the younger ones use it more frequently. Also according to the tenure of office and title, differences may appear as the superiors may take their ease. In terms of gender, men sense a stronger bias to chat over internet. In one research, the ratio of the women who chat over internet is %50 and the %70 of men chat over internet. (Tarcan 2005;59)

However, we didn't come across significant differences in terms of these factors, so the ones who work in public sector showed different results from the general impression. This can be the result of public pressure.

On the other hand, these results shouldn't make us feel too comfortable about this issue. Insomuch as that, there may be costs and damages causing by the usage of internet and instant messaging software for personal interests.

Consequently, it is not possible to speak clearly about and pass judgement on the usage of internet and instant messaging software in public service environment or their personal usage. The thing that should be done is determining a policy in accordance with the features of the institution, professions, works and employees. Objective evaluation should be done about the reasons it should be allowed, the employees for whom it should be prohibited. For example, no restrictions could be made for the academicians, whereas it could be applicable for the administrative personnels.

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"IS THE LABOUR RELATION OF THE CIVIL SERVANT AN ADMINISTRATIVE CONTRACT?"

LIANA-TEODORA PASCARIU[*]

Abstract:
Nowadays, public institutions have contractual employees, hired on the basis of the Labour Code, and public servants, appointed on the basis of the Civil Service Statute. If the labour relation of the public servant is not qualified as a labour contract, what is its juridical character? This paper tries to demonstrate that the civil servant develops labour relations under different circumstances, i.e. on the basis of an administrative contract.

Keywords*: contractual employees; public servants; labour contract; administrative contract; juridical character*

Introduction

The Romanian doctrine has provided that, as far as the employment relation of civil servants is concerned, "the juridical fact that generates the employment relation is not the at will agreement but the unilateral willingness of the authority that appoints" [1]. Only "the issuing of the appointment decree generates the public service employment relation"[1].

Following the enactment of the Civil Service Statute of 1999, the juridical literature hasn't ceased to define the juridical nature of civil servants' appointment. The first studies on the subject have concluded that the employment relations of the civil servant are mainly related to private law, since they are quite similar to the employment relations defined by labour law. This statement has been further developed and the logical outcome was that the employment relation is, in fact, a juridical labour relation with typical features generated by the specific incidence of certain public law provisions.

The present analysis mainly focuses on the present research advancements in employment relations of civil servants, starting with the interpretation of their juridical nature. The main questions lead to the two types of relations defined by private and public law analysts. On the one hand, there is clear proof supporting the idea that these relations are mainly governed by labour law, resembling the employment contract; on the other hand, it is equally true that the public service is related to public law, subsequently complying with specific juridical standards.

The very title of the paper may seem to favour the administrative contract nature of this type of relationship, but the conclusions will further develop these ideas and employ an original method in the attempt to define the juridical nature of the public service.

The juridical character of the labour relation of the public servant

The confirmation of the administrative contract nature of this juridical relationship came with the adoption of a resolution reached during a relatively recent appeal of the High Court of Cassation and Justice[2], postulating on the fact that the difference between the employment relations of the public service and the labour relations of employees is that the civil servant is the conveyor of the public power that he employs within the limitations set by his specific duties. Therefore, civil

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[1] Verginia Vedinaş, "The civil service statute, Comments, Legislation, Doctrine, Jurisprudence," (Bucharest: Universul Juridic Publishing House, 2009), 35.

[2] Decision no. 14/18.02.2008 of ÎCCJ.

servants do not perform under the stipulations of an employment contract but have employment relations based on the administrative appointment decision and do not fit the category of employees as defined by Art.1 of the Law 142/1998.

The main difference between the employment relations of the public service and those of employees is the fact that the civil servant is the conveyor of the public power that he employs within the limitations set by his specific duties. The appointment decision issued by the public authority, accompanied by the request or/and the prospective civil servant's acceptance of the position make up the at will employment agreement, i.e. the administrative contract.

The specific difference between the employment relations of the civil servant and those of employees is mainly related to the establishment of the juridical relationship based on which the services are provided and also makes reference to the fact that the civil servant is the conveyor of the public authority, while the employee is not. The civil servant is a public law entity, whereas the employee is a labour law entity.

Clearly, civil servants do not perform their duties in compliance with an employment contract, since they are in an employment relation derived from the administrative appointment decision but, this appointment decision, alongside the request or/and the prospective civil servant's acceptance of the position make up the at will employment agreement, i.e. the administrative contract.

The employment relations of the civil servants and labour relations are differentiated by the juridical framework based on which the services are provided, as well as by the fact that the civil servant is the only conveyor of the public authority.

Labour law analysts[3] have embraced the viewpoint of the High Court and argue that the employment relations of civil servants are contractual in nature, given the existence of two distinct circumstances for the enforcement of the at will agreement expressed by the subjects of the employment relations: a) the inclusion among civil servants in an executive public position defined as "apprentice", when the employment relation is established by the candidateship in the recruitment competition and the appointment in that public position, issued by the public institution or authority; b) the accession to the civil servant body in a specific executive public position, when the employment relation is defined by the appointment in that public position, issued by the authority or the management of the public institution and accompanied by the candidateship in the recruitment competition, followed by the professional oath taken by the appointed civil servant.[4]

Should we choose to share these ideas, the contract signed by the parties would appear as an adhesion contract, since the only option would be to agree or disagree with the working conditions and the salary. Such circumstances, *de lege ferenda*, would demand the alteration of Article 4 of Law no. 188/1999, through the introduction of Article 4^1 that would stipulate the following: *"the appointment decision, accompanied by the request or/and acceptance of the position by the prospective civil servant, make up an at will employment agreement that is known as the administrative contract"*.

The jurisprudence of lower courts seems to embrace this vision: for instance, the decision no. 941/2006 of the Court of Appeal Bacau, stipulates that the juridical employment relationship between the civil servant and the authority or the public institution of the central and local authority has been controlled by the Law no. 188/1999, with its subsequent alterations on the Civil Service Statute.

[3] Şerban Beligrădeanu, Ion Traian Ştefănescu, "Mutual civil liability between the parties of the contractual employment report of civil servants", Dreptul 4(2009): 78-79; Şerban Beligrădeanu, Ion Traian Ştefănescu, "Theoretical and practical studies on Law no. 188/1999 on the Civil Service Statute" Dreptul 2(2000), 7-14.

[4] Alexandru Ţiclea, Laura Georgescu, Ana Cioriciu Ştefănescu, Barbu Vlad, "Public labour law", (Bucharest: Wolters Kluwer Romania Publishing House, 2010) 29-30.

Indeed, in the case of civil servants, Law 188/1999 exceptionally stipulates the functional competence of the administrative contentious court in the settling of conflicts of rights, but this competence is not fully granted by jurisdiction but is limited to a certain category of labour conflicts, strictly defined by the special law.

As a consequence – as stipulated – by virtue of the absolute nature of functional competence regulations and the principle „exceptio est strictissimae interpretationis", any other disputes qualified as labour conflicts as defined by article 281 of the Labour Code fall under the jurisdiction of the courts stipulated in article 284, paragraph 1 of the Labour Code and not under the jurisdiction of Administrative contentious courts.

The analysis must start from the premise that the regulations related to the civil servant statute belong to the organic law, thus emphasizing again the special role played by the public service and the civil servant in the legal and constitutional system.

The public service describes the juridical status of the natural person legally empowered with responsibilities in fulfilling the competence of a public authority that consist in the aggregate rights and obligations that constitute the complex juridical contents existing between that particular natural person – the civil servant, and the authority that empowered him.

The public service cannot be the subject of an agreement between parties, it is the result of a universal at will employment act, thus defined by the legal empowering provided to the person who deploys the prerogatives of the public power and, at the same time, the public service is available to all citizens, under legal provisions.

The civil servant is appointed by the competent public authority and is legally endowed with the responsibilities of a public service in order to perform activities directed at the continuous fulfilment of a public service. Civil servants are appointed by an administrative unilateral appointment decision. The appointment in a public position endows the civil servant with a legal statute that stipulates his rights and obligations.

Unlike civil servants who are appointed, have an employment relationship and are governed by a special law – Law no. 188/1999 on the civil servants statute – it must be noted that contractual employees perform their duties based on the Labour Code and have an employment relationship established by an individual employment contract. The public service relationship is established only by the issuing of the appointment decision; the civil servant statute is acquired at the moment of appointment and is enforced after the oath has been taken.[5]

The contents of the individual employment contract comprise the aggregated rights and obligations of the parties as stipulated by the law or agreed upon by the parties.

The rights and obligations of the contracting parties and making up the contents of the individual employment contract are expressed in the clauses inserted in the contract as they constitute the material structure of the agreement between the parties and establish their rights and obligations.

Similarly, the Labour Code provides the freedom of negotiation and therefore the parties can enclose in their individual employment contract – defined as the "law of the parties" throughout the development of the juridical employment relationships – any clauses they may think necessary, complying with the legal provisions, the public order and good morals. Public institutions may be allowed an exception in the negotiation of an employment contract, applied to salaries and other benefits that have not been established by the wage and salary laws of the public sector.

These contracts do not allow the negotiation of clauses related to rights whose conferral and quantum have been established by legal provisions. The contractual personnel does not benefit from vacation premiums, while civil servants who take a leave of absence receive an amount that equals the salary they had received a month before taking the leave. Apart from certain circumstances, civil servants enjoy workplace stability whereas contractual personnel do not.

[5] Verginia Vedinaș, "The civil service statute, Comments, Legislation, Doctrine, Jurisprudence," (Bucharest: Universul Juridic Publishing House, 2009) 35.

A recent study[6] of a renowned author revisits the juridical nature of the employment relationships of the civil servants and sheds a new light on previous studies that argued that the employment relationship of the civil servant is a typical manifestation of a juridical labour relationship which, even if different from the individual employment contract (archetype of the juridical labour relationship), is not essentially different from the latter and therefore, from a logical and juridical viewpoint, the employment relationship of the civil servant is a fundamental element of labour law (regulations). The author also emphasizes the fact that, from a legal viewpoint, the difference between the juridical employment relationships of employees and those of civil servants has gradually diminished.

The author continues with an account of the typology of the current juridical employment relationships, as follows: the juridical relationship of employees (generated by the signing of the individual employment contract, governed by the Labour Code); the juridical employment relationship of civilian civil servants (generated by Law no. 188/1999 on the Civil Service Statute or by certain statutes related to special categories of civil servants, such as police officers, diplomats and consuls, customs officers, etc); the juridical employment relationship of professional military personnel (officers and non commissioned officers – Law no. 80/1995); the juridical employment relationship of public officials; the juridical employment relationship of magistrates (governed by Law no. 303/2004); the juridical employment relationship between the cooperative retail society and its members (Law no. 1/2005).

In reference to this typology of juridical employment relationships, the author believes it wrong to limit the subject of Labour Law exclusively to the juridical employment relationship of the personnel (governed by the Labour Code), and strongly argues that all juridical employment relationships mentioned above are, in his monist labour law standpoint, elements of the Romanian labour law, whose *summa divisio* is made up of the common labour law (on the juridical employment relationship of employees, based on the individual employment contract mainly governed by the provisions of the Labour Code) and, on the other hand, of the special labour law (which includes the juridical employment relationships of civilian and military civil servants, of public officials, of magistrates and cooperative retail society members). The special labour law is based on different provisions of the Labour Code, nevertheless governed by the latter as common law.

Labour law analysts[7] are ones who strongly argue that the employment relations of civil servants are contractual in nature, as typical employment relations which, even if not rooted in the individual employment contract (archetype of the juridical labour relation), do not necessarily differ from the latter.[8]

The same authors argue that employment relations designate: *"the juridical labour relation created as a result of the agreement between the public authority or institution and the civil servant"*. The contractual nature of the employment relations of civil servants is also adopted, as previously stated, by the High Court of Cassation and Justice.

Basically, there are two distinct instances for the at will employment agreement manifesting the willingness of the subjects of the employment relation:

a) the first instance refers to the admission among the civil servants body on an executive public position professionally defined as "apprentice", when the employment relation is established by the candidateship in the recruiting competition and the appointment in that position, issued by the authority or the public institution;

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[6] Şerban Beligrădeanu, "Studies on the juridical labour relations of civil servants, as well as in relation to the typology of juridical labour relations, with a monist standpoint on the object of labour law", Romanian Private Law Journal 3(2010).

[7] Şerban Beligrădeanu, Ion Traian Ştefănescu, "Mutual civil liability between the parties of the contractual employment relations of civil servants" Law 4(2009): 78-79.

[8] Alexandru Ticlea (co-ordinator), Laura Georgescu, Ana Cioriciu Stefanescu, Barbu Vlad, "Public labour law", (Bucharest: Wolters Kluwer Publishing House, 2010) 31.

b) the second instance applies to the admission among civil servants, on a permanent executive public position, when the employment relation is established by the appointment in that public position, issued by the authority or the public institution and through the candidateship at the recruitment competition, followed by the oath taken by the appointed civil servant.

It must be noted that the juridical fact that generates the position relation is not the at-will agreement but the unilateral volition of the authority making the appointment, as argued by the eminent professor Iorgovan[9].

That is why the opinion according to which the common law juridical procedures applied to civil servants are mainly similar (as juridical bodies) to those applied for employees, that the special regulations for civil servants are similar, that the similarities are normal since the employment relations of civil servants are located at the interference of labour law and public law (mainly administrative law) – is not entirely realistic, from our standpoint.

We can therefore acquiesce, with the following suggestions, on the subsequent fundamental elements:

- the appointment of a person in the position of civil servant is carried out only with the consent or by an individual act of appointment in a certain public position; the consent of the civil servant is given gradually, the final phase being the oath;

- there is an at-will agreement, a contractual statute, without being an individual employment contract, as defined by the Labour Code, *but a* contract *of public law, an* administrative contract, *where the contractual freedom of the parties is compensated by the legislator*. We are talking about a contract: unnamed; with specific clauses both for stipulation acts (mainly) and for subjective acts (in those areas where negotiations are allowed by the law); solemn (the written form of the appointment decision, the taking of the oath); binding; onerous; with gradual execution; signed *intuitu personae*;

- upon signing the at-will agreement, the responsibilities of that specific position cannot be negotiated individually, as they are established – objectively and objectionably – by the law (by the authority or the public institution for each public position, in compliance with the law);

- the relation created upon signing the administrative contract – the employment relation (i.e. the relation between the civil servant and the authority or the public institution) – displays the specific traits of a juridical labour relation (the object and the cause corresponding to those of any juridical labour relation); both the civil servant and the employee are in a typical juridical labour relation; the civil servant, alike the employee, is subordinate to the one he is working for (the authority or the public institution).

Nonetheless, it is difficult to grasp how the employment relations of civil servants – juridical labour relations – are a vital in analyses and in labour law, but only as comparative benchmarks opposite the labour relations of employees, provided that their particular characteristics are noted, emphasized and regulated by public law provisions. It is equally difficult to understand why labour law exclusively deals with the juridical labour relation between the civil servant and the public authority only from the standpoint of comparisons with the labour relations of employees.[10]

We believe that, when identifying the juridical employment relations of civil servants, ne must start with the criteria used to define a contract as being administrative. The doctrine[11] emphasized a series of specific traits of administrative contracts that would define their juridical nature, as opposed to other types of contracts governed by private law:

- The juridical inequality of the parties, induced by the need to defend the general interest by the public authority, thus outranking the co-contractor;

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[9] Antonie Iorgovan, "Administrative law treatise" (Bucharest: All Beck Publishing House, 2005) 582.

[10] Ana Cioriciu Stefanescu, http://www.avocatnet ro/content/articles/id_19003/Raportul/de/serviciu/-/conditia/acordului/de/vointa./Consideratii/inedite html#ixzz1EFqXoKnO.

[11] Ioan Alexandru et al., "Administrative law" (Bucharest: Lumina Lex Publishing House, 2005), 412-414.

- The status of authority of the public administration or its proxy, held by at least one of the parties;
- The limitation of the public authority's free will, through legal provisions;
- Serving the public interest, by the public authority, thus endowing it with a special purpose;
- The extended interpretation of the contract, pertaining to the prevalence of the public interest of the administration;
- The strict performance of the obligations described in the contract, both by the private party and by the civil servant;
- The *intuitu personae* nature of the contract.

After a close inspection of these characteristics, one can easily qualify the employment relation as an administrative contract to the full extent of its significance. When defining a contract as being administrative, one can be guided by several criteria, as the differentiation serves the purpose of establishing the juridical standards to be applied. The easiest way of pinpointing the distinction is by identifying the law, where the law specifically defines a certain type of contract as administrative, without leaving any room for interpretation of its juridical system. The Romanian legislation uses this identification criterion only indirectly, by assigning contract litigations to administrative contentious courts.

The second method of defining a contract according to its juridical nature – which is our case in point – is the jurisprudential determination, where juridical literature[12] identifies two situations: one in which the interpretation of the contract is made by each court, after settling a dispute brought before it and a second case, when the interpretation results after the settlement of an appeal in the interest of the law by the High Court of Cassation and Justice. So far, the High Court has made indirect comments on the juridical nature of the employment relations of civil servants, in the above mentioned decision.

Conclusions

Our attempt so far was to briefly describe a part of the contemporary doctrine that alternates between the two contradicting statements: on the one hand, the affiliation of the civil servant employment relations with labour law, as far as identifying an employment contract in these relations and, on the other hand, the inclusion of employment relations in the category of administrative contracts.

When establishing the juridical nature of the institution taken into account, we believe that one must start from the fact that the civil servant appointed in the public position performs the state power prerogatives on behalf of the authority (institution) that appointed him and thus expressing the competence of the latter.

The concluding opinion that this type of employment relation is an administrative contract is drawn by extrapolating the French model where, apart from determining the law, the description of a contract is also done in a jurisprudential manner, by establishing two criteria used to identify the administrative nature of a contract: an organic criterion that requires the presence of a public official as a contractor and an alternative criterion that makes reference either to the presence of exorbitant clauses from common law or to the provision of a public service as object of the contract. This opinion has led the doctrine to establish another definition for the administrative contract: any contract signed by a public official or on behalf of a public official can be qualified as administrative if it includes derogatory clauses from common law or is concerned with the provision of a public service.[13]

[12] Dragoş Dacian, "Administrative law concepts. Coursebook for the academic year 2008/2009" http://apubb ro, p. 2.

[13] Phillippe Foillard**,** "Administrative law*"* (Paris: Paradigme Publishing House, 2008) 224.

We conclude with the following suggestion we have anticipated in the introduction and we intend to study thoroughly in the future: the employment relations of civil servants are qualified as an administrative contract, governed by public law, but of a mixed juridical nature, and the enforcement of labour law as *lex generalia* can only be performed when there is no other special provision that expressly regulates a component of the juridical relation.

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MODELING AND SIMULATION OF QUEUE WAITING THROUGH THE CONCEPT OF PETRI NETS

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FILIP TANCEV [**]

Abstract
Petri Nets-PN are a graphical formalism which is gaining popularity in recent years as a tool in Matlab for the representation of complex logical interactions among physical components or activities in a system. This notes are devoted to introduce the formalism of Petri nets with particular emphasis on the application of the methodology in the area of the performance and reliability modelling and analysis of systems. A technique is presented whereby queueing network models and generalized stochastic Petri nets are combined in such a way as to exploit the best features of both modeling techniques. The resulting hierarchical modeling approach is useful in the solution of complex models of system behavior.

Keywords: *Petri nets, modeling and simulation, toolbox PNTool 2.3, queue.*

Petri nets

Petri Nets offer profound mathematical background originating namely from linear algebra and graph theory. Various Petri Net tools offer convenient graphical environment and sometimes they provide complex simulation and analysis of various high level Petri Net classes.

Petri Net (PN) is mathematical and graphical modeling tool well suited for describing and analyzing discrete events systems (DES). PNs allow to model and visualize systems, which contain concurrence, resource sharing or synchronization. These possibilities allow them to be used for various applications in areas including computer systems, communication protocols, flexible manufacturing systems and software verification.

Within the mentioned context, the initiative of developing instruments for simulation, analysis and design of PNs under MATLAB brought remarkable benefits for training and research because Control Engineering people are familiar with the exploitation of *Graphical User Interfaces* (GUIs)[1] based on this popular software. Although a recent list of the programs developed for PNs includes many resources (Mortensen, 2003) running under different operating systems, our initiative was successful due to the large preference shown for MATLAB.

It is worth separately mentioning that the overall design and implementation philosophy that sustains the ***PN Toolbox***, as well as the integration with MATLAB, allow further developments in the modern direction of studying hybrid dynamics involving both DES and ODE models.

After ending a simulation experiment, several *Performance Indices* are available to globally characterize the simulated dynamics. Some of the indices recorded for the transitions of the net refer to: the total number of firings during the simulation

(*Service Sum*), the mean frequency of firings (*Service Rate*), the mean time between two successive firings (*Service Distance*), the fraction of time when server is busy (*Utilization*). For the places of the net, the recorded indices refer to: the total number of arrived (*Arrival Sum*) and departed

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[1] The GUI gives the possibility to draw PNs in a natural fashion and allows a straightforward access to various commands starting adequate procedures for exploiting the PN models.

(*Throughput Sum*) tokens, the mean time between two successive instants when tokens arrive in (*Arrival Distance*) and depart from (*Throughput Distance*) the place, the mean time a token spends in a place (*Waiting Time*), the average number of tokens weighted by time (*Queue Length*).

Only for timed or (generalized) stochastic PNs, the time evolution for both current and global values of a *Performance Index* may be displayed dynamically while in the *Step* and *Run Slow* simulation modes by means of the *Scope* command. Another facility available only for timed or (generalized) stochastic PNs is *Design*, which can be used for the synthesis of the models. One or two *Design Parameters* varying within intervals defined by the user can be included in the model. For each test-point belonging to this (these) interval(s) a simulation experiment is performed in the *Run Fast* mode. The dependence of a *Design Index* on the *Design Parameter*(*s*) can be visualized as a graphical plot (2-D or 3-D, respectively).

QUEUEING THEORY

Queueing theory is the mathematical study of waiting lines, or queues. The theory enables mathematical analysis of several related processes, including arriving at the (back of the) queue, waiting in the queue (essentially a storage process), and being served at the front of the queue. The theory permits the derivation and calculation of several performance measures including the average waiting time in the queue or the system, the expected number waiting or receiving service, and the probability of encountering the system in certain states, such as empty, full, having an available server or having to wait a certain time to be served. Queueing models are generally constructed to represent the steady state of a queueing system, that is, the typical, long run or average state of the system. As a consequence, these are stochastic models that represent the probability that a queueing system will be found in a particular configuration or state.

2.1 M/M/1

The basic queueing model is shown in figure1. It can be used to model, e.g., machines or operators processing orders or communication equipment processing information.

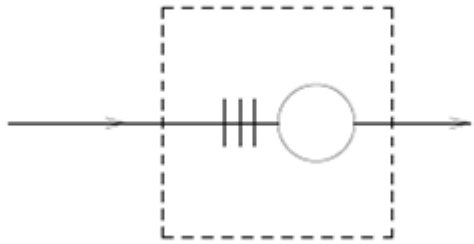

figure 1: Basic queueing model

Among others, a queueing model is characterized by:

- The arrival process of customers.
- The behaviour of customers.
- The service times.
- The service discipline.
- The service capacity.
- The waiting room.

We analyze the model with exponential interarrival with mean $1/\lambda$, exponential service times with mean $1/\mu$ and have a single server. Customers are served in order of arrival. Service rate is $\rho = \frac{\lambda}{\mu} < 1$.

The required characteristics are of great importance can be obtained theoretically for arbitrary values for λ and μ.

The following table shows basic formulas for calculating the important characteristics of the queues.

Performance Measures	$M/M/1$	$M/M/c$	$M/M/1/K$
Traffic Intensity ρ	$\frac{\lambda}{\mu}$	$\frac{\lambda}{c \times \mu}$	$\frac{\lambda}{\mu}$
Utilisation U (per server)	ρ	ρ	$\rho(1 - \frac{(1-\rho)\rho^K}{1-\rho^{K+1}})$
Prob. system is idle π_0	$1 - \rho$	$\left(1 + \frac{(c\rho)^c}{c!(1-\rho)} + \sum_{n=1}^{c-1} \frac{(c\rho)^n}{n!}\right)^{-1}$	$\frac{1-\rho}{1-\rho^{K+1}}$
Prob. buffer non-empty B	ρ^2	$\frac{(c\rho)^c}{c!(1-\rho)}\pi_0$	
Mean no. in system N	$\frac{\rho}{1-\rho}$	$c\rho + \rho B/(1-\rho)$	$\frac{\rho}{1-\rho} - \frac{(K+1)\rho^{K+1}}{1-\rho^{K+1}}$
Mean no. in buffer N_b	$\frac{\rho^2}{1-\rho}$	$\rho B/(1-\rho)$	$\frac{\rho}{1-\rho} - \rho\frac{1+K\rho^K}{1-\rho^{K+1}}$
Mean response time R	$\frac{1}{\mu(1-\rho)}$	$\frac{1}{\mu}\left(1 + \frac{B}{c(1-\rho)}\right)$	$\frac{N}{\lambda(1 - \frac{(1-\rho)\rho^K}{1-\rho^{K+1}})}$

table 2 Basic formulas

The following examples are examined theoretical and simulation values of the queue M/M/1 and M/M/3. Made a comparison of theoretical and simulaciskite values and received a percentage of error.

We consider several cases for M/M/1 queue with Petri nets. Modeling is done and shown in the following figure.

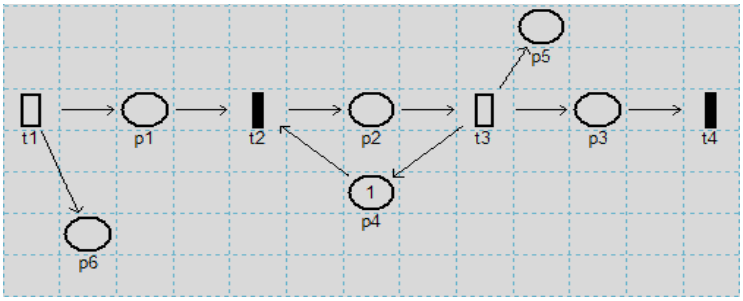

figure 2 Petri nets model on M/M/1

M/M/1	λ	μ	ρ	po	p1	p2	p3	E(X)	E(S)	E(W)
theoretical	0,100	0,400	0,250	0,750	0,188	0,047	0,012	0,333	3,333	0,833
simulation	0,101	0,375	0,269	0,731	0,197	0,053	0,014	0,368	3,645	0,980
percentage of error	0,820	6,213	7,498							

table 3

M/M/1	λ	μ	ρ	po	p1	p2	p3	E(X)	E(S)	E(W)
theoretical	0,100	0,220	0,455	0,545	0,248	0,113	0,051	0,833	8,333	3,788
simulation	0,100	0,219	0,456	0,544	0,248	0,113	0,052	0,837	8,400	3,828
percentage of error	0,312	0,573	0,262							

table 4

M/M/1	λ	μ	ρ	po	p1	p2	p3	E(X)	E(S)	E(W)
theoretical	0,100	0,120	0,833	0,167	0,139	0,116	0,096	5,000	50,000	41,667
simulation	0,100	0,119	0,837	0,163	0,137	0,114	0,096	5,127	51,366	42,983
percentage of error	0,178	0,592	0,416							

table 4

We can be concluded that the percentage of error is less than 10%. Therefore I believe that the simulation values obtained are accurate.

We consider several cases for M/M/3 queue.

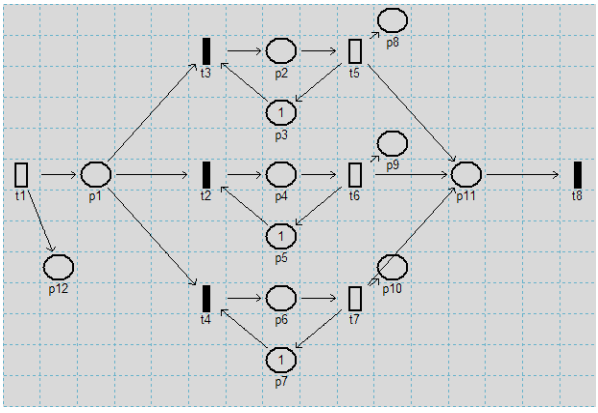

figure 3

M/M/3	λ	μ	ρ	po	p1	p2	p3	E(U)	E(X)	E(S)	E(W)
theoretical	0,100	0,667	0,050	0,868	0,130	0,010	0,000	0,150	0,150	1,500	0,000
simulation	0,100	0,675	0,049	0,870	0,129	0,010	0,000	0,148	0,148	1,481	0,000
percentage of error	0,003	1,250	1,231								

table 5

M/M/3	λ	μ	ρ	po	p1	p2	p3	E(U)	E(X)	E(S)	E(W)
theoretical	1,000	0,351	0,950	0,004	0,012	0,017	0,016	0,328	0,328	3,178	3,178
simulation	1,020	0,327	1,041	0,003	0,009	0,013	0,014	0,342	0,335	3,397	3,465
percentage of error	1,990	6,928	9,581								

table 6

M/M/3	λ	μ	ρ	Po	p1	p2	p3	E(U)	E(X)	E(S)	E(W)
theoretical	1,000	0,337	0,990	0,001	0,002	0,003	0,003	0,332	0,332	3,302	3,302
simulation	0,990	0,330	1,000	0,000	0,000	0,000	0,000	0,333	0,337	3,367	3,3338
percentage of error	0,987	1,990	1,023								

table 7

We can be concluded that the percentage of error is less than 10%. Therefore I believe that the simulation values obtained are accurate. The simple queue of waiting has formulas that can be obtained theoretical values, but for complex queue there are no such formulas. Because the simulation values have a small percentage of error for simple queue are true, then will believe that is correct simulation values wide following a complex queue.

Example: Show Petri net model of queue 3*M/M/1

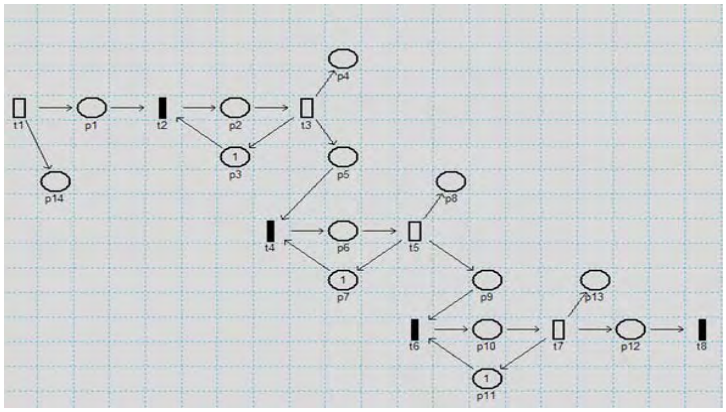

figure 4 **Basic model on 3*M/M/1**

Characteristic simulation values are shown in the following tables. Value of arrival rate λ and service rate μ taken randomly.

Events:10000

Time:6496.6981

Place Name	Arrival Sum	Arrival Rate	Arrival Dist.	Throughput Sum	Throughput Rate	Throughput Dist.	Waiting Time	Queue Length
p1	1254	0.19302	5.1808	1252	0.19271	5.1891	18.7507	3.6135
p2	1252	0.19271	5.1891	1251	0.19256	5.1932	4.1994	0.80862
p3	1251	0.19256	5.1932	1252	0.19271	5.1891	0.99306	0.19138
p4	1251	0.19256	5.1932	0	0	Inf	Inf	626.9505
p5	1251	0.19256	5.1932	1249	0.19225	5.2015	28.9124	5.5584
p6	1249	0.19225	5.2015	1249	0.19225	5.2015	4.4764	0.8606
p7	1249	0.19225	5.2015	1249	0.19225	5.2015	0.72511	0.1394
p8	1249	0.19225	5.2015	0	0	Inf	Inf	620.5315
p9	1249	0.19225	5.2015	1249	0.19225	5.2015	3.9695	0.76313
p10	1249	0.19225	5.2015	1248	0.1921	5.2057	2.9545	0.56755
p11	1248	0.1921	5.2057	1249	0.19225	5.2015	2.2494	0.43245
p12	1248	0.1921	5.2057	1248	0.1921	5.2057	0	0
p13	1248	0.1921	5.2057	0	0	Inf	Inf	619.2008
p14	1254	0.19302	5.1808	0	0	Inf	Inf	631.3727

table 8

Events:10000

Time:6496.6981

Transition Name	Service Sum	Service Rate	Service Dist.	Service Time	Utilization
t1	1254	0.19302	5.1808	1.3842	0.26718
t2	1252	0.19271	5.1891	0	0
t3	1251	0.19256	5.1932	1.31	0.25226
t4	1249	0.19225	5.2015	0	0
t5	1249	0.19225	5.2015	1.3723	0.26382
t6	1249	0.19225	5.2015	0	0
t7	1248	0.1921	5.2057	1.1283	0.21674
t8	1248	0.1921	5.2057	0	0

table 9

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CAREER OPPORTUNITIES IN A DOWNTURN SOCIETY

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Abstract
The world crisis that began in 2008 has negative influences over financial and economical-social structures, mainly affecting the young working population. The most affected by the current economical and financial crisis is the youth. Jobs offer for young people seems to have decreased to a significant extent, while they of all categories of job candidates are the most affected precisely due to their lack of experience and to the high costs for training new employees under the current competitive labour market conditions. Data from a study by the National Employment Agency indicate for 2010 that only 6.36% of young unemployed (under the age of 25) found jobs within the first three months. In the same time, the main specializations for which personnel was still being recruited at the end of 2010 were IT, outsourcing, accountancy, engineering, retail and pharmaceuticals, according to recruitment agencies.

Keywords: *Young graduates unemployment, EU unemployment, chances of employment, downturn, international financial crisis, learning and education, professional experience and training, emigration, broken families.*

Introduction

In Romania, a country continuously troubled by transition, reforms, motions and internal crises, all overlapping on the global financial and economic crisis, we are beginning to wonder whether we are somehow too many or too young or untrained for finding our purpose within this system. The consequences of the global economic crisis triggered in 2008 are being felt worldwide economic.

Thus, the unemployment rate among young people increased in all the Member States of the European Union. At European level, university graduates face the greatest difficulties in finding a job to be appropriate for their training level. In early 2009, approximately 17.5% of young Europeans did not have a job, compared with 14.7% in early 2008.

The labour market deterioration in Romania occurs in the third consecutive year of recession, amidst an unprecedented austerity plan. In November 2010 35.6% of young people aged between 15 and 24 years were unemployed, compared to 27.8% during the same period of last year. Women are more affected by unemployment than men, with an unemployment rate of 17% in 2010 compared to 13.3% in November last year. According to a study made by the European Space Agency, the number of unemployed in 2010 was 692,577, meaning it was increasing with 30.2% compared to the previous year.

The purpose of this paper is not to provide solutions, but to determine, based on statistical data, the critical situation in which most graduates are found in Romania, and we are also trying to analyse some of the causes of this situation.

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Literature review

The economic development, the evolution of the labour market, issues of integrating youth into the labour market and the migration of work force phenomenon represent issues that are viewed with great interest by economists and sociologists. Economic literature has gained over time from many studies of famous authors including economists such as: Theodore W. Schultz ("Investment in Human Capital") – Nobel Prize winner, Gary S. Becker ("Human Capital: A Theoretical and empirical Analysis, with Special Reference to Education") and GJ Stigler who are also Nobel Prize winners in Economics, Angel de la Fuente and Rafael Domenech ("Human capital in growth regressions: how much difference does data quality make? An update and further results"), studies of the European Council, EUROSTAT, as well as numerous surveys performed by agencies such as Daedalus Millward Brown, Catalyst Solutions and Instituto Nacional de Estadistica of Spain. In our country, the works of Ionel Muntele („Migrations internationales dans la Roumanie moderne et contemporaine"), Daniela Nicoleta Andreescu and Aurel Teodorescu ("Romanians' work migration after 1990") are significant, as well as the studies prepared by the National Agency for Employment, National Institute of Statistics, International Labour Organization and the Credit Risk Control of The National Bank of Romania.

Theoretical background

Employability of youth in a downturn society

The global crisis that had been triggered three years ago has negative influences on the financial, economic and social structures affecting primarily the young population that is fit for work. Young people are the most affected by the current financial and economic crisis. Job offer for them was significantly reduced and they are among the most affected category of candidates, because of lack of experience and very high costs for training new employees under the present conditions of competition on the labour market. In the European Union there are currently 96 million young people between 15-29 years, which means almost 20% of the Union's total population[1].

Thus, young people from European Union become an increasingly valuable resource being essential to providing work force for national economies. For every young person the chance to receive a quality education means the opportunity to develop his skills at a higher level, to take advantage of professional counselling and guidance and thus to have increased opportunities to be employed. Increased investment in education and initial training, generate the most important gains in the future participation of the individual on the labour market, which makes social integration through work to represent an important part of the efforts to reaffirm their opportunities. But given the current downturn economy, safe jobs are increasingly scarce, many young people of the European Union being forced to accept temporary jobs or poorly paid compared with their training. Frequently, in the desire to find a job, young people do mind their specializations and apply for a job at any company that accepts their CVs. A study conducted in Romania, based on the "Job-Shop" Fair, organized by the Board of European Students of Technology Bucharest, shows that in 2009 young university graduates accepted wages that were lower up to 40% - 60% than those requested in the previous year. In the same time, graduates of the last two years of master's degree agree to accept jobs that do not require higher education, but rather high school education. These compromises determine many young graduates to have difficulties providing for themselves, without having the opportunity to become economically and socially independent and without being able to fully integrate into society.

In this period of downturn, job vacancies do not offer attractive wages, according to the youth's aspirations. However, according to statistics, many young graduates want to work. Also,

[1] Marioara Ludusan, Monica Angela Bara, "1 decembrie 1918" University of Alba Iulia in Centre for Social Research, Political and Administrative Sciences, Society and Politics no. 1, April 2010

skills and competences acquired by young people are not always fully relevant to labour market demand, which contributes to higher unemployment.

Unemployment among young people age group between 16 and 24 has increased in all Member States of the European Union (data from 2008), except for Bulgaria, where it decreased from 13.9% in the first quarter of 2008 to 13,5% towards the end of the year. At European level, young graduates face the greatest difficulties in finding an appropriate job. The same statistics show that in early 2009, approximately 17.5% of young Europeans did not have a job, compared with 14.7% in early 2008. This value of the analyzed indicator represents more than double of the unemployment rate in the EU, which, for the same period (2008 - 2009), has increased from 6.8% to 7.9%. After three years of sustained economic growth, while the indicator has decreased, the unemployment rate among young people began to grow in the first quarter of 2009 so that in the States of the European Union that have adopted the Euro currency, the seasonally adjusted unemployment rate among young people, was of 18.4%, twice higher than the European average of 27 countries (8.8%), the Euro area recording 3.1 million unemployed youth compared to 5 million unemployed youth in the European Union.

According to a study conducted by EUROSTAT[2], in 2007 (interestingly, this study provided for 2009 a youth unemployment rate of 60% at European level - 35.7% for women and 22 2% for men) the overall unemployment rate in Romania has remained stable compared to 2006, 7.2%, but it has evolved to 7.6% at the end of 2009. Recent data of the National Agency for Employment (NAE) show that the number of unemployed reached 601,673 at the end of August 2009 compared to the 403,400 level recorded at the end of 2008. In July 2008, in Bucharest the number of unemployed exceeded 18 200 persons, of whom 1,500 (8.2%) were university graduates. However, alarming statistical data are in regards to youth unemployment rate, which is a continuously increasing indicator, increasing from 17.2% in 1999 to 23.8% in 2005. In 2010, data from a study of the National Agency for Employment show that only 16,500 unemployed youth (under 25) have obtained jobs within the first three months of 2010, a total of 105,007 young graduates being registered as unemployed, more precisely a percentage of 6.36. The number of university graduates who receive unemployment benefit has reached almost 53,000 in September, the highest level of post-December period, taking into account that every year, approximately 100,000 Romanian graduate a higher education institution.

The number of unemployed persons with higher education[3], has tripled in the last three years, given the fact that in 2008 there were two generations of graduates (with undergraduate studies of three and four years), following the conclusion of the Bologna Convention which provides the length of undergraduate of 3 years and 2 years for the Bachelor's degree. The employability rate of graduates has decreased as a result of the fact that private universities have lost credibility because of issues regarding the legality of the diplomas. The education system is the only one to blame or is there a combination of factors which contribute to this state of affairs?

It should be noted that in the European Union are currently 6 million young people who manage to complete only the maximum compulsory education (14.28% of youth aged 18-24 years). In the same time, approximately 108 million people have a low education level, which represents approximately 33% of the European Union workforce. Also, those in a high percentage who failed to complete high school have fewer opportunities to participate in lifelong learning. Challenges exist for preschool education also as in EU countries one of seven children aged 4 years is not attending pre-school, the majority of them coming from families with a precarious socio-economic status.

There are similar, but somewhat different, issues depending on the geographic area within the EU countries. Romania is in a disadvantageous position compared both to the average European, as well as the former states from the Eastern European space.

[2] Fewer people outside the labour force in 2009 - Issue number 57/2010
[3] Ziarul Financiar, September 2009

Romania is far from achieving in 2010 the targets established by the Treaty of Lisbon for four of the five agreed performance standards: skills in reading / literacy, reducing the share of young people who drop out prematurely the education system, increasing the number of those who complete upper secondary education and participation in lifelong learning. At the same time, at European level, only the objective regarding literacy skills is unlikely to be achieved.

As can be seen in the EUROSTAT data, Romania is far from the goal set for young people aged 18-24 who have left early the education and training system and have completed at the most the compulsory education. Although there has been a slight improvement compared to 2000, our education system faces a serious challenge represented by nearly 20% of young people aged 18-24 who leave the education system without having at least a mid-level qualification. Comparative data on the indicator of early leaving the education and training system of young people show that Romania continues to place well below most of the countries that recently joined the EU such as Poland (5.0%), Czech Republic (5.5%) and Slovakia (6.4%), etc.

Table 1. The performances of the European education systems for the indicators adopted as reference level in Lisbon (2007)

European Union Countries	Mathematics, science and technology aduates as percentage of the total higher education graduates	The percentage of those who participate in lifelong learning	The percentage of opulation aged 20-4 having completed e upper-secondary education	The percentage of opulation aged 15 having low performance in literacy
European Union Objectives	**Maximum 10.0**	**Increase by 15% compared to the reference year**	**At least 85.0**	**Decrease by 20% compared to the reference year**
Czech Republic	**5.5**	**27.4**	**91.8**	**24.8**
Estonia	**13.2**	**43.5**	**82.0**	**13.6**
Hungary	**12.4**	**30.0**	**82.9**	**20.6**
Latvia	**19.0**	**32.8**	**81.0**	**21.2**
Lithuania	**10.3**	**35.2**	**88.2**	**25.7**
Poland	**5.6**	**36.6**	**91.7**	**16.2**
Slovakia	**6.4**	**35.3**	**91.5**	**27.8**
Slovenia	**5.2**	**26.2**	**89.4**	**16.5**
Bulgaria	**18.0**	**41.1**	**80.5**	**51.1**
Romania	**19.0**	**40.0**	**77.2**	**53.5**
U.E. Average	**15.3**	**31.2**	**77.8**	**24.1**

Source: EUROSTAT, 2008

However, one must not forget the fact that our country is facing now (like most European countries) issues related to aging population, significant emigration, youth lacking family support and an acute lack of professional qualifications.

In these precarious circumstances and influence of economic recession in which the labour market in Romania is becoming also a market which increasingly emphasizes high skills, one may believe that in the future years, population with low professional qualifications, will be more and more disadvantaged. Until the labour market record positive developments, young graduates in Romania can choose from the few options offered by the labour market in areas such as manufacturing industry, finance, insurance, real estate or the distribution of electricity, water and gas sector.

A similar situation is found in the case of the indicator on the share of youth who have completed upper secondary education. For this indicator, there is a negative deviation of 10%

between the target set at Lisbon and the performance recorded by the Romanian education system in this regard. Although the number of Romanian youth attending a higher education institution has significantly increased in the last couple of years, the number of those who fail to complete the upper-secondary education is still high.

Our country is far from the EU average in terms of participation rate in education of 5-29 age group people. Meanwhile, other East European countries are close or even exceed this average (see Lithuania, Poland and Slovenia). This means that Romania still has one major disadvantage compared to the other countries within the European Union.

Another handicap is represented by the structure of migration by age group which is highlighting a higher tendency to migrate of young people of working age, those who actually have the best chance of professional achievements. Thus, approximately 50% of migrants were young people aged 26-39 years, who were already qualified and had a high potential of employment. In the last years, "the migration of clever minds" determined that the share of population aged 18-24, that were graduates or in the last years of studies, with high employment prospects or potential, to increase to 14%. Romanian higher education graduates represent approximately 10-12% of all legally immigrated persons, and this process has direct implications for young manpower resources in Romania. Immigrants with high technical and professional studies represent about 9% of the total. A third of all Romanian immigrants is held by persons who have completed only primary school or secondary school, and among them a significant share is held by children and adolescents who have emigrated with their family.

A comparative estimate demonstrates that the number of Romanians who left to work abroad in 2009 is somewhere between 2.8 million and 3 million people. However, the statistical data published in our country regarding the status of the migrated persons are outdated and they often underestimate the real situation because only those that have migrated abroad and whose residence is also abroad are being registered. Thus, according to the Statistical Yearbook of Romania from 2008, the number of immigrants is 8.830 in 2007 and from 2002 to 2007 their number is 65,874 people, which means approximately only 10.000 immigrants annually. How many Romanian citizens left to work abroad in 2009? To answer this question we can analyze two appraisal variants: one that is based on official statistics of the main countries of emigration, supplemented by survey data, and another that has as starting point surveys whose data are correlated with official data. Although the official statistical records are not updated, information known about Romanian migrants represents a valid basis for estimating. According to official statistics, requested by the CURS and provided by the Instituto Nacional de Estadistica from Spain, there were 731,806 Romanians in Spain in early 2009, of which 190.000 in the capital area of Madrid (Instituto Nacional de Estadistica:[4]). According to the latest Caritas Report "Romani a Immigrazione a Lavoro in Italia", in early 2008 there were 1.016 million of Romanian immigrants in Italy (of which 749.000 Romanian workers - 73.7% 239 000 family members - 23.5 % and 28.000 - 2.8%, other categories).

The values shown represent significant increases compared to statistical data from 2006, due in particular not so much to the new wave of immigrants, as to the formalization or legalization of the situation of many emigrants after Romania joined the EU in 2007. We can assume that in 2009 the total of emigrants remained approximately the same, the arrivals of new immigrants being practically cancelled by returning home of some of those affected by the economic recession. The official statistic, however, must be regarded as minimum values for the proportion of migrants from Romania. Statistical surveys of CURS from 2008 conducted at the request of the Metropolitan Library of Bucharest, in the capital areas of Madrid and Rome, show that approximately 35% of the Romanian workforce in these cities is working without a contract or work permit, some of them even carrying out criminal activities. Also, 20% of Romanian citizens who have emigrated abroad say that they are living illegally in these countries. Thus, to those approximately 1.75 million people

[4] http://www.ine.es/

emigrated from Romania that are officially registered in Spain and Italy, we can add about 350 thousand, meaning 20% (the percentage of those who live and work illegally). It results approximately 2.1 million Romanian immigrants in Spain and Italy. In other words, even for a minimal estimate, in these two countries are currently at least two million Romanians. The official statistics of EUROSTAT (Labour Force Survey) shows that the share of Romanian workers in Spain and Italy is about 80% of Romanian residents in the European Union. The data from the CURS survey in 2009, based on information gathered from people in migrants' households, reveal that the share of those two reviewed countries is 70% of total of people that left Romania to work in the European Union and about 60% of emigrants for employment worldwide.

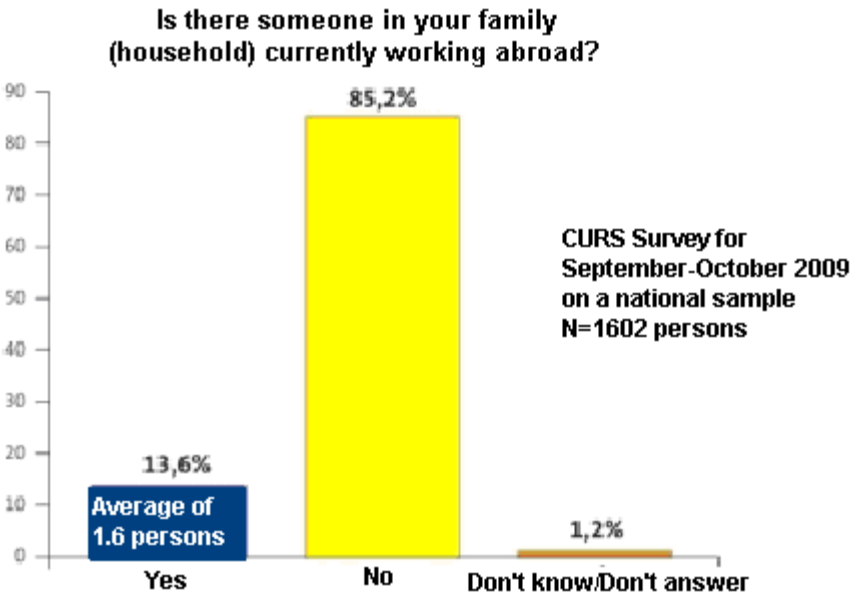
Thus, if we accept an average share of immigrants from Western Europe by 75% in Spain and Italy (2.1 million people), to determine the actual volume of immigrants from Europe we must add to this number another 25%, meaning 0.7 million people, thus resulting a total of approximately 2.8 million Romanian immigrants left to work in European countries. According to the same CURS polls, the share of Romanian immigrants in other countries than those from the European Union is approximately 14% of the total migrants. Thus, given that 86% of immigrants are in the European Union, shows that approximately 0.45 million of Romanian immigrants are at work in other countries than those from the European Union, so as we can estimate the number of Romanian immigrants to over 3.25 million in 2009, of which over 2.8 million are in the European Union countries.

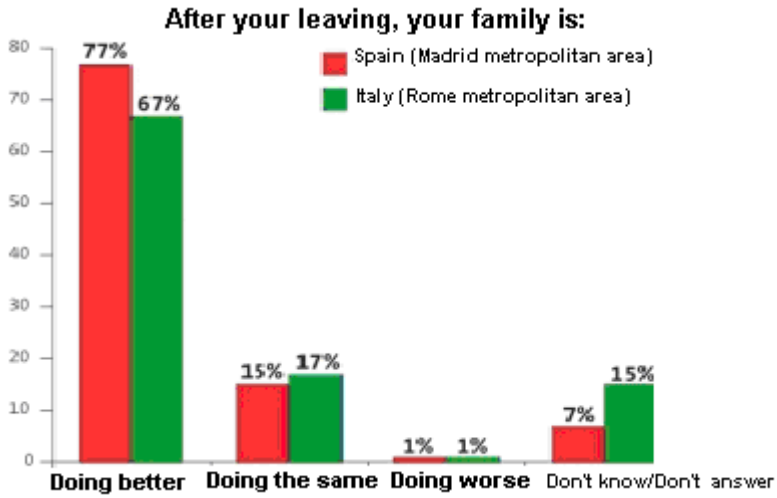
These citizens are temporarily living and working outside Romania. The forecast for the number of migrants abroad based on information provided by various surveys is based on three indicators:

- Volume of individuals and families (households) who have all members gone to work abroad, at least temporarily;
- share of households with people who have currently gone to work abroad, of all existing households in the country;
- Average number of persons per household, gone to work abroad from households that have members left to work abroad.

According to surveys conducted by CURS, in 2008 in Spain and Italy, the volume of people gone to work abroad that no longer have a household in Romania is about 40% of the total migrants. In this category are included the reunited families: husband and wife, husband, wife, plus children, but also single people, especially young people. Believing that in other countries with Romanian immigrants the situation is similar, to an average percentage of minimum 40% compared to the approximately 3 million estimated migrants, the volume of this category of people who have no household in Romania is amounting to 1.2 million. At an average number of persons per household of only 2.5, one can estimate that abroad are approximately 480 thousand households of Romanian immigrants, which were not accessible to the conductors of this study, more precisely they were not in Romania at the time of the CURS survey.

From the survey data conducted by CURS (at the request of the Jurnalul National newspaper) it results that the share of households with at least one member who went to work abroad is of 13.8%. Therefore, 13.8% compared to 6.84 million households currently existing in Romania (7.32 million existing households in Romania, according to the census of 2002, of which we subtract 480 thousand households temporarily moved abroad altogether) results a number of approximately 943 thousand people (with at least one member of the household left to work abroad). However, as shown in the chart below, the average number of people left to work abroad per household is 1.7. Thus, the number of people who are working abroad, but keep their households in the country, is over 1.6 million. In other words, in this minimal estimation variant (which considers both households that have left the country altogether, as well as the share of the households that remained in Romania and which have at least one family member left), we can say that the number of people going to work abroad is about 1.2 million plus 1.6 million, resulting in a total of 2.8 million people.





According to the data of the National Agency for Employment, the unemployment rate among young university graduates reached at the end of September 2010 to 7.9%. By comparison, in 1991 the unemployment rate was 2.3%, corresponding to 8000 unemployed university graduates. Since late 2008, most private companies have started to reorganize and to recruitment budgets in order to be able to keep business running at a medium level, operating massive costs cuts. This means that in Romania in 2010 there are 53 000 licentiates who do not have a job. And these observations reflect only the data recorded. The actual number of young university graduates without a job is much higher.

Most university graduates have failed to get a job because companies that still had vacancies have had a broader range of experienced candidates, who came from those over 570 thousand people that had been fired since the economic crisis began.

Under these conditions, university graduate receive this year (2010) due to the austerity imposed by the economic crisis an unemployment compensation of 255 lei, 15 percent less than last year for a period of six months if they submit the documents to the agency for employment within 60 days from the date of graduation.

Approximately 20% of the employees with higher education had pay cuts within the company they work for, and for 10% of them working hours have been reduced or are in temporary layoff, according to a survey conducted in March 2009 by Daedalus Millward Brown and Catalyst Solutions, on a sample of nearly 1.160 employees with higher education.

The main specializations for which personnel was still being recruited at the end of 2010 were IT, outsourcing, accountancy, engineering, retail and pharmaceuticals, according to recruitment agencies. If we analyze the ad submitted by Com Invest/Work -Study Abroad which selects university or college graduates for the training program in the U.S., we observe that the main areas of interest are: Hospitality Management, Food and Beverage Management, Information & Communications Technologies, Management/Business/Finance, Business, Sales and Marketing, Engineering. Com Invest/Work - Study Abroad also states methods to access and draw up the appropriate documentation because it considers that on the European level there is a lack of information in regards to writing a resume or a letter of intent.

Following this analysis, there appear contradictory aspects, on one hand young people's discontent with employment conditions, on the other hand their need to attain higher education, regardless of the profile. It is noted, in these circumstances, the absence of vocational schools as an alternative for higher education. At the same time the labour market suffers from the shortage of highly qualified work force and the Romanian secondary and university education produce “experts”, however something different from the most important requirements of the labour market: ceramic tile fitters, construction and civil engineering electrical wiring plumbers, installers specialized in heating systems and home networking, etc. Meanwhile, at all job fairs the demand for skilled workers is of 80%.

Conclusions

Creating new jobs represents an European goal of most importance. At European level there has been significant progress: the employment rate, which reached 66% in 2008, had advanced the 70% target set in Lisbon for 2010. However, the spread of financial crisis and the associated downturn imply that European countries should review their policies and to renew their efforts to return to the path of increasing employment, particularly for youth.

There are currently in Romania many families without children, but also families with three or four children, of whom one is emigrating and another is dropping out of school. Unfortunately this alarming situation is not occurring only in Romania, but, as we tried to demonstrate within this paper, it extends to other European countries. Then a question with disturbing implication rises: is the current global crisis just the precursor of the real social crisis that will trigger due to “aging population”?

This paper is part of a broader study of sociological research[5] conducted in collaboration with a group of teachers led by University Professor Elena Nedelcu, PhD. The average age of those involved within this research project is 40 years. Generation of 40-year-old is the “children of the

[5] Contract no. 1/02.06.2009 “Study on subjective professional skills and employability of students”

decree" generation, those with 20 years of service. This is a generation which for 20 years has contributed consistently to the social insurance funds and also a generation that will be close to retirement in 20 years from now.

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A STUDY OF SYMBOLIC RELATIONS IN PUBLIC TRANSPORT

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Abstract
This paper presents an anthropological, exploratory study of the microsocial world of public transport. Our research focuses on the symbolic relations that are being established (verbally or nonverbally) between urban transport travellers that do not know each other and the consequences these relations create. Modern urban configuration forces large numbers of individuals to share public space every day. When this space becomes restrictive, symbolic relations and interpersonal behaviors such as territoriality and personal space management become clearer. Due to overcrowding, public transport is the scene of one of the most restrictive public spaces in a city. The challenge was to observe and interpret daily, casual behaviors through a sociological and psychological scheme, following the methodological tradition established by Erving Goffman and the other symbolic interactionists. Finally, our study generates a number of hypotheses and explanatory models for common practices and behaviors in trams and metros regarded from a symbolic perspective.

Keywords: *public transport, symbolic relations, symbolic interactionism, observation, interpretative scheme*

Introduction

As Marc Auge stated, we live in an era of scale reversals[1]. Along with the other social sciences, anthropology enrolls in this logic, practicing with ever-more perseverance the attention for present and proximity. The accent increasingly falls on *daily* and *contemporary "in all the aggressive and disturbing aspects of reality at its most immediate"*[2]. The scale overturn that leads to the emphasis of the *daily* is interpreted by Michel de Certeau as distancing from the hegemonic and generalizing[3] discourse that used to dominate the social sciences. Vintilă Mihăilescu regards the rediscovery of the *daily* as *„a way to bring forward and put under spotlight everything that was left behind, neglected or deemed insignificant by the grand theories"* [4].

Auge discusses the difference between what anthropology describes as *places*, as opposed to simple *spaces.* Thus, places are relational, historical and concerned with identity, while simple spaces are recognizable by the absence of social and symbolic relations. Consequently, these become *non-places*[5]. The economic and social dynamics that are specific to supermodernity create *non-places* such as the transit spaces, which people use for functional reasons determined by the urban configuration. [6]

Practicing the same dedication to microsocial, this paper sets to investigate the nature of the relations that occur between individuals in such *non-places*, or transitory spaces that simply connect places and are described by the absence of the intentional social relations. In a synthesis about the progress in the sociology of transportation Glenn Yago underlined the absence and necessity of research on the psychology of personal relations in public transport. [7]

The subject of this paper is, therefore, the psychological and symbolic interpretation of daily personal interactions that take place in public transport. We see public transport as a space of routine

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[1] Marc Auge, *Non-Places: Introduction to an Anthropology of Supermodernity* (London: Verso, 1995), 12
[2] Auge, *Non-Places: Introduction to an Anthropology of Supermodernity*, 31
[3] Vintilă Mihăilescu, *"Introducere"* la *Etnografii urbane*, coord. Vintilă Mihăilescu (Iași: Polirom, 2009), 16
[4] Vintilă Mihăilescu, *"Introducere"* la *Etnografii urbane*, 16
[5] Auge, *Non-Places: Introduction to an Anthropology of Supermodernity*, 34
[6] Auge, *Non-Places: Introduction to an Anthropology of Supermodernity*, 94
[7] Glenn Yago *"The Sociology of Transportation"*. Annual Review of Sociology, Vol. 9 (1983): 185

and somewhat ritual interaction, which makes a fertile study material for the researcher interested in what is common and daily. Our ethnographic observation sets to create an explanatory model for the aforementioned type of interactions and bring new data in this field by generating a number of new hypotheses and explanatory models. We sought to conduct a microsocial, interpretative analysis of social interactions following the flexibly-structured research method "patented" by symbolic interactionists such as George Herbert Mead and Erving Goffman. Our main hypothesis before pursuing the study was the existence of symbolic relations and of a certain spatial structure of the means of public transport that was derived from the constant negotiation of power between individuals.

Paper content

Regarding from an evolutionary perspective, the natural type of human community is the tribe. The closest correspondents in present times are the rural communities, where "everybody knows everybody". Desmond Morris[8] demonstrates the city is a modern, artificial construct that forces individuals that do not know each other to manage and share a multitude of common or *public* places. An interesting sort of dynamics occurs: the way people handle each other`s presence when they do not know each other, they have no preset rapports, but only a common space that needs to be shared. But what happens when that space becomes narrow, restrictive? In this case the symbolic relations of power become more noticeable. These relations occur, most of the times unconsciously, between individuals forced by the urban configuration to relate to each other`s presence. They have no other reason to interact but their very presence in the same space.

Starting from Auge`s vision of *places* and *non-places*, we sought to investigate, through an ethnographic study, the human relations and symbolic dynamics generated by the public transport. Albeit these relations are not intentional, we will seek to demonstrate they are inevitable, and to investigate the rules by which the simple presence of several individuals in the same space will start a process of symbolic negotiation of their relations.

The role that Max Weber ascribed to sociology was to analyze and interpret human behavior and interaction. Symbolic interactionism, one of the dominant sociological paradigms of the 20th century, states that daily life consists of interactions based on exchange of symbols. The research method put forth by the most prominent symbolic interactionist – Erving Goffman – was largely based on observation and interpretation through dramaturgic methaphors and parallels with theatre. This research approach has created perhaps the most original, popular and relevant forms of symbolic interactionism. The research we have conducted is part of the same observative – interpretative tradition started by the symbolic interactionists. Another important methodological aspect linking our study with this paradigm is the generation of multiple and dynamic hypothesis.

Discussing the role of the public transport system, Yago stated: "*Transportation centrally affects the relationship between physical space and society. (...) changes in transportation affect the organization of human activity in urban and regional space, structuring the built environment, spurring urban growth, and ordering the relationships among cities in a national urban system*"[9]. The urban transport network is a good indicator of the spatial limits of a city. Usually, when a certain transport system reaches its limit and cannot match the growth rhythm of the city anymore it is complemented by a different mean of transport that is able to cover the new city limits.

The means of transport are selected by the city dwellers through a rational process influenced by their social and spatial ranking in the urban configuration. Yago shows that, for example, the wealthier dwellers have a smaller probability of using public transport, choosing to travel by car, instead.[10] In the absence of similar studies about the Romanian urban communities, we find ourselves

[8] Desmond Morris, *The Human Zoo* (London: Jonathan Cape, 1969), 55
[9] Glenn Yago "*The Sociology of Transportation*". Annual Review of Sociology, Vol. 9 (1983): 171
[10] Yago, "*The Sociology of Transportation*", 176

constrained to extrapolate the findings of usually American studies, such as Yago`s. However, Bucharest`s polynuclear configuration as well as the high variations in architecture and social structure lead us to the assumption that the travel routines of Bucharest residents are probably more manifold than those of American dwellers living in more simply-structured cities. Identifying the dominant travel corridors would presumably be more difficult as we would have to deal with three different means of public transport and a private one.

Several studies conducted in the last decades were aimed at discovering the effects if public transport on city dwellers. Bateman and Brown show that overcrowding, traffic congestion and subway breakdowns create dehumanizing environments that may erode urban dweller`s sense of identity. [11] Milgram shows transportation-related stress, overcrowding, traffic congestion and noise may contribute to *psychic overload*[12]. Stress is also responsible, by Lundberg, for much of the aggressive or inappropriate behaviors that occur in public transport. [13]

Another interesting study regarding social interactions in public transport belongs to Susie Tanenbaum*[14]*. Her ethnographic study was conducted for three years in the New York subway and followed several categories of subjects, from musicians and simple dwellers to salespersons and the subway staff. One of the main findings was that subway music performers facilitate social interactions by creating connections between strangers that would otherwise have no pretense to interact.

As we have already mentioned, the main methodological inspiration for our ethnographic study relies in the model that was promoted and enhanced by symbolic interactionism. This was synthesized by Herbert Blumer through the following phrases: "*Symbolic interactionism is a down-to-earth approach to the scientific study of human group life and human conduct. It lodges its problems in the natural world, conducts studies in it and derives its interpretations from such naturalistic studies. If it wishes to study religious cult behavior it will go to actual religious cults and observe them carefully as they carry on their lives*".[15] He also underlines society exists *in action* and this is how it should be researched. This should be the starting point of any empirical study[16]. The observational research „borrows" its exploratory character from the anthropological tradition: the researcher seeks to discover new data without „tying himself" to a rigid set of hypothesis. He tries to respect the natural world conditions and to not induce any major changes through his presence. His interest is diffuse at the beginning. Any aspect of the group`s life can fall under the researcher`s scrutiny. [17]

We, therefore, chose to conduct an exploratory research of the everyday, casual interactions in public transportation, namely trams and metros. These two means of transport were selected because they are perhaps the two most representative spaces of public transport in Bucharest. They were also relevant to our research due to their fundamental difference: one travels underground while the other travels above. Our starting point consisted in the analysis of the interactions and nonverbal behavior.

While we had almost no rigid hypothesis besides the existence of symbolic relations that may determine a certain perception of the spatial structuring, we decided to follow a few dimensions:

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[11] J. R. Bateman and J. W. Brown, *Urban planning, transportation, and human behavioral science.* Guidelines for New Systems (Chicago: Barton-Aschman Assoc, 1968), 2

[12] Stanley Milgram, "*The experience of living in cities"*, Science 167, (1970), 1461-68

[13] O. Lundberg, "*Urban commuting: crowdedness and catecholamine excretion"*. J. Hum. Stress 2/3 (1976): 26-32

[14] Susie Tanenbaum, *Underground Harmonies: Music and Politics in the Subways of New York.* (New York: Cornell University Press, 1995)

[15] Herbert Blumer, *Symbolic Interactionism – Perspective and Method* (University of California Press, Ltd, London, England, 1969), p.67

[16] Blumer, *Symbolic Interactionism – Perspective and Method*, 3

[17] M. Q. Patton, *Qualitative Research & Evaluation Methods*, 3rd edition (Sage Publications, 2002), 260

- The natural display of individuals; possible grouping criteria (such as age, gender, social status)
- The existence of possible variations in the homogeneity or disparity of travellers in different areas of the city
- The occurrence and functioning of prosocial and antisocial behaviors
- Possible patterns in the emergence of social interaction between strangers
- Attitudes and behavior towards individuals with a special status: baggers, security staff and ticket inspectors
- The management of impression (in Goffman`s terms) and the management of the personal space

The study was conducted over a period of six months and it resulted in a larger quantity of data, out of which we will only present the most relevant part.

The means of transport were selected with regard to the length of their route and the variations in the areas they cross. We sought trams that would offer a convenient posture for observation and note-taking, and that would cover several socially-diverse areas. We finally selected three main tram lines (55, 5, and 21) that cover a large part of the city and offer a center-outskirts transition. In selecting the metro lines we used the same criteria that would maximize the variation of the individuals, the attitudes and the behaviors we would observe, but in the end we conducted our observation along all the city`s metro lines.

The research findings

Much of the social scene of the public transport can be explained through age and status. The first notes of our observation show a traveller`s placement inside a tram is closely determined by these factors. This becomes visible when a traveller has to choose a seat inside the tram when there are many empty seats to choose from in all areas. Younger people are more likely to select the back segments of a tram, while the front segment tends to be preferred by the elderly. In the center segment of a tram you will most often find younger people, and also the *white collar class*, active people involved in intellectual activities. The *blue collar* workers (the ones involved in physical labor) would usually choose the back segment.

At the metro, while on the waiting platform, the most hurried travellers are more likely to sit next to the platform limit. The same pattern is also present inside the metro, the most hurried choosing to sit near the exits. The management of the personal distance is highly visible inside the metro. The metro travellers seem to be more permissive in this regard compared to the tram travellers. Overcrowding seems more tolerable inside a metro. Nonverbal cues of territoriality and the protection of one`s personal space are less present when compared to a tram. We hereby advance the hypothesis of an unconscious acceptance of reclusion which is driven by the closed configuration of the metro space. The perception of architectural closure weakens one`s expectations of personal space. This would explain why the same level of overcrowding will produce less conflict (verbal or nonverbal) in a metro than in a tram.

The “social landscape” inside a tram is somewhat more heterogeneous than in a metro. The easier access inside a tram (the possibility to travel without a ticket) and the absence of the guards (who patrol some of the metro trains) can explain the presence of individuals from more social categories inside a tram. We have found a category of “travellers without a destination” that use the tram as a shelter. They often travel until the end of the tram`s route where they are coerced to exit, only to take the first tram coming from the line`s end.

Observing the prosocial behaviors inside the tram we found their frequency is higher in the front and median segments of a tram. Two indicators pointing towards this conclusion are the level of cleanliness and the number of the seats offered to other people. The elderly and the physically challenged individuals will very often choose to sit in the first segment of the tram, denoting a more or less conscious knowledge of this fact. The “renegades”, the socially marginal (such as the

"travellers without a destination" category) or the baggers will most often choose the back segment of the tram. The metro seems to spatially repress the marginal individuals towards the front and back limits of the wagons.

The people in the back segment of the tram are more likely to use a louder voice. They also are more likely to be more expressive through the use of inflexions and imitative words. Besides the social and demographic factors we have already mentioned as influencers of one`s position in a tram, there still is not enough to explain why people in the vicinity of the driver`s cabin will usually talk lower than in other parts of the tram. Thus, we presume this fact is explained by the functional authority of the tram driver. This allows him to monopolize the aggressive behaviors. In the cabin`s area the driver will often be the loudest and most expressive individual. The travellers behind the cabin will quietly accept his informal leadership and unconsciously seek the protection that comes from the leader`s proximity. This self-preservation behavior could explain the higher frequency of the older travellers in the first segment of the tram, near the driver`s cabin. The elderly are generally less able to protect themselves of aggression, thus they are more prone to look for exterior protection. Also, the marginal individuals, the ones that feel in opposition to the social norms (such as beggars) are more likely to choose the back side of a tram because the driver`s authority is weaker in there. Because of the inhibition of aggressivity determined by the driver`s authority in the front segment, the nonverbal dominance and aggressivity cues are usually more present in the back side of a tram. The personal space is also larger in the back side. People will usually seek to distance them more from the others compared to the front side. We believe that can be seen as a more intense need of protection that translates in a need for a larger "buffer zone". Again, the need for protection is smaller in the front side of a tram because of the driver`s authority.

Aside from their perceived authority and aggressive monopoly, the driver`s involvement in the "tram`s social life" is limited. On the contrary, most of them use different tactics of isolation from the people behind, by covering the cabin`s interior window with clothes or ornamental objects. If their concern with the world behind is uncertain, there is a certain preoccupation for taking hold of the cabin space through various forms of personalization, often religious. We assume this practice carries indicators on how the driver would like to be treated when working, and, consequently, how the travellers should behave in his tram. We hold as an argument Rapoport`s point of view expressed in a study on the effects if built environment on human behavior: *"people react to environments in terms of the meanings the environments have for them"* and *"the meaning of an environment is generated through personalization, through taking possession, completing it, changing it"*.[18] He underlines the social character of symbols and their role in connection to status, social order and the individual`s place in it: *"the basic point that symbols communicate, that they are social, that they are related to status and represent the social order and the individual's place in it, are all notions that can be studied in other ways-notably through nonverbal communication*"[19].

The metro drivers do not seem to have a similar status or influence on what happens behind them, compared to the tram drivers. In their case the authority does not seem to bypass the limits of their cabin. There are two hypotheses we have in this regard: their posture is not elevated, compared to the tram driver, so they lack an important cue of domination. Also, their perceived authority derived from the driver`s role is divided by two, because the metro drivers always work in pairs. The metro requires two people to perform the same role for which the tram requires only one.

Observation of nonverbal behavior in public transport will generously show cues of territoriality and protection of personal space. There are a number of behavioral patterns that accompany the breach of one`s personal space. Most often this state of perceived inadequacy is minimized by eluding the intruder or intruders` look, like a symbolic negation of the uncomfortable

[18] Amos Rapoport, *The Meaning of the Built Environment - A Nonverbal Communication Approach*. (Tucson: The University of Arizona Press, 1990), 21

[19] *Rapoport, The Meaning of the Built Environment - A Nonverbal Communication Approach*, 48

position. Besides the gestures that indicate a desire to escape, individuals offer cues of nervousness and self-preservation. For example, overriding one`s personal space will usually result in a more alert rhythm of breathing.

We have identified two forms of isolation in travellers: spatial – when one chooses to stand in the most remote area of a tram or metro wagon - and social, when one avoids interaction with others by exhibiting specific indicators of reclusion, such as headphones, handling the telephone or "diving" into the lecture of newspapers or magazines. These types of isolation cues are much more present in the case of younger travellers compared to the other age groups. Another reason for the desire of isolation seem to be the "overloads". The travellers carrying heavier objects usually enter the back segment of the tram because they estimate they would be less likely to disturb the others in that side. However, when entering an empty tram, two people carrying a large box will almost always sit in the back. If the same people would enter the tram without any overload, their placement option will most likely be different. One possible reason for this is the perceived association of overload with lower status and manual labor, which would influence the individual into thinking his most appropriate position at that moment is in the back segment of the tram (the *blue collar* segment).

The metro clock has facilitated the investigation of a specific dimension of the perception of time: the attitude towards waiting, or towards "useless time". The waiting generates nervousness signals that climax when the clock resets, after ten minutes from the departure of the last metro. There are several approaches in handling the waiting stress. They are influenced mostly by how much each individual values his time in that moment. Thus, the travellers that value their time most tend to look more often to the metro clock and stand closer to the platform limit. The others are more likely to rest on the chairs while waiting for the metro. Another nonverbal pattern is linked to the relief gestures when the train`s arriving sound is heard from the tunnel. Such gestures are groans or sudden turns of the head.

Beggars and ticket inspectors represent the social types of exclusion and coercion. The travellers tend to regroup and rethink their territoriality when confronted with their presence, and seek to avoid contact through such gestures as turning the head away in a symbolic denial of their presence. In the *intruders'* category also fall the travellers that force their entrance in an overcrowded tram or metro. Confronted with the intruder`s entrance efforts, the travellers inside the tram or metro will adopt a *team behavior* (in Goffman`s terms) or solidarity by spontaneously generating a group norm that defines the acceptable crowding degree and sanctioning the intruders. Once they manage to force their way into the tram or metro, the former outsiders will adopt the same team behavior and sanction the ones that try to enter after them.

Ticket inspectors usually tend to avoid the back segments of the tram, probably sharing the same perception of a higher risk of aggression and deviance. Together with the drivers, the ticket inspectors are the only ones that share a formal role in the tram space, and the only ones that rely on a formal authority. However, if the inspector`s authority is coercive, the driver`s formal authority is more reminiscent of a *low-status gatekeeper*. Returning to Auge`s terms, we may observe the tram represents a *place* for the driver and the inspectors, and only a symbolic space for the rest of the travellers.

Conclusions

In decoding the symbolic relations established in public transport we left from a set of dimensions that were extended over the course of the research. The study generated an important number of hypotheses and explanatory models for some of the behaviors that were observed. A simple passage through Bucharest by public transport will, in most cases, offer an image of the social diversity of the city. Travelling and observing frequently and persistently the same means of

transport will emphasize, in time, recurring behaviors of the same individuals and offer different cues for interpreting these.

The main findings of this study rely on the symbolism of the relations established inside means of public transport. The spatiality specific to trams is mostly induced by the driver`s perceived authority. Also, the isolation and self-preservation behaviors are some of the most relevant findings that would benefit from further research.

We sought to test our hypotheses by discussing with a number of frequent travellers, but their inputs were merely seldom relevant. Much of the behavior we observed and interpreted proved to be unconscious and instinctual, rather than rational and intentional.

The natural follow-up to this study would be extending it to even more means of transportation from different cities and eventually verifying the hypotheses through experimentation and quantitative data.

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MAIN TYPES OF VIOLENT BEHAVIOR IN THE CONTEMPORARY SOCIETY

MARIA LULESCU[*]

Abstract
The proposed scientific theme is going to approach and study the violence phenomenon as a contemporary social matter, from a conceptual and etiological perspective. Firstly, the violence phenomenon is explained from multiple angles: legal, psychological, socio – political, anthropological and last but not least sociological ones. Secondly, I am going to analyze the main violence types encounted in contemporary society; this approach also implies the study of the way each violence type is expressed, and the discovery of the causes that determine the commission of such acts. Thirdly, the main types of violence existing in sport are presented, this phenomenon being frequently encounted in contemporary society, while converting a sport game into a real battle – a situation which is frequent both among athletes and especially supporters.

Keywords: *the concept of violence, types of violence, violence etiology, violence among athletes, violence caused by supporters.*

Introduction

Violence represents a complex social phenomenon encountered more and more often in contemporary society. Representatives of international organization, specialists, governmental and non-governmental institutions and ordinary people, express their concern and opinion regarding the increasing number of violent actions and their varied manifestation, and no less concern about the citizens' insecurity in different social environments. Violence represents an area of large interest, on which most researchers have closely looked upon lately, with a special interest in its causes, manifestations and especially the procedures to prevent and combat.

In Romania nowadays, violence as a form of behavior represents a complex social problem, whose form of manifestations, social consequences and possible solutions are of great interest for institutions representatives responsible for social control as well as the public opinion. It is very important to take into account the fact that social inequalities among people and different social groups, economical crisis, inflation, poverty, unemployment generate social tensions and conflicts.

This paper defines in its first part violence as seen from World Health Organization perspective, with a special view of the definitions given by sociologists and researchers. The violence phenomena are presented not only from legal perspective, psychological aspects, political sociology, but also from cultural anthropology point of view.

The second part of this work, which represents the core of the paper, presents types of violence encountered in contemporary world using the existing classification provided by modern sociologists.

In the third part of the paper, a conceptual approach of the violence phenomena in sport was presented as this is the main subject in my research project. I have studied the type of violence identified with sport violence in contemporary society and I have presented the two types of violence, identified by the researcher Jean –Yves Lassalle: those of the sportsmen and of the supporters as well.

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1. Conceptual perspective on violence

World Health Organization has defined violence considering all possible situations which may be characterized as violent actions. According to this international organization, the violence is the result of "*intentional using or deliberate threatening using physical strength against your own self, against other person or against a group or community, which produces or is on the point of producing a trauma or a death, a moral prejudice a trauma or a deficiency*"[1].

In the Explanatory Dictionary of Romanian Language, 1984 edition, violence is "*the property, character of what is violent (1); power, intensity, strength (2) lack of self control in speaking or in actions, vehemence, anger (3); the fact that brutal force is used, constraint, raping, law infringement (4); violent, impulsive action (5)*".

Nowadays, the meaning of word *'violence'* has received new aspects in Dictionary of Romanian Language for Students and specifically, "violence" represents firstly a "*feature, character of what is violent; big power, intensity, strength"; secondly "lack of self control in communication and deed, vehemence, anger"; thirdly "the attitude to use brutal force, constrain, violence"*.

The phenomena is generalized and is present in any society, either occidental or ex-communist, but making clear that the increase of violence is definitely higher in all ex-communist countries, compared with the other countries. Even more worrying is the increasing rate, changes presents in the structure of criminality, toward high criminality and especially violence.

Violence is seen as a manifestation where force and constrain is used by an individual, group or social class in order to impose on others. The term "violence" gains particular meanings according to context of reference where the meaning is found[2].

From legal point of view, *violence* defines physical force or personal authority usage in order to produce a prejudice, or an injury upon personal integrity of a person (criminal **violence**, homicide, voluntary hurting, rapes etc).

In **psychology**, *violence* defines aggressive behavior, usually displayed as a result of frustration (from Freud's point of view "Oedipal conflict" the example is accompanied by unconscious desire of a child to kill all those who stay against his maternal affection). Frustration tendencies can be a self-aggressive behavior which defines people presenting suicidal tendencies, suicide representing a type of **violence** so called non-criminal, private which has as a main purpose voluntary suppressing a person's life.

In **political sociology**, *violence* signifies an important means to establish social dominance or in order to obtain a dominant position, materialized through conquering wars, international terrorism etc.

In **cultural anthropology**, violence is the equivalent to the constrain applied by a cultural community on another or by a norm system on other, through repressive agents having economical, political or moral character to act in favor of the dominant model.

Last, but not least, in **sociology**, *violence* is not considered only a resource of a powerful social class or some privileged groups, but also a compensatory means used by social classes and unprivileged groups (especially when their interest are not fulfilled through "normal" legal procedures) pushed toward the edges and constituted from people lacking resources, not properly integrated in society or just partly integrated. Their behavior is a reaction to compensate their own diverted status. Without having access to institutionalized methods to fulfill their social purposes they use illegal, illegitimate, and sometimes violent means, in order to obtain access to some 'social opportunities'. R.A. Cloward and L.E. Ohlin, inspired by Merton's[3] paradigm regarding anomy, have introduced the 'differentiated opportunity' notion represented by the procedures used by social

[1] Etienne G. Krug, Linda L. Dahlberg, James A. Mercy, Anthony Zwi, Raphael Lozano-Ascenio, „*Rapport mondial sur la violence et la sante"*, Organisation Mondiale de la Sante, Geneve, 2002, p.5

[2] http://www.dictsociologie netfirms.com/Termeni htm

[3] Rădulescu S.M.," *Teorii sociologice ţn domeniul devianţei şi al problemelor sociale"*, 1994, p. 59

groups to fulfill their desires. According to these opportunities, legitimate or not, the positions occupied by members of society in the 'opportunity structure' are defined.

Violence is a consequence of disregarding the social disorganized processes, of social anomy and lack of social integration and is manifested by aggressive behavior which bends the law or unwritten codes. Violence is not a new phenomenon, though its presence and evolution are close related to people, groups, organizations, institutions and human societies's evolution. This is one of the reasons some specialists and researchers appreciate that violence is a permanent feature of humanity, close related to human being and to society functions. Defining violence has proven to be a difficult attempt. This can be due to the complexity of the phenomena, and the great variety of its form of manifestation as well.

Violence as a notion is analysed in a close relationship to aggressivity. Aggressivity is defined as any deed which has as a main purpose to produce e prejudice to a certain target. The Latin root of the term violence is '*vis*', which means 'power' and induces the idea of power, domination, using physical superiority against someone else.

ERIC DEBARBIEUX (1996), a specialist in the problems related to violence in schools, gives a definition where he surprises violence as a whole: "*violence is the brutal disturbance or continuously of a personal, collective or social system that may be translated through integrity loss, integrity which may be physical, psychical or material. This disorganization can be treated through aggression, using conscious or unconscious force, but we can discuss also about violence from victim's point of view, without aggressor's intention to hurt anyone*[4]".

YVES CHAUD appreciates that: "*There is violence during an interaction when one or more factors act in a direct or indirect manner, concentrated or distributed, bringing others prejudices of different intensity, affecting either their physical or moral integrity, their possessions, or in their representations either symbolic or cultural*".[5]

2. Typologies of violence in contemporary society

Violence's forms are becoming more and more diverse during human society evolution and get larger and larger amplitude despite the means and costs involved in fighting against them.

The manifestations of violent deeds are different according to epoch, culture, circumstances, but especially related to moral and spiritual evolution of the communities. Violence is a variable phenomenon. It can take forms from obvious violence to a hidden one. What is called violence has a larger area than those defined by criminology.

The types of violence encountered in contemporary society are the following:

A. Direct structural and cultural violence

The Norwegian researcher, **Johan Galtung** has studied the most subtle forms of the violence and has offered a new perspective on the phenomenon according to social reality of the XXI century.

"I understand the violence as a *deterioration of fundamental human needs which can be avoided*, or more general, a *life impairment* which decreases the degree where people are able to fulfill their needs at a certain level or *potential* possible. Even *threatening* is violence too."[6]

The majority of analyses support the idea that the aggressivity is more related to instinct, while the violence is close related to culture, education and context.

According to the modalities, the violence is presented and in order to understand its whole nature in contemporary society, Galtung has found out that there are three types of violence: **direct**, **structura**l and **cultural**.[7]

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[4] Debarbieux, E (1996). La violence en milieu scolaire, volI (Etat des liex), ESF, Paris, p. 45-46;

[5] Ecaterina Balica, Violent Criminality – Tendencies and Risk Factors, Bucharest, Ed. Oscar Print, 2008, p. 28

[6] Johan Galtung, *Kulturelle Gewalt*; în: Der Bürger im Staat 43, 2/1993, p. 106, http://articole famouswhy ro/definirea_termenului_de_violenta/#ixzz14mo83MVA

[7] Ibidem

1. Direct violence is related to physical images: blows, wounds, injuries on the physical body generated by another person directly or indirectly and is related to hurting and injuries intentions.

2. Structural violence is the common one, without intention, where all society members are involved. This type of violence is applied, according to Galtung, to all social and economical exploitation systems which affect basic needs of people, identified in: surviving, wellbeing, identity and freedom needs.

Structural violence is presented in two main forms:

• ***Vertical structural violence*** – which implies exploitation (economical power) repression (political power) and alienation (cultural power) and which affect basic needs as wellbeing, liberty and identity;

• ***Horizontal structural violence –*** implies keeping people together despite the fact that they do not want to, or to part them when they want to live together.

Social isolation or pushing people toward social limits, stopping them to have the possibility to access knowledge and culture, manipulating, any other form of action, social structure or ideological conception which narrow the possibility to satisfy basic necessities is called structural violence too. In this respect are noted structural violence phenomena such as[8]:

Poverty – in modern countries structural violence is manifested when government politics worsen the disadvantaged social classes and multiply the privileges for the rich people in society and in this way the gap between poor and rich is enlarged.

Death – when industrialized countries, on their run to obtain profit, deeply affect planetary system and produces major climatic changes with fatal effects on people's lives.

Suffering – people's inability to satisfy their need of recognition or self esteem, due to a society which reduces any possibility to distinguish, generating a great frustration or unfulfilling feeling.

Galtung uses the term structural violence in a way synonym with 'social injustice'. Thus, Galtung's analysis is related to criticism towards the capitalism in the countries still in a development process. It legitimates their fight against unjust social systems (guerilla etc) even though these mostly renounce to direct oppression methods.[9]

3. Cultural violence is that one which considers as good and righteous the other two forms of violence. "Cultural violence is not visible, but has clear intention to hurt, even indirectly kill through words and images, in a way, symbolic. This is priests' violence, intellectuals' or professionals' violence." Cultural violence refers to ideologies, traditions, knowledge, beliefs, all ideological systems which make possible and justify direct or structural violence.[10]

"Through cultural violence we understand those culture aspects that could be used in order to justify or legitimate direct or structural violence. Stars and stripes, the hammer and the sickle, crosses, flags, hymns, military parades, the omnipresent portrait of a leader, heated discourses as well, are included in this category."[11]

"Cultural violence is even more problematic than structural violence because is in all of us, not only in some, so called, bad actors (…)

The structures are seen as something external, but culture is internal, feeding our hearts with religion/ideology, the language of rough culture which forms or identity".[12]

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[8] Sorin- Tudor Maxim, *„Violența în Sport"*, *Publisher*. All, 2006, p.54

[9] Johan Galtung, *Kulturelle Gewalt*; în: Der Bürger im Staat 43, 2/1993, p. 106, http://articole famouswhy ro/definirea_termenului_de_violenta/#ixzz14mo83MVA

[10] Sorin- Tudor Maxim, op.cit, Publisher. All, 2006, p.55

[11] Idem

[12] Johan Galtung,"*Conflict Transformation by Peaceful Means"*,Unitated Nations,2000

Considering a turning point Galtung's definition (people's basic needs deterioration) and adding four new need groups to the two already mentioned, we will have the following typology:[13]

Typology of violence by Galtung	**Needs groups**			
	suvival (denying: death)	**prosperity** (denying: poverty, illness)	**identitity / purpose** (denying: alienation)	**liberty** (denying: oppression)
Direct violence	murders	Injuries siege, penalties, poverty	de-socialise, re-socialise, second hand citizens	repression, inprisonment, expulsion, deportation
Structurală violence	exploatation A	exploatation B	penetration, segmentary	marginal, fragmentarye

We have seen Galtung's typology of violence, and we have to explain the terms from the last row of the table – what is exploitation (A and B), what is penetration, segmentation, marginalization and fragmentation.

Exploitation represents the core of an archetypal structure of violence. Galtung makes reference to an "unequal exchange" realized between the two social categories, named by the Norwegian researcher: *topdogs* – those that take most advantages from the system and the *underdogs*, the opposites.

Exploitation type A. The so called *underdogs* can be so disadvantaged thus they can even die because of that (due to famine or epidemic diseases).

Exploitation Type B means to leave the *underdogs* to permanently support unwanted poverty, which naturally includes underfeeding and disease.

"All these take place inside some complex structures and at the end of some long and extremely complicated causal cycles. A violent structure leave marks not only on human body, but also on their minds and soul.

The following four terms can be understood as constituent parts of exploitation or as components having an amplifying value inside its structure. Their function is *to hinge conscientious* formation and also its *stimulation*, two essential ingredients for a real fight against exploitation."[14]

Penetration, segmentation, marginalization fragmentation. An *underdog* conscientious is *penetrated* by *topdog*'s ideology elements, this being accompanied by a *segmentation* which does not open to *underdog* anything but a limited vision of reality. Segmentation is just a result of two processes, *marginalization* and *fragmentation*. *Underdogs* are pushed towards edges, being convicted to be unimportant, parting them from one another. These four concepts, actually describe the forms of structural violence."[15]

B. Interpersonal and collective violence

Etienne G. Krug and his team have worked to realize the *World Report on Violence and Health* have included in the area of violence, interpersonal violence deeds, action of violence against own self, but collective violent deeds as well.

Interpersonal violence includes violent activities among people no matter their relationships. Thus, in this category there are presented two subtypes of violence considering the relation between aggressor and his victim and the space where aggression takes place:

1. "*Violence in family and violence among partners* is manifested among people where there are family relationships (maltreatment applied to a child, partners or elderly people);
2. *Violence in community among people without any family connection* – takes place in other spaces than victims or aggressor's residence, among people knowing each other or not (young

[13] http://articole famouswhy ro/definirea_termenului_de_violenta/#ixzz14mo83MVA
[14] Johan Galtung, *Kulturelle Gewalt*; în: Der Bürger im Staat 43, 2/1993, p. 107
[15] Ibidem

people violence, rape and sexual aggression committed by unknown persons, or violence in institutions)."[16]

Violence against own self (intrapersonal) represents a category where the authors include suicidal and self mutilating behavior. It has been noticed the way how specialists from World Health Organization understand to define suicidal behavior, including not only suicide, but also the "precursor's activities of the suicidal action (thoughts and actions regarding suicide, identification of the necessary means to prepare the suicide)."[17]

Collective violence includes violent manifestations which are identified with a group against another group in order to obtain political, economical or social advantages. In the area of such type of violence there are included violent deeds of an army against another or against population, actions considered genocide, actions which implies fundamental rights of individual infringement, terrorist activity or violent actions included in organized criminality.

The specifications brought by the authors in their report allow understanding that the World Health Organization suggests violence should be approached not only from the aggressor – victim perspective and place where the aggression takes place, but also considering the type of action against the victim. As a result, considering the type of action upon victim, violent deeds can be "physical, sexual, psychological, or can involve deficiency or carelessness."[18]

From this perspective Gilles Ferreol and Adrian Neculau, have established the following typology of violence:[19]

1. Private violence

a) Criminal violence
- Deadly - killing, assassinating, poisoning, capital punishment

b) Noncriminal violence
- Suicide and suicide tentative
- Traffic and work accidents

2. Collective violence

a) Citizens' violence against political power
- Terrorism;
- Revolutions and strikes

b) Violence against citizens
- State terrorism
- Industrial violence

c) Paroxysmal violence
- War

There is another typology of violence, elaborated by Dan Baciu and Sorin M. Radulescu who differentiate between:[20]

a) Primary violence – usually occasional, accidentally, casual characterized by uncontrolled and outbursting reactions of some people, general reaction promoted by criminal opportunities (alcohol consumption, conflicting relationships with the victim etc);

b) Passion violence – generated by revenge, jealousy, humiliation usually characterizing people manifesting egocentric and autistic feelings, or that prove emotional instability and a clear diminish of voluntary mechanism of self-control and self-adjustment;

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[16] Etienne G. Krug, Linda L. Dahlberg, James A. Mercy, Anthony Zwi, Raphael Lozano-Ascenio, *„Rapport mondial sur la violence et la sante"*, Organisation Mondiale de la Sante, Geneve, 2002, p.5, 6

[17] Ibidem

[18] Ibidem

[19] Gilles Ferréol şi Adrian Neculau ,*"Violenta. Aspecte psihosociale"*, Iasi, Publisher.Polirom, 2003, p.6

[20] Dan Banciu, Sorin M. Rădulescu, Vasile Teodorescu, *Criminalitatea în România în perioada de tranziţie(Teorii, Tendinţe, Prevenire),* Piteşti, Publisher.Lică, 2001,p.262 -263

c)Utility violence – generated by purposes that follow a profit, material interests, goods and services met in thefts accompanied by violence, robbery and mugging;

d) Pseudo legal violence –generated by purposes that follow to repair the damages and to punish the author of a murder, rape or robbery by a group or community that substitute to the legal system (it is the case of vendetta, lynching etc);

e)Symbolic violence – generated by some codes, messages and symbols that act as triggering factors produced by some people against others;

f) Rational violence – characterizing organized crime and criminal activities, having as final purpose to obtain high illegal profit (murder and kidnapping people, people trading, coercion and physical and moral blackmailing, weapons and hallucinogen substances trading etc.).

C. Physical, economical and moral violence

Jean Claude Chesnais, trying to establish semantics areas included in definition, has established a geometrical representation three circles.[21]

As core, the first circle, there is **physical violence**, which is considered by the author the most serious, as it causes body injuries or even death of the attacked person. This is the most savage and brutal form.

The second circle, and larger, is represented by **economic violence**, related to all prejudices and frustrations on personal belongings and having numerous forms. In a high developed industrial society is difficult to make a difference between what you own and what you are, because the person is mostly identified with what belongs to him/her as a means of subsistence. In this way the violence is confused with delinquency.

The third circle is represented by **moral violence**. To talk about violence in this respect, states Chesnais, is a linguistics abuse in nowadays conditions, when ambiguity, regulation and aggression, organization and aggression are mistakenly taken for one another.

D. Physical violence, psychological and verbal violence

The sociologist Daniel Welzer-Lang appreciates that the most important forms of violence manifested in a society are: physical violence, psychological violence, verbal violence, sexual violence, violence against animals, violence against children, economical violence, violence against oneself and street violence.[22]

Physical violence is represented by "any physical contact on someone else's body". Welzer-Lang includes in the area of this type of violence, actions whose gravity and intensity are different: "pulling someone's hair, scalding using water or oil, violent gestures having as a main purpose to frighten someone, bouncing someone's head to walls, tearing someone's clothes, forcing someone to touch an electric wire, electrocution."

In area of **physiological violence**, the author includes all actions that affect or try to affect physical or mental integrity of a person, such as "self-appreciation, confidence, and personal identity". In this category there are included: "verbal abuse, ungrounded critics, browbeating, bullying, threatening with raping or retaliations, blackmailing, blackmailing someone with suicidal action, threatening someone to leave, over controlling someone's program".

The previous mentioned actions emphasize the idea that psychological violence is a result of the message conveyed to victim by the aggressor.

Conversely, **verbal violence**, is expressed by verbal flow, violence in the voice, pitch, crisis, in another word is related to "authoritarian tone used in order to ask something, interrupting the interlocutor and reproaching, avoiding some topics to discuss, totally denying, listening or answering to the interlocutor and frequently usage of verbal abuse during discussion."

E. Sexual violence

[21] J.C.Chesnais,1981,pag 32 apud Gilles Ferréol Adrian Neculau, pag 122,123;

[22] http://tahin-party.org/textes/impp50-85.pdf

World Health Organization defines sexual violence as "any sexual action performed by someone against someone's sexuality, or attempt to have a sexual intercourse, comments or sexual attempts, trading actions or other actions using force, no matter his/her relationships with victim in any context, without being restrained to the place of living or work."[23]

F. Financial violence

Noël Flageul is one of those who supports the idea of violence in financial world, referring to "actions based on force or brutal manifestations which affect people or goods".[24] Considering financial violence, the main reference is "money laundering, tax frauds, stock transactions offences, card frauds, fictive finance-accounting procedures, bribing or illegal funding of political parties". Thus, violence takes the appearance of the "lack of balance in real economy, taking into account the more and more close connection among states and globalization".[25]

G. Criminal violence

Canadian criminologists Jean Proulx, Maurice Cusson and Marc Ouimet include in this type of violence "actions forbidden by law and liable to penal punishment".[26] There are included here murders, sexual aggressions, robberies injuries and corporal aggressions.[27]

Criminal violence particularities

There is a methodological necessity to make some clarification regarding violent criminality. Jean Proulx, Maurice Cusson have appreciated that it is necessary to distinct between:

1. "*predatory aggression*, justified by the desire to obtain money or goods and *clash violence* justified by revenge or defense desire;

2. *severe violence* (murder and murder tentative) and *less severe/critical violence* (injuries and others); theories that explain delinquency and theories applied to violent criminality only".

Mihai Ralea, who has approached violence as a phenomenon since 1931, supports the idea of violence manifested in large groups and formed through contamination, meaning that those ruled in their life by thinking and rationality, once settled in a group, lose their self-knowledge. This phenomenon is named "contagiousness" and can reach anyone.[28]

It happens very often to see on stadiums people swearing and having a violent behavior, but in their daily life to be a real model for their politeness and respect.

World Health Organization launched in 1996 a four level risk program to prevent violence:[29]

a) **Individual level**, where risk of violence is given by previous abuse and antagonistic experiences, mental disturbances and illness as well. Prevention at this level will develop as a target self respect development;

b) **Interpersonal level**, where violence risk is given by the alcohol or drugs intake, by the man's control over family's goods, but also by conflicts inside the family;

c) **Institutional level,** which has as causal factors for violent behavior the following: low level of socio-economic status, unemployment, women social isolation and violent families, joining to men's delinquent groups. In order to build prevention at this level a target should be established in attending schools and programs with educational profile and community cohesion development as well.

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[23] Etienne G.Krug,Linda L. Dahlberg,James A.Mercy,Anthony Zwi,Raphael L.Ascenio, *„The world report on violence and health"* ,pag.165;

[24] Neculau, Adrian (coord.), *„ Manual de psihologie socială"*, Publisher.Polirom, Iași, 2003,p.270

[25] Idem, p.263-271

[26] Jean Proulx, Maurice Cusson şi Marc Ouimet,*"Les violences criminelles"*,1999,p.3

[27] Balica, Ecaterina, *„ Criminalitatea Violentă.Tendințe şi factori de risc"*, Publisher. Oscar Print,2008,p.35

[28] www.supliment.polirom ro/interviu

[29] Ana Muntean, *„Violența în familie, în Violență. Aspecte psihosociale"*, coordinate by Gilles Ferreol şi Adrian Neculau, Publisher.Polirom, 2003, p.153- 154

d) **Structural level,** where the risk of violence is close related to cultural tolerance of violence in controversy solving, rigid gender model promotion and encouraging male as a dominant element.

H. Anomic violence

Raymond Boudon and Francois Bourricaud appreciate that the anomic violence is "the proliferation result of aggressive relationships in disturbed areas of the society".[30]

Violent anomic forms are given by the possible types of anomy in a society: "legal, political and moral anomy." Legal anomy encourages aggression against a member of the society and his or her belongings as a result of loosened legal norms.

Political anomy concurs with insecurity generalization which brings increasing number of self-defence actions and repression institution support. Legal anomy combined with the political one lead to exceptional situations. Moral anomy demolishes the individual respect for law and customary law and invite to a "save whoever is able" generalised state.

According to the authors, there are two cases where violence is manifested in different forms:

- *Totalitarianism*, defined by disorganized violence"manifested by a society against its own members in order to prevent any preferences (verbal or nonverbal)".
- *War*, defined by organized violence "war representing an organized and driven exercise and its strategists do not intend to kill, but to break the political will of an opponent, to destroy it not as a living person, but as a political combatant".

I. Conflicting violence and predatory violence

According to Maurice Cusson[31], conflicting violence involves the existence of conflicting relationships between aggressor and his/her victim previous the conflict (murder in a married couple), while in the case of predatory violence there are no relationships among the people involved in aggression (for example murder in a case of stealing or raping an unknown woman).

Conflicting violence implies a conflict understood as a "disagreement between two parts which end by hostilities exchanges." It the case of conflicting violence is difficult to distinguish victim to aggressor as the two exchange their parts during the conflict. Also, conflicting violence usually takes place when the people involved live in a social and physics proximity: live in the same house, are colleagues or neighbours.

Predator violence is manifested one-sided; one person being aggressed and the other is the aggressor.

Proulx and his collaborators have identify some of the characteristics of the two types of violence starting from information close related by the purpose of violence, the role of victim and aggressor, their experiences and development (see Table 1).

Table 1. Predatory violence and conflicting violence characteristics

Predator violence	**Conflicting violence**
Example	Example
Armed robbery ordered murder, murder associated with stealing, rape against an unknown person, „charging"	Alcoholic fight, family arguments, murder in a married couple
Violence purpose	Violence purpose
The aggressor wants to constrain the victim, to take his/her money to take advantage of it	Anyone of those implied wants to punish the other, to revenge, to save himself/herself, to defend
The aggressor and victim's role	The aggresor and victim's role

[30] Raymond Boudon, Francois Bourricaud, *"Dictionnaire critique de la sociologie"*, 2004,p. 672,675,678

[31] Maurice Cusson,*"* ***Criminologie actuelle",*** 1998,p.22-35

The aggressor is the attacker, he/she attacks firs without being provoked; proactiv. The victim supports the attack	Sometimes is difficult to distinguish between aggresor and victim. The damages are shared. The opponents exchages blows, everyone with defence or retorting feelings
Emotions	*Emoţions*
Indifference concerning the victim. Justification	Furry, hostility, hatred, fear, unjustice feelings, humiliation
Development	*Development*
Preparing, attacking, running.	Mistake or insult, ultimatum, denay excuses,arguments accompanied with fight.

Source:According to Jean Proulx, Maurice Cusson, *Que savons – nous sur la violence criminelle?,* în : Jean Proulx, Maurice Cusson, Marc Ouimet : *Les violences criminelles*, Les Presses de L'Universite Laval, 1999, p. 21

J. Symbolic violence

French sociologist Pierre Bourdieu, starts his theory from the fact that members of any society are hierarchically placed based on their economical resources, social, cultural which any of them owns.

Any person is supposed to accede to a higher position throughout his/her life generating tensions among interpersonal relationships. In a so called „game for domination" anyone will take advantage of his or her assets and, according to the situation, will convert so that to obtain maximum satisfaction with the least effort. There is in the whole process a value resource, a symbolic asset which provides the biggest and most secure income and this one is associated with prestige, honour and respect.

It is a hidden violence, which is not necessary related to hatred, furry, slaughtering cruelty or collective attrociousness. This „soft" form of violence is presented under different forms of economical, cultural or social domination, not obvious in daily life.[32] Bourdieu states that symbolic violence is one "censored and euphemistic, meaning unrecognizable and acknowledged."

It cannot be discussed about symbolic violence if the participants in such action have different semantic codes. Thus, the process of symbolic impose of power is preceded by creation of some cognitive schemes in a person's mind to force him/her to see things in a certain way.[33] In this equation, the role of the state and also politics is an essential one, because being "empowered by gathering and exerting its power it is enabled with means to impose and inculcate such long lasting principles".[34]

Imposing implies an aggressive and violent language with Manichaean accents: "those who are against symbols are covered by negative appreciations and those who accept and conform receive the praises."

3. Typology of violence in sport

Even though there is no exact definition of the concept of sport violence, the phenomenon as such has been carefully studied, typologies of violence in sport have been studied, identified violent actions that are the object of this research and causes that determine aggressive behavior have been investigated.

Georges Vigarello, for example, estimates that there are four dimensions of the violence in sport concept: "*symbolic violence, direct violence of the actors, direct violence of the audience,*

[32] Sorin Tudor Maxim ,"*Violenţa în sport"*, Published bu Suceava University 2006, p.132-133
[33] Elisabeta Stanciulescu, "*Teorii sociologice ale educatiei"*,Polirom, Iasi, 1997,p.171
[34] Pierre Bourdieu," *Ratiuni practice"*,*Publishe*a Meridiane, Bucharest, 1999,p.85

indirect violence of both, those of the accidents, of disasters or of the organizational failures of any kind liable to determine bloodshed".[35]

The contemporary analysts Beatrice Abălașei defines violence in sport as: "*behavior manifestation which consists of explosive actions spontaneous or premeditated, which violate moral rules, physical integrity and social rights of peoples.*"[36]

As it was previously presented, there are numerous typology of violence, according to different forms of social organization, but they are not encountered in daily life in a pure form. Sports represent the symbolic form, but its effects become visible only through physical violence, this being able to influence collective violence appearance. Sports represent a confrontational state, whose purpose is to win or support the symbolic defeat, honour or contempt being shared among community members.

Jean-Yves Lassalle has analyzed violence in sport phenomenon from sociologic perspective and appreciated that two types are distinguished: **Sportspeople's violence** and **Supporters' violence.**[37]

1. **Sports people's violence** can be direct or indirect, voluntary or involuntary according to the type of sport. There are sports with a high level of violence such as box, wrestling or martial arts. There are also sports with a lower level of violence: chess or tennis, but not this type of violence is a problem for the society. The regulations for different sports, even those that imply a high level of violence, have been trying to diminish or even eliminate the violence consequences.

The majority of sociologists have concluded that violence gives rise to violence. Despite the fact that regulations for different sports have been devise so that to narrow or to eradicate the phenomenon, infringing them by players of a certain sport, new forms of violence are born, sometimes with disastrous consequences on participants. Thus, even any organizational effort regarding the event became useless.

2. The phenomenon which has captured the attention regarding violence in sport is **supporters' violence**. This phenomenon takes place most of the time on stadiums and outside them with worrying consequences as there are injured people and material goods destructions. Football is on the first place in this respect. In order to explain this phenomenon some factors which should be considered are related to supporters' personality on one side and on the other side are connected to social and psychosocial features. The beginning of research on supporters' and hooligans' violence on the football stadiums has implied to determine demographic and social coordinates of the violent groups of supporters (age, sex, profession, level of education etc). Having these elements clearly established, the researchers have deepen the study regarding the supporters' violence and have investigated causes related to lack of social integration, some dwellers marginalization, a certain degree of subculture. The sport event becomes a fight, individual or collective, against some obstacles or enemies, becomes an inner war for a spectator, that one indirectly implied by choosing a favourit, either an athlete or a team which represents the club, the city or the country.

Conclusions

Contemporary society evolution emphasizes the fact that despite the intensified measures and interventions of the specialized institutions in controlling delinquency and criminality deeds, in many countries a recrudescence and increasing number of violent attitudes and aggression are encountered in economical and financial-banking areas, fraud, blackmail, bribery, corruption as well. Violence is not a new phenomenon, its advent as its evolution as well being close connected by people, groups, organizations and humane society's development. This is one of the reason for which some

[35] Sorin Tudor Maxim ,"*Violența în sport"*, Publisher Suceava University 2006, p.70
[36] http://www.sportsisocietate ro/articol/violen-a-i-spectacolul-sportiv-o-perspectiv-psiho-social/48
[37] Idem, ,"*Violența în sport"*, Publisher Suceava University 2006, p.71 -72

researchers estimate that violence is a human permanence, close connected to human being and society development.

In conclusion, as it has emphasised in the present paper, in the contemporary society there are numerous forms of violence, but never in a pure form. Violence in sport is emphasized as symbolic violence, but this one can degenerate into other forms of violence. Most of the time, violence, in sport, a symbolic violence, becomes physical violence, primary which becomes conflicting, collective, communitarian violence.

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POPULATION POLICY OR SOCIAL POLICY?

ANDREI STANOIU*

Abstract
After 1989, the demographic situation of Romania population experienced a dramatic, very concerning and dangerous evolution trend. One of the first measures of the new political power was to abolish the very restrictive, anti-human and abusive legal regulation adopted in 1966 by the communist regime concerning abortion and the whole old demographic policy. As a result of this measure and of the worsening economic and social situation of the great majority of Romanian population, the birth rate declined sharply and, from 1992, the natural demographic growth rate became a negative one. The absolute number of Romanian population decreased more and more and, if nothing changes, in the next few decades it will be no bigger than 15 million people.
At the same time, the process of demographic ageing of population will accentuate, generating serious problems from demographic and social-economic point of view,
Taking into account the present demographic situation and, especially, the foreseen trend of evolution, it is more than clear that there should be taken some urgent, coherent and consistent measures in order to stop this dangerous demographic evolution, until it is not too late, and to avoid, as much as possible, a potential demographic disaster.
The problem is: what kind of measures should be taken and what kind of policy should be adopted? Some social scientists believe that a new population policy should be adopted; some others believe that rather a social policy should be adopted.
The purpose of my paper is to analyze this different opinions and to show that, behind the dispute on the terminology, should be taken consistent measures, at governmental level, in order to assure a substantial improvement of demographic situation, not only from a quantitative, but from a qualitative point of view as well, and to identify some of these kind of measures.

Keywords: *demographic transition, demographic increase, social policy, population policy, ageing process*

Introduction

The trend of demographic evolution of Romania population after the Second World War proved that our country entered, even if later, the process of demographic transition from high and oscillating levels of birth and death rates to a more and more lower ones. But, due to the specific social-economic and political situation of Romania, this process was very oscillating and contradictory. It was significantly influenced by social-economic, political, demographic and legislative factors (the rhythm of changes in social-economic structures, the demographic effects of the First and Second World War and the legislative measures taken in 1957, 1966 and 1984, especially regarding abortion).

Demographic policy promoted by Communist Party after 1966 intended to increase the birth rate in order to sustain such a rapid demographic growth as the Romania population to number at least 25 million people in 1990 and about 30 million people in 2000. This goal was intended to be achieved almost exclusively by very hard and anti-human legal measures. The results were very far from what was expected and, at the end of 1989, the birth rate was only about 16‰ and the population number – about 22 million people.

The failure of this policy proved that, in order for a demographic policy to be a successful one, it should be based on a scientific analysis of all factors (objective and subjective) that influence

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the demographic evolution of population and to use a large variety of measures, especially stimulator and not punitive.

In this paper I intend to review the main changes that took place in Romania demographic situation (a high contribution in this field had demographer and social scientists like Vladimir Trebici in "Is it Necessary a New Demographic Policy in Romania?", Vasile Ghetau in "Population Number Decrease and Demographic Ageing – one of the Biggest Challenges of Romania at the Beginning of 21st Century", Traian Rotariu in "Demography and Sociology of Population", Catalin Zamfir in "Demographic Transition and Associated Social Problems" and so on), to analyze the actual and potential effects of these changes and to propose some measures that could stop the negative evolution of demographic situation in our country.

I. Demographic Changes After 1989 and Their Effects

December 1989's events were the beginning of a very profound, difficult and painful process of transition from a highly centralized economy to a free market one, from an authoritarian, dictatorial to a democratic political regime that implied great changes in social-economic and political structure, in the family life, in its structures and functions, in the field of human behavior and human relationships and in the whole social life.

Some of the most significant and dramatic changes took place in the field of reproduction behavior of the population. These changes and their long term consequences were analyzed by some outstanding demographer and social scientists, as already mentioned in the Introduction above. They also tried to answer the following question: what could and should be done in order to improve the present and foreseeable demographic situation?

The problem is very complex and an adequate answer is very difficult to be found. As a matter of fact, there are some different possible answers, but nobody can say for sure which one is right and which is wrong. The problem is also very important and very concerning because, after 1990, the result of Romania population's evolution trend was a continuous worsening of demographic situation.

The most important phenomenon was the sharply decrease of birth rate from 16‰ in 1989 to 11.4‰ in 1992, with a tendency to remain relatively constant (around the value of 10.5‰) until now. If, during the last years of Communist regime, the number of children born every year in Romania was between 370.000 and 380.000, in the recent period this number was only about 210.000, that means less than 60% from the previous level.

This evolution was determined by different factors, like: abolishment, by the new political power, of very restrictive anti-human and abusive legal regulations adopted by the Communist regime concerning abortion; giving the population unlimited access to contraception and abortion; the decreasing number and the worsening age structure of fertile feminine population; the worsening economic and social situation of the great majority of Romania population, especially of the young people and so on.

As Traian Rotariu said, the birth rate seems to stabilize at the level of about 11% and the mortality, measured by crude death rate, is not expected to reduce too soon because of population ageing process, "so it is expected that demographic decrease of our country to continue, even if the possible measures of demographic policy could determine a rise in fertility rate"[1]. He also considered that "the possible measures of fertility reestablishment will have a small influence on population evolution in the next years, but they could have important consequences on medium and long term (if

[1] Rotariu, Traian, "Demography and Sociology of Population. Demographic Structures and Processes", "Polirom" Publishing House, 2006, pag. 211

they determine durable effects)"[2]. There is also a sign of abandonment of traditional Romanian reproductive behavior and adoption of western reproductive behavior.

At the same time, mortality rate tended to slowly rise, mainly because of the worsening economic situation and medical assistance and also because of the process of population ageing (specific mortality rates for older people being naturally higher).

The mortality rate level became in 1992 higher than the birth rate and the situation hasn't change by now. As a consequence, natural demographic increase became permanently negative, its level being between 1-2‰.

The most important effects of this birth and death rates' evolution are:

a) The continuous decrease in absolute population number from about 22 million people in 1990 to 21.6 million in 2005 and 21.4 million in 2010. If nothing significantly changes, the decrease will continue so that the Romania population will have, according to different projections, the following values[3]:

Year	V. Ghetau (million people)	United Nations Organization (million people)	EUROSTAT (million people)
2025	20.2	19.9	19.7
2050	16.7	16.8	17.1

The tendency of decreasing in population number is clear, but nobody could say for sure how much will be this decrease. This demographic evolution trend is also influenced in a significant way by external migration. It is important not only the migration increase rate, which was permanently negative (out-migration being higher than in-migration), but also the age structure of out-migrants. According to Vasile Ghetau[4], in 2002, the percentage of Romanian out-migrants between 20 and 40 years old reported to the total number of Romanian out-migrants is two times higher than the percentage of stable Romanian population in the same range of 20 – 40 years old reported to the total number of Romanian stable population.

It is probable that the tendency of decrease in population number will be reversed if birth rate begins to rise (which is highly improbable) and if the trend of external migration changes, so that Romania to become more and more an in-migration area, the in-migration level becoming higher than the out-migration level. But such evolution of external migration, even if possible, will certainly have very serious effects on social and cultural life, on population's lifestyle. It is possible to appear serious difficulties in social integration of in-migrants, ethnical and racial tensions, some social turbulence and so on. By now, it is almost impossible to estimate the nature and the magnitude of these effects.

b) The accelerated process of population ageing, of growing proportion of older people in total population. It is estimated, for example, that the average age of population will be 40.8 years in 2025, the proportion of all old population will be about 21% and of young population only 15%. This process has a lot of demographic and social-economic consequences.

First of all, fertility rate has small chances to recover or, at least, to remain constant. This is because this process affects not only the number and proportion of fertile females in total population, but the age structure of this category of population too. Under these circumstances, not only crude

[2] Idem, pag 212

[3] Ghetau, Vasile, "Our Necessary Children and the Future of Romania Population. A 2007 Perspective of Romania Population in 21st Century", "Romanian Sociology" magazine, 2007, tome 5, No. 2, page 74

[4] Ghetau, Vasile, "Population Number Decrease and Demographic Ageing – one of the Biggest Challenges of Romania at the Beginning of 21st Century", "Population and Society" Magazine, Supplement No. 1/2001

birth rate will tend to go down, but also the crude fertility rate (the age specific fertility rates being lower as women age increase). In order to maintain at least the present level of birth and fertility rates, a highly improbable substantial increase in specific fertility rates at all ages would be necessary.

Secondly, the crude death rate will tend to increase or at least to remain relatively high despite of the fact that life expectancy at birth has a moderate tendency to increase. One can expect, in the best case, a somehow lower age specific death rates and a higher life expectancy in the next years, as a result of improvement in social-economic life standards and in medical assistance quality. But this is not enough to compensate the effects of ageing process on the crude death rate, which will tend to remain at the current level or to slowly increase.

But this ageing process will probably have very serious effects on the whole social and economic life. With respect to these effects, there are different points of view.

For many demographers, there is no doubt that the mentioned effects of demographic evolution after 1990 are mainly negative and that this trend should be stopped. As Vasile Ghetau said, "the negative potential of demographic evolution after 1990, dominated by decreasing natality, will materialize its negative effects on long and very long term and maintaining present parameters and characteristics of demographic situation will only aggravate this potential"[5], but "the natality decrease had on short and medium term incontestable beneficial effects like an important reduction of some high costs that individual, couple and society support for pregnancy, motherhood, child arising and taking care of, education"[6].

Maybe he was right in what he said, but the trend of natality decrease is very difficult or even impossible to be reversed if there are not taken measures to stop it in a reasonable period of time the temporary benefits could generate very high costs later.

Some of the most important social-economic consequences of the population ageing process mainly determined by natality decrease could be considered:

- Continuous decrease of the number and proportion of economical active population in the total population and growth of old economical inactive population;
- The bigger pressure on state retirement system. More and more retired people will have to be economically sustained by a fewer and fewer economically active people;
- The bigger pressure on assurance and medical system;
- Serious consequences on the social and cultural life, on the population's state of mind, on the inter-generations relationship and the life pattern and so on.

Some authors[7] consider that the consequences are not so severe and some of them could be counteracted if the productivity of social work will grow significantly, if the retiring age increases up to 70 – 75 years or more, if the quality of life shows a very significant improvement, if the population health (especially of the older people) is continuously improving and so on.

From theoretical point of view, these opinions could be right, but in Romania it is almost impossible for these conditions to be fulfilled in a reasonable horizon of time.

With respect to the decreasing number of Romania population, different opinions are also expressed. If some social scientists consider that this process is really concerning and dangerous because of demographic and social economic consequences it implies, some others have different opinions. For example, Traian Rotariu said that: "Personally, I don't see arguments for big anxiety with respect to the evolution of the country's population number by itself. At the contrary, I strongly believe that it is more important for governmental policies to focus on the quality of state's <<subjects>> rather than on their quantity"[8]. More than that, if there is a small chance for natural

[5] V. Ghetau, op cit, pag 2
[6] Idem
[7] Rotariu, Traian, op cit
[8] Rotariu, Traian, op cit, pag 214

increase to have a significant contribution to a positive evolution of country's population, the solution for stopping the decrease of population number would be a positive migration increase in the next years. But, as the above mentioned author said, "Replacing migration could be an acceptable solutions for the country who receives migrants, if 1. It satisfies in the first place the economic requirements and 2. If the number of yearly in-migrants is small enough to make possible their social and cultural integration"[9].

Unfortunately, nobody can say for sure what evolution will have the external migration on long and very long term and what consequences it will have.

II. What could be done to stop this trend of demographic evolution?

Even if, as I already mentioned, there are differences between opinions expressed about the demographic evolution of Romania population, almost all demographers and sociologists agree that these evolutions are concerning and dangerous enough and some measures are needed to stop this evolution and to reestablish as much and as soon as possible the demographic situation.

Some social scientists and demographers[10] think that the only solution is to adopt a new demographic policy adapted to the new social-economic and political conditions existing in Romania. Some others consider that, even if a new population policy seems to be necessary, it is neither opportune nor suitable in the actual conditions, but a social policy focused on children and friendly from a demographic point of view is urgently needed[11]. The main argument is that "a policy of natality direct stimulation cannot have rapid results without a massive material support and it is not possible to be applied because of severe shortage in economic resources. And, even if a special effort is made in order to assure important economic resources for this purpose, the result will be rather modest and counterproductive. Instead of this, the negative effects will immediately appear: the increase of social dependency of families with many children from marginalized environments. In these conditions, the only possible demographic policy is an indirect one: a policy of family and children support"[12].

V. Ghetau has almost the same opinion: "Reestablishing fertility at a level which makes possible to stop demographic decline and to assure population number stabilizing or even a moderate growth couldn't come only from a different economic and social context […]. Only a well projected, efficiently applied and carefully monitored in its effects demographic policy will be able to lead to the established goal. But, until then, from a strictly demographic perspective, nothing can be done. Any measure taken in the actual social-economic context for natality stimulation will have undesirable consequences. This doesn't mean that social protection measures focused on families with children wouldn't be welcome"[13].

It is difficult to make a clear distinction between demographic and social policy and to choose between them. If a demographic policy has mainly quantitative goals (to influence the population number and the rhythm of population growth, especially by trying to influence natality), a social policy focused on family and children, demographic friendly, has mainly qualitative goals (to assure a better quality of population, with a higher life standard, a better health and higher education level and so on).

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[9] Idem

[10] For example Vladimir Trebici in his remarkable study "Is it Necessary a New Demographic Policy in Romania?", "Social Research" Magazine, no. 2 / 1991

[11] Zamfir, Catalin, "Demographic Transition and Associated Social Problems", in „Social Policies in Romania. 1990-1998", „Expert" Publishing House, 1999, pag 658

[12] Zamfir, Elena, "Social Policies Regarding Family and Child Protection in Romania", in "Social Policy Dictionary" coordinated by Luana Pop, „Expert" Publishing House, 2002

[13] Ghetau, Vasile, "Population Number Decrease and Demographic Ageing – one of the Biggest Challenges of Romania at the Beginning of 21st Century", "Population and Society" Magazine, Supplement No. 1/2001

Both goals are equally important, so an acceptable demographic policy should be integrated into a larger social development policy and considered as an important part of this policy. Consequently, this demographic policy should aim not only to assure a desired population number and a well-balanced age structure, but also to create such social-economic, cultural, educational circumstances necessary to guarantee an adequate quality and well-being of population.

The question is: what kind of measures should be taken in order to achieve these goals? It is very difficult to answer this question because a demographic policy should meet some important conditions in order to be a successful one.

First of all, it should have a scientific ground. One of the most important impediments in promoting a successful population policy is a cognitive one. In order for someone to take measures able to significantly influence natality, it is necessary to know the different factors which determine fertility, which are the motivating factors of different population categories' reproductive behavior. Until now, it is difficult for someone to say that these factors are known, that it is clearly identified what their role and importance are in influencing the fertility level. It is probable that these factors differ from one specific population group to another, so the measures taken should be adapted to the specificity of each group. At the same time, should be clearly established the target population of these measures, especially the population which should be encouraged and sustained to increase its fertility and the efforts and resources should be focused on this population. For example, if families with enough resources to arise children and to assure them an adequate level of education, professional qualification, health and so on have only few children (1-2 children like in Romania), these families should be primarily the target of these measures, adapted to their specific.

Secondly, because the population policy is usually quite expensive, society should have enough financial and material resources to promote it. Of course, a population policy could be promoted not only by economic means, but in any case the costs of such policy are relatively high. If the demographic situation is so deteriorated that taking measures to improve it cannot be postponed too much and the society doesn't have necessary resources for this (and this is the case in our country), the governmental decision makers, if they are responsible enough, should consider solving the population problem as a high priority and act accordingly, if they want to avoid very dangerous future demographic evolution.

Finally, in promoting a population policy, ethical impediments should be also taken into account. That means the measures taken shouldn't affect in any case human dignity and the freedom of marital couples or women to decide the number of children they want to have . As Kingsley Davis wrote, the main difference between family planning and population policy is that, if in the first case parents or women have the right to take any measures they want in order to achieve proposed goals, in the second society doesn't have the right to take any measures considered necessary to obtain the number of the population desired.

Conclusions

The demographic situation of our country and the established trend of its evolution are very concerning and require urgent, coherent and well sustained measures in order to significantly improve this situation. Consequently, a new well designed and scientific based population policy should be adopted, as a part of a larger social-economic policy. The objectives of this policy should be not only to assure the desired number of population and a well balanced age structure of it, but also an adequate quality of population (a higher life standard, a better state of health, education, professional qualification and so on). Further researches would be necessary in order to clearly identify the specificity of the new reproductive behavior and the factors which influence it, in order to determine the measures that should be taken on short, medium and long term. At the same time, all governmental and political decision makers should understand how dangerous and concerning the present demographic situation is and prove more responsibility in taking measures in order to improve this situation until it is too late.

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ACADEMIC PERFORMANCE THROUGH COMMUNICATION-ORIENTED MOTIVATION

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Abstract
Researchers' focus on academic performance brings forth the "quality of academic life" and it's highly positive correlations with "students' welfare" as well as with certain personality features such as "self-respect" and "positive affectivity" alongside negative correlations such as „academic stress" and "negative affectivity".

Key-words: *motivation, communication, performance, educational relations, academic environment.*

Introduction

An academic welfare index is the "academic satisfaction/dissatisfaction", as a result of the educational policy and hence of the *training style* focused on students' development, on their involvement in the training practice, on their relations with teachers and colleagues as well as on the emotional support provided throughout the training process.

Therefore affective comfort will imply a sense of affective safety, of accepting and recognizing a human being as valuable to the group of colleagues and teaching staff, whereas the lack of a concord between *students' expectations and teachers' high expectations* as regards academic performance and discipline might affect the relations among them, engendering dissatisfaction on both sides. Furthermore the educational process would provide a strenuous environment conducive to students' negative satisfaction.

The **main objective** of our **study** which is part of an ampler survey carried out on a **sample** of 336 students of the Faculty of Law in an University, was to scope students' motivations for and interests in learning foreign languages as a means of attaining performance in foreign language communication. The underlying hypothesis was that if the motivating factors used by foreign language teachers to induce a certain learning conduct are articulated in a consistent set, then communicative-professional competence increases with the linguistic performance defined as a) linguistic skills acquisition and b) operational linguistic efficiency. Direct qualitative and quantitative investigation tools have been used in the survey such as Student questionnaire/adapted form: CH-MSA-IN 2006 a focus group with high academic performance students, a focus-group with foreign language teachers, co-participative observation, evaluation scales (applied in the view study), structured essay, case study, quantitative and qualitative analysis of documented foreign language study evidence (notebooks, reports, rolls, tests), statistical mathematical methods (statistical correlation, Pearson linear correlation coefficient – r).

From the analytical viewpoint the study of causative, conditional and methodological factors, which are instrumental in developing a thorough and efficient study of foreign languages has an open structure. For pragmatic reasons we have only dealt with factors that are extremely motivating and of topical interest for the present essay.

Performance Impact Variables

Academic Self-efficacy is the confidence in own capability of mobilizing cognitive and motivational resources towards attaining academic performance. It therefore implies the measuring

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of the capacity of performing activities rather than personal qualities and links to the criterion of *personal power* in fulfilling tasks. It is measured by the *degree of certainty* with which an individual can fulfill a task at the highest level. The measurement of self-efficacy hinges on the academic evaluation context and must be done before students achieve activities likely to bring about alterations in the perception of the academic self.

Schunk et al (1989) have shown that signals of academic progress towards performance are capitalized by setting up confidence in personal efficacy. This is proved by the efficiency with which students use their skills. Irrespective of such skills, psycho-social influences alongside evaluative feedback and social comparison will enhance self-efficiency confidence.

Building on **Bandura'**s *hypothesis* (1977) that *"self-efficacy confidence have an influence on the level of effort, persistence and choice of activities",* Schunk et al. (1985) have noticed students' progress in acquiring skills through a methodical qualitative approach and through the development of confidence in own problem solving abilities. As a result, increased efficiency brings forth success expectation which further generates perseverance against students' issues. Perseverance may thus lead to success, which enhances self-efficiency confidence in similar circumstances.

Self-efficacy confidence acts by the *motivational mechanism*. If students' trust in their self-efficacy is poor, then the resources they will be putting into academic work will be quite scarce, which will most likely bring about failure and the sense of self-inefficiency. This feeling triggers states of ruminative affectivity, absenteeism, aggressiveness, and training discontinuity. Students' confidence in their efficacy in achieving their academic tasks has an influence on their emotional states, motivation and hence their success and performance.

Performance expectations are crucial in the "*input effort-output result*"e equation. *Teachers' expectations* may thus become predictions which come true, endowing students with *self-efficiency confidence* which they so much need. Or, on the contrary, they may deliberately deprive students of self-efficiency confidence, which will affect their motivational, cognitive and emotional processes, influencing their behaviour both directly and indirectly, via their effect on the regulating mechanism built on personal performance standards and goals. Starting from the teacher's beliefs, some distortions may emerge in his/her relations with the students and even in the relations among students, which impairs on the educational environment and hence on the chances of academic performance.

ON THE EDUCATIONAL SIDE Albert Bandura (1995) advises teachers to focus more on the enhancement of students' self-efficacy and to take care of self-confidence of both teachers and students.

Perceived self- competence is a psychological construct directly related to self-efficacy. Originally conceptualized as *an internal impulse generating the sense of competence*, perceived self-competence facilitates the development of confidence in personal capabilities.

ON THE EDUCATIONAL SIDE The teacher should help his/her students to realize that same skills may be applied differently according to contextual circumstances, to become aware not only of their own cognitive and behavioural skills but also of the motivational management aptitude as well as resistance to problem-induced stress.

Locus of control is **Julien Rotter**'s concept (1966). *Internal locus of control* implies the belief that personal strength and control can influence life outcomes and events, whereas *external*

locus of control implies that personality force has a minimal effect on life events which are caused by chance or others' power.

ON THE EDUCATIONAL SIDE The teacher should attach importance to this concept since a dictatorial climate at class or even by successive evaluation against increasing exigency may induce to students the sense of a limited control over their activity level and self-inefficiency, which will focus them on fear of failure rather than on task requirements.

The self-image (the Self-Concept or the "g" Factor) is the central nucleus of personality with a major role in selecting values and goals; it is the mirror of representations of own skills, attitudes and behaviours. Deemed to be multi-dimensional and hierarchically structured, it integrates the "social Self", with the "academic Self", the "emotional Self", the "competence Self", the "physical Self", the "family Self". **Bracken et. al** (2000) have confirmed that these dimensions contribute to the structuring of the global image of personality.

The Self-image (the Self)
Analysed though the real Self, the future Self, the ideal Self

The real - actual Self derives from experiences which we have lived within the socio-cultural milieu we have been living in and it comprises: "*the physical Self*", "*the emotional Self*","*the academic Self*", "*the competence Self*", "*the family Self*", "*the social Self*".

The physical Self structures the development, the acceptance of own corporality, the manner in which an individual perceives itself and believes s/he is perceived by the others.

The emotional Self brings together an individual's experiences by reference to her/himself, to the others and to the future. If the emotional Self is stable, then the world will be perceived as a safe environment which does not threaten the self-image.

The *academic Self* refers to the manner in which the self receives and integrates information contents about itself and the world, the manner in which these operate. The more the self-image is kept at the positive pole, the higher the individual's performances rise. **Parsons et al.** (2001) building on the approach of other authors (James Marcia, 1980 ; H. March, 1989 ; Marsh and Jeung, 1997) on the multi-dimensional features of the Self-Concept, focus their entire research on the "*academic Self*", on the ***relationship between school performance and the academic Self***, on working techniques and on training activity design. These recent studies have drawn attention to the impression which school leaves on each individual's self-image.

The *competence Self*, of the action possibilities, refers to an individual's clear awareness of her/his own skills - relational, assertive communication, career planning, By putting face-to-face people's assessments about the self with the actually obtained performance, the image of own competences will be shaped.

The *family Self* expresses the emotional comfort felt by reference to the family members.
The *social Self* includes the personality dimension which we reveal to the others alongside our responses in our inter-action with them.

The ***future Self*** refers to the manner in which an individual perceives her/his personal development potential by projecting her/himself into the future. It consists of the *desired Self (*all projectible aspirations, motivations and goals) as well as the *anxious Self (*what an individual does

not wish to be – both of them resulting from a combination of representations of the past with those of the future. The desired Self yields joy and self-confidence, while the anxious Self releases fury, anxiety and depression.

The ***ideal Self*** refers to what we would like to be, and for which we are concerned with identifying the necessary resources. Orientation and domination of the self-image by the ideal Self when remotely placed from the real, may induce unhappiness and frustration.

ON THE EDUCATIONAL SIDE it is important that we make students aware of the value of the *possible Self* which is attainable and highly energizing. Thus, the ideal Self will mark the roadmap of the possible (future) Self. The teacher should bear in mind the fact that the self-image may be a personal construct with a regulating function in action programming and setting aspiration levels. But s/he should also take into account that an individual's subjectivity and the others' subjectivity – which are two intertwining, key elements – may parasite the ideal image.

As concerns the role of *expectations* in the academic outputs, adepts of social-cognitivism have shown that teachers' expectations shape students' behaviour and *performances*, harmonizes their *self-image*. As a result avoidance of negative labelling and differentiated approach become prerequisites of students' personality evolution.

Self-image is not static; it has got its own dynamics underpinning the assertion of the *self-image* (*self-assertiveness*) and *defence of self-image*. A student's positive self-image is a pre-requisite of his/her physical and psychological health.

Self-esteem is *the evaluative and affective mirror of the self-image*; it is the manner in which we assess ourselves by reference to our own expectations and to the others. A high-level self-esteem expresses optimism, self-appreciation and self-confidence, while negative life experiences will entail decreased self-esteem and a sense of devaluation accompanied by emotional states such as sadness, anger and even anxiety.

Competence (cognitive skills), *merit* (physical, psychological or moral traits), *power* (ability to influence others), *attribution* (internal or external) of academic failure, *acceptance* (respect, admiration) are the main dimensions influencing stability and the self-esteem level. The flow of academic successes and failures stabilizes self-esteem; also, comparison to others or reference to the social context has its significant role because for a student signals from the teacher, the colleagues or the family can equally be a powerful catalyst and a source of blockage. The teacher can assist students in the development of their self-esteem by focusing on their positive aspects, giving appreciation to their individual efforts rather than to their skills, offering options and opportunities for getting involved in the planning of learning activities and in making decisions, but not before delineating expectations according to their levels.

ON THE EDUCATIONAL SIDE Trust, autonomy and positive enhancement will be given to students with a view to developing **internality** - a dimension which stimulates students' activism, affective welfare and energetic support needed for reaching high academic performance. Self-esteem which defines the degree of an individual's tendency to positive self-evaluation and to rejection of positive attributes, becomes an index of the welfare which a teacher aiming to attain high performance with those students should make them aware of.

Factors highly motivating thorough and systematic study of a foreign language
With values between: **80%-70%**

- Scientific competence of the foreign language teacher

With values between: **75%-60%**

- Self-confidence in the acquisition and command of a foreign language;
- The actual (or correct) image of the performances to be attained in the study of a foreign language;
- Types of behaviour self-control in foreign language training;
- Open communication style in foreign language training;
- Positive educational relations;
- Tonic academic environment.

Stimulating academic style – tonic academic environment

a) The study of correlation matrices (Pearson method) revealing the whole item grouping range and therefore the location of key factors, elicits in student's view, the following significant value hierarchy for their academic success:

1st degree: **"stimulating academic style" – "tonic academic environment"** (r = 0.893);
2nd degree: **"tonic academic environment" – "contents student's needs"** (r = 0.862);
3rd degree: **"compensatory valences and learning style assurance/differences" – "cross-disciplinary content**" (r = 0.822).

The 1st degree correlation coefficient with the highest, thus the most significant, value, r = 0.89, is the correlation **"stimulating academic style" – "tonic academic environment".** This shows that higher-education activities through the way they are unfolded, primarily contribute to the quality of the academic environment of the particular university faculty and consequently to academic and professional success. It is absolutely evident that a systematic, democratic, satisfaction-yielding, autonomy creating, modeling, safeguarding, efficient style is what students appreciate as positively stimulating in their studies, in maintaining optimal student-student, student-teacher relationships as well as contributing to a tonic academic environment beneficial to their success.

b) Another key factor in maintaining an academic environment favourable to student's academic success is the *curriculum*, its contents – particularly those meeting students' needs – and the way it is devised, built and implemented. We specifically refer to the use of some criteria of which essential for students are "cross-disciplinary contents" and "compensatory valences and learning style assurance/differences"

c) It is certain that students are very interested in their academic, and implicitly professional, success. A lot of correlations mentioned by them refer to this in various ways along each correlation range from each of the 3 value-descending levels.

Thus, on **level 1** the correlation coefficients range between **r = 0.893 and r = 0.891**, that is between the correlation pairs "stimulating academic style" – "tonic academic environment"; "wide scope of training methods" – "tonic academic environment".

From the analytical view point, within the correlation coefficient range of this level between the above mentioned extreme correlation pairs the following significant value hierarchy is elicited:

TABLE I Correlation coefficients at level 1 of statistical representation

Current no.	Correlation coefficient	Correlation
1	r = 0.862	tonic academic environment – contents which meet students' needs
2	r = 0.822	Compensatory and diferentiated valences – cross-diciplinary contents
3	r = 0.809	Wide training method range - stimulating academic style
4	r = 0.806	stimulating academic style - contents which meet students' needs

These correlations show that for academic-professional success students believe that alongside the curriculum (especially "contents"), which meets their needs and interests, as well as "compensatory and differentiated values" by reference to study styles "cross-disciplinary contents" is another criterion practically significant for the design, build and didactic implementation of the teaching-learning units, which shapes into teaching strategies conceived and used in alternatives adaptable to the characteristics of the student groups., Noteworthy is the fact that such contents meet students' needs, impose a certain style to academic performances, endow them with a stimulating and efficient tone. For instance, this applies to the correlations "wide range of training methods" – "stimulating academic style", having the correlation coefficient r = 0.809. and "academic stimulating style" – "contents which meet students' needs", having the correlation coefficient r = 0.806. All this in so far as "stimulating academic style" correlates to "contents which meet students' needs" as well as to "wide range of training methods"; and consequently "contents which meet students' needs" correlates to "wide range of training methods".

Level 1 of the correlation degrees reflects therefore the high significance which students attach to the teacher's academic style and to the academic environment for their higher education and professional success. These factors have actually very high close-value correlation coefficients. A stimulating, energizing motivation engendered by a comparable academic style and environment will contribute to the maintenance of academic success at a top level. In this respect the correlations fall under the pair **"stimulating academic style" – "tonic academic environment"**

Thus, level 1 correlations confirm students' belief that crucial for their academic success is the quality of the academic environment in the university/faculty/course or seminar. The most essential factor underlying this is a stimulating academic style, rendered both by a suitable cross-disciplinary curriculum, and by the availability of compensatory tasks for personalized assistance.

The scientific competence of the foreign language teacher

The *scientific competence of the foreign language teacher* is perceived as highly motivating for students. It imposes respect and adequate conduct towards a thorough, systematic study of a foreign language. This factor is in their opinion at the higher level of the evaluation rates, between 70% and 80%, specifically 72.3%, with 243 of the students *mostly agreeing* that the scientific value of their teacher's qualification determines their response to their professional training challenges, where command of foreign languages ranks quite high. Thus a total of 91.3% of the respondents (i.e. 307 students) *mostly agree* and *quite agree* with the above-mentioned response.

This fact is confirmed by the large number of correlations where a **foreign language teacher's scientific competence** occurs, specifically 14 correlations at levels 1 + 2 plus their

varieties. This shows that students agree with the role played by a teacher by virtue of his scientific competence in the entire educational component of the teaching, learning and evaluating act, both in what s/he achieves with students and how s/he leads them to the aimed performances. Noteworthy are the following ways mentioned by students: "feedback", "organized style", "systematized content", "adequate strategies", "clear goals", "progressive and stimulating tasks", "high learning skills", "elimination of any learning issues or teaching-derived misunderstandings" in addition to elements which define "evaluation and set up of high output levels" as well as "teacher's progressive control". Last but not least, educational relations appear as relevant: "teacher-student" relationship, "student-student" relationship, "cooperation relationships", "positive competitiveness" relationships alongside those pertaining to the "understanding of students' needs".

For instance students are appreciative of a teacher's open, exciting, stimulating communication style, which helps them to acquire and improve their foreign language communication competences necessary in their future profession. This is how the teacher's scientific competence influences the entire educational act. Worth noting here is the hierarchy of students' preferences.

It can be stated that:

a) students are motivated by a competent foreign language teacher who provides the teaching-learning feedback, also maintaining the actual image of the performances to be attained.

The following correlations are detected at the level of degree hierarchy:

1st degree: "**teacher's scientific competence" – "feedback provision"** ;
2nd degree: "teacher's scientific competence" – "actual performance image" ;
3rd degree: "teacher's scientific competence" – "set up of high output levels" ;

b) immediately following is students' appreciation of the teacher's contribution to their qualification as high professionals in their fields of choice, self-confident, confident in the communication competences acquired at the level required by their professional accomplishment.

An illustration of the above mentioned is the following order of degrees:

4th degree: "teacher's scientific competence" – "types of behaviour self-control";
5th degree: "teacher's scientific competence" – "self-confidence" ;
6th degree:"teacher's scientific competence" – "communication competences"

c) an additional observation to the above refers to students' interest not only in what and how much to learn but also in how to learn, which denotes "*a cognitive-emotional-attitudinal synthesis*" so necessary in the profession they are training for.

Self-confidence in the study of foreign languages

Education specialists, and in our study students as well, regard the role of *Self-confidence* as essential in ensuring personal, social and professional success. Students thus feel motivated by the foreign language teacher who enhances their positive thinking, builds up a rich knowledge pool, makes them masters of their own forces and therefore "free". This is why this sub-item has been regarded as a key motivating factor by 206 of the students, i.e. 61.3% of the respondents, with an opening towards a large number of correlations with appropriate correlation coefficients.

Among students' options "self-confidence" is primarily connected to "communication competences" acquired in foreign language learning, then in descending order, to the "type of behaviour self-control" over foreign language learning, to foreign language "learning skills" and to the "actual image of the performances" to be attained in a foreign language. This reveals the fact that students are interested in ***how*** to inter-relate and inter-communicate, how to learn and raise to the performance level required by a proper command of a foreign language. As a result, highest appreciation appears to be given to the foreign language teacher who teaches them "how to do" not only "what to do" and "how much to do". The bifactorial relationships are dominated by the following correlations:

Self-confidence
(1) **"self-confidence" – "communication competences"** (r = 0.770) ;
(2) **"self-confidence" – "types of behaviour control"** (r = 0.769) ;
(3) **"self-confidence" – "learning skills"** (r = 0.750) ;
(4) **"self-confidence" – "actual performance image"** (r = 7.39).

Students are aware that "self-confidence" indicates how much they feel they "command" a foreign language and their intercommunication and relational efficacy in a foreign language. This is why this sub-item correlates to whatever belongs to the foreign language educational act: the manner in which feedback is provided in the teaching-learning process, realistic set up of desired output levels, resolution of learning issues, educational relations which ought to exist between teacher and student, student and student, teacher's competence, cooperation relationships, teacher's efficacious, crystallized and organized style.

Herewith our findings in order of options:

Self-confidence:
(1) "self-confidence" – "feedback provision" ;
(2) "self-confidence" – "set up of high output results" ;
(3) "elf-confidence" – "resolution of learning issues" ;
(4) "self-confidence" – "positive educational relationships" ;
(5) "self-confidence" – "teacher's scientific competence" ;
(6) "self-confidence" – "cooperation relationships" ;
(7) "self-confidence" – "organized teaching style".

The actual image of performances in foreign language training

Students are interested in the image of the performances to be attained in a foreign language which provides their confidence in and satisfaction with their personal, social and professional success. This is why they consider that in order to own and turn such an image into reality, to reach professional satisfaction, a solid knowledge and management of their own foreign language vectors is needed: "efficient manners of behaviour self-control", high quality "self-confidence", proper "learning skills", "high communication competence". This engenders a steady quest for "self-improvement ", stake raising, "intercommunication stimulation", all in an educational process where the " teaching-learning feedback" operates on expected parameters and "educational relationships" are optimal.

The most apparent factorial pairs with very good correlational values are given below in descending order:

Actual performance image:
(1) **"actual performance image" – "types of behavior self-control"** (r = 0.792);
(2) **"actual performance image" – "communication competence"** (r = 0.778) ;
(3) **"actual performance image" – "set up of high output levels"** (r = 0.761) ;
(4) **"actual performance image" – "feedback provision"** (r = 0.754) ;
(5) **"actual performance image" – "self-confidence"** (r = 0.739) ;
(6) **"actual performance image" – "learning skills"** (r = 0.705) ;
(7) **"actual performance image" – "communication stimulation"**(r = 704) ;
(8) **"actual performance image" – "positive educational relations"** (r = 0.700).

According to student' opinion, in order to turn the performance image into reality the foreign language teacher's competence underpins both the teaching act ("organized style", "teaching strategies", "avoidance of teaching misunderstandings") as well as the learning act ("learning issues") and not least evaluation, especially "progressive checking/controlling". Noteworthy is also the teacher's tactfulness in developing and maintaining "cooperation relationships and circumstances" so necessary to an efficient intellectual work climate.

We are listing below the factorial pairs as evidence for the above assertions:

Actual performance image
(1) "actual performance image" – "teacher's scientific competence";
(2) "actual performance image" – "cooperation circumstances";
(3) "actual performance image" – "resolution of teaching misunderstandings" ;
(4) "actual performance image" – "progressive control" ;
(5) "actual performance image" – "organized teaching style" ;
(6) "actual performance image" – "resolution of learning issues" ;
(7) "actual performance image" – "teaching strategies".

A challenge for students is to get performance outputs in a foreign language. The clarity and actuality of a performance image is directly related to the extent to which the performance is understood and acknowledged as well as to its attainment motivation. Hence the requirement that a foreign language teacher should be open in communication, active, indefatigable and continuously exciting, able to determine competitive circumstances, designer of progressive, stimulating tasks, an excellent manager, well organized and systematic in content value presentation, properly responsive to individual needs.

Efficacious types of behavior self-control in foreign language training

"*And if there are two moral attitudes which our times might need, they are definitely self-control and compassion*" says Daniel Goleman in his "Emotional Intelligence".

Indeed, self-control is one of the supportive pillars in the emotional architecture of our professional behavior; it is the skill with which we place reasoning on the scales when emotions are too heavy on the soul platter; it is the IQ with which we try to honour the new paradigm of our times which advises us to "harmonize the mind with the soul".

Therefore, the teacher has the noble mission of channeling towards this fundamental ability so much needed for maintaining the harmony of feelings and emotions which sometimes may become far subtler and rigorous than words.

Let us not ignore the cries and whispers of emotions which may induce not only power but also weariness; nor should we ignore their beauty or "non-beauty" which may surge or lower; let us learn how to recognize them within ourselves and in the others, let us learn how to channel them towards noble goals such as success and performance.

The surveyed students have given "*great*" attention to self-control in foreign language teaching/learning, which is most necessary for the new generation behaviour and life style.

The manner in which students manage their cognitive and emotional powers regarded as "types of self-control in foreign language teaching/learning" is connected to their *challenge* level and hinges on how well their targeted foreign language performance is *known* and *acknowledged*. To this a key factor in reaching and even exceeding the performance should be added, namely "students' self-confidence". This is why students consider that it is only a proper management of the training act in the foreign language classes that can provide the "so much necessary teaching-learning feedback", that can determine "the actual output levels", can provide them with the exact manner in which "learning skills" and "communication competence" are acquired. Additionally it can boost "their self-confidence", it can show "the targeted performance".

The correlations are given below in descending order:

Types of behavior self-control
(1) **"types of behavior self-control" – "actual performance image"** (r = 0.792);
(2) **"types of behavior self-control" – "communication competences**" (r = 0.780);
(3) **"types of behavior self-control" – "learning skills"** (r = 0.775);
(4) **"types of behavior self-control" – "self-confidence"** (r = 0.769);
(5) **"types of behavior self-control" – "feedback provision"** (r = 0.737);
(6) **"types of behavior self-control" – "set up of high output levels"** (r = 0.722).

Students have a high opinion of foreign language teachers who have a rich teaching experience and scientific competence, who quite tactfully manage to set up and maintain positive educational relationships, who stimulate inter-communication within proper limits, who appreciate competitiveness as a positive boosting factor, who eliminate any teaching cognitive disruptions, who balance teaching/learning issues.

Other significant correlations are:

Types of behavior self-control
(1) "types of behavior self-control" – "communication stimulation";
(2) **"types of behavior self-control" – "teacher's scientific competence**";
(3) **"types of behavior self-control" – "competitive circumstances**";
(4) "types of behavior self-control" – "educational relations";
(5) **"types of behavior self-control" – "resolution of learning issues**";
(6) "types of behavior self-control" – "resolution of teaching misunderstandings".

Open communication teaching style, an optimal prerequisite of foreign language training efficacy

An open communication style actually designates a *style open to an optimal communication circumstance*. This is considered both from Rogers' *nondirectivity* approach (including "unconditioned acceptance of the others", "benevolent neutrality", "authenticity", "empathy") as well as from Porter's *active listening* approach by which the less we interpret the more we allow others to express themselves in a personal and profound manner (first rule of non-interpretation), the less we evaluate somebody the higher his/her possibilities of authentic expression (second rule of non-evaluation), the less we counsel somebody, the wider his/her possibilities of real expression (third rule of non-counseling), the fewer questions asked, the wider his/her possibilities of free expression (fourth rule of systematic non-questioning), the more we wish to facilitate others' communication, the more we should show that we are interested in what s/he is telling us and that we are listening in order to understand, not to judge, him/her (fifth rule of understanding).

The students' answers to the questionnaire prove that they have not felt judged or guided, but simply listened to as regards their view on the place and role of foreign language training which should be as high as possible for ensuring their personal, social and professional successes. The findings point to the value of the "open style" in which they have communicated own opinions about foreign language training: the significance of "positive educational relations" and of "cooperation relations", "understanding of professional needs", "teaching strategies", "progressive control", "progressive and stimulating tasks" , "elimination of teaching misunderstandings and of learning issues", "teacher-induced stimulation", "competitive circumstances", "organized and systematized contents".

Observing the two levels also indicated in data processing, we reach the following values of the correlation coefficient (Pearson model) which reflects the above statements.

At level 1:

Open communication teaching style

(1) **"open communication teaching style" – "progressive control"** (r = 0.799);
(2) **"open communication teaching style" – "teaching strategies"** (r = 0.754);
(3) **"open communication teaching style" – "resolution of learning issues"** (r = 0.734);
(4) **"open communication teaching style" – "resolution of teaching misunderstandings"** (r = 730);
(5) **"open communication teaching style" – "teacher's understanding of student's needs"** (r = 0.718);
(6) **"open communication teaching style" – "set up of cooperation circumstances"** (r = 714);
(7) **"open communication teaching style" – "educational relations"** (r = 0.713);
(8) **"open communication teaching style" – "progressive, stimulating tasks"** (r = 0.702).

Positive educational relations in the foreign language class – an efficacy generator towards academic success

The academic environment addresses relations between students and teachers, among students, among teachers, between teachers and students. Its openness can be ensured only through an optimal communication style underpinned by appropriate educational relations.

By virtue of his/her main activity, which is training, the university teacher is a highly prestigious scientific personality, a true hallmark in the taught subject. Through training a teacher conveys knowledge to students, shapes students' skills and attitudes needed in their future profession so as to enable them to perform as specialists, with professionally typical competence, and sets up formal, non-formal and informal contacts. Hence the significant role of pedagogical and educational aspects in the teaching and coaching processes. A key aspect is obviously the balanced choice between student's adaptation to the teacher's demands and the adaptation of a teacher's style to the features of a certain group of students. The decision is at the discretion of, but not only of, the teacher, who should know best what exactly of the taught subject should be transmitted to students and particularly how, through which relations and, last but not least, how open these relations should be.

It is only appropriate relationships that enable reciprocal understanding. Through such relations students gain confidence in asking questions to the teacher in order to clarify their uncertainties, as well as in unleashing their curiosity, creativity and willingness to face and overcome challenges, which leads to improvement of training activities.

In the teacher-student relation, the student influences directly but also indirectly the teacher's training behavior. This relation cannot be sustained unless the teacher is a "model", a lively personality with whom students can *communicate permanently*. The relationship will be quite special, endowed with a strong psycho-affective trait, by means of the most natural gesture of the *hand put out…. in search of support…*, by means of the most human gesture of the *hand put out… to provide the searched support… whenever needed.*

The foreign language teacher is regarded by students through various quality angles as a reflection of his/her own personality. Thus students believe that teacher-student educational relations are positive only if they rely on "teacher's competence" of providing students' actual performance image, on the professionalism with which the teacher manages and organizes his/her training activity ("organized teaching style", "teacher-induced excitement", "communication stimulation"), on the "openness with which the teacher resolves teaching misunderstandings", on the teacher's responsiveness to novelty and relational openness towards cooperation and dialogue ("open communication style", "set up of cooperation circumstances").

Below are given the correlation values of this factorial group:

Positive educational relations

(1) **"positive educational relations" – "communication stimulation"** (r = 0.799);
(2) "**positive educational relations" – "set up of cooperation circumstances"** (r = 0.735);
(3) "**positive educational relations" - "resolution of teaching misunderstandings"** (r = 0.732);
(4) "**positive educational relations" – "teacher-induced excitement"** (r = 0.730);
(5) **"positive educational relations" – "organized teaching style" (**r = 0.717);
(6) **"positive educational relations" – "resolution of learning issues"** (r = 0.714);
(7) **"positive educational relations" – "open communication style"** (r = 0.713);
(8) "**positive educational relations" – "actual performance image"** (r = 0.700).

Conclusions

The conditional-motivational factor approach in the academic study of foreign languages at university-level – equally rich and complex – is located at the top of the evaluation scale of students'

performance and success. The range of students' choice of factors motivating both their foreign language-related behaviour and other players involved in the teaching-learning-evaluation process elicits a refined, creative and creational process inherent to the human value space. Its variations refer to values dependent on clarity of objectives, content organisation, quality of the subject curriculum and, not least, the teacher's personality, who stands for a model to be followed in all aspects.

The basic factor correlation enabling the study of foreign langauges should combine a tonic academic environment, with a stimulating teaching-learning style based on a rich array of educational methods and techniques apt in delivering a curriculum appropriate to the students' professional needs.

Students believe that 'the ability to communicate and inter-relate' are instrumental to successful performance which depends on higher methodological competences and self-evaluation skills, more diversified study methods and techniques as well as a wider freedom of choice – all enabled by a stimulating academic environment.

A curriculum that responds to the students' needs is the model of the essential factor correlation accounting for students' academic success. It should be based on well-designed training-learning methods, with adaptable alternatives, delivered through all facilities towards better information and documentation (full study support: auxiliary materials, internet, magazines, books), in a performance-oriented tonic academic environment, which, with systematic student-oriented curriculum contents, should be adding to the pedagogical methods and teaching materials.

The way in which students have responded to the delivered questionnaire proves that they have not felt judged, analysed, interpreted or guided but simply listened to with much understanding. Hence the value of the open style in which they have communicated their opinions about the significance of positive educational and cooperative relations, the understanding of professional needs, teaching strategies, progressive control, progressive and stimulating tasks, elimination of teaching misunderstandings and of learning issues, teacher-generated stimulation, competitive situations, well-organized and systematic contents.

The surveyed students consider as key factors in determining positive teacher-student relations the teacher's competence in providing an actual, correct picture of their performance, the teacher's professionalism in managing and organizing the teaching activity; the teacher's willingness to openly resolve any teaching-related misunderstandings; the teacher's responsiveness to novelty; and the teacher's relational capacity open to cooperation and dialogue (open communication style which facilitates cooperative circumstances).

The success of a higher education teacher within a tonic background able to yield "academic satisfaction", can be attained through a teaching activity which creates "performance-related" values as regards the "students" factor. Students expect the training style to be focused on ensuring their "academic welfare"; "the teaching strategies" to be designed in as wide a scope as possible, with alternatives adaptable to the students' characteristics and needs; the compensating and/or assisting tasks to be differentiated and even personalized as appropriate and the difficulty progression criterion to be observed.

The insertion in the questionnaire of a whole range of motivational factors implemented further on in the study of *academic performance by motivation towards communication in a foreign language* has enabled a quite interesting array of responses whose distribution and hierarchy could indicate "pools of interest" for foreign language teachers, for students as well as for foreign language curriculum designers and decision makers.

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THE LEGITIMACY OF INCLUDING THE SOCIAL PARAMETERS IN EVALUATING THE HEALTH STATUS IN THE SOCIAL ASSURANCE SYSTEM

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Abstract
The social state crisis encouraged a reductionist tendency which had recently developed in the evaluations of the health status in the social assurance system. A holistic, psycho-medical approach, which took in consideration the implications of the social factors regarding disability, was confronted with a strictly medical model, in which the illness is exclusively considered a person's problem; therefore, the references towards the „social" are irrelevant. In this context, the present paper states the question of the legitimacy of using some sociological concepts, in medical expertise, considered relevant in this area, such as: „occupational access" or the „social functioning of the person". The present study doesn't stop at offering as arguments of legitimacy the authority of some recommendations regarding the use of the social-medical model, including the evaluation of the health status, recommendations received from the behalf of OMS and the European Council (see CIF). The paper presents the construction of specific evaluation instruments and tries to identify the sense in which using the references regarding the „social" could influence the pressures in the social assurance system.

Keywords: *social parameters, health status*

I. Introduction

In this paper we attempt to find an answer to the issue regarding the inclusion of certain social components in the health assessments that are applied in the social security system.

Clarifying the chosen subject is particularly important now since – considering the existing crisis that affects the "welfare state" – there is a more and more frequent tendency towards understanding and assessing "illness" from a strictly medical perspective. The reason for narrowing the perspective on illness, which means giving up the complex biological, psychological and social factors it involves, lies in the fear that such a complex approach would lead to the appearance of "medically illegitimate cases".

There are at least 3 sources on which we rely to prove the legitimacy of connecting social parameters for assessing health in the social security system:

- Scientific
- Normative
- Praxiological.

The present study doesn't stop at offering as arguments of legitimacy the authority of some recommendations regarding the use of the social-medical model, including the evaluation of the health status, recommendations received from the behalf of OMS and the European Council (see CIF). The paper presents the construction of specific evaluation instruments and tries to identify the sense in which using the references regarding the „social" could influence the pressures in the social assurance system.

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II. Paper content

Scientific legitimacy

The increase of life expectancy in the countries which have seriously developed from an economic and social point of view during the last 200 years has led to successive changes in the health evaluative concepts and indices. Thus, specific indices – such as the "surviving" ones, i.e. morbidity or mortality, as well as the rigid nosological categories – have been replaced by assessments of the individual's daily life performances so that today there is a dynamic and holistic approach which insists on the individual's "welfare" and "quality of life".

By following this tendency we shall be able to find in special literature several paradigms which explain and define health and illness. Some of the best known are: the medical pattern and the medical-social pattern.

According to the "medical pattern", illness is strictly a problem of the individual. His life context, no matter how pathogenous or obstructive it is, appears as irrelevant and is ignored. Individual healthcare is the only subject for curing or treating the illness.

Morbidity and mortality indices are specific to this pattern (these indices do not measure the health state, but the bad health state, which is a negative measurement), alongside with the division in nosological categories and clinical assessments which do not involve any reference to the individual's current life environment.

On the other hand, the medical-social pattern makes use not only of strictly medical information regarding the existing health problem, but also of information regarding the functioning of the individual.

The definition for health given by World Health Organization – as "the complete physical, mental and social welfare, and not just as the absence of an illness or impairment" – has led to introducing positive health indices referring to the three dimensions: physical, mental and social.

We shall briefly present the assessment types accomplished in conformity with the medical-social paradigm for the period of 1950-2000.

Besides the scale types used for measuring physical impairment, such as the PULSES profile, one can state that the first scales used for assessing individual state of health were the ADL scales (Activities of Daily Living)[1]. Using the concept of functional liability, one has tried to answer to the question: which are the normal limits of individual functioning when the latter takes care of the daily activities? From this perspective, **an individual is healthy only if he is physically and mentally able to do the things he wants and needs to do**.

ADL indices have been developed by Sydney Katz starting with 1959 and they basically refer to the patient's capacity to deal with his basic hygiene, the ability to take care of oneself, as well as the patient's mobility abilities. These indices can be expressed as an **impairment index**. Katz used the functional level as a marker that indicates the existence, the severity and impact of the illness; this level makes it possible for the measurement to be made even if, sometimes, nothing is known about the etiology of the illness. So, ADL scales measure the patient's degree of independence in performing activities such as: getting dressed and undressed, washing, using the toilet, personal care, mobility and eating.

Especially after 1970, the ADL scale has been applied to persons living in a community (family, work) – within which they perform different roles. This scale has been named IADL (Instrumental Activity of Daily Living). IALD methods include indices which bring into evidence an enlargement of the impairment issues with reference to the elements specific to a largely used concept – at least up to the year 2000 – i.e. the concept of handicap. More and more extensive scales have been created to record the factors that can explain different levels of handicap, for one kind of

[1] Ian Mc Dowell, Claire Newell, *Measuring Health*, Oxford: Oxford University Press, 1987, pp 5-22;

impairment or another, e.g.: the type of work performed by the subject, his house etc. This extension will lead to creating indices known as "social and emotional functionality indices."

Assessment scales mentioned in specialized literature have made use of a large range of indices: psychological, social, life quality etc., which are often vaguely defined and difficult to be applied: "welfare state", "welfare", "life quality" etc.[2] Despite of several imprecise definitions, the use of the mentioned concepts has made it possible to create measurement instrument, which can point out not only the illness symptoms, but also positive states that are specific to the illness.

A remarkable valorization of the medico-social pattern was accomplished in the book: The International Classification of Functioning, Disability and Health (ICF)[3].

Far from being a simple catalogue for classifying and codifying illnesses, ICF is a real paradigm on health and people with health problems, while offering the conceptual frame and the necessary operational definitions. ICF requires the development of research activity for improving "assessment procedures", appreciating that "empirical research will lead to … a clearer operationalization of the notions."

A fundamental concept in the medical-social paradigm used for explaining the illness (in ICF) is the bipolar concept of functioning-disability.

Disability (term opposed to functioning) is understood not only as an impairment of the whole functional body integrity, but also as activity limitation and a participation restriction to daily activities.

Disability (fig. 1) is a general term for *impairments, activity limitations and participation restrictions*. It denotes the negative aspects concerning the interaction between *the individual (who has a health problem) and the contextual factors (environmental and personal factors).*[4]

This concept juxtaposes social disfunctionality and body disfunctionality and it also establishes a connection between them. Consequently, the definition given to disability makes reference to the daily consequences of the impairments, consequences that are expressed as activity limitations and participation restrictions. Moreover, the consequences cannot be mechanically deduced from "body impairments", because the **functioning/disability** of a person is seen as a dynamic interaction between health problems (illnesses, disorder, lesions, traumas etc.) and the existing contextual factors.

ICF pays maximum attention to context in assessing the individual health state. Contextual factors are, in ICF, "the basis on which health states are founded."[5]

Now we could conclude that the difference between the two paradigms – the medical pattern and the medical-social pattern – relies on two key words: "**illness**" and "**disability**".

While the "ill person" is "seen" and his/her state of health is evaluated in the clinic and the lab, the "person with disabilities" is "seen" and evaluated taking into consideration his/her life style, the social "current environment", because his/her way of expressing himself/herself, as well as his/her abilities, are due both to his/her impairment and to his/her life conditions. "Two persons with the same illness (serious illness, author's note) may function differently, exactly as two persons who function in the same way must not necessarily have the same state of health".[6]

By means of these theoretical clarifications – brought by ICF– and also by means of the constructs conceived before ICF, as well as after the publication of this paper. I have conceived two

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[2] Mihai Nedelcu, *O paradigmă a cunoaşterii calităţii vieţii – rezumatul tezei de doctorat*, Bucureşti: Editura Universităţii din Bucureşti, 1996;

[3] Clasificarea internaţională a funcţionării dizabilităţii si sănătăţii – Organizaţia internaţională a sănătăţii, Bucureşti: Editura Marlink, Bucureşti, 2004;

[4] Idem, p. 217

[5] Clasificarea internaţională a funcţionării dizabilităţii si sănătăţii – Organizaţia internaţională a sănătăţii, Bucureşti: Editura Marlink, Bucureşti, 2004, p. 218;

[6] Idem p. 4;

questionnaires that are basically meant for documentation and specific assessments in the social security system.

I refer to *The Social-Professional Assessment Instrument (S-PAI)* and *The Social Functioning Assessment Instrument (SFAI).*

a) ***S-PAI*** combines qualitative and quantitative information. Thus, we accomplish a presentation of the subject's social situation: occupational status, professional career, family, living conditions, living standard and an evaluation made according to the concept of "*occupational access"*.

"*Occupational access***"** is not mentioned as such in ICF, but it is rather considered as a synthetic, "resumative" indicator[7], which joins variables from different categories, such as: environment and social factors, as well as "activities and participation" factors.[8]

We have showed that contextual factors (environment and personal factors) are an essential ICF component. They interact with the other "functionality-disability" components and they *facilitate* or *block* the impact of the physical and social world, as well as people's behavior.

The expertise of the work capacity consists in wholly evaluating a person's health state in order to establish if and to what extent this person is compatible with one or another kind of activity, as well as with taking up an occupation (workplace).

But, access to a workplace of persons with medical problems does not depend either on that person's medical status, on the diagnosis, on the impairment itself or on that person's "availability" to work. In many cases non-medical factor – contextual factors – are involved. According to the above presented theory, these factors can reduce or increase the disability, facilitate or block access to work.

The complex, evaluating concept "occupational access" – presented in S-PAI – includes the following variables: age, duration of unemployment, household activities, occupational trust-mistrust in relation to the economic characteristics of the residential area, availability to work.

The "Occupational access" indicator and its variables are congruent with the medical-social paradigm of functioning-disability.

b) ***IEFS*** is a social assessment instrument. Its role is to bring into evidence and in a quantifiable form the activity limitations and participation restrictions that may appear in different life areas, while indicating the most important limitations, the situations in which the person with disabilities needs support from other persons. The necessary social services are evaluated taking into consideration the degree to which the disabled person depends on help from someone else.

This indicator is based on the functioning-disability bipolar concept. The result may be presented as a general score, a sum of several sectorial scores.

Normative legitimacy

In the last 50 years, as a consequence of the tendency manifested by the World Health Organization to define and evaluate health state, one has noticed a move from the static approach to the individual (who was placed in a nosological category) towards a more dynamic one (which places the individual within the context of his/her daily capacities and functional performances).

Since this tendency became prominent, in May 2001, at the 54th session, the World Health Organization approved the International Classification of Functioning, Disability and Health[9] and recommended the member states to use ICF "in research, surveillance and reporting…"

Romania has been a WHO member since 1948.

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[7] Idem p. 172;

[8] Idem p. 124;

[9] Clasificarea internațională a funcționării dizabilității si sănătății – Organizația internațională a sănătății, București: Editura Marlink, București, 2004, pag. 25;

EU Directives – e.g. Directive 2000/78 in favor of equal job opportunities – set forth the main concepts and the objectives of the Sectorial Operational Programs, on the basis of which EU allots structural and cohesion Funds for: social economy development, development of programs for reintegrating persons with disabilities, supporting the creation of new workplaces in factories, improving access and participation of vulnerable groups. All these programs are elaborated in the spirit of the medical-social pattern, whose conceptualization and operationalization have been significantly improved by ICF.

The above mentioned terms and objectives do not fit within the strict limits of the medical pattern.

Romania has been a EU member state since 2007.

Praxiological legitimacy

The term "disability" is a generic one. It might replace the notions of handicap and invalidity, which are regarded as being "pejorative" by ICF. Thus, the significance and implications of the concept of disability are not only semantic or ethical, but they can also influence organization, social policy, legislation and the financial sector.

Undoubtedly, there are cases in which participation limitations are due not only to the incapacity caused by the illness/impairment, but also to the environment, including the social restrictive attitudes. However, the major role of the social enterprise is not to replace medical criteria or to eliminate them, but to provide information that might help conceive solid and functional social medical policies.

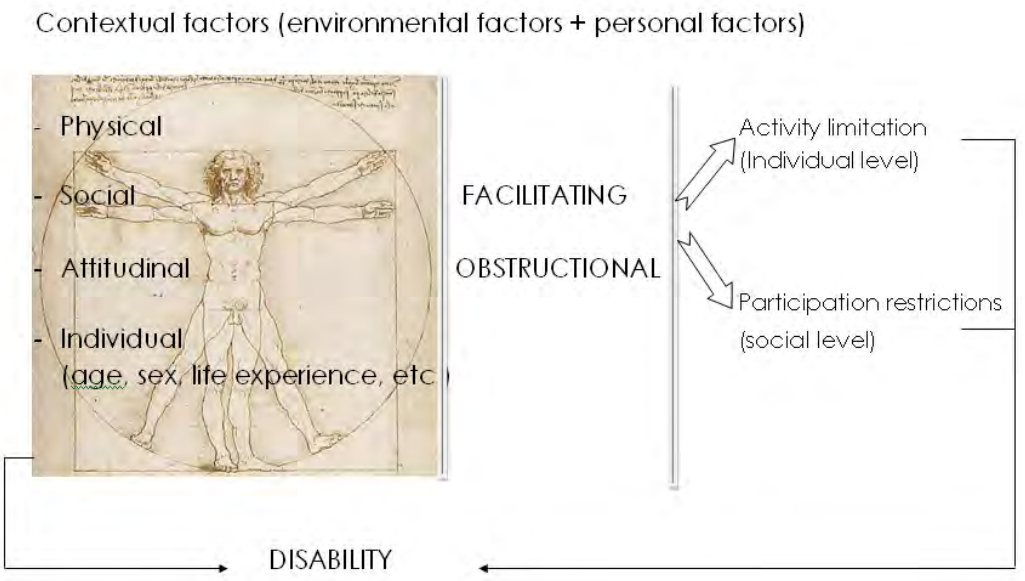
Introducing or accepting social references are meant to complete medical information which will be useful and adequate to a large number of applications including for the social security system. ICF offers the information conceptual frame that can be applied to personal health problems, including for preventing illnesses, promoting health, improving participation (by elimination or diminishing obstacles and by offering support as a facilitation factor or social level).

The aim of this activity is to reduce disability, impose social and professional participation and inclusion, finally to reduce the financial assistance expenses.

III. Conclusions.

Since the medico-social paradigm is recommended by the WHO in an official document (ICF), it results that it is legitimate according to the international scientific community and it is fully compatible with the EU values; at the same time, the Romanian present norms regarding the granting of medical pensions is tributary to a medical federalist model in which connections between "the biological" and "the social" are annihilated."

The fear that this connection might lead to an increase in the number of persons retired on medical grounds is not justified because this scientifically and normatively legitimate type of documentation and evaluations is crucial for conceiving authentic social medical policies. It is this type of solutions that can "reduce the pressure" existing on the security system.



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THE ROLE OF THE UNIVERSITY IN THE KNOWLEDGE SOCIETY: ETHICAL PERSPECTIVES ON ACADEMIC RESEARCH IN THE AGE OF CORPORATE SCIENCE

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Abstract
Knowledge society lies on the ruins of national culture that thought people to function in a single universal form of science. This type of society is tightly related to a post-national multicultural world that nourishes the erosion of classical (Kantian and Humboldian) cultural and scientific foundations of the university. We are now witnessing it's transformation into a "multiversity" dominated by the competitive international academic market for students and scholars and "commodified" knowledge. The fiscal crisis of publicly financed universities forced them to constantly pursue other forms of income, the industry being the most obvious solution. In the place of universities of reason and culture the drastic decrease of public funding generated the commercialization of the universities. This is because there is an "asymmetric convergence": while universities are adopting corporate values and principles the industry itself is not influenced by the academic values and norms. The pursuit of knowledge for mere intellectual curiosity and also the conception of the knowledge as a public good have been abandoned in favor of applied research serving corporate interests. The resulting academic capitalism is far from being the best solution to budget cuts and this study is trying to highlight some of advantages but also the most important shortcomings of this present trend in our universities.

Keywords: *knowledge society, commodified knowledge, academic capitalism, corporate interests, research limitations*

Introduction

During the last decade one of the most heated debates regarding academic freedom took place in USA. It was caused by an extremely controversial agreement signed between two important institutions: a famous land-grand university and the biggest pharmaceutical and biotechnological corporation. The fierce debate remained known as the Berkeley-Novartis Controversy. I chose this very interesting chapter in the industry-university relation as a starting point of my research as a result of a peculiar situation regarding the way this controversy was reflected in the mainstream press. When theorists made an inquiry on the most debated themes in mainstream journals, the general ethics issues came in the fourth place after corporate control, general research and economic concerns themes. It is not my intention to reshape the current interpretations of this particular event but to prove that this controversy is also important on a different level. I consider that the Berkeley-Novartis Agreement epitomizes a very controversial relation between corporations and universities and I think this should be the starting point for further analyzing the ethical challenges the university has to address in the present knowledge society. The long debated Berkeley-Novartis Controversy is only a result of a much deeper crisis threating the academic world. The long praised academic Ivory Tower is currently under attack from many directions. It is my intention to bring forward some of its enemies by highlighting some of the dramatic transformations taking place in university of the knowledge society.

In the first section of my paper I shall present some of the key moments in the transformation of the university. The university has been for centuries the sole producer of knowledge and this is only of the many reasons it was built as an intellectual Ivory Tower now under siege. Nowadays

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there are numerous knowledge producers and knowledge users and the knowledge society is also a society of huge corporation deeply connected to the neoliberal political agenda. This is why I think it is very important to put the university into a historical and political context in order to see whether the university lies in ruins, as Readings[1] would say or whether it can serve a more important role in the global context by linking the knowledge to its users as Delanty[2] would argue.

The second section of my paper I shall analyze some of the most important theories regarding the penetration of the managerial ethos in the academic space. The growing importance of the corporations as major sources of income for universities generated different theories trying to describe the complex relation between industry and university.

Finally in the third section of my paper I shall take a closer look to the Berkeley-Novartis Controversy in order to pinpoint the important ethical implications of the so-called academic capitalism dominating the university in the knowledge society. Although it is a recent development in Romanian academic world, academic capitalism is been largely promoted in the past decade through policies and practices designed to build a closer relationship with the economy in the context of deregulation and fierce competitiveness. This is why I think that before embracing this type of perspective a closer analysis of its most important implications is in order.

1. The historical evolution of the university

In an extremely well documented work Gerard Delanty brings forward some of the most important moments in the transformation of the university. I shall follow in this section some of the directions he is analyzing. During medieval times the university was closely related to the idea of a universal truth offered by the Christian theology. It was an austere place resembling the literary myth of Castalia where an order of intellectuals lived for the discovery of the ultimate Truth. Since this was such an abstract quest anyone could participate in it and the result was the scholars all over the world gathered in the university offering it a cosmopolitan character. The medieval institutions were even more cosmopolitan than those functioning today. The Bologna's ten thousand students came from all over Europe. But this was not the only aspect giving them a privileged position in the medieval academic world. We may ask ourselves what was so interesting about our Christian University. During medieval times important universities flourished outside the Christian world. Twenty-five thousand students learned in the Muslim university of Timbuktu, for example. It was the incredible dynamics of the European university that help it develop in a way that Hindu, Muslim or Chinese universities where not able to since they were imprisoned by a very strict curricula. The continuous specialization in the curricula of Christian universities helped them make such important progress. During those times Latin was the official language of the university. The lack of technological means of communication made this process very difficult. Knowledge was the privilege of a very few scholars able to learn the languages of Antiquity in order to have access to its manuscripts. The relation with the public was quasi inexistent due to the cultural, economic and political characteristics of medieval society. Thus, knowledge was the delight of some privileged individuals able to learn the dead languages of Antiquity. This privileged stance of medieval scholars was praised or criticized by different philosophers analyzing knowledge and its evolution. The literary myth of Castalia can be contrasted to the cynical perspective offered by *Il Nome della Rosa*. Auguste Compte is underling the fact that it was this peculiar social situation that made knowledge metaphysical (separated form society). In other words, knowledge was not metaphysical by itself: the social context made it so. This is a recurrent theme in the philosophy of science and this is not the place to analyze it any further. The rise of modern university is closely related to the struggle of institutionalizing knowledge. The university was trying to escape de dominance of the Church and

[1] Bill Readings, *The University in Ruins*, Harvard University Press, 1996

[2] Gerard Delanty, *Challenging Knowledge. The University in the Knowledge Society*, Open University Press, 2001.

find refuge under the wing of the absolutist state. Due to its cosmopolitan nature the university managed to escape the absolute political control and this is why theorists venture to say that it was the unique milieu where "culture was never fully dominated by power". [3] The relative autonomy of the university was also a result of a particular social and political context: while the authority of the Church was declining the modern state was not fully established. In between those two powerful institutions, the university was able to gain some academic freedom. The university was often developed as an autonomous association of scholars able to grant important privileges to its members. This is why the common understanding of the university was that of a "republic of letters" or a "republic of science" where knowledge was considered an end in itself. Using the capitalist terms, Delanty is describing this situation as one where "knowledge became a site to be inhabited by a knowledge producing and consuming elite. Unlike today, those who produced knowledge were also the chief consumers of knowledge."

The Enlightenment was the period where the historical alliance of the university with the state was largely established and accepted. The academic institutions were central to the consolidation of the national state. The very essence of the Enlightenment was the belief that knowledge has an emancipatory power. The modern state was build up on the firm ground offered by the rationalistic and technocratic values of the Enlightenment. The belief in the emancipatory power of knowledge made it possible for the masses to have access to formal education. It was the time where the school became financed by the state and where everyone was granted access to some form of education. Unfortunately this came with the cost of destroying the old medieval universities. Not surprisingly, this side effect was most visible at the hart of the Enlightenment movement, that is, in France. This was the country with the most collateral damages as a result of Napoleon's project of creating *les grandes ecoles* responsible for doing most part of the research, the teaching activity being main task of the universities.

Another key moment in the development of the university was the rise of positivism. It was for the first time in the history of the university where the culture of experts was opposed to the culture of intellectuals. More precisely with the rise of positivism came the exile of the intellectuals populating the salons and not the university that was conquered by experts and scientists. Despite the conflict between scientist and intellectuals they all shared the monastic belief that knowledge is autonomous and that they are the producers and owners of knowledge. This situation was not common to all the European states. In Germany, the Enlightenment had a slightly different understanding. The French version of the Enlightenment considered knowledge able to help cultivate the people and to substantially contribute to the progress of the society. In Germany the emphasis was on the culture as the main element responsible for the self-construction. German university also benefit from the presence of one of the most important philosophers of all time, Immanuel Kant. In 1978 he published the famous plea to the Prussian king *The Conflict of Faculties*. Those were glorious days for philosophers, who, benefiting from the presence of such a powerful personality found themselves in a privileged position, that of servants of reason and truth. It was perhaps a unique moment when the apparent lack of immediate utility of philosophy was transformed in such a huge advantage. Not only philosophy was to be tolerated although it did not serve am immediate political or social goal, but it had to be accepted as the most important of the faculties exactly for its fully commitment to superior values such as reason and truth. The philosophers were not the only ones to take advantage of this perspective. It was the starting point for the justification of the pursuit of knowledge as an end in itself.

The case of England was slightly different since Oxbridge was designed to educate clercs and gentlemen rather than experts and intellectuals. The conservative attitude of England's most famous universities reflected in an anti-industrial values. This is why they adapted later to modernity and its values.

[3] Gerard Delanty, *Challenging Knowledge. The University in the Knowledge Society*, Open University Press, 2001.

The most influential intellectual whose work and ideas contributed decisively to the creation of the first modern university was Wilhelm von Humbolt. He was one of the most important supporters of the academic freedom. Instead on being a place where civil servants trained, the university has to be the institution having the important spiritual role of cultivating the entire nation. Humbolt defended the university against the bourgeois utilitarian conception of knowledge so largely accepted in present times. He considered that the university should take the huge responsibility of offering spiritual guidance, therefore taking the place of the Church. Those were the glory days for those cherishing the utopian perspective of the university as a "Republic of Letters". This perspective had the peculiar side effect of allowing theology to come back into the university as an important field of knowledge. The true enemy of the "Republic of Letter" was not the Church, but the utilitarians. The University College London was founded by important utilitarians such as Jeremy Bentham and they denied the right of theology to consider itself a cognitive science. The struggle to maintain the university as the institution fully committed to the idea of searching knowledge as an end in itself was not an easy task. There were important intellectual figures to maintain the idea that knowledge has to be useful for the society. Herbert Spencer for example was very prompt to adopt a perspective favoring science and socially useful knowledge and not humanities.

This type of civic responsibility was partly cherished by American pragmatists such as Peirce, James and Dewey but their commitment was mostly directed towards the community. Thus American academic institutions found themselves closer to their cities and their region than to the state or the empire. They mostly provided useful knowledge for those in need of vocational training. Their commitment locally directed is perhaps the main reason for their surviving in the initial form in the Globalization era. Since they were never closely related to the nation state and they never assumed the responsibility of spiritually guiding the nation and pursue knowledge as an end in itself they were able to survive de decline of the national state.

Many cultural wars occurring in modern times influenced the faith of the university. The numerous attempts to reconcile all knowledge with the Christian doctrine, for example, represents yet another battle shaping the form of today's academic world. We can still sense the echoes of those heated debates. The Natural Theology is far from its glory days, but there are still Protestant Colleges in the USA where teaching the evolution theory is forbidden by their founding members.

The history of the university represents a fascinating subject interesting by itself. I only used it to place the debate about the academic capitalism in a historical context. The medieval and modern legacy left us with an unsolved conflict between the cultural-liberal perspective and the modern perspective on the role of higher education. The first one stresses the role of humanities and of pursuing knowledge as an end in itself while the former is committed to the scientific progress and the usefulness of knowledge.

The debate between liberal and modern perspectives on the university did not forbid the state to be for a very long period of time the sole financial provider of academic institutions. Even after the world wars the state was greatly supporting universities and was the main source of income for research programs. Although there were a lot of criticisms related to the fact that most research programs were related to the army and the Cold War the universities received great financial support from their government. This was, along with the technological progress, one of the key factors leading to the unprecedented development of the university. This development meant the appearance of a large number of new academic institutions and the transformation of the university form an elitist site to a mass form of education. As we all know higher quantity almost always means lower quality and this is the main reason this recent development of the university is not always accepted as the best direction to follow.

The seven decade of the last century bought along with important students protests major changes in the way universities are financed. The 1968 revolt was the moment where it became clear that the university was no longer an ally of the national state. Although it received most of its funds from the government the university was no longer offering spiritual guidance to the nation. On the

contrary, it became a site of intellectual revolt were the very foundation of the modern state were questioned. The financial problems of the eighties reflected in an important decrease in federal funds. Consequently the old and the newly created universities found themselves functioning on their own in a very competitive environment. The end of the Cold War was the second important factor determining the state to retreat its financial support. The development of huge corporations able to invest important amounts of money into research and the university's search for funds were the elements contributing to the emergence of academic capitalism. One of the first books written on the subject offers the following definition: "institutional and professorial market or market-like efforts to secure external moneys" [4] This is one of the two most important enemies of the academic Ivory Tower. The other one is cultural relativism. The capitalist approach to knowledge transforms it into useful information that can be transformed in intellectual property. This perspective that leads to the instrumentation of knowledge finds a very powerful ally in the postmodernist cultural relativism. In other words, the cultural relativist assumption is that there is no such thing as the ultimate truth. Everything is culturally determined and there are many competing truths equally legitimate. The feminist movement and the minority struggles contributed to the erosion of the idea of a unifying culture supporting the national state. In the absence of an ultimate truth to be pursued for its own sake the knowledge as an end in itself cannot exist anymore. This way only the useful knowledge should be taken into consideration. This assumption has many implications: the final victory of the modern perspective of the university with its emphasis on science but also the victory of applied research over fundamental research. Some of those implications are analyzed by numerous theorists and I shall present the most important perspective in the following section of my paper.

2. Theories of universities in knowledge society

Since knowledge should not be pursued as a mere intellectual curiosity but serve a superior goal, that is the social progress no advantages could be granted to researchers and professors. They have to be socially responsible. This is translated into the accountability of their work. Nobody seems to be willing to offer money for a research project that has no immediate and measurable results. This is why universities have to justify every penny they receive and this is paving the way for the development of the so-called "audit society". The managerial ethos is penetrating academic space and values such as efficiency, profit and low production costs are undermining the academic ideal of a "Republic of Letters" or a "Republic of Science" governed solely by the rules of Reason. Several theories have been developed in order to explain this situation. They include private versus public interest science (Krimsky, 2003), academic capitalism (Slaughter, Leslie, 1997), the triple helix (Etzkowitz, Leydersdorff, 1997), public private isomorphism, (Hackett, 1990), asymmetrical convergence (Kleinman, Vallas, 2001).

The public –private interest theory is underling a very important aspect regarding the research conducted in universities. Nowadays science requires a huge amount of technological tools. Nobody can conduct an important research project without being granted access to the sophisticated laboratories and the state of the art technological tools. Since the state is no longer the sole provider of those research instruments universities turn to private investors. The raising problem is that those private investors will not be interested in making the results of the scientific research available to the public. This can have extremely dangerous consequences if we think at the microbiology research. In a very pessimistic perspective we shall all be eating deadly "franken-foods" since the results of the research made in this field would not be available for the public. The big corporations are only interested in transforming the knowledge into intellectual property by patenting the scientific discoveries and selling those patents. The capitalist approach is focusing only to one aspect of accountability, that is explaining why and how money is being spent. In the audit society the

[4] Sheila Slaughter, Gary Rhoades, *Academic Capitalism and the New Economy: Markets, State and Higher Education*, John Hopkins University Press, 2004.

universities are accountable, but only for the money they use, not for the public they should inform. They are fiscally but not socially accountable and this way it is not at all clear whether their research is in fact socially useful or not.

The academic capitalism theory was developed by Sheila Slaughter and Gary Rhoades. They define academic capitalism as the pursuit of profit using the well-known market means. Thus universities compete not only for the *best* students but for *enough* students allowing them to secure their profit from tuitions. Also universities are competing for research grants allowing them to gain profit from the results of scientific discoveries.

During modern times the university found itself in the middle of two other important powers: the Church and the national state. The triple helix theory is emphasizing the fact that nowadays universities are found themselves again at the intersection of two important powers: the government and the industry. The federal funds often came with political strings attached: most part of the research conducted after World War II was related to military objectives. The corporate funds have their own strings attached: there is no possibility for the university to do research questioning the corporate interests on its own money. The research agenda is no longer freely established.

The isomorphism theory and asymmetrical convergence theory are both underling the fact that universities and industry institutions are becoming more alike since the penetration of managerial ethos in the academe. The asymmetrical convergence theory is trying to show that there is an asymmetrical relation between industry and university since the university is more likely to be influenced by the industry by accepting is norms, values and procedures. Efficiency, low production costs, managerial hierarchy, audits are only a few of the industry's values adopted by contemporary universities.

What I shall try to do in this paper is not a comparative analysis of those theories. My intention is draw a list of the most important moral issues generated by those current developments in contemporary university.

3. Berkeley-Novartis Controversy

This very interesting episode in the history of contemporary university marks the beginning of the serious debate on the social accountability of the university. To the present day, universities were only to account for spending government or corporate money. They had to produce commodified knowledge to the profit of the state or the corporation. This was about to change when one of America's biggest land-grand university – Berkeley – signed a research agreement with the largest pharmaceutical company Novartis. The University of California was a "land-grant university". That is, the 1862 Morrill Act established that every state would preserve at least 40 acre of land for a university that would teach and disseminate information to the laboring masses. The land grant university served two traditions that theorists call the progressive and the populist traditions[5]. The progressive trend was represented by wealthy bankers and land owners who tried to improve the production mode. The populist trend was represented by left or right wing politicians or intellectuals trying to defend "the little guy" form major corporation interests. Those two traditions functioned together until the infamous agreement was signed. The university of California was largely perceived as representing mostly the populist tradition trying to develop research projects that would take into consideration the influence of major changes in agriculture would affect the farmers, for example.

The chronology of events that took place at Berkeley show us how a team of researchers at the Plant and Microbial Biology Department tried to find alternative research funds. First they tried to make the private corporation give them money with no strings attached: the university would have complete freedom in choosing the research agenda, the results of scientific research were to be made public, the faculty shall be rewarded according to the criteria established by the university. Of course,

[5] Dawn Coppin, Jason Konefal, Bradley T. Shaw, Toby Ten Eyck, Laurence Busch, *Universities in the Age of Corporate Science*, Temple University Press, 2007.

none of the corporation was interested in signing such a contract. Several years later the demands regarding academic freedom and autonomy were dropped and the board of professors settled for only four criteria to be met by any corporation willing to invest in research. Those criteria included the alliance with only one industrial partner, use traditional competitive means in order to encourage bidding among the willing corporations. The fact that a whole department was involved in a contract with the higher bidder was often called, especially by those opposing this type of agreement, "the auctioning of the deparment". Thus in 1997 a committee of four was established. The same year Plant and Microbial Biology Department contacted nine companies insisting that a large number of faculty members could be interested in an alliance with a single industrial partner. From the six companies responding to the offer the committee selected Novartis in 1998. A first draft of the agreement was ready the same year. On August 1998 the Academic Senate was contacted about this contract. Several months later a non-profit organization, Students for Responsible Research presented the Academic Senate a petition with 400 signatures asking for the delay of the signing of the agreement. On November 1998 the agreement was signed despite the student's efforts to delay it. During the following years there attempts have been made to externally evaluate the agreement. In November 2003 the contract expired.

The most controversial aspect surrounding dis agreement was the interesting tenure case of Ignacio Castaneda. In 1997 Castaneda was an untenured member of PMB. He was also a critic of the agreement. In 2001 he published along with David Quist, a graduate student, an article that received more attention than most scientific articles often do. He was stressing the fact that in Mexico the maize landraces contained transgenic DNA constructs and that those were unstable. A heated debate started in the academic community. The controversy was fueled by the findings of the newspaper *The Guardian* that provided evidence for the debate on Castaneda's article being initiated by some fictious scientist traced back to a public relation firm owned by the biotechnological corporation Monsanto. The same year the intensely debated article was published began the evaluation of granting tenure to Castaneda. The first committee voted overwhelmingly for granting tenure (32 to 1). The dean forwarded this case to an ad-hoc external committee for further review. At this point a very unusual decision was made by the chair of the ad-hoc committee asked that the members of this board had nothing to do with the Berkeley Novartis agreement. The ad-hoc committee recommended tenure. The case was sent back to the committee for further review. The chief of that committee resigned. Than Castaneda's case was sent to the Academic Senate Committee were Jasper Rine was a member on the Advisory Board of B-N agreement. This Committee denied tenure to Castaneda in 2003 who began a legal action against the university. In 2005, after headed debates and important support of faculty members (more than three hundred faculty members signed a petition) Castaneda was finally granted tenure.

4. The ethical issues generated by the entrepreneurial perspective of universities

After setting the historical context and presenting one of the most controversial corporation-university agreement we are able to detect the most important ethical issues deriving from the penetration of the managerial ethos into the academe.

a.The first ethical problems relates to academic freedom. A cherished valued for several centuries, academic freedom means that university professors and researchers should be free to decide what are the most interesting research themes and establish the curricula according to their wishes. This is maybe only an ideal that was never fully realized. Every historical period had its examples of occasions where this imperative was not applied. I is my intention to show who overrides today this ethical principle. The academic capitalism has its own flaws in terms of accepting academic freedoms. Embracing efficiency as its main value the entrepreneurial university is not interesting in critical thinking or on debates since it has to take decisions fast. The Academic Senate is a time and money consuming in terms of decision making. Thus, the hierarchy present in corporations tends to replace the democratic method of making decisions in the entrepreneurial

university. Since the profit is the only legitimate goal those in charge of university's destiny resemble more to the managers than to the professors.

b. Closely related to the first problem is the way work is being evaluated in the university. Since it is very difficult to deal with "tenured radical" the whole process of granting tenure is designed to be very complex. More than fifty percent of faculty members hired in major universities are not tenured. This is partly because the tenured radical has a great power: he is well trained, possessing important knowledge, having important critical thinking skills and strong beliefs. In other words he is the nightmare of any manager seeking efficiency: that is the rapid implementation of his decisions by the obedient subordinates. This is probably why tenured was abandoned in some countries such as England. The faculty members have to be efficient. Thus, the industry of producing articles was born. Everybody is engaged in a desperate quest for more and more published articles. This creates an inflation of articles.

c. The third ethical challenge regards the way research is conducted in contemporary university. The Berkeley-Novartis controversy showed us how difficult someone opposing corporate control was granted tenure. It is also important from other points of view. First of all setting the research agenda should be entirely the task of the university. But how can some scientist develop a research project opposing the corporation funding the department objectives? Today's research implies access to extremely sophisticated technological instruments and it is by no means the work of the solitary scientist. The Berkeley Novartis agreement was a dangerous and unprecedented step since a whole department found itself at the mercy of a unique huge industrial partner with hundreds millions of dollars at its disposal. Given those circumstances, how can anyone develop research projects affecting the financial interests of the corporation?

d. The forth ethical dilemma is also related to scientific research. From another perspective, the commodified knowledge is the result of transforming the scientific discoveries into intellectual property afterwards sold by the industrial investor. But what if the scientific discoveries were to affect the public? Is the university only accountable for the way it spends corporate money or is it also accountable for the way its research affects the public? The common assumption of the "absolute relativism" is that there is no ultimate truth but only partial truths and that there is no such thing as fundamental research. The relativism and instrumentalism are combining giving birth to the situation where those partial truths are transformed into the intellectual property. The objective of making knowledge useful to society can no longer be met since, in the era of academic capitalism, the university is only accountable for the money it spends. There is simply no way of determining whether the scientific research is useful or not since for the sole reason that it is not available for the public. The problem is even more complex when it comes to universities still receiving government funds. If the university is using also government money and is then transforming the scientific findings into the intellectual property of the corporation the academic institution find itself in the position where it is using government funds to transform public knowledge into intellectual property.

e. The third moral challenge regards the "conflict of faculties". One of the main reasons the university loses its importance is the transformation of the national society into the knowledge society. The technological progress and the globalization process based of the generalization of financial capitalism made it possible for knowledge to be incorporated in every aspect of our society. Since the decline of the national state the university is no longer the unique provider of knowledge. But this is not the only major transformation: there are also numerous knowledge consumers. In this context the battle between the liberal and the modern perspective on university is finally decided. "The Republic of Letters" is finally defeated by "the Republic of Science". In the knowledge society is easier to survive if you are a scientist. Even if you have to make important compromises you can still have a successful career as a scientist. This is not the case of those working in the humanities. Philosophy or history are both tolerated in the academic institution seeking profit at all costs.

Conclusion

Knowledge has no value in itself in the knowledge society. There are theorists trying to prove that there is still room for the university role in this type of society. Gerard Delanty stresses that the major contribution con contemporary university is to diminish the growing gap between knowledge producers and knowledge users. I think that this is too optimistic. What we are experiencing in terms of defining the university status is a mixture of postmodern cultural relativism, utilitarianism and positivism. Given these circumstances we, as intellectuals working in humanities, are risking to be facing the same abominable imperative of a not so long ago abolished social order. That is: intellectuals are not productive. The scientific findings of a philosopher or a classical language professor cannot be transformed into the intellectual property on any corporation. It has no potential consumers since the interest in those fields is constantly dropping. The knowledge we are offering cannot be sold to anyone so why bother to produce it?

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THE OZ BEHIND THE CURTAIN EFFECT: ETHICAL PERSPECTIVES ON THE ASSESSMENT OF SCIENTIFIC MERITS

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Abstract
There is a genuine desire in Romanian research institutions to follow the rules of scientific evaluation tested over the decades in stronger academic and scientific communities such as those in the USA or the Western Europe countries. The main objective of our paper is to show that before enthusiastically embracing such rules of scientific merits evaluation a closer analysis of those norms is in order. Although the peer review system is the best method used so far, we have to analyse it and even criticize it in order to improve it. There are two points to be discussed in view of offering the right perspective on how the rules of scientific merits evaluation function: the peer-review system and the number of citations criterion. In the first part of our paper we shall investigate the shortcomings of the peer-review and the particular situations proving that the double blind review system does not always work to the benefit of scientific progress. In the second part of our study we shall examine the formalism undermining the number of citations criterion and show that we can find better alternatives. Those alternatives are not mere speculations: even prestigious institutions such as "Natural Science and Engineering Research Council of Canada" for example are giving up on the "classical" way of evaluating the scientific merits of researchers by shifting towards the content of the articles and not the number of their citations.

Keywords: *scientific research, the evaluation of scientific research merits, the peer-review system, the number of citations criterion, criticisms of the peer-review system*

Introduction

Each state in the European Union has institutions that govern the research by establishing research merits criteria and funds distribution rules. The process of evaluating the importance of research is based on several elements. The most important are: publications in prestigious academic journals, winning research grants and established reputation in the field. A century ago, when the scientific community was small there was no need for objective criteria in establishing one's research merits. The growing number of universities and research institutions as well as the allocation of important amounts of money in the science field called up for objective rules of establishing the importance of scientific research. The three elements mentioned above are to be translated into quantifiable terms in order to obtain objective criteria of evaluation. For instance, what does "prestigious" mean? A century ago, there was no challenge into giving a largely accepted meaning to this term. Nowadays, "prestigious" could mean a lot of things, not all of them being close to scientific research. This is why the above mentioned institutions have to come up with objective and relevant means of establishing the criteria an academic journal has to follow in order to be prestigious, or what it means for a researcher to have a good reputation. The main purpose of this paper is to prove that, although the intentions may be honourable, the result of translating terms like "prestigious" or "good reputation" into quantified parameters has its shortcomings. Thus, the most important weakness of this system is the fact that it relies on quantity instead of the quality of scientific endeavour. Those three elements mentioned above are closely connected to each other. Thus in order to gain a good reputation, a researcher has to publish, (or else *perish*) in prestigious journals. Moreover, the researcher's articles must have enough citations for his/her research to be considered important. After gaining a good reputation based on the type of journals the articles are

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published in and on the number of citations, the researcher can send applications to receive funds to support his or her scientific projects.

2. The Oz-Behind the Curtain Effect and the Peer Review System

The peer-review system is important also for the academic journals as well as for gaining access to research grants. This is why we think that it is crucial to have a debate over this way of evaluating academic journals and scientific applications. Maybe we could say the same thing about the peer-review as Churchill said about democracy. That is, "the worst form of government except all those other forms that have been tried from time to time". But since it represents such an important element in establishing what is the relevant research, how articles are selected and who is to be considered an important researcher, we consider it is vital to have an ongoing debate on the ways of criticizing and improving it.

First of all we should explain what the term "peer-review" means. This term is used to designate a way of self-regulating used by a certain profession. The term "peer" means „One of the same rank, quality, endowments, character, etc.; an equal; a match; a mate"[1]. The term review means „A critical examination of a publication, with remarks; a criticism; a critique"[2]. The meaning of the two terms leads to the understanding of this collocation: the peer-review system refers to the situation where people having the same academic rank are asked to read and make a fair evaluation of an article recommending its publication or rejection. This works the same for the scientific projects that are evaluated by the same system. It now becomes clear that the judgements of colleagues play a crucial part in the way grants are distributed and articles selected in order to be published, and eventually on the way individual careers might evolve.

There were numerous scandals undermining the ethics of the peer review system. Several examples proved the system to be failing when it was put to the test. A famous cardiologist cooked his data but the study was published in the most prestigious medical journal. A famous researcher intentionally published a study based on data that proved to be bogus and the peers reviewing it failed to see that. It was only after his self-denouncement that the scientific community realised the failures of the work. Are those isolated situations or is the system responsible for those failures? In order to answer this question we have to take a closer look to the way this system works.

The Oz-behind the curtain effect refers to the fact that the peers reviewing the scientific articles are working anonymously. The main reason academic journals use this particular procedure is due to the fact that by hiding the identity of the peers those academics will be protected against any kind of influence by their colleagues. But this is a blade cutting both sides: while protecting the referees it offers them the possibility, while hiding their identity, to act arbitrarily. This is the reason why in the United States even the Congress investigated the peer review system, which had been seriously questioned after a series of frauds and unethical scientific behaviours.

As Tom Abate points out, "whether grading grants or screening articles, a peer reviewer must preserve scholarly integrity by rising above the three deadly sins of intellectual life: envy, favouritism, and the temptation to plagiarize"[3] This is an example where the pure proceduralism encounters its main obstacle: no matter how well designed the procedure may be, the persons implementing it have to possess important moral traits in the absence of which the procedure has no chance to be successful. There are two ways of establishing scientific merits: by relying on authority, thus turning to important personalities in the field, or by relying on colleagues to fairly review the scientific articles. The peer review system finds itself closer to the second way of establishing scientific merits. But this procedure is not by itself enough to ensure an objective way of screening scientific articles and projects. Moreover, "the persons most qualified to judge the worth of a scientist's grant proposal or the merit of a submitted research paper are precisely those who are the scientist's closest competitors"[4] The hidden philosophical assumption of the peer-review system is that relying on a procedure is better than relying on authority. The ethical problem resulting from this assumption parallels the one encountered by one of the most important philosophers of the twentieth

century, John Rawls. When trying to sketch an *outline of a procedure decision in ethics*[5], Rawls wanted to rely only on the fairness of his procedure but soon found himself in the difficult position of assigning a long list of intellectual and moral traits to those appointed to implement it – the moral judges.

It was precisely the unethical behaviour of the reviewers that called for the Congress investigation. Thus in 1994 the General Accounting Office, an investigating department of the US Congress, issued a 133 page report regarding the peer-review system. The report was the result of the examination of 246 winning and rejected grants and of interviewing 1.400 reviewers. The auditors found most of the criticism as being well founded, but that the system was functioning reasonably well. A first measure to be taken in order to improve this system was to add more women and representatives of the minorities in the review process. A second measure taken at the end of the Second International Congress on Peer Review in Biomedical Publication in 1993 was the blind review procedure that will grant the researchers the opportunity of a fair trial as a result of the fact that the identity of those applying for grants or sending articles to be published was to be hidden from the reviewers.

3. The Peer-Review System and the Case of Analytical *versus* Continental Philosophy

There is a case where even this improved peer-review system does not work. It is the case of philosophy, where most of the academic journals favour the analytical way of philosophical investigation. This is a situation that calls for a closer look since it is the perfect example that proves the fact that the peer review system is completely failing. If the other cases are notorious scandals that can be considered as exceptions to the rule, the case of analytical philosophy is a field where this procedure proves to fail systematically.

For decades analytic philosophy has been the main way of doing philosophy in English speaking countries. Recent history of philosophy places us in front of a distinction between two types of wisdom loving, separated not only by a theoretical boundary but also by a spatial delimitation: analytic philosophy (specific to North American and British space) and continental philosophy. Throughout the century numerous conflicts emerged between the representatives of the two philosophical trends, which have considerably undermined the possibility of a constructive dialogue. Based on solid knowledge of mathematical logic, most analytic philosophers consider that the sole task of philosophy is to investigate the language for the therapeutic purpose of preventing us from attempting to solve problems or, more exactly, pseudo-problems such as the existence of good, of divinity or the existence of beauty. The war declared to all types of metaphysics regards the exclusion from the field of serious philosophical concerns of all problems this venerable discipline has tried to find an answer to for centuries. To ask ourselves what reality is or what reality looks like is a pseudo-problem which, at most, has the chance to *charm our intellect by means of our language.* The correct way of approaching this matter is to investigate the latent ontological presuppositions of a statement about reality. What differentiates, however the analytic philosophers from the representatives of phenomenology (especially from the works of Martin Heidegger) is not only a net detachment from metaphysical problems. The direct consequence of reducing metaphysical attempts to find answers to pseudo-problems is completely ignoring the history of philosophy. For centuries philosophy has been associated with the assimilation of important works of predecessors but the 20th century meant for the North American and British philosophers an almost total exclusion of endeavours connected with the study of ancient or modern philosophers. Phrases of the type „he who doesn't know his history is forced to repeat its errors" do not seem to represent a serious threat. Since all metaphysicians' problems are pseudo-problems, the investigation of ancient, modern or even analytic thinkers is, at most, a historical effort, labelled as philosophical history and not as authentic philosophy.

However strange it may seem for a person educated within an academic environment such as the Romanian one, where a special importance is placed on the study of the significant works in the

field, in the United States it is possible, at least theoretically, to reach the highest academic distinction (PhD) without reading a single page of Aristotle or Kant. The programmatic and complete isolation from the philosophical past represents a completely exceptional fact in the history of philosophy. It is unlikely that one might identify such a programmatic detachment from the significant works of the past in any of the other sciences, be that exact or humanistic. Lost in sterile disputes, most of the times dominated by personal egos, phenomenologist and analytic philosophers seem to ignore this very extraordinary fact. Since this way of doing philosophy has managed to keep the most important American and British philosophers *captive* for a century, one should initially look not only for the social but for the theoretical resources that made this thing possible.

Another unprecedented element is the fact that debates represent an essential feature of analytical philosophy. However, attempts to make an analysis of the analysis, a criticism of analytical philosophy, emerged only recently, accidentally or not, their appearance coinciding with the *pluralist revolt* in 1978. The history of analytic philosophy made by analytic philosophers is, in general, an enumeration of important philosophers, of the works and their significant contributions in the field. There are, of course, notable exceptions: M. Dummett (trying to determine the origins of analytic philosophy), P.F. Strawson,(interested in identifying the Kantian roots of analytic philosophy)[6], J Floyd (who focuses on early analytic philosophy)[7], D. Follesdal, (trying to offer a historical explanation for the analytic philosophy domination in USA)[8]. Still, critical approaches to this type of doing philosophy, a self-criticism, from the perspective of philosophical or metaphilosophical history, are, as previously mentioned, recent attempts. Criticisms coming from those who chose another way of looking at this issue are extremely vulnerable. As previously mentioned, in 1978 a conflict emerged in the United States, which has been imprinted in the history of philosophy as the *pluralist revolt*. We can not offer here a detailed account of this outstanding event of the recent history of philosophy. Nevertheless, we shall use this situation to attract attention on the incommensurability of the philosophical paradigms, which make even reciprocal criticism impossible. During this revolt of the phenomenological philosophers against the analytical philosophers, Bruce Wilshire, a professor at Rutgers University since 1970 and a promoter of the revolt, launches himself in a dispute with Quine: "I myself get a frigid letter from Quine. Its reasoning was so elaborate, condensed, and mathematical that I hat great difficulty following it, though I read it several times. I am unable to judge the validity of his argument. Perhaps he intended to teach me –existentially, so to speak, or as a Zen master might – that I was incompetent"[7]. This dialogue between philosophers coming from different schools shows that the best way to investigate what we actually mean by the concept of *analytic philosophy* and the potential problems arising in the approach to doing philosophy is represented by the efforts of somebody with a background in this philosophical tradition.

If we were to follow the Rawlsian idea stipulating that an essential condition for the possibility of solving a conflict is each adversaries' capacity to formulate criticisms in terms acceptable to the other, we could notice that it cannot be respected by the representatives of the two traditions. A close analysis of the "inner criticisms" is much more fertile because it can reveal elements pertaining to the theoretical resources that enabled analytical philosophy to settle comfortably in the North American and British space for almost a century.

The explanations offered for this unusual turn generally give a privileged position to the social, historical and institutional conditions which lead to the sometimes arbitrary acknowledgement of a single trend in the philosophical investigation. This is about analytical philosophy representatives holding leadership positions for decades within the most important professional association (American Philosophical Association), which is very influential in controlling the distribution of funds for research or the labour market for philosophers. In this context one could also consider the above mentioned *pluralist revolt* which included, among others, the possibility to do another type of philosophy in the US and to offer students other approaches to philosophical reflection.

This heated debate between the two types of wisdom lovers shows us how the peer-review system is failing to do them justice. That is, it was not the persons the main analytical journals turn their criticism to, but a way of doing philosophy. This way, if a philosopher wanted to write something on Plato's dialogues or Aquinas's theological arguments, it was the very nature and content of their study that made them not eligible for publication in mainstream journals. Even if famous analytical philosophers gave up their previous convictions and joined the phenomenologist in their way of doing philosophy their articles could not be published in prestigious journals since the academic world in United States was dominated by analytically oriented philosophers.

This arguments show that this peer review system represents a proceduralistic perspective in assessing the scientific merits that is not at all unerring so one might take a closer look to its criticisms before embracing it.

4. The Number of Citations Criterion

Another important tool in the research evaluation process is represented by the number of citations. This is an instrument that tries to complete the peer review system. That is, even if a study is published in a mainstream academic journal, if it does not leave a trace, if it is not acknowledged as such by the large academic community it is not considered a relevant research. That is, in order to ensure a more "democratic" way of evaluating important research results we should "let the community decide, depending on citation, what would become permanent electronically or be published."[10] This is the most formal and arbitrary criterion leading to unacceptable situations in the scientific community. This criterion resembles the high audience criteria in evaluating the quality of a TV Show. As the recent media history showed us the quest for higher audiences only lead to dramatic decrease of the quality of media shows. The same way, the rating of an article is a criterion that cannot function by itself. Someone could intentionally write unsubstantiated claims in order to attract criticism, and therefore, a large number of citations. Could such an article be considered more important or relevant from the point of view of scientific research? If, of the other hand, someone writes about using nanotechnology in finding treatments for rare diseases and the article is not cited enough does this make the article less valuable and less notorious? This situation made important institutions such as Natural Science and Engineering Research Council of Canada to abandon such formal and arbitrary criteria. Let us take into a closer consideration the following rules issued by NSERC:

"To focus the assessment of excellence of the researcher on the quality and impact of recent contributions to research, applicants are asked to identify up to five of their most significant research contributions in the last six years and to explain how these contributions have influenced their field and/or she activities of users.

Selection committees and panels are advised by NSERC to neither rely on numbers of publications in their assessment of productivity nor create or use lists of "prestigious" or "unacceptable" journals in their assessment of quality. The quality of the publication's content is the determining factor, not that of the journal in which it appears, and the onus is on the applicant to provide convincing evidence of quality".[11]

These regulations are the expression of the justifiable discontent with the previous standards used to evaluate the quality of research, such as the prestigious peer-reviewed journals and the long list of citations. A common sense observation could justify such a stance: the quality of the journal cannot and should never replace or stand for the quality of the article. The *form* – that is the prestigious journal – as well as the *content* should be of importance in assessing the merits of scientific research.

5. Conclusions

The peer-review system is subject to numerous criticisms since it leads to the Oz-behind the curtain effect and to a form of systematic discrimination, the same as in the case of analytical *versus* continental philosophy. As for the number of citations criterion, the way of establishing the quality of an article based solely on its higher rating is a case where even common sense intuition can prove to be right in rejecting it. Although it can offer an important instrument for assessing the impact and visibility of a scientific article it can be completely independent of the article's quality. Scientific research is the field where it is not important how many people read you, but essentially who are those people reading your article. Pure academic proceduralism and the complete disregard for authority is a mere abstraction leading to unacceptable situations in the scientific community.

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GOVERNANCE ON THE INTERNET. MEASURING THE PERFORMANCES OF E-GOVERNANCE IN BUCHAREST MUNICIPALITIES

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Abstract
This paper analyzes the electronic governance and how it's functioning in Romania. Being part of a larger institutional reform process, the electronic governance represents a new approach of the relation between Government and the citizen, with the purpose of increasing the participative dimension of the politic action, and as a way to provide more efficient services by the public agencies. E-governance uses information technologies (especially the Internet) in the public sector, in order to improve the activity of bureaucratic institutions and encourage citizen participation. This paper analyzes the concept of electronic governance and with a focus on the obvious differences between the ideal model and the way in which these policies are actually implemented in Romania. The analysis was made for the 6 town-halls in Bucharest, but can offer a good sample of how e-governance is made in Romania. The instrument used for measurements is the comprehensive Rutgers e-governance performance index, covered in detail in the article. The areas taken into consideration were the public services offered by the institutions, the usage degree by the citizens and the civic participation dimension, understood as a bi-directional communication between the institutions and the citizen. The final part of the paper is dedicated to explaining the results, with recommendations for the Romanian public institutions. The research has its limits, but the results can draw attention over an institutional process that can represent a huge positive change in the way that governance is usually understood to be made in Romania and a very important improvement in the relation between state and society.

Keywords: *e-governance, risk, security, electronic services, citizen participation*

Introduction

The goal of this paper is to assess the current state of e-governance on a local level in Romania, mainly the six district municipalities of Bucharest.

Electronic governance means providing citizen with online public services in order to improve the quality of those services. These services can vary from posting useful information on the internet, to paying taxes online and online decisional process with consultations between government and citizens. (Sharma, 2006). Additional definitions can be found on (www.worldbank.org) (AOEMA report) and (www.unpan.org) (AOEMA report).

The electronic governance's main goal is improving the effectiveness of the governance by using information technologies, especially the internet. These technologies would help improving the services offered by public institutions, as well as inducing greater citizen participation to the decision process. But electronic governance means more than building a web site. (Pardo, 2000). It's not only about using informatics technologies, but transforming the way through which the governance process is carried, from the services offered to the degree of usage of these services by the citizens. To reach its objectives, e-governance implies efforts from the authorities and citizens with an open mind.

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It's not very clear weather we should use the term e-governance or e-government (see Kettl, 2002, and Riley, 2003 for the difference between government and governance) but there seem to be a consensus regarding the benefits of e-governance in generating major political changes (Norris, 1999) such as reducing bureaucracy (Moon and Bretschneider, 2002) and, why not, improving democracy (Pardo, 2000).

This study consists in a web-site examination of the six Bucharest municipalities by applying the Rutgers E-Governance Performance Index. (Holzer 2009). The results are consistent with the studies of Holzer (2009) and Stoica & Ilas (2009).

A taxonomy of electronic governance services

There are three target groups that need taking into consideration when we speak of electronic governance: the Government, the citizen and the business class. These relate with three dimensions or relations on which we can build an analysis model of e-governance (Backus, 2001). The first dimension is built on the relation *Government to Citizen* (G2C) and contains the activities through which the Government offers online access to information and services to the citizen. In other words, citizen can ask questions on the public institutions websites and receive answers, can download forms, pay taxes and fines, renew their driver's licenses, make appointments, etc. The institutions can also disseminate information, offer online support and so on.

The second dimension of e-governance is that of *Government to Business* (G2B). It mainly focuses on private companies that are selling products or services to the public institutions and it translates through publicly-private partnerships in which private companies implement informatics solutions inside institutions, or the public institutions externalize some informatics services through private companies.

The third dimension of e-governance, that Backus presents, refers to the *Government to Government* relation (G2G). This dimension points towards those activities that take place between various institutions/agencies and implies using the information technologies to improve those institutions activities.

There is a fourth dimension too (Palvia & Sharma, 2007). It refers to the relation between the Government and the electorate (E-democracy). It involves online campaigns, electronic vote and online political engagement (actively participating to political debates on the internet).

Within all three dimensions discussed above, Mary M. Brown (2003) argues there are three types of actions that take place.

1. Posting information on the internet – i.e. information about the institution, work schedule, services, etc.

2. Bidirectional communication between the institution and the citizen, companies or other agencies. This way, the electronic services users can post comments or ask questions online.

3. Online transactions – tax payments, fines, etc.

Backus (2001) also considers four phases through which e-governance must pass on its way to maturity, three of which correspond to the model proposed by Brown (2003)

1. In the first phase, e-government means "being present on the internet, offering the public (G2C and G2B) relevant information" (Backus, 2001). This way, argues Backus, the first step for the public institutions web pages is to have a format similar to that of brochures, their main value being that of making information accessible online.

2. In the second phase, the interactions between the public and the Government grow through various facilities. People can ask questions, can use search engines, download documents etc. The big advantage of these facilities is that they can be used anytime, not only during the work schedule of the institutions.

3. In the third phase, the complexity of used technologies grows, but so does the added value of the offered services. The citizen can now make complete transactions online, without being forced to go to the public office. He can pay taxes, fines, permits, etc.

4. The last phase is complete when all informational systems are integrated, and the citizen can benefit from all services having to use a single virtual office.

Measuring the performances of electronic governance

The e-governance is a complex process, and trying to measure its performances can be a very provoking task. An exhaustive measurement attempt is both legitimate and costly. The research methods can vary from official statistics to qualitative and panel studies. International and regional comparative studies can also be carried on.

There are though some established research and study methods that have been carried on globally or locally. Still, there isn't a relevant study for Romania yet.

On an international level, there are a number of e-governance indexes. One of them is *The Telecommunication Infrastructure Index* (Palvia &Sharma, 2007). This index measures a country's ICT capacity: PCs/100 persons, internet users/1000 persons, telephone lines/1000 persons, online population/1000 persons, mobile phones/1000 persons, TVs/1000 persons. Another popular index is the *UN E-Government Index*[1]. This index is built by analyzing the governmental web pages at a national level. It measures aspects regarding site navigation easiness, offered information and services, participation and security. Romania is ranked on the 51st place from 191.

Research methodology

The instrument that I used for evaluating the websites of Bucharest municipalities replicates the method used by Holzer, *et al* (2007, 2009) and Stoica & Ilas (2009). It's a comprehensive index that contains 98 measures on 5 distinct categories: 1. Security/privacy; 2. Usability; 3. Content; 4. Service; 5. Citizen Participation (e-democracy). Table 1 summarizes the measures used and the Appendix A contains an overview of all the indicators. The maximum possible raw score is 219 and the weighted score is 100. Even if the number of questions differs for each dimension (18-20) and so does the raw score (25, 32 48, 59, 55), they received equal weight, so the maximum weighted score will be 20 for every one of them.

[Table 1] E-Governance Performance Measures (Holzer 2009)

E-governance Category	**Key Concepts**	**Raw Score**	**Weighted Score**	**Keywords**
Security/ Privacy	18	25	20	Privacy policies, authentication, encryption, data management, cookies
Usability	20	32	20	User-friendly design, branding, length of homepage, targeted audience links or channels, and site search capabilities
Content	20	48	20	Access to current accurate information, public documents, reports, publications, and multimedia materials
Service	20	59	20	Transactional services - purchase or register, interaction between citizens, businesses and government
Citizen Participation	20	55	20	Online civic engagement/ policy deliberation, citizen based performance measurement
Total	98	219	100	

[1] http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN028607.pdf

43 items are dichotomous. These were coded with 0/1 and a few of them with 0/3. The other items were evaluated on a 3 or 4 steps scale (0, 1, 2 or 0, 1, 2, 3) where 0 indicates that for the respective site there is no information regarding the asked question; 1 the fact that information does exist; 2 the fact that the information can be downloaded (files of folders, audio or video documents); and 3 indicates the possibility of on-line transactions (payments for goods or services, applications for permits, the existence of certain data bases where information can be searched for, the possibility of using an electronic signature).

Here is the breakdown of the 5 dimensions used for the evaluation of the municipal websites.

Security/Privacy. This section regards two main areas: the existence of a privacy policy and the security of data on user authentication. I checked if the websites had a privacy policy, if it stated the intended use of gathered data or if it identified the institution that collected the data. Equally important were the protection of personal information when the user filled in online forms, storing information on secure servers, the use of cookies or web beacons or the disclosure of personal information to third parties.

Usability. Each web page should have been easy to use and easy to understand, fulfilling conditions such as a home page, navigation bar, site map, less than two pages length (the user should not have to scroll down more than two screen lengths). In addition, I looked if the page had search capabilities and advanced search features, such as search on specific departments (e.g. public works) or sorting of the search results.

Content. This dimension contains five key areas: access to contact information (phone numbers and/or e-mail addresses), public documents (budget, minutes of public meetings, multimedia materials (e.g. video records of meetings), disability access (for blind, deaf), and time sensitive information (last actualization of the website, up to date information).

Service. This area represents the ability of municipalities to provide their citizen with online services such as paying taxes online; pay fines online; filling online forms; apply for permits; the possibility of creating an online user account; downloading forms; a FAQ section, etc.

Citizen participation (e-democracy). This is maybe the most important dimension of all. On one hand, I checked for technical means offered by the municipalities to engage citizen such as discussion forums, the possibility for users to provide comments and feedback, the existence of online polls on specific matters or citizen satisfaction surveys. On the other hand, it was important to see if there was real participation and collective action through online petitions or online discussion groups between citizens and elected officials. Other issues addressed were the provision of a newsletter or bulletin boards and if there were any performance measures of the online activity.

For a detailed list of all five dimension indicators, see Appendix A.

Results

Table 2 shows the results of the evaluation for the six municipal websites in Bucharest. I also included in the evaluation the general city-hall for comparison purposes. As seen below, the general municipality (GM) obtained the best overall score (49.83) and also the best score on each of the five dimensions, except the "Content" dimension.

From the six district municipalities, District 3 has the best score (34.93), while District 5 registers the lowest score with 19.38. The overall average score was 32.02, the General Municipality included. This average is consistent with both the data obtained by Holzer, *et al* (2007, 2009) and Stoica & Ilas (2009), who used the same measure instrument.

[Table 2] E-governance rankings for Bucharest municipalities

Rank	District	Total	Security	Usability	Content	Service	Participation
1	GM	49.83	10.37	16.88	7.3	8.2	7.08
2	D3	34.93	0	16.25	7.3	7.21	4.17
3	D2	33.19	4.44	10.63	8.89	5.9	3.33
4	D1	31.52	2.96	11.25	7.3	4.59	5.42
5	D6	27.68	0	13.13	6.98	5.9	1.67
6	D4	27.61	0	13.75	6.35	4.59	2.92
7	D5	19.38	0	12.5	2.86	3.61	0.42
-	**Average**	**32.02**	**2.53**	**13.48**	**6.71**	**5.71**	**3.57**

Legend: GM – General Municipality; D1-6 – District 1-6

Looking at the table of results, we can easily observe that the "Usability" dimension received the highest scores for every district municipality and for the General Municipality, with an overall average of 13.48 points; whereas the "Privacy/Security" dimension registers the lowest scores, with an average of 2.53.

The very low scores in "Privacy/Security" (an average of 2.53 out of 20) show that there is almost no concern for personal data protection or for confidentiality. Four out of six district municipalities didn't even have a privacy policy, nor any security features for protecting the information required for filling out forms, for example. The ones that had a privacy policy had only a few features, none of them stating if the data gathered was stored on a secured server or if there were using cookies or web beacons to monitor and track the user's activity.

On the other hand, "usability" registered the best scores, showing that the first condition met is the technical one, most sites being user friendly and easy to use. Almost all of them had a site map, a home page, consistent color scheme throughout the page or a search button. The search button however was rather limited, without providing any options for advanced search or for sorting the search results.

In terms of "Content" the websites score also very low. There are downloadable documents and forms, some municipalities offer minutes of public meetings or information about the yearly budget. There can also be found contact numbers or email addresses in some cases. However, none of the sites provides searchable databases, format for persons with disabilities (blind, deaf), mobile versions or multimedia materials. The information was usually up to date, but it consisted in news about recent achievements such as festivities or national holidays. None of the websites offered up to date announcements such as calamities or traffic deviations.

The "Service" dimension scores low points too, with an average of 5.71 out of 20. None of the websites offered the possibility to pay utilities, fines or taxes directly on the homepage. In some cases (District 1 and 4) there is an electronic payment system but is either clearly stated that is not working or it cannot be accessed. Others don't have any electronic payment system or simply offer a physical address where taxes can be paid (District 5).

The last area is "Citizen Participation" or e-democracy. With an average score of 3.57 we can barely speak of citizen participation. Only the website of the General Municipality offers a discussion forum, and the site of District 1, where citizens can post comments on the mayor's blog. There aren't any features for making e-petitions (an online petition signed by a group of citizens) or discussion groups for online decisional process.

Discussion

The overall average of 32.02 (from a possible maximum score of 100) represents a rather low score, placing Bucharest on the 42nd place in the global ranking made by Holzer (2009). Seoul occupies the first place on this ranking system, with a total score of 84.74 points, while Baku (Azerbaijan) occupies the last place (87th) with an overall ranking of 7.78 points out of 100. The first European city is Prague, with 72.84 points and the last is Chisinau with 20.31 points. Among European cities, Bucharest's score is comparable to that of Copenhagen, Riga, Amsterdam, Sofia, Zurich and Istanbul (maximum difference of 5 points up and down) (Holzer, 2009). Table 3 provides an overall ranking of e-governance for European capitals, using the same measurement instrument.

[Table 3] E-governance rankings for European cities (Holzer, 2009)

Rank	City	Total	Security	Usability	Content	Service	Participation
1	Prague	72.84	16.7	17.62	13.02	13.86	11.64
2	Madrid	55.59	11.2	14.38	13.2	13.9	2.91
3	Vienna	55.48	16	11.88	12.8	6.44	8.36
4	Paris	52.65	12	13.13	12.4	7.12	8
5	Bratislava	52.51	13.6	17.5	9.2	7.12	5.09
6	London	51.96	13.6	15	8.8	9.83	4.73
7	Zagreb	50.16	9.6	13	12.8	7.12	7.64
8	Ljubljana	49.39	8	13.13	11.6	10.85	5.82
9	Lisbon	48.82	8.8	15	10.8	9.49	4.73
10	Brussels	48.01	12	16.25	11.6	7.07	1.09
11	Vilnius	47.5	10	13.44	11	7.97	5.09
12	Helsinki	45.61	10.4	13.75	13.2	6.44	1.82
13	Dublin	45.16	12	12.5	9.6	10.51	0.56
14	Oslo	44.76	2.4	15	12.8	9.83	4.73
15	Berlin	42.9	12.8	10.63	7.6	6.78	5.09
16	Stockholm	41.79	5.6	13.13	10.8	6.44	5.82
17	Warsaw	41.66	12.4	9.2	8	9.15	2.91
18	Tallinn	41.57	0	11.88	16.4	12.2	1.09
19	Moscow	40.1	4.8	12.5	8.8	7.46	6.55
20	Copenhagen	37.78	3.2	15.63	8.8	5.42	4.73
21	Riga	36.88	5.6	12.5	10.4	4.75	3.64
22	Bucharest	34.65	2.4	15.63	8	6.44	2.18
23	Amsterdam	34.27	2.4	13.13	8.4	7.8	2.55
24	Sofia	33.13	6.8	8.75	5.8	8.14	3.64
25	Zurich	32.65	0	15	7.6	6.78	3.27
26	Istanbul	30.93	0	6.25	11.6	10.17	2.91
27	Belgrade	28.65	0.8	14.38	6	4.75	2.73

28	Rome	26.85	6.4	8.13	7.4	2.37	2.55
29	Skopje	26.56	0	12.44	5.1	7.22	1.8
30	Kiev	25.45	4	8.75	4.8	6.44	1.45
31	Minsk	25.4	2.4	10	6	3.73	3.27
32	Athens	24.84	3.2	13.75	4.4	2.03	1.45
33	Budapest	24.76	2.4	9.38	7.6	1.02	4.36
34	Chisinau	20.31	1.6	9.38	7.2	0.68	1.45

The e governance score of Bucharest municipalities places the Romanian capital on the 22nd place among European cities, any score below 40 being considered as poor. (Stoica&Ilas, 2009). With an average of 32.2, Bucharest falls below the European average of 40.3. But the most interesting finding of this measurement is the distribution of the dimension averages which could point to a stadial evolution of e-governance.

The Bucharest municipalities score follows the following pattern: the best score is obtained by usability (13.48), followed by content (6.71) and service (5.71). Participation is fourth with 3.57 points and last comes Security with 2.53 points. While it seems normal for usability to have the best score, since it represents the first step to e-governance by first building a website, it also seemed that participation should have the lowest score, as the last step of e-governance. But the curious finding on Bucharest municipalities was that the security dimension came last. The security dimension is actually very important if all the other areas of e-governance are to work. Without the protection of personal information, neither participation, nor the providing of services can occur. The first two dimensions – usability and content represent only the first step of a two steps model: posting information on the internet and, second, interacting with the citizens. Providing services and electronic participation represent the second step of this model, personal data being needed to fill out forms, pay taxes or participate in online forums. As I was saying, usability and content are the easiest steps to reach, since it only involves the activity of the institution. For services and online participation, both people and institutions are involved. If the government provides electronic payments features, citizen will use them sooner or later, out of need or commodity. Participation comes a little later, since it requires a democratic and participative culture that can't evolve over night. But these two dimensions – services ad participation – can't occur if the personal information required isn't properly stored and protected.

To test if the distribution of the dimensions is resembles with other cities, I compared the Bucharest municipalities' averages with the European averages from Holzer's study (2009). Table 4 presents the results of the comparison.

[Table 4] E-governance dimensions distribution

Bucharest		**Europe average**		**Top 19 (above average)**		**Bottom 15 (below average)**	
Rank	**Score**	**Rank**	**Score**	**Rank**	**Score**	**Rank**	**Score**
Usability	13.48	Usability	12.7	Usability	13.62	Usability	11.54
Content	6.71	Content	9.51	Content	11.28	Content	7.27
Service	5.71	Service	7.27	Security	10.1	Service	5.18
Participation	3.57	Security	6.85	Service	8.92	Participation	3.57
Security	2.53	Participation	3.98	Participation	4.93	Security	2.47

Europe average – the average scores on all five dimensions for all European municipalities that had a website. Europe overall average is 40.3

Top 19 – the overall averages of the first 19 cities situated above 40 points

Bottom 15 – the overall averages of the cities situated under 40 points, Bucharest included

As it can be seen above, usability registers the best score on Europe average, as well as for the first 19 and the last 15. The same applies for content. The participation dimension comes last on the European averages score and the top 19 cities. Security comes last on Bucharest municipalities and on the bottom 15 cities. However, even if participation ranks better in the 5 dimensions distribution than in the European average and the top 19, the absolute score is still lower.

The concern for privacy and security seems to be lower on cities in early stages of e-governance development. The hypothesis I am proposing is that the higher the security score is, the higher the scores of the other dimensions will be. Looking at the table 4, the average security score for the first 19 cities is even higher than the services score. Usability remains relatively stable, but all the other absolutes scores are higher. This hypothesis would need further testing of course, but we can advance a simple explanation in this moment.

E-governance is not as simple as it looks. And it's doesn't come without risks either. We can speak about two types of risk: intrinsic risks and perceived risks. The intrinsic risks are the actual risks of e-governance. Online transactions involve always a degree of risk: the internet is not always stable; the web pages could be hacked etc. The storage of personal data is also a delicate matter. The law demands the protection of personal data and storing databases of user information online means a great responsibility from the institutions.

The perceived risks refer to the risks that users are or are not willing to take when using public online services. They can consider that the information offered is not accurate or reliable, could choose not to trust the security of the online transactions or the confidentiality of their personal data. All these perceptions of risk and trust issues can and probably have an impact over the usage of online services by users. These questions need another study besides this one, but they remain legitimate and could offer possible explanations on the electronic governance's performances in Romania and worldwide.

Other explanations for the overall low usage of electronic services can be the low internet penetration, low internet usage or the fact that citizens simply don't interact that much with public institutions. For data regarding this subject see the Agency for Governmental Strategies (2007).

One last possible explanation could be the fact that citizens consider using online public services as too complicate and, corroborated with the relatively rare usage, prefer to go in person to the institution building. (Dunleavy & Margetts, 2007)

Conclusion

Looking at the data presented earlier in this paper, we can see that the six Bucharest municipalities have a rather low score as compared to other European cities, being situated in the lower half. Even though they scored well on the "usability' dimension, this only represents the beginning in the road to successful e-governance. I keep the belief that the security dimension is the key to e-governance success. The low score in security and privacy could mean a refusal to govern through electronic means. The several privacy policies that I Identified stated clearly that the institution doesn't assume any responsibility regarding the loss of personal data, nor it can guarantee for the accuracy of the presented information. Failing to provide the security dimension, the service and participation dimensions cannot and will not evolve.

This paper has its obvious limitations and the explanations that I propose need to be tested using other methods too. The analysis of municipal sites can offer insightful information, but it doesn't cover many aspects such as the citizen's point of view, or the public institutions employees.

In addition, the analysis only covers the municipal websites in Bucharest and it doesn't have the pretention to represent the state of e-governance in Romania. What it does however, is to offer a small piece of a larger picture that is e-governance in general and in Bucharest municipalities in particular.

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APPENDIX A

Privacy/ Security	
1-2. A privacy or security statement/policy 3-6. Data collection 7. Option to have personal information used 8. Third party disclosures 9. Ability to review personal data records 10. Managerial measures	12. Secure server 13. Use of "cookies" or "Web Beacons" 14. Notification of privacy policy 15. Contact or e-mail address for inquiries 16. Public information through a restricted area 17. Access to nonpublic information for employees 18. Use of digital signatures

11. Use of encryption	
Usability	
19-20. Homepage, page length. 21. Targeted audience 22-23. Navigation Bar 24. Site map	25-27. Font Color 30-31. Forms 32-37. Search tool 38. Update of website25-27. Font Color 30-31. Forms 32-37. Search tool 38. Update of website
Content	
39. Information about the location of offices 40. Listing of external links 41. Contact information 42. Minutes of public 43. City code and regulations 44. City charter and policy priority 45. Mission statements 46. Budget information 47-48. Documents, reports, or books (publications)	49. GIS capabilities 50. Emergency management or alert mechanism 51-52. Disability access 53. Wireless technology 54. Access in more than one language 55-56. Human resources information 57. Calendar of events 58. Downloadable documents
Service	
59-61. Pay utilities, taxes, fines 62. Apply for permits 63. Online tracking system 64-65. Apply for licenses 66. E-procurement 67. Property assessments 68. Searchable databases 69. Complaints 70-71. Bulletin board about civil applications	72. FAQ 73. Request information 74. Customize the main city homepage 75. Access private information online 76. Purchase tickets 77. Webmaster response 78. Report violations of administrative laws and regulations
Citizen Participation	
79-80. Comments or feedback 81-83. Newsletter 84. Online bulletin board or chat capabilities 85-87. Online discussion forum on policy issues 88-89. Scheduled e-meetings for discussion	90-91. Online survey/ polls 92. Synchronous video 93-94. Citizen satisfaction survey 95. Online decision-making 96-98. Performance measures, standards, or benchmarks

DISPUTE RESOLUTION AND MEDIATION ON CAPITAL MARKET

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Abstract
Capital Market is usually depicted as a place for experts, for people with high trading skills. This is a half truth. There are entities established and functioning under strict scrutiny of Romanian National Securities Commission (RNSC), in compliance with Capital Market Law and regulations. There are also the investors, in many cases individuals involved in shares/financial instruments trade. In both cases disputes can rise. Disputes are inevitable a part of human interaction, hence the need for dispute resolution. First option is the judicial court system. Alternative dispute resolution comprises arbitration and mediation. Arbitration is an alternative choice to provide simpler, speedier and more accessible justice than ordinary courts as well as expertise in matters that are technical in nature and require special knowledge to adjudicate upon. Capital Market environment provides an institutional arbitration court for all participants, including investors. In many cases the agreement executed between participants under RNSC scrutiny The other option for settling disputes outside the court is mediation. Mediation can provide a much cheaper and quick extrajudicial resolution of disputes in commercial matters without time consuming procedures and rigid rules. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to foster the commercial relationship between the parties. The interaction between investors and brokerage houses is based on investment services agreement concluded by parties. This is the usual framework for disputes between parties and the usual "landscape" for mediation on capital market.

Keywords*: alternative dispute resolution, regulated market, mediation, capital market, investment services agreement.*

Introduction

1. European laws and regulations lay down detailed rules regarding financial instruments trade, regulated market and investment firms. Directive 2004/39/EC, on markets in financial instruments (MiFID), was sought to establish the conditions under which authorised investment firms and banks could provide specified services in Member States. Following this European framework the Romanian law on capital market (Law no 297/2004) enacts certain rules regarding the interaction between investment firms and clients.

The document concluded by and between the firm and the client set out the rights and obligations of both parties and other conditions under which the investment firm will provide services to the client. The rights and duties of the parties to the contract may be incorporated by reference to legal texts. Our paper is intended to observe disputes that can arise from this business relationship - investment services agreement concluded by investment firms with their clients – and mediation alternative dispute resolution.

The subject is important because disputes are expenses and time consuming and clients need effective redress for their losses in order to remain interested on capital market trading. Mediation can satisfy investment firms as well as clients, preserving even their business relationship and "appetite" for trading on regulated market.

The contract between the investment firms and clients contains certain obligations prescribed by law. Investment firms shall establish and implement effective arrangements regarding an order execution policy to allow them to obtain, for their clients, the best possible result. Further, in order to enable clients to assess at any time the terms of a transaction in shares that they are considering and

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to verify afterwards the conditions in which it was carried out, rules should be established for the publication of details of completed transactions in shares and for the disclosure of details of current opportunities to trade in shares. In this framework we intend to reveal circumstances in which disputes can arise and mediation can intervene.

Despite the extensive regulation of the financial services and the rules laid down for investment services agreement consisting in rights and obligations of the investment firms und the client for pursuing transactions in shares, the nature of this contract is still disputed by scholars. Some scholars consider the brokerage house is acting as a proxy for its client[1]. Others embrace the different legal status: the agent (investment firm) acts in his name, but on client's account[2]. Thus this investment services contact need scrutiny as well as mediation in such specific framework.

Investment services agreement – ground for disputes in Capital Market domain.

2. The investment firms defined by Capital Market Law has the exclusive right to operate on regulated markets, to provide one or more investment services to third parties and to perform one or more investment activities on a professional basis (investment services and activities means any of the services and activities listed in Directive 2004/39/EC, on markets in financial instruments (MiFID), Section A of Annex I relating to any of the instruments listed in Section C of Annex I).

Investment services contract entered into by investment firms and investors is the only framework in which investors could have their market orders executed on regulated market or MTS (multilateral trading system). This investment services agreement is a compulsory premise, the preliminary step for participants to enter trading ring in order to sell or purchase financial instruments.

Investment services agreement is a *sine qua non* condition in order to access the regulated market. On the other hand this contract is the ground for the most common disputes on the capital market, the disputes between clients and investment firms. The alternative dispute resolution for such situation can rest in mediators' hands.

The Bucharest Stock Exchange offers a regulated framework for dispute resolution: Arbitration Chamber of Stock Exchange[3]. Its regulations set the procedure for settling cases borne by operations concluded on regulated market or on alternative trading system (ATS) operated by BSE between participants (authorized firms) on trading system of BSE, between participants and issuers which securities are admitted to regulated market operated by BSE and between clients and participants (investment firms)[4]. The last situation is borne by investment services business relationship. Besides the arbitration, mediation is an alternative approach for such dispute resolution.

The content of the investment services agreement.

3. Investment firms can be authorized to execute orders on own account or on behalf of their clients. In such cases firms should implement procedures which provide for the prompt, fair and expeditious execution of client orders und they should undertake a bundle of obligation laid down in a predefined contract. The regulation on investment services and activities[5] aims clients' protection and market integrity. According to relevant provisions an investment firm shall provide investment

[1] A. Tutuianu, *Capital Market, Legal regime of participants*, Bucharest: Hamangiu, 2007.

[2] Cristian Gheorghe, *Capital Market Legal Science*, and Bucharest: CH Beck, 2009; C. Dutescu, *Capital Market Law annotated and commentated*, Bucharest: CH Beck, 2010.

[3] Regulation for Procedures, Bucharest Stock Exchange Arbitration Chamber, adopted by Stock Exchange Council based of Art. 134 para. 6 from Law no 297/2004, Art. 10 para. e), 22 para. e), 64 para. 1 letter. i) from RNSC (Romanian National Securities Commission) Regulation no 14/2004, approved by RNSC Decision no 372/31.01.2006.

[4] Participants are the investments firms authorized to operate on a specific market.

[5] RNSC Regulation no 32/2006.

services according to a contract "in written form, on paper support or other durable support" which shall comprise rights and obligations of the firm and client[6].

The minimum content of the contract laid down by the law encompasses the framework within which the firm-client business relationship shall evolve.

Investment services and activities provided and financial instruments traded[7]. Investment services agreement shall have a defined object agreed upon by parties concerning the investment services and activities and the securities such services applied on (this should include appropriate guidance on and warnings of the risks associated with investments in those instruments or in respect of particular investment strategies)[8]. The contract shall include the types of securities (shares, bonds, and derivates) without specifying an individual financial instrument. This last one will be pointed by orders given to broker on the basis of the contract, orders that represent part of a transaction concluded on a regulated market.

Rights, obligations, term and other conditions under which the investment firm shall provide client with investment services. Specific rights and obligations can be added to legal framework of the investment services contract the clauses will reproduce the appropriate legal provisions. Regulation states already the behaviour and the minimal content regarding the parties' rights in the investment services contract. If special communication channels are intended (i. e. phone orders or orders via e-mail) parties should expressly agree such alternatives (including electronic signature if applicable) including recording and preserving these orders for proofing purposes.

Investment firm have to ask the client to provide information regarding his knowledge and experience in the investment field so as to enable the investment firm to assess whether the investment service or product envisaged is appropriate for the client or not. In case the investment firm considers, on the basis of such information, that the product or service the client asks for is not appropriate to him, the investment firm shall warn the client or potential client about this risk[9].

Interests, currency exchange, estimated charges. Investment services contract shall comprise in a comprehensible manner all the ancillary obligations as well as the interests accrued to sums deposited by clients, currency exchange rates, etc.

Investment services agreement shall include clauses regarding investment services agreed upon by parties including the broker's fee and other estimated costs and associated charges incurred by orders execution.

General conditions for alteration and termination of the contract shall be included too.

Without prejudice to the right of client to bring their action before the court, the regulations encourage private bodies established with a view to settling disputes out of-court[10]. Parties can agree upon arbitration clause, denying court jurisdiction and ensuring out of court dispute resolution. Such clauses exclude legal "ability" of a court to exert jurisdiction over parties and reveal the parties' appetite for alternative solution, including mediation procedures.

The consequences of client-firm business relationship based on investment services agreement. The agent's duties and disputes that arbitration or mediation can deal with.

4. The record of the client-firm business relationship comprises the extent of the outcome of the contract, rights enjoyed by parties. Such extent of rights and obligations governs the future

[6] Directive 2004/39/EC („MiFID"), Art. 19, para. 7. The investment firm shall establish a record that includes the document or documents agreed between the firm and the client that set out the rights and obligations of the parties, and the other terms on which the firm will provide services to the client.

[7] RNSC Regulation no 32/2006, Art. 110, 119.

[8] Ibidem, Art. 19 para. 3.

[9] Ibidem, Art. 19 para. 5.

[10] See Commission Recommendation 98/257/EC of 30 march 1998, on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes.

behaviour of the parties and arbitrates the disputes that orders execution can arise. The clients could claim that the agent breach the contract and could find out remedy for their inflicted damage.

Damages inflicted by breach of contract usually applied to agent's behaviour contrary to client's best interest in orders execution on market or in financial instruments portfolio management.

The investors can fill with the court or access out-of-court procedure like arbitration or mediation. Investment services and activities record covers the obligations of both parties. Investors shall cover all costs and associated charges revealed by agent and shall comply with all requirements to support the agent in providing his services. Most of the disputes in this domain are borne by failure of the agent to comply with legal standard laid down for executing clients' orders. Mediation procedure can support the process of indemnifying investors for their losses as a result of misleading behaviour of the agent or his brokers.

5. The obligation of investment firm to act honestly, fairly and professionally in executing the client's orders. The most important obligation of the investment firm consists in receiving and executing orders communicated by clients and fulfilling the procedure requested for securities transactions on behalf of client. The investment firm receives specific orders that conclude a sell-purchase agreement in the form accepted by a regulated market. The brokers receive orders in a form established by regulated market rules (limit orders, stop losses orders, market orders, etc.) and are supposed to execute them in accordance with the best interests of clients.

Following the principal agent theory, the broker acts in his name (or in the client's name) but on the client's account. The property of securities as well as the price to be paid stands finally for the client. He remains the beneficiary of the bundle of rights incurred by fulfilled transactions.

6. A possible conflict can arise in case of "self-contracting" situation, when the investment firm acts both on behalf of its client and on own account, in the same transaction. That means, for example, that investment firm is buying what client selling or firm selling what client is buying, client being represented in transaction by the same firm.

In case of "self-contracting" situation the investment firm aims for maximum consideration in exchange for its offer. Generally speaking such expectation can conflict with the interest of the counter-part whose interest should be defended by "opponent".

In such situation dispute resolution and particularly mediation should start from observing the market quotes made public by market operator on a reasonable commercial basis.

In this case, concerning a regulated market that makes public quotes based on independent transactions, good commercial practice accepts this kind of contract[11]. In this situation the investment firm can deal directly with its client. The balance of consideration given by parties is verified by full disclosure in the benefit of the client who have to be inform about the particular transaction and be able to evaluate personally the protection of his interest in that transaction[12]. These are the reasons why "self-contracting" situation is allowed in this domain, the client's interest being observed with no effort by the client itself.

Any discrepancy between the quotes revealed by the market operator and the reported price entitles the client to indemnification, dispute that can be solved in a mediation framework.

[11] Commercial Code, Art. 411. Romanian provisions regarding commission (agency like) agreement: When the agent is ordered to buy or sell bill of exchanges, T-bonds or other bonds, existing on the market and goods, with quotation prices on an stock exchange or market, he can provide such titles or goods on his name as a seller or to receive on himself as a buyer such goods he was ordered to sell on principal account paying current price notwithstanding his payment, if principal doesn't forbid such operations.

[12] Law no 297/2004, Art. 27, para. 1: „... to reveal to clients all the material information regarding agreements in which the agent is contracting on his own account".

7. Conduct of business obligations when providing investment services to clients. Obligation to execute orders on terms most favourable to the client. The agent should carry out his obligations "in good faith and at professionally standard" - requirements stated by scholars as a distinctive agent's obligation[13].

On the capital market this obligation is transposed in the principle of "best favourable execution" of orders the investment firms are receiving from their clients. Investment firms should take all reasonable steps to obtain, when executing orders, the best possible result for their clients, taking into account price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of the order[14]. Investment firms are obliged to establish and implement effective procedures and order execution policy to allow them to obtain, for their client orders, the best possible result[15].

The order execution policy implemented by investments firms will allow them to act honestly, fairly and professionally in accordance with the best interests of clients as well as ensuring an equal treatment of them[16].

Any failure in implementing such principles can create disputes between investment firm and clients. The client can employ the services of a mediator in order to settle such conflicts.

Other examples of inappropriate agent behaviour are: client financial instruments or pecuniary resources theft, unauthorized borrowing, surety or any kind of encumbrances on client financial instruments undertaken by investments firm, disposing without written consent of the client, direct or indirect, of his assets, executing market orders with sole intention of misleading on proprietor real identity.

Some revealed agents' or brokers' behaviour is prosecuted as criminal offence.

8. There are fraudulent practices of the investment firm that harm the clients' interest. So called marketing techniques or even (dishonest) advertising which are widespread in commercial practices are strictly forbidden on capital market.

Other illicit agents' practices can encompasses providing information from undisclosed sources as confidential information in order to deceive clients and make them give market orders, providing misleading, incomplete or exaggerated information about a financial instrument in order to determine client to pursue transactions regarding such instrument, false promising or guaranteeing the client future profit from transaction executed on market, etc. Securities industry doesn't support common commercial ad and prohibits misleading investors and client enticement. Investment firms are obliged to provide investors public, correct and documented information.

Against good practices in domain are such practices too: the priority given to own agent's order against previous clients' orders, excessive trading on clients account with sole end of generating trading cost for the firm, using clients assets for fulfilling agent's obligation, any payment (reward, bonus, etc.) in the benefit of the broker aside the framework of the parties contract, etc[17].

9. Conflicts of interest. Investment firms shall take measure to identify conflicts of interest between themselves, their managers, employees and tied agents, or any person directly or indirectly linked to them by control and their clients or between one client and another that arise in the course

[13] St. D. Cărpenaru, *Romanian Commercial Law*, (Bucharest: All Beck, 2004), 479. Capital Market Law asks for agent to act „honestly, impartially and with professional care in order to protect investors interest and uphold the market integrity" (Law no 297/2004, Art. 27 al. 1).

[14] MiFID (Directive 2004/39/EC), Art. 21. Nevertheless, whenever there is a specific instruction from the client the investment firm shall execute the order following the specific instruction.

[15] RNSC Regulation no 32/2006, Art. 137.

[16] Ibidem, Art. 102.

[17] Ibidem, Art. 163.

of providing any investment and ancillary services, or combinations thereof[18]. We have two kinds of potential conflicts of interest: between investment firm and clients and between different clients working with the same agent.[19]

In order to avoid such conflicts of interest the law enforces simple rules: clients order have higher priority than own agent's orders and the investment firm shall execute received orders from clients on chronological basis: first received order shall be first initiated and executed in regulated marked[20].

Even so, whether the internal regulations made by the investment firm in order to avoid or manage conflicts of interest "are not sufficient to ensure, with reasonable confidence, that risks of damage to client interests will be prevented, the investment firm shall clearly disclose the general nature and sources of conflicts of interest to the client before undertaking business on its behalf"[21].

10. The agent's obligation to report operation executed on client's behalf. The client must receive adequate and detailed reports on the services provided by the investment firm on his account[22]. Such obligation is ordinary in agency theory law. Agent shall inform principal on all operations pursued in his account[23].

Reports concluded by investment firm shall include all relevant data and, where applicable, the costs associated with the transactions and services undertaken on behalf of the client.

Reports shall be made available for investors on contractual basis. Competent authority will be provided with detailed reports too, in order to ensure transparency and to uphold the market protection. Investment firms shall keep at the disposal of the competent authority, for at least five years, the relevant data relating to all transactions in financial instruments which they have carried out, whether on own account or on behalf of a client. "In the case of transactions carried out on behalf of clients, the records shall contain all the information and details of the identity of the client The reports shall, in particular, include details of the names and numbers of the instruments bought or sold, the quantity, the dates and times of execution and the transaction prices and means of identifying the investment firms concerned"[24].

From contractual perspective client is entitled to receive from his agent adequate reports describing operations executed on his behalf. Although, the investment firms keeps his position of services provider who doesn't guarantee the executing of orders irrespective of regulated market evolution. In fact the fulfilling of orders stand for other participants: central counterparty, clearing house, etc.

Conclusions

11. The business relationship between investors and their brokers is governed by the investment services contract, an agent-principal relationship type. The best favourable execution, the obligation to execute orders on terms most favourable to the client can rise disputes between client and broker. Mediation can be a solution for any situation when broker fails to comply with professional and contractual standards.

Clients are put in the position to defend their rights as they receive full report concerning order execution and they are in the position to observe and compare their concluded transactions with market quotes displayed by market operator. This comparison should represent a tough ground for

[18] MiFID (Directive 2004/39/EC), Art. 18, para. 1.
[19] RNSC Regulation no 32/2006, Art. 96.
[20] Ibidem, Art. 141.
[21] MiFID (Directive 2004/39/EC), art. 18 para. 2
[22] Ibidem, art. 19, para. 8.
[23] Stanciu D. Cărpenaru, *Romanian Commercial Law*, (Bucharest: All Beck, 2004), 478.
[24] MiFID, art. 25.

clients' rights defence. Mediation renders an appropriate framework for dispute settlement and confidentiality the parties are seeking for.

Investment firms are keen to mitigate the echo of their disputes with clients and on the other hand these clients appreciate a rapid and fair redress for their losses. Nevertheless the capital market is a specialized domain that needs expertise of an arbiter or mediator rather than a common commercial court expertise.

However present law asks for conciliation prior to filing with the court in commercial disputes, conciliation that can be realized through mediation procedure.

Investment services agreement and obligations borne by it can be the framework for pursing a success mediation process and rendering a solution equitable for both parties involved: investment firm and clients.

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ENVIRONMENTAL CONFLICT MEDIATION

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Abstract
At a time of global economic crisis followed by resource crisis, a period in which the world seeks alternative resources through eco-investment, environmental conflicts are inevitable. Romania is among the few countries that do not pay enough attention to environmental conflicts and to the advantages to of solving them through mediation procedure. The present paper deals with areas in which conflicts can be applied in environmental mediation and its benefits.

Keywords: *environment, mediation, conflict, gases, pollution*

Introduction

Permanent changes of the economic, standing controversy between the right to economic development and the right to live in a space that continues to provide optimal living conditions led to the emergence of environmental conflicts.

To conserve resources and to ensure optimum life of the inhabitants of the planet, international organizations have developed the principle of sustainable development.

Sustainable development is development that allows the current needs of present generations without jeopardizing the ability of future generations to meet their own needs.

Such a development aimed at equitable and balanced use of natural resources. Any unfair or unbalanced use can give rise to a environmental conflict.

Conflict resolution becomes necessary when resource area priorities conflict.Confrontation polarizes parties that need to sit together, to communicate in order to find resolution. Most of time communication communication was in the form of public participation, this being the form of solving conflicts.It must be stressed that most of the time it has been one-sided that is why conflict were not solved. That is why most of the countries began to orient themselves to resolving conflicts through mediation. Mediation , a form of alternative dispute resolution [1]allows the presence of a third party that supports communication between the parties.

Alternative Methods of Dispute Resolution – ADR were originally defined as means of resolving disputes outside the state judicial system through procedures conducted by a neutral and impartial third party.

In recent years, in many states, have been established the legislative or by rules of the arbitration court, two of alternatives methodes of dispute resolution such as mediation and judicial conciliation.

Section 1 Classification of ADR-s

In the wide acceptance, ADR includes mediation, conciliation, mini-trials (mini-Trials), assessments done by experts (Expert Determination)[2] , arbitration, etc.

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[1] ADR

[2] Expert determination (ED) is a voluntary process in which a third party which is usually an expert specialized in the dispute arose giving a solution that binds the parties.Unlike the arbitrator, the expert is not bound by the rules of procedure, excepte the rule of having a proper behavior.ED is common especially in the construction industry.

But most authors provides a clear demarcation between the ADR and arbitration and therefore a narrow definition has been formulated excluding arbitration and expert assessments from the category of proceedings, called ADR.

In U.S. ”dispute resolution” gradually includes various alternative methods of dispute resolution depending on the requirement of the other party and third party participation and the rights and obligations of the last.

In practice are considered alternative methods different types of procedures annexes to judicial courts or abitration.

1.1 Types of Alternative Methods of Dispute Settlement

It seems extremely interesting how ADRs evolved in US and types of ADRs. We still intend to present these forms.

It is appropriate to takeover this by the Romanian system too, as much more, now, when in Romania was regulated by the law 192/2006 only mediation.

1.1.1.Inaction

Inaction is the most commune form of dispute resolution and consists in voluntary withdrawal of at least one of the parties in dispute.

Given the fact that any dispute involves two parties, when one party, the injured,is not seeking for the other than the dispute is resolved. This part choose the method of dispute resolution and its solution.

Another form of inaction is to be completed by the attitude of a party to sit and wait to see what happens. The other party may choose, consciously or unconsciously,the inaction or may choose a method of settlement that would lead to a better solution for it.

Finally,*inaction* may occur as a result of abandoning negotiation and claims by one of the party.In this case the parties begins to negotiate and the injured party formulates claims that the other party can reject them.The injured party withdraw deciding in this manner dispute resolution.

Not only the injured party can use inaction as a method of settling disputes.Even the party that caused the injury can use inaction but,in this case,inaction takes the form of expectations to see what happens. This method is effective only if the other party decides not to act.

The party knows the loss that will suffer but knows the fact that the action to obtain compensation is not without risks and costs.

1.1.2. Compliance / Total Concesivity

Compliance may take the form of action or inaction. This occurs when one party requests the other to act in a certain way and the second complies and does what was asked or refrain.

1.1.3 Compliance and Negotiation

Although the two alternative methods of dispute resolution might seem similar however they differ significantly whereas,in case of negotiation,if the parties agrees than there is a contract which is based on an exchange of positive or negative counter-prestations.In compliance the party that formulates the claims has no obligation.

1.1.4 Self-help

This method is to satisfy their own interests by the party who is injured, without court intervention.The action to meet the claims on its own has to be legal.

A concrete example would be the beneficiary that claims non-conformity of construction work and withheld the last rate of payment that would have to pay as compensation or of the bank that takes possession of the property purchased from the loan(mortgage or pledge)to cover part of the prejudice.

Very interesting is the practice of the Anglo-Saxon legal systems that divides this form of ADR in one based on status and one based on common law.

In the US is considered, especially, provisions of the Uniform Commercial Code which for example,authorizes the buyer who has accepted goods to use self-help under revocation form of the

acceptance of the goods delivered and their return to the seller if non-conformity substantially diminishes the value of goods.

1.1.5 Negotiation

Negotiation is seen as being the form of ADR involving two warring sides, that tries to seek resolution of their conflict without using a third party. In this case, the parties are involved in a process that involves compromise on their part.

In identifying possible solutions, the parties shall consider the facts and the legal provisions.

The parties will think which should be strengths or weaknesses of their position in the event of a dispute.

The agreement concluded by the parties has the value of a contract in which each party undertakes to do, to give or not to do something in exchange for consideration of the other party. (quid pro quo[3]).

1.1.6 Early Neutral Evaluation -(ENE)[4]

ENE is a procedure for specific purposes other than those that are meant to enable parties to reach settlement of their dispute.

It has its origins in 1985 in northern California where district court provided the parties neutral evaluation procedure.

ENE's stated goals are:

1. determination of the parties to confront the strengths of their positions with those of the opposing party;
2. identification since the beginning of the parties dispute of the facts and the law;
3. provide an objective evaluation of the case;

ENE can be organized as an independent procedure that takes place after a party brought an action in court or can be incorporated into a court-sponsored mediation procedure.

In the first case, after placing the action, parties follows an evaluation session led by a lawyer named by court which makes an objective assessment of the case.

If the assessment is incorporated into the mediation procedure, the mediator will establish a private meeting with the parties and their lawyers.In this meeting the mediator assess the strengths and weaknesses of the case and predict the result of the dispute. As a result of this anticipation,the mediator can push the parties to reach a solution.

This type of mediation is different from facilitative mediation where the mediator doesn't push but encourages the parties to discuss possible solutions.

1.1.7 Trial by Jury Summary(TJS)

Represents legal proceedings ordered by the judge in those cases where the state court case and no applications were filed.

It is headed by a judge or magistrate and start by choosing a jury. Counsel for parties submit the case and evidence to the jury obtain a verdict from them.

The entire procedure is brief and lasts two days. The verdict is advisory and doesn't bind the parties.

This trial is recommended especially in cases where the parties have unrealistic expectations regarding the solution.

Parties may choose for a private summary trial with jury. This type of trial is different from the previously indicated by the fact that in this case the parties are those who chooses the rules of conduct of the proceedings.

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[3] Martin A. Frei –*Alternative Methods of Dispute Resolution*, Ed.Thomson,Delmar Learning, 2003,pag.101;

[4] In England ENE may be conducted by a person possessing legal knowledge but also by a person who does not possess such knowledge. It is clear that in assessing strengths and weaknesses of the position of the parties, assessor shall not consider and legal provisions applicable in case, as it proceeds in case of self-help but and summary trial - see in this respect Hazel Genn – *Mediation in Action. Resolving Court Disputes without Trial*, Ed.Caloust Gulbenkian Foundation, 1999, pag.15 ;

Very interesting seems Trial by Jury Summary where conflict is serious and the stakes are high.In this case,one party may request to TJS that the other party cannot participate. The purpose of such judgments would be to test the jury to see their reaction to their own case and their own expectations.

1.1.8 Ombuds

It is a procedure involving a third party which doesn't represent any person and to whom it is addressed by a person a specific problem.

Ombuds has its own independence and must be impartial and maintain confidentiality of information available when they carry out informal investigations.

Ombuds institution's takes three forms:

1.1.8.1*.the form of classic ombuds*

In case of this form,the third party is officially named and is attached to a state or federal administrative agency.

Its role is to assist the public in how to deal with the thicket of rules and administrative procedures of the institution. Moreover, it addresses to the relevant institutions issues raised by the public about the actions or policies of public institutions or individuals within those institutions without their advocacy.

1.1.8.2 the form of *organizational* ombuds

The third is an employee of public or private organization that reports directly to the people in the organization's management.

It receives complaints of members of the organization (employees, contracting parties, students, educational institutions, etc.).and help them resolve informally and respecting the principle of confidentiality. It also alerts the organization's top management on major issues.Neither in this case the third party doesn't argues in favor of applicants.

1.1.8.*3* *the form of ombuds defender* in which the third party contractor, named in public or private section,pleads in favor for those who requires their services.It is often met in medical field and of licensing,etc.

Ombuds after hearing the party,gathers the information and helps it to clarify the problems and to find possible solutions to resolve the conflict.

Although it is not intended to resolve the problems of the party that notifies it, however, dispute resolution can be achieved after discussions with the party that caused the problem.

1.1.9 Private mediation

Private mediation is the consensual process,planned,led by a neutral and impartial third party *facilitating* discussions between parties in an attempt to help them to resolve their dispute by concluding an agreement.

In some systems the mediator is more active by proposing solutions to the parties.

The mediation is called private because it is entrusted to a private mediator and it is not held under the the auspices of the court.

1.1.10 Mediation Funded by the Court

It is the type of mediation, known in some legal systems such as the Anglo-American, where the procedure is conducted by a judge, a magistrate or a special mediator appointed by the court.The last one,usually, sometimes, is the mediator called adjunct settlement judge(ASJ).

This type of mediation was ADRs which enjoyed its greatest success in the U.S.

1.1.11 Mini - Trial

Mini - Trial is the type of procedure used in solving disputes between companies.

The procedure consists in an abbreviated trial, reduced, taking place in front of a presidium composed of three persons, one representative of each company, part of the conflict and a neutral third party.

The procedure takes place in two stages.In the first stage the presidium listens to the lawyers arguments of the two companies and attend a formal presentation of evidence.

Later, the Presidium has the opportunity to interogate the parties.

The company representatives,being in presidium,hears mostly, for the first time the details of the dispute from its own lawyers as from the lawyer of the opposing party.

The end of the procedure runs between the two representatives of the parties from presidium without the participation of the lawyers of both companies.

The involvement of the neutral third party in procedure differs from a mini-trial to another.Sometimes it has an active role and in other cases the role of consultant.If our neutral third party is there when the two representatives are meeting to negotiate a solution than he will have the role of mediator between the two.If the third party is not there the two representatives will negotiate directly with each other the solution.

The third party can have many roles:may advise the parties regarding technical and legal aspects, may question witnesses and parties lawyers, may prepare a summary or analysis of the case etc..

This procedure seems very interesting. It is interesting the changing position of representatives of both parties,from leader to „judge"or adminstrator of the procedure in the second phase of the mini-trial.

It is also interesting the role of the third party in this procedure that depends on the will of both parties involved and progressivelly evolvs from a passive attitude (that of consultant if the parties requires opinion)up to a very active one,being able to interogate witnesses,lawyers of the parties,etc.

This procedure is different from *negotiating session(settlement conference)*in which the third neutral party negotiates with the parties and mediates between them and of *summary trial by jury* where the advisory jury pronounce a consultative decision.The difference is in the fact that in this case the two representatives of the presidium of the parties are those who solves their dispute.

We cannot avoid mentioning the fact that, this procedure shows the great disadvantage of the fact that in the situation in which the parties don't reach an agreement, risks disclosing their strategies to the other party.

It also appears as being interesting the fact that,this procedure of ADR is the only one applicable or especially in commercial disputes and,more accurate,in those in which the parties are the companies.

1.1.12 Private Arbitration

Private Arbitration is that procedure by which the parties refer to a third party, a group of neutral third parties or an institution that examine evidences and issue a decision based on law.

The parties are usually those that sets the arbitration procedure and the decision of the arbitrators is mandatory for the parties.

In this procedure the parties are entitled to decide that this decision is not compulsory for them.

The decision pronounced by arbitrators is final and can not be appealed only on grounds of unconstitutionality of the procedure or abuse of arbitrators consisting in violation the obligation of discretion. [5].

1.1.13 Arbitration courts handed

It is defined as a form of arbitration that has become a public process because of their takeover by the courts.

The procedure is common in some states in the US that have developed special programs of arbitration and, unlike private arbitration which is voluntary, this is mandatory.

The procedure starts after the introduction of legal proceedings and takes the form of an abbreviated process.

The arbitrator is appointed by the court from a list of arbitrators accredited by it.

[5] Martin A. Frei - op.cit., pag.223

Unlike the private arbitration this type of arbitration is compulsory and follows the procedure established by the court(not chosen by the parties)and the pronounced decision is not compulsory for the parties.

They may ignore the decision and request the court the proceedings from the beginning as no arbitration had occurred.

We will not insist on this type of arbitration being seen only in civil actions not in the commercial one that is the subject of this report.

1.1.14 Mediation-Arbitration (MED-ARB)

It is a procedure composed from mediation and arbitration.

In MED-ARB,the parties agrees that the procedure to begin with a private mediation and if the conflict between them cannot be stopped with an agreement to continue with a private arbitration.

Depending on the agreement of the parties,the arbitrator may be the same person with the person of the mediator.

The particularity of this procedure lies in the fact that priority is given to parties's agreement and in the end of the procedure,if such an agreement is not established,the conflict will be settled by an arbitration decision.

1.1.15 Litigation

It is not considered as a general rule, a form of ADR.

1.1.16 Private Judgement (RENT-A - Judge)

It is that procedure, considered as the ADR right, in which the parties choose to submit the conflict between them to a private trial conducted by a neutral third party, usually a former judge, a law professor, lawyer, etc.

Private Judgement may be under a contractual provision or the permission of such judgments may result from the law.In this last case, the parties addressed the court for appointment of the third party who will lead the proceedings.

Such a "judge" doesn't have the power of a court judge. In addition, the trial procedure is determined by the parties, parties may limit the decision rendered by setting financial limits minimum and / or maximum, that will determine whether the decision of the judge is mandatory or not, if it is motivated or not, etc..

If the decision is mandatory it can not be appealed by neither of the parties because of error or misapplication of the law by the judge.

British legal system knows the following forms of ADR:arbitration, early neutral evaluation, conciliation and mediation.

Section 2 Environmental Conflict Mediation

2.1. Definition of mediation

Mediation is defined as an unofficial procedure / informal in which a third party, called mediator, assist parties in reaching an agreement that will lead to dispute settlement.

The mediator has no power to take decisions or to give solutions which obliges the parties.

2.2 Areas in which mediation takes place in Romania

Mediation can be performed areas like : waste management, water pollution and air pollution, environmental damage on urban issues (cutting of trees, construction, development of parks, etc.), infrastructure management, collaboration with public sector institutions, public services (sewerage, water supply, etc.), etc.

Mediation or Arbitration, are possible in those conflicts that aims the rights that the parties may have.

Mediation is not recommended in clear cases, in those in which the party does not want mediation but wishes to obtain the opinion of a third party or a public rehabilitation.

In contrast to these cases, that misses the purpose of using the mediation procedure or the good faith that is necessary to such procedures, it is found that it is useful in cases in which parties

are involved in a business relationship because usually they want to continue business and not getting justice, reason that will make concessions to reach a compromise, a mutually satisfactory solution (ie - parts of a license agreement).

2.3 Mediator

Complex environmental conflicts are most often related to social, economic and cultural. Therefore, such a conflict mediator must be a highly qualified person, to have knowledge in the field and ability to work with specialists. Most often such conflicts necessitate an evaluation of environmental management, requires the opinion of a chemist, engineer, etc.

Law 192/2006 does not provide additional conditions to the general ones to give mediator the right to mediate such kind of conflicts. Therefore, any person who has lawfully acquired the status of mediator could mediate un environmental conflict**.**

In fact, such a mediator will not have the necessary skills to support the parties in finding a mutually satisfactory and lasting solutions.

2.4. The type of mediation which can be use in international and in Romanian conflict

Countries as Austria, USA, Germany offers both the evaluative and facilitative mediation. Romania allows only facilitative mediation.

Facilitative mediation, the only one known by our legal system is that the mediator offers or provides to parties an assessment of the situation that is not meant to bind parties.

In *evaluative* mediation, the mediator has the power to assess the situation and propose a solution in which parties may accept or reject it.

Although the law 192/2006 does not offer this option, in practice is used more frequently this type of mediation rather than the facilitative mediation. The explanation would be that skills in communication, empathy and negotiation of the Romanian side involved in the conflict are not developed, lacking the ability to defuse the intra-and interpersonal conflict itself and finding a solution. Therefore, the mediator finds itself forced to overcome the limits of facilitating a discussion, to support the parties in finding a solution and him providing potential solutions.

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INSURING CONSISTENCY WITHIN THE WIPO'S UDRP DECISIONS ON DOMAIN NAMES LITIGATIONS

BEATRICE ONICA JARKA *

Abstract
The paper presents the need of insuring consistency within the domain name litigations starting with the adoption of the UDRP as a mean to insure uniform dispute resolution and continuing with the creation and application of the different practical instruments of insuring consistency identified and used by the few providers of UDRP services. The paper shall focus on the UDRP's application by the WIPO Mediation and Arbitration Center and the consistency issues under UDRP, by analyzing the working instruments of insuring this consistency at the level of Administrative Panel's decision and how these instruments are thought within the UDRP WIPO's practice. Further the paper shall analyze the correspondence between the independence of the Administrative Panel and the consistency issues and shall conclude on the need to insure consistency as a prerequisite for predictability and stability of the domain names dispute resolution.

Keywords*: UDRP, practice, consistency, methods, Administrative Panel*

Introduction

Since its creation by ICANN[1] in 1999, the Uniform Dispute Resolution Policy (further called UDRP) have become a constant alternative dispute resolution for the solving the disputes in connection with the domain names. The scope of the UDRP is limited to the abusive registration of the domain names with the infringement of third parties trademarks rights. According to the UDRP, in case that an infringement of the trademark rights occurs by the registration of a domain name, the trademark holder may ask, based on UDRP: the transfer or cancelation of the disputed domain name. The Administrative Panel appointed by the UDRP providers based on a UDRP complaint, shall grant the request for transfer or cancelation if three conditions are cumulatively fulfilled: the disputed domain name is similar or identical with a trademark in which the complainant has rights, the respondent has no rights or legitimate interests in the disputed domain name and the disputed domain name had been registered and used in bad faith.

The UDRP had been thought as an instrument universally applicable for the trademark infringements by an abusive registration of a domain name. Such universality was meant, considering the universality of the internet virtual space, from different legal perspectives, namely the UDRP provisions have no national law reference, the lists of Panelists available on domain names dispute resolution providers websites contain reputable specialists in intellectual property all over the world, therefore with different backgrounds corresponding to different law systems, the Rules for UDRP (further called as "the Rules" as the UDRP itself do not include national law reference and the

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[1] ICANN stands for Internet Corporation for Assigned Names and Numbers. ICANN was formed in 1998 as a not-for-profit public-benefit corporation with participants from all over the world dedicated to keeping the Internet secure, stable and interoperable. It promotes competition and develops policy on the Internet's unique identifiers. Through its coordination role of the Internet's naming system, it does have an important impact on the expansion and evolution of the Internet. Following WIPO conducted consultation process on domain names including the dispute resolution and the recommendation of WIPO for the institution of a policy to be followed uniformly by all registrars in the .com, net, and .org TLDs, ICANN approves on 24th of October the UDRP and the implementation documentation. WIPO becomes the first provider of UDRP. For more details see information available at http://www.icann.org/ en/udrp/udrp-schedule htm

Supplemental Rules adopted by each dispute resolutions services providers[2] do no make more national specific the application of the UDRP. Therefore, the universality of the UDRP has to be supported also by a consistency in application of the said rules so no fundamentally contradictory decisions would rise at least from the application of the UDRP, the Rules and Supplemental Rules as applied firstly from different national law perspectives and secondly based on each Administrative Panel's personal understanding perspective of the UDRP.

The need for consistency in the UDRP practice appears not only in the application of the UDRP by each international provider but also from the perspective of general UDRP practice at the level of the four international existing UDRP providers.

The consistent UDRP application has a strong relevance also considering the provisions of paragraph 4 j[3] from UDRP which provides for the availability of Court procedures, before or after the administrative proceedings initiated by the domain name holder takes place. The initiation of the recourse to the Court proceeding, after the UDRP proceedings, suspend the implementation of the UDRP decision by the Registrar until the Registrar receives (i) evidence satisfactory to it of a resolution between the parties; (ii) evidence satisfactory to it that the domain name holder lawsuit has been dismissed or withdrawn; or (iii) a copy of an order from such court dismissing the domain holder lawsuit or ordering that the unsatisfied party do not have the right to continue to use the disputed domain name. In other words, the holder of the domain mane unsatisfied with the UDRP decision has the possibility to address the Court of competent jurisdiction for an independent dispute resolution from the UDRP application.

Moreover, the need and scope of consistency is determined, as in any dispute resolution practice, either ADR or judicial, by the need of predictability of the UDRP practice.

This article shall analyze the need and scope for consistency within the UDRP practice of first approved by ICANN of the four international providers of domain disputes resolution – the WIPO Center for Mediation and Arbitration, the practical implementation instruments initiated by the said provider to assist the UDRP practice itself in building its consistency, while comparing with the others providers implementation and focusing on the internal as well as external determinations and effects of such consistency.

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[2] Complaints under the Uniform Dispute Resolution Policy may be submitted to any approved dispute-resolution service provider as approved by ICANN. The list of approved providers by ICANN at February 20th , 2011 available at the internet address: http://www.icann.org/en/dndr/udrp/approved-providers htm ,

Asian Domain Name Dispute Resolution Centre, Dispute Proceedings/Decisions:, https://www.adndrc.org/hk/case_decision.php

National Arbitration Forum, Dispute Proceedings/Decisions: http://domains.adrforum.com/decision.aspx

WIPO, Dispute Proceedings/Decisions: http://www.wipo.int/amc/en/domains/search/index html

The Czech Arbitration Court Arbitration Center for Internet Disputes, Dispute Proceedings/Decisions: http://www.adr.eu/adr/decisions/index.php

[3] According to paragraph 4 letter j from **UDRP:** "*The mandatory administrative proceeding requirements set forth in Paragraph 4 shall not prevent either you or the complainant from submitting the dispute to a court of competent jurisdiction for independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded. If an Administrative Administrative Panel decides that your domain name registration should be canceled or transferred, we will wait ten (10) business days (as observed in the location of our principal office) after we are informed by the applicable Provider of the Administrative Administrative Panel's decision before implementing that decision. We will then implement the decision unless we have received from you during that ten (10) business day period official documentation (such as a copy of a complaint, file-stamped by the clerk of the court) that you have commenced a lawsuit against the complainant in a jurisdiction to which the complainant has submitted under Paragraph 3(b)(xiii) of the Rules of Procedure. (In general, that jurisdiction is either the location of our principal office or of your address as shown in our Whois database. See Paragraphs 1 and 3(b)(xiii) of the Rules of Procedure for details.) If we receive such documentation within the ten (10) business day period, we will not implement the Administrative Administrative Panel's decision, and we will take no further action, until we receive (i) evidence satisfactory to us of a resolution between the parties; (ii) evidence satisfactory to us that your lawsuit has been dismissed or withdrawn; or (iii) a copy of an order from such court dismissing your lawsuit or ordering that you do not have the right to continue to use your domain name*"

The consistency subject is of utmost importance within the UDRP practice as it is in general within the ADR and judicial practice, as consistency represents the basis of creation of confidence and stability in the dispute resolution. Moreover the consistency implementation instruments created by the domain dispute resolution providers may serve, despite of being determined by specific causes as the generally common regulations of the trademark rights and by the universality of internet, as a good model which adapted would be able to be function also within the national legal orders.

1. Legal framework

The legal framework shall consider the UDRP, the Rules and the Supplementary Rules adopted by the WIPO Mediation and Arbitration Center in respect to the domain name dispute resolution as well as the practice of the Administrative Panels under the UDRP within the Center.

2. Consistency created by UDRP practice itself

The UDRP, the Rules and the Supplemental Rules adopted by the WIPO Mediation and Arbitration Center provide any express requirement for consistency.

The UDRP represents a common body of substantive and procedural rule rules.

In addition to UDRP, the Rules and the Supplemental Rules provide for the procedural framework in which the UDRP cases are considered by the WIPO Mediation and Administrative Center.

The UDRP had been thought as a hybrid mediation/arbitration scheme[45] operated primarily by private entities based on a contract – the Registration Agreement- concluded among the parties responsible for the registration of the domain name: the registrant, the registrar and ICANN. The contractual nature of the UDRP supplemented by ICANN with the Rules and further by each dispute resolution providers with the Supplemental Rules created a significant freedom of appreciation by the Administrative Panel of the domain names disputes.

In this sense, the UDRP provides at paragraph 10 the general powers of the Administrative Panel, which instructs the Administrative Panel to

- conduct the administrative proceeding in such manner as it considers appropriate in accordance with the Policy and these Rules.

- to treat and ensure that the Parties are treated with equality and that each Party is given a fair opportunity to present its case.

- to determine the admissibility, relevance, materiality and weight of the evidence.

Moreover, according to paragraph 15 letter a from UDRP, the Administrative Panel shall decide a request under a complaint on the basis of the statements and documents submitted and in accordance with the Policy, these Rules and any rules and principles of law that it deems applicable. Such freedom of appreciation provided for the Administrative Panel by the UDRP may be considered to create apparently the premises for inherent inconsistency among the UDRP decisions.

The determinations of such inherent inconsistency are related to the universal character of the UDRP together with a flexible wording of the UDRP, the globalization of the trademarks and the last but not the least to the freedom of legal appreciation that an UDRP Administrative Panel has in deciding an UDRP case. While UDRP creates substantive rules based on which an Administrative Panel has to decide the transfer or cancelation of a disputed domain name namely the identity or similarity between the disputed domain name with a trademark, the lack of the rights or legitimate interest of the disputed domain name holder, the registration and use in bad faith of the disputed domain name, the universal character of the UDRP leads to the application of such substantive rules

[4] For more details see David W. Maher, The UDRP: The Globalization of Trademark Rights, IIC, The International Review of Intellectual Property and Copyrights Law, Max Planck Institute for Intellectual Property, Competition and Tax Law, Vol. 33, 8/20, pp 924 -948, ©Verlag, CH Beck, oHG, Munich available at the internet address: http://dmaher.org/Publications/globaliz.pdf.

in connection with two different determinations: the national law background of the trademarks registration and the national law background of the Administrative Panel which resolve the domain name dispute. Such determination cannot be avoided despite the universal UDRP application and universality of the internet virtual space. Apparently, there is no room for creating a consistent UDRP practice under the said determinations. Moreover, the lack of any consistency requirements under the UDRP, the Rules and the Supplemental Rules may weaken the chances for a coherent consistent UDRP practice within the same dispute resolution provider. An example of the flexibility of the UDRP language which would encourage inconsistency is the provisions at paragraph 11 – language of proceedings –letter , which states that "*unless otherwise agreed by the Parties, or specified otherwise in the Registration Agreement, the language of the administrative proceeding shall be the language of the Registration Agreement, subject to the authority of the Administrative Panel to determine otherwise, having regard to the circumstances of the administrative proceeding*". It is evident that the rule of having the administrative proceedings conducted in the language of the Registration Agreement has different exceptions which give the Administrative Panel the freedom and flexibility to decide in any way based on the circumstance of cases even against the rule.

While, internally, within each UDRP dispute resolution providers there is no rule providing for consistency, externally the existence of four different UDRP dispute resolution providers may worsen the situation, as no specific instrument contractually provided requires the insurance of UDRP decisions consistency among the decisions issued by the different providers.

The UDRP, the Rules and the WIPO Supplemental Rules present the flexibility and a reduced formalism specific to ADR which makes the ADR preferable to the judicial dispute resolution.

As presented, the administrative proceedings under UDRP contain all the internal and external determination possible to result in an inconsistent practice.

In spite of such determinations, consistency had been initiated through the UDRP practice itself. It cannot be denied that an important body of Administrative Panelists on WIPO Administrative Panelists list[6] came from the common law systems which valuate the precedent as a source of law. This body of Administrative Panelists marked the UDRP practice and initiated the consistency practice. Moreover the need for predictability and stability in their own legal systems became more and more important in the Administrative Panelists[7] with German Law background and contributed to a convergence of opinion in continuation of the trend of the consistency within the UDRP practice.

It was the UDRP Administrative Panels that considered that UDRP should not be a roulette wheel[8]; that they should aim for a high degree of consistency (which is the basis for predictability).

From the WIPO case, 3636275 Canada, dba eResolution v. eResolution.com, D2000-0110**[9],** the WIPO UDRP decisions had initiated and valuated the precedent considering that "*The jurisprudence which is being rapidly developed by a wide variety of Panelists world-wide under the ICANN Policy provides a fruitful source of precedent*". In the case, Time Inc. v. Chip Cooper[10], D2000-1342, which decided the transfer of the disputed domain names "lifemagazine.com", "lifemagazine net", lifemagazine.org", the Administrative Panels went further and has underlined the consistency which imposes itself from the need of predictability and stability of the UDRP practice: "*The majority believes that the UDRP procedure should be governed by the rule of law, rather than*

[6] The WIPO Domain Names Administrative Panelists list is available at the internet address: http://www.wipo.int/amc/en/domains/Administrative Panel html

[7] The European Human Rights Court

[8] See information available at the internet address: http://udrpcommentaries.wordpress.com/2010/09/30/predictability-and-consistency-in-application-of-udrp-jurisprudence/

[9] The decision is available at the internet address: http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0110 html

[10] The decision is available at the internet address: http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-1342 html

by the individual consciences of the Administrative Panelists. If a principle enunciated in a decision is well-reasoned and repeatedly adopted by other Panels, the majority believes that absent compelling reasons which require a determination otherwise, the rule established should be respected. The majority believes that potential users of the UDRP are entitled to some degree of predictability. Counseling one who is considering filing a Complaint should consist of more than, "It depends what Administrative Panelist you draw."

Nowadays, the consistency is also valuated in the UDRP jurisprudence as an act of control in the case, Pantaloon Retail India Limited v. RareNames, WebReg[11], D2010-0587 (WIPO June 21, 2010, the Administrative Panel considered that: "*There is a substantial consensus among Administrative Panelists that the acquisition and offering for sale of domain names and/or using them to provide links to other sites may well (provided it is not directed at trademark misuse in breach of the Policy) be a legitimate business, a business engaged in not only by Respondent but by other operators who acquire and "warehouse" domain names which they think others might consider valuable. Whether that consensus is justified may be a matter for debate, but in the opinion of the Administrative Panel there is a strong body of precedent which, though not binding, is strongly persuasive*".

The UDRP practice serves as a good example of the self-imposed limitations of the Policy dictating the judgments under the UDRP.

Self building of such role by the UDRP WIPO practice determined the administrative management of the WIPO Mediation and Arbitration Center to identify, in consultation with the Administrative Panelists and develop instruments to ease the application and following up of the consistency. In this sense the Center developed chronologically in this order the full on line posting of all decisions at http://www.wipo.int/amc/en/domains/decisions.html, Center's online Legal Index of WIPO UDRP Administrative Panel Decisions at the address: http://www.wipo.int/amc/en/domains/search/ **,** Search WIPO Cases and WIPO Decisions at address: http://www.wipo.int/amc/en/domains/search/, the WIPO overview of WIPO Administrative Panel Views on Selected UDRP Questions at the address: http://www.wipo.int/amc/en/domains/search/overview/index.html and finally the Selection of UDRP related cases at the address: http://www.wipo.int/amc/en/domains/challenged/ . These instruments represent equally the framework and the means to insure the persuasive body of precedent necessary to maximize consistency within the WIPO UDRP practice.

4. WIPO consistency implementation instruments

Self building consistency within the WIPO UDRP practice has been facilitated and increased by the implementation instruments analyzed below. It is necessary to note that all these instruments may be used in supplementing each other with the final purpose to enhance predictability and stability within the WIPO UDRP practice through consistency.

4.1. The posting of all WIPO decisions

The Center provides for the online posting of all WIPO decisions. The Decisions are organized and posted per years with the indication of the case number.

4.2. Index of WIPO UDRP administrative panel decisions

The index of WIPO UDRP Administrative Panel Decisions represents a valuable instrument useful in the UDRP practice equally to the Administrative Panelist but also to the dispute parties. The index offers identifications on two main categories of all the WIPO UDRP decisions: decided WIPO Cases by domain names categories and a legal index. The Legal Index contains also supplementary

[11] The decision is available at the internet address: http://www.wipo.int/amc/en/domains/decisions/text/2010/d2010-0587 html

an identification of the WIPO decision considering legal categories under UDRP as the legal categories under UDRP substance or UDRP procedure.

4.3. Search WIPO cases and decisions engine

The search WIPO cases and decisions instrument creates several search engine which facilitates the identification of an WIPO decisions considering criteria as full text search on WIPO Administrative Panel Decisions, search WIPO Cases by Domain Name, or search by named complaint or by the named respondent.

4.3.WIPO overview of WIPO administrative panel views on selected UDRP questions

One of the most useful instruments in assisting equally the Administrative Panelists and UDRP applicants in the consistent application of the UDRP is the WIPO overview of Administrative Panel views on selected UDRP questions. While for the Administrative Panelists the WIPO overview is a mean to identify the majority Administrative Panel views on legal issues which commonly arise, in the interpretation and application of the UDRP for the latter is a mean to stability and predictability of this practice. The WIPO overview is deemed to be an informal overview of Administrative Panel positions on what is considered to be key procedural and substantial issues.

According to the information available at the address http://www.wipo.int/amc/en/domains/search/overview/index.html, the WIPO Overview uses questions andimplies and evaluation of opinions based on the 7,000 UDRP cases the WIPO Mediation and Arbitration Center has administered through February 2005.

This instrument is clearly stated as having a non binding nature, as it is the nature of prior Administrative Panels decisions. Each Administrative Panel is free to make its judgment in the particular circumstances of each individual proceeding and each case party is responsible for making its own independent assessment of decisions relevant to its case.

4.3. Selection of UDRP related cases

As mentioned above consistency implementation instruments serves building consistency among the UDRP decisions based on the persuasive although non - binding nature of the UDRP precedent. In addition the Center created a further instrument, this time external for creating the consistency through the posting of selection of UDRP related cases in the national Courts. The effects of such selection of related UDRP cases represents an useful instrument to consider the UDRP decisions from the perspective of the external effects of such decision in case of Court challenge under the national jurisdiction

5. Other UDRP CONSISTENCY IMPLEMENTATION INSTRUMENTS

Other UDRP providers offer to their UDRP Administrative Panels data base of all cases under their administration with specific search engines which facilitates the identification of the decision. National Arbitration Forum is going even further in assisting the Administrative Panels in their work for building the consistency and supplements the Administrative Panel appointed in an UDRP case with a memo with the possible legal standings on the three cumulative conditions for the transfer or cancelation of disputed domain name according to the specific elements of the case. The memo is drafted by the National Arbitration Forum and documents the eventual legal standing on prior UDRP Administrative Panel decisions. It has to be noted that the National Arbitration Forum memos are always documented not only on the NAF UDRP Administrative Panels decisions but also on decisions adopted by the UDRP Administrative Panels under all the domain name disputes resolution providers. As in WIPO case, neither the prior NAF Administrative Panels' decisions nor the memos are binding for a Administrative Panel appointed in a domain name dispute.

6.The need for consistency and the independence of the Administrative Panel

The Rules contain at paragraph 7, express provisions regarding the impartiality and independence of the Administrative Panels solving the domain name disputes, and the mandatory disclosure of any circumstance giving rise to the justifiable doubts as to such impartiality and independence.

While the matter of independence has generally the meaning of absence of any bias deriving from direct prior activities of the Panelist appointed, a question arises also as to the biasing nature of the self built consistency within UDRP practice. May any one say that the self stated consistency need, the persuasive nature of the precedent may be considered a bias to the appointed panelist? Could a panelist be kept by the body of precedent in taking the decision under UDRP?

The instruments presented above are clearly stated as having a non binding nature. Finally it is the UDRP, the Rules and The Supplemental Rules which governs the adoption of the UDRP decision by the Panel, and they do not impose consistency and offer enough flexible wording to allow the Panel to decide even against the acknowledged UDRP practice if the circumstances of the case and his understanding of the case represent the basis of solid line of reasoning. This is ultimately the beauty of the UDRP which allows for the building of an extensive UDRP practice enriched with the valuable national law systems diversity.

7. Conclusions

Drawing conclusions on the consistency within UDRP practice, it s worth to underline that in spite the lack of specific rules for insuring consistency, the practice itself built such consistency from a natural need for stability and predictability. It was the merit of the UDRP services providers to identify and develop the necessary practical instruments for assisting the Administrative Panel in further building consistency with the UDRP practice, while leaving the legal creativity of the panelists to add value to the different questions of interpretation and application of UDRP.

There is a lot to learn from the model initiated by WIPO as an UDRP provider for encouraging the consistency. While developed for the specific circumstances of the trademark rights globalization under UDRP, the WIPO model could be adapted and used for the implementation of consistency at national level.

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MANDATORY CLAUSES IN MEDIATION CONTRACTS

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Abstract
The mediation contract – a contract by which conflicting parties agree, in conjunction with a mediator, upon conflict resolve in an amiable manner through the agency of mediation, under due efforts on the mediator's part, in exchange for payment of a fee by the parties – must contain a set of mandatory clauses in compliance with legal provisions, Article 45 of Law no. 192/2006. In the absence of one of said clauses, sanction by absolute annulment is imposed.

***Keywords**: mediation contract, mandatory clause, mediation agreement, mediant, mediator.*

Introduction

In a society where conflicts[1] are increasingly numerous and complex, and their resolve does not yield solutions compatibile to the developmental degree of our society, enforcing a law that create prerequisites for improvement of judicary activity and ensure the nascence of a space of liberty and security for citizens becomes imperative. Accordingly, by dint of Law nr. 192/2006[2], the legislator considered that, via mediation, dialogue should be brought back into society and solutions in differences found according to a win-win type, not a win-lose type of scenario. One of such modalities to solve extant conflicts between two parties is constituted by mediation, that presents itself under the form of a contract[3] legalising the will of parties to prevent or extinguish a conflict.

Presentation

The mediation contract is a contract by which the parties at conflict agree, in a presence of a mediator, to resolve the differences in an amiable way, under assistance of a mediator, under due diligence on the mediator's part, in exchange for payment of a fee by the parties.

Any contract, therefore, also a mediation contract, is subject to several types of legal rules: some are general, notwithstanding the contract category, whereas others pertain to a specific contract category[4]. The Civil Code includes a corpus of rules applicable to contracts in general (Book III, Title III, Art. 942 and following), and, accordingly, to mediation contracts, setting forth the valid

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[1] Romania is currently faced with over 4 million law suits, with an increase rate of 30% per annum, at a population of over 20 de million citizens, and a judiciary system spending 250 million euro per annum on pending law suits in courts of justice;

[2] Law nr. 192/2006 and Law nr. 192/2006 on mediation and mediator's activity organisation, issued in The Official Gazette no. 441 of 22.05.2006, as amended and completed by Law no. 370/2009 , issued in The Official Gazette no. 831 of 3.12.2009 (aimed at setting up the legal framework in accordance with Directive 2008/52/C.E. of the European Parliament and the European Council, with a view to introducing the character of enforceability of mediation contracts between parties, expressedly guiding seekers of justice towards an amiable resolve of differences or antagonisms emergent between contracting parties) and by *Emergency Government Ordinance no. 13/2010* on amendment and completing laws in the area of justice, with a view to implementation of Directive 2006/123/C.E of the European Parliament and Council of 12.12. 2006 on inland market services, issued in The Official Gazette no. 70 of 30.01. 2010. *We shall herein refer to Law no. 192/2006 as the Law*;

[3] If nearly anything can be solved by dint of a contract, it follows that "we are living in an increasingly contractual manner" (L.Josserand, Aperçu général des tendances actuelles de la théorie des contrats, R.T.D. civ. 1937, p.1);

[4] *see* Ph. Malaurie, L.Aynes, Ph. Gautier, *Special Contracts*, Wolters Kluwer Publishing House, 2009 (coord. of Romanian version: M.Șcheaua, Att.at-Law), pp.3 ;

form (consent, capacity, object, cause, formal conditions). Concurrently, Law no.192/2006 covers rules exclusively applicable mediation contracts

Article 45 in the Law imperatively ennumerates the clauses to be mandatorily included in mediation contracts.

The first clause to be included in a contract is in reference to the identity of the conflicting parties or, as is the case, their representatives (Article 45 letter 'a' in the Law). Accordingly, mention must be made of the following: last name, first name, domicile (registered office, should one of both parties be a legal person), as well as any other data deemed by parties as necessary or an aid to assure celerity and efficiency in conflict resolution. We notice that the lawmaker only makes reference to the "identity of the parties at conflict", not to the person assisting in conflict resolve, i.e. the mediator, who, in his/her turn, is a party to the contract. As a result, albeit not provided by the law, identification data of the latter must be included[5]. There are situaitons where one of the parties is unable to physically attend mediation; in such cases, the Law allows for representation via proxy[6]; in this case, personal data of the representing party must be included.[7].

Article 45 letter 'b' of the above Law provides a further mandatory clause on contract type or object. Mediation addresses any type of conflict[8] lending itself to this manner of resolve, thus the parties must, in conjunction with the mediator, clear the aspects in the case that shall be subjected to mediation procedure. The contract shall include the actual state of conflict, accurately described in order to allow for identification of main aspects, to prevent, should confusion or doubt arise, interpretations that could jeopardize the resulting solution.

A further clause to be included in the mediation contract is in regard to "a statement of the parties ascertaining prior information on the mediator's part on mediation, the effects thereof and the applicable rules thereto." (Art. 45 letter 'c' in the Law). This clause is aimed at constituting a guarantee to the fact that parties have freely opted for mediation and that the mediant has met his/her obligation to inform the parties. To this end, the mediator is under obligation of granting clarifications to the parties regarding the act of mediation, i.e. to offer information as to the aim, rules and effects of mediation, on the relations constituting the object of mediation.[9] With regard to the effects of mediation, the scope must be significantly extended than in the case of trial, due to the fact that, as a result of mediation, the parties may resume or cease their relations in an amiable and mutually advantageous manner. In addition, the mediator must explain the principles and procedures

[5] To exemplify: Office for Mediation….. founded by Decision of Mediation Council No.……of ….. with a registered office in ……street…no....bl…..county…. Tax Code No.….and bank account ……..opened at…..via mediator….;

[6] The situation commonly arises in conflicts where one or both parties are legal persons;

[7] A party's proxy is not to be confused with a person allowed to be present in mediation, along with the parties (Art.52 in the Law);

[8] Types of conflicts that may be extinguished by resort to mediation procedures are, as follows: mediation of insurance conflicts (e.g. interpreting and seeing through an insurance contract, cautions in absence of payment, conflicts between insurance companies), mediation in the area of consumer protection, relevant should the consumer claim the existence of damages following purchase of e.g. flawed products or services; mediation in the labour area (co-worker relations, employer-employee relations); mediation in the family area (divorce, child custody); mediation in the business environment, in the sphere of intellectual property, in the educational area (relationship teacher-student), in criminal litigations, in the medical area. It must be mentioned that, in mediations involving children, mediators should primarily have the prevalent interest of the child at heart, which a.o. implies the right to benefit from protection by mediation. The European Network of Mediators founded in 1997 is aimed at the implementation of the Convention of Childrens' Rights in Europe.

[9] Expert literature makes reference to "informed consent" , i.e. consent granted by a person in order to facilitate an event; it is based on a selective presentation of facts needed to consciously take a decision (G.Falk, G. Koren, Kommentar zum ZivMediatG, Verlag Österreich, Wien, 2005, p. 537);

surrounding mediation, his/her and the parties' role in the procedure, highlighting the parties' right to decide decide in a mediation process[10].

The fourth clause included in the Law makes reference to "the obligation of the mediator top safeguard confidentiality and the decision of the parties on keeping confidentiality, if need be" (Art. 45 letter 'd'). By the very nature of his/her profession, the mediator is a repository of the conflicting parties' "secrets" subject to mediation, and, at the same time, is the "addresee" of comunications of a private nature. Incidentally, a relationship of trust must be established between the mediator and the parties; in the absence of a confidentiality guarantee, trust cannot persist. As a result, the professional secret is acknowledged as a fundamental right and duty of a mediator; this obligation must not extinguish at the time of mediation cessation and is permanent (Art. 32 of Law no. 192/2006). The same confidentiality obligation rests with the parties, bearing in mind that they are for the first time confronted in order to identify the roots of their conflict; thus, the lawmaker must allot increased attention to the patries' private lives.

A further clause that must be a mandatory part in a mediation contract is relative to "the commitment of conflicting parties to observe the rules appliocable to mediation" (Art. 45 letter 'e'). The conclusion of a mediation contract is based on agreement of parties to resort to said procedure and, accordingly, to abide by the rules imposed under law in amiable conflict resolve, in order to reach a solution convenient to both conflicting parties.

The next clause that constitutes due part of a contract covers "the obligation of conflicting parties to pay due fee to the mediator and the expenses incurred by him/her on behalf of the parties, as well as the ways of deposit and payment of said amounts, including cases of mediation forfeit or insuccess, as well as the ratio to be covered by the parties, considering their social standing, if possible. If not agreed upon otherwise, the amounts under issue shall be covered by parties in equal amounts".

The mediator is entitled to receiving payment of a fee[11], fixed in negotiation; this fee must be reasonable[12] and take into account the following criteria: the nature, the novelty and the object of the conflict subject to mediation, time alloted by the mediator to the mediating sessions[13], the importance of interest under question, the results obtained to the parties' benefit; this must unfold relative to the number of parties, upon consensual agreement therewith. As a consequence, a mediator's activity is lucrative; to this end, the contractual parties must agree with the mediator upon his/her due fee. However, concurrently, other expenses incurred in the process of mediation must be provided for[14], as well as ways of deposit and payment of said amounts. Under law, the parties are given leeway in establishing the quantum of the fee to be payed by that each one; if the parties have not agreed therein, the fee shall be paid in equal amounts. The right to receive a fee is guaranteed under

[10] In the The Code of Ethics and Deontology, under 2.1.3 it is shown that: "The mediator shall inform the parties, at the onset, of the scope and nature of his/her activity and on the fact that the final decision lies exclusively with the parties; in addition, the parties are allowed towithdraw from mediation procedure at any time."

[11] In actuality, the right to receipt of fee is regulated under provisions of Art. 26 in the Law: "The mediator in entitled to payment of a fee fixed with the parties via negociation, as well as to refund of expenses incurred during mediation";

[12] In *The Mediator's Code of Ethics and Deontology* under 2.7 it is stipulated that: "Mediators shall inform the parties with regard to their fee, whereas the total value of the fee and expenses incurred during mediation procedures must be fair and justified. They shall explain to the parties the manner of calculation and the value of the fees, as well as the refund of expenses.";

[13] By way of example, Art. III.10 of *Recommendation (2002) 10 on Mediation in civil matters by The Minister's Committee of the Council of Europe*: "Should mediation imply expenses, then these expenses must be reasonable and on a par with the importance of disputed matters; at the same time, they must take heed of the work load on the part of the mediator.";

[14] Thus, added expenses incurred in the act of mediation shall be covered by the parties (phone, fax, means of transportation), based on receipts, whereas contingencies (hiring experts), payed to the parties' benefit and on their approval, and shall be presented in detail, e.g. in an annex to the contract;

provisions of Article 48 in the law; according to this article, with regard to the parties' obligation to pay the due fee, the mediation contract has an imperative character, which allows for the legal exercise of force in the absence of voluntary delivery of obligation. We deem that, in order to increase the dimension of an act of justice and of the citizen's trust[15], mediation - in order to receive wider recognition - should, at least in the beginning, be partly free of charge, or the fees lower, to encourage a justice seeker to gain more courage in resorting to this procedure.

Should mediation be forfeited or terminated, payment must be partly refunded, under conditions stipulated in the mediation contract, and not in direct ratio to the undergone mediation stages, as provided under the prior law, that has seen no amendments under Law nr. 370/2009.

A further clause that must be included in a mediation contract is with regard to "agreement of the parties on the language of the emerging mediation" (Art. 45 letter 'j' in the Law). The lawmaker has included said clause into the category of mandatory clauses, given the option that some of the differences (commonly, in the field of family law or commercial law) bear an international trademark, bestowed by the nationality of the legal person or by the citizenship of the natural person; as a result, mediation must take place in a language known both to parties and mediator. This is imperative, as, in mediation, a resolve convenient to all conflicting parties implied must be reached.

The penultimate mandatory clause in a mediation contract is with regard to "the number of copies in which the agreement shall be drafted, ahould this agreement be in a written form, corresponding to the number of signatory parties to the mediation contract".

Should the conflicting parties reach a consensus via mediation, this may assume the form of a written agreement, to comprise all the clauses agreed upon; these clauses shall not touch upon the rule of law and public order. The agreement is commonly drafted by the mediator and has the value of a writ under private signature. Moreover, the agreement represents the result of common efforts on behalf of the parties opting for mediation procedure, who, with the competent aid of the mediator, have reached a negociated and unanimously accepted agreement. The agreement shall be drafted in a number of copies tantamount to the number of parties involved in the mediation process.

The last mandatory clause in a mediation contract refers to "the obligation of parties to sign the procesul verbal drefted by the mediator, noywhjistanding the way in which a mediation is concluded". In observance in the Law of symmetry, a mediation procedure ceases as it has commenced, i.e. by an consent of will of parties and mediator. The minutes constitute a distinct writ of potential agreement between parties. Altough not provided by the law, the minutes must contain the data of parties, the mediation result, expressed will of parties to end the mediation process, as well as the parties' signatures. The minutes must be issued in a minimum of as many copies as the number of signatory parties.

As is apparent a.o. from the contents of Article 45 of the Law, the absence of one of the afore-mentioned clauses in a mediation contract is sanctioned by relative annulment. By amendment in the Law no. 192/2006, the lawmaker has offered a more amiable solution, by mention of the sanctioned compared to absolute annulment previously stipulated; we deem the prior sanction excessive; absolute annulment is meant to safeguard the general interest and therefore allows the opportunity for a vast number of persons seek cessation of the concluded legal act by defeating norms created to protect this interest. By contrast, relative annulment may be cited, as a rule, solely by the person in the interest of whom the legal sanction has been ruled. Wee deem the enforcement of the latter sanction as more natural, as the very reason behind the act of annulment is safeguarding a private interest. The affected contract party is the most knowledgeable to ascertain whether his/her interest has or has not been affected as a result of unobservance of legal provisions created for his/her protection and thus, is the person of the utmost competence to ask for protective annulment.

[15] Thus, if a large number of conflicts is solved by way of mediation, it follows that the courts of justice face a smaller file load, thus enabling magistrates to allot more time to the case study and, as a result, rule with significantly increased chances of committing legal errors.

Conclusions

As a conclusion, the mediation contract must formally observe both general conditions dictated the Civil Code, mandatory in any legal act, and certain specific conditions imposed by the regulating Law. Such conditions are meant to highlight the peculiarities of the mediation contract, a distinct legal form aimed not solely at engendering social relations but also at predecessing the extinguishment of a legal conflict relation through a third party agency. Under consideration of the fact that the conflicting parties wish to settle their conflict in resorting to negotiation via mediator, it has to be made clear that they have neither forfeited, nor intend to forfeit a private interest, which lends a markedly personal character to rights nascent of their voluntary agreement. Thus, the necessity of mandatory clauses to individualise the mediation contract arises (e.g. the mediator's obligation to safeguard confidentiality, and the parties' decision on safeguarding confidentiality, if this be the case, Article 45 letter 'd' of the Law). Moreover, the involvement of a mediator in resolving a difference can not be deplete of legal consequences.

The mediator, a legal expert, does not have to play an active role in the mediation activity; thus, the necessity of further specific mandatory clauses in individualising a mediation contract arises (e.g. a parties' statement ackowledging prior information on the part of the mediator, with regard to mediation, its effects and applicable rules, Article 45 letter c'' of the Law).

Imposed under reservation of annulment, these clauses are mandatory and meant to induce to the parties circumventing legal dispute the confidence that resort to mediation is an apt, efficient and convenient means to protect and meet personal a interest.

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PRACTICAL ASPECTS OF MEDIATION

IULIA FLOCA *

Abstract
Today the Romanian state gives some advantages to those who use mediation. If the Romanian state would take further steps, mediation would work as in the countries with old tradition. The article refers to success and failure got in the two years of practice. The mediation can be seen in two aspects: The first aspect regarding the mediation itself can lead to a mediation agreement. The mediation agreement gives both winnings to the conflict parts and professional satisfactions to the mediator. The second part concerns the mediation contract. It is very important for the mediator who wants to practice and to gain money. The mediation will work in Romania when the mediator passes from the pro-bono stage to winnings. The article refers to the conditions of the appearance of mediation in Romania, the purpose for which it was founded, the usefulness of mediations to relieve the number of court cases and increase the efficiency of the courts, as well as the results obtained from the adoption of the mediation laws until now. The practical aspects leading to the mode in which Romanians perceive mediation and wish to participate or not in the sessions of mediation Recommendations for promoting mediation in Romania

Keywords: *mediation, mediator, conflict, contract, law*

1) Introduction

Mediation is a new domain in Romania, which has bearing on legal and social matters and that gave birth to a new profession, namely the profession of the mediator.

This paper tries to answer why it is so important to know the advantages of mediation, to know the progress made by mediation but also to know the difficulties encountered and their causes.

The work of a mediator is described in a couple of words. There are also many advantages, which the Romanian state can grant to those who wish to resort to mediation and sanctions for those who do not wish to respond to an invitation to mediation to address the other side of the conflict. The article gives a concrete answer in regards the aspects that make mediation difficult. Diverse theories have appeared n specialized literature regarding mediation. This work is the result of practices in mediation by an authorized mediator and tries to be one of the first works regarding the aspects of practice in this new domain. The work proposes and indicates legislative proposals aiming to promote mediation and real functions of mediation in Romania.

2) The Conditions for the Emergence of Mediation

Romania had to meet certain obligations imposed by the conditions of accession in order to join the European Union.

One of these obligations was the adoption of the Law 192 / 2006 on mediation which defines mediation as "an optional way of settling disputes amicably, with the help of third party individuals specialized in mediation, in conditions of neutrality, impartiality and confidentiality and with the free consent of both parties".[1] Article 1 paragraph 1 Law 192/2006

Under the authority of the European Commission to streamline the justice system, measures were initiated to identify how the European Union's recommendations on mediation were put into practice, starting with a monitorization program of many states, among which Romania was included.

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[1] Article 1 paragraph 1 Law 192/2006

Under these conditions, Romania has had to adopt a series of legislative measures able to integrate mediation as a new profession that can increase efficiency and relieve the courts, improving the quality and efficiency of the justice system.

Mediation is a new profession, which with difficulty is making its place among the other known professions in Romania.

There have been many events organized to promote mediation, but the procedure is still unknown to the general public.

There exists a difference between the understanding of the word "medium" in the Romanian language and its meaning "something brought at medium level" and the understanding of the word "mediation" as an alternative dispute resolution procedure.

In legislation terms such as school mediator, health mediator worker or family mediator have appeared, but they have nothing in common with the significance of the word that denotes the new profession of mediator.

Today in Romania mediation is still perceived as a compromise.

Mediation is not a compromise, mediation is a procedure by which independent parties, with the help of a third party, come to realize the source of the conflict between them and identify possible ways to stop the conflict, and from this, through mutual agreement they choose a convenient solution.

"Mediation is based on the trust the parties have for the mediator, as a person able to facilitate negotiations between them and support them in resolving the conflict by reaching a mutual, convenient, efficient and lasting solution"[2] Article 1 Paragraph 2 of Law 192 / 2006.

" Mediation is completely voluntary and any resolution must be acceptable and agreed upon by all the parties to the mediation. Mediation offers the advantage of informality, with reduced time , as well as minimizing workplace disruption. All discussions are held in the strictest confidence, no records or files are maintained by the Alternative Dispute Resolution Office. All notes taken by the mediator or the parties to mediation are destroyed at the conclusion of the mediation and prior to departing the location of the mediation. Sometimes it may be helpful to share information with the other party in order to facilitate resolution of a matter. However, this will not be done without the party's express permission to do so. Mediations are usually conducted in the conference room at the Alternative Dispute Resolution Office in order to promote the neutrality and confidentiality of the process.

The process occurs in a very private and informal setting. Typically the parties as well as the neutral sit around a table. The mediator makes an opening statement including the establishment of ground rules regarding the process and conduct to be followed by the parties. Then each party will have an uninterrupted opportunity to present the issue from their point of view. Once the issues have been defined, the parties generate settlement or resolution options. The mediator may ask clarifying questions or meet with the parties jointly or separately, in what is called a caucus, in order to help them explore settlement possibilities. If resolution is attained, the agreement is formalized in a written Resolution Agreement, which is a binding agreement.

The mediator does not have the authority to impose a settlement or resolution on the parties but will attempt to help them reach a mutually satisfactory resolution of their dispute. The mediator is authorized to conduct joint and separate meetings with the parties. The mediator is authorized to end the mediation whenever, in the judgment of the mediator, further efforts at mediation would not contribute to a resolution of the dispute between the parties."[3]

[2] Article 1 Paragraph 2 of Law 192 / 2006.

[3] Mediation Preparation- http://www.cdc.gov/od/adr/medprep htm

3) Two aspects that can be regarded as mediation

Mediation, as a process, can be viewed from two viewpoints

4) The first aspect—The activity of the mediator during the procedure of mediation

The first refers to the activity of the mediator that takes place in the presence the parties engaged in conflict. Activity that aims to end the conflict and concludes in an agreement, while the second refers to the completion of the mediation contract between the mediator and the parties in the conflict as the primary and essential element of mediation, without this mediation would not be able to exist.

The professional mediator represents a neutral, impartial, third party, professionally trained to help the parties solve the conflict, maintaining confidentiality of the information discovered out during the mediation activity.

Whatever the nature of conflict, mediation implies the following five steps:

1) Process Overview
2) Identifying problems
3) Exploration of interests
4) The parties generate options and identify possible solutions
5) Conclusion and Agreement

This can be done in one session of mediation, or more, depending on the complexity of the matter and the ability of the parties to hold a constructive dialogue.

A mediation session may last up to 3-4 hours.

Although we are inclined to believe that a decision would be the logical consequence of thought, it is clear that emotions influence decision-making during mediation.

The mediator is actively listening to the story of the conflict, showing empathy for both sides, he will help them understand the boundary between the emotions and anger with which they came and their interests which should be followed.

The mediator is a peacemaker that diffuses conflict step by step.

The mediator plays the role of a psychologist and a real questionnaire is given to the parties in order to understand the motivation of their actions.

He follows the interests of the parties to find a solution to a painful problem, a solution that does not come into conflict with the interests of other parties.

Forced to defuse the situation, the mediator will use his entire life experience to build a positive, affective atmosphere. He will use any method of encouraging positive behavior.

The mediator will hold plenary meetings with the parties but very often he will talk confidentially with both parties, helping them to understand the favorable aspects; and when necessary breaks will be taken.

During the entire procedure, and particularly when the agreement is made, the mediator must be particularly attentive to the legal language used, especially if the agreement serves as a transaction that will be approved by a court.

The agreement must be designed in legal language to fit the legal documents of a court decision.

But aside from the specialized professional knowledge, the mediator must prove above all, a moral character and the inclinations of the profession.

Perhaps more than other professions, the mediator's mood affects the result of the mediation itself.

It was found that a good-humored mediator succeeds to induce cooperative behavior in the disputants.

The mediator must be available to be able to help the parties when they have reached a certain level of finding a solution; the agreement could fail just because of the mediator's lack of time to draft an agreement.

For this reason it is important that the mediator be only a mediator and nothing more.
I personally still have not met mediators who can maintain the profession.
The mediator from his own funds often subsidizes maintaining the costs of an office.

5) The second aspect—the closing of the contract of mediation as a vital condition for the existence of government-employed mediators in Romania.

The pecuniary aspect of the mediation process is connected to the second stage of mediation, which refers to an essential and vital element for the development of mediation, and I refer to the closing of the contract between the mediator and the involved parties.

Mediation, as a procedure, is non-existent in the absence of mediation agreements.

Mediation will never exercise its role in the view in which it was adopted, to relieve and to increase the efficiency of the justice system and thus reduce budgetary expenditures relating to the justice system, so long as no one will close the contracts for mediation.

6) Some of the reasons why Romanians do not resort to mediation

1) because they do not know what mediation is and they perceive it as a compromise and not as an alternative way of resolving the conflict
2) because it is not mandatory
3) because they are too tired of the failed negotiations before the introduction of the action in court
4) because they do not see another mode of resolution than what they have already foreshadowed mentally
5) because they do not want to show any sign of weakness in front of the opposite Party.
6) because often they are not aware of their framing of the problem as having a false impression that they will win
7) because mediation costs more compared to criminal courts that are completely free and to civil courts where many cases suitable for mediation are taxed at low judicial stamp value.
8) because the agreement does not have the value of authentic document

7) What advantages does the Romanian state give the litigants?

a) Free local information services offered by the mediator, the mediator does not charge a fee for a briefing as a result of the obligation imposed by Article 614 Code of Civil Procedure

b) Pecuniary benefits available for all litigants provided by **Law 192 / 2006**.

"At the request of parties who have resorted to mediation proceedings shall be suspended in civil cases by the courts or arbitration under the conditions stipulated in article 242 paragraph 1 section 1 of the Code of Civil Procedure and if the mediation agreement is not achieved, the application for reinstatement for the judicial duty stamp is free".[4]

"If the dispute is settled through mediation, the court will rule on the request of the parties, a decision according to art. 271 of the Code of Civil Procedure"[5]

"With the ruling the court shall order, at the request of the interested parties, a refund of the tax paid for this investment "[6]

c) Pecuniary benefits stipulated by **GEO 51/2008** on public legal aid for legal services are granted to those who meet the conditions for public legal aid.

[4] Article 62 Law 192/ 2006
[5] Article 63 paragraph 1Law 192/ 2006
[6] Article63 paragraph 2 Law 192/ 2006

Public legal aid is granted to litigants who earn less than 200 euros a month per family member.

Art 20" If the person meets the requirements for obtaining public legal aid proving that, before the beginning of the process he went through the process of mediation for the dispute, he also benefits through the reimbursement of fees paid to the mediator."[7]

"The same legal benefits are given to a person who meets the provided conditions for receiving public legal aid if they solicit mediation after the beginning of the process, but before the first day of appearance." [8]

8) What happens if one party declines the offer of mediation by the other party?

In this case the judiciary public support may be denied.

9) Results obtained

Following mediation, agreements were concluded in 70-80 % of mediated cases.

The biggest problem is the participation of both parties.

10) Constructive solutions to promote and increase the efficiency of mediation

a) Mandatory participation of both parties involved in the briefings for cases of family law, civil law, commercial litigation and administrative law

b) Recognition of mediation as a public activity not only scripting (Article 4 paragraph 1 of Law 192/ 2006) [9]and also paying the mediator for the sessions from the same fund from which the legal system functions.

c) The introduction of mediation as a mandatory step after the introduction of the notary application for divorce at the court or city hall, the stage in which the mediator will be able to fulfill one of the activity's objectives which is misunderstanding between spouses regarding continued marriage[10] If after attending the mediation procedure and deadline of three months, the two were not reconciled, then the decision to divorce through the simplified procedures provided by the law

In this way, mediation will be making its contribution to fulfilling the promise held by the statute of Romanian state *"In Romania, the state shall protect marriage and family, he supports, by economic and social development and family strengthening."*[11]

11) The social implications that can make the procedure of mediation mandatory in the following cases of divorce.

The proposal made in 10 paragraph c is also especially beneficial to Romanian society also in cases of marriage where children that are minors exist. These innocent children suffer from the misunderstanding between their parents who with ease can dissolve their marriage often leaving no place for the children. Outside of a lack of material necessities, which leave an imprint on the physical and psychological development on the children. These children can become violent or in time they can lose faith in the institution of marriage and not take part in family life leaving the birth rate to decline alarmingly. In this way all Romanian society as a whole has something to lose.

To quote a colleague that is a mediator as well as a family counselor[12]

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[7] Article 20 paragraph 1 GEO 51/ 2008

[8] Article 20 paragraph 2 GEO 51 / 2008

[9]Article 4 paragraph 1 of Law 192/ 2006)

[10] Aricle 64 paragraph 1 law 192 / 2006

[11]Article 1 Family Code

[12] Gheorghe Surtea - mediator Email to the author 18 02 2011 The easy way in which the couples get the divorce mediatori@googlegroups.com mediatoriautorizati@googlegroups.com

" Unfortunately families with the civil registrar, many of them realized in front of an altar stating "till death do us part" can not always be maintained, proving once again that life is very complex or that people are too weak, proud, too ambitious or too unforgiving toward their spouse to whom they swore eternal love. This is when divorce appears. Sometimes it can seem inevitable, but in many cases with preventative help it can be avoided, or the two individuals can continue to have a nice life. When I say this, I say it from my experience as a family counselor. From this position I have helped to reconcile many families and to avoid divorce, even in families where divorce had already been announced. Well, the measures taken by Law 202/2010 in regards to divorce do not appear to me to protect marriage and family. The ease with which a marriage can be dissolved, whether in front of a public notary or by administrative action, seems to me to be more of a stimulant for the dissolution of marriage and a motive for less responsibility and seriousness when founding a marriage. The foundation of a family was always regarded as a serious business and that those who do not want a clear responsibility preferred cohabitation. Now, on the contrary people prefer to marry for their own advantages, however if it doesn't work out, with a modest tax or even for free in some municipalities one can have a divorce certificate in one's pocket in 45 days. These legal provisions in their actual form are a big hit to families, if not also for society as a whole. Once again, I don't believe that the phenomenon of divorce will ever disappear and I am also not a supporter of divorce with scandal in the courts. Here's what I think is missing from the new provisions contained in Law 202/2010, **the absence of mediation and the mediator**. Not in the sense that the mediator would decide the divorce. Frankly, personally I would not have wanted something like that. But lacking the mediator, as an attempt to mediate and reconcile the parties before the divorce, even possibly on amicable terms"

Conclusions

Relieving the courts is a necessity for improvement of the justice system, both in terms of accuracy and attention given to cases brought to the legal system and in terms of reducing budgetary expenditures.

The lost cases of the Romanian State at the court in Strasbourg put heavy burdens on the shoulders of Romanian citizens, supplementing the already excessive budget for maintenance and operation of the legal system. Romania has fulfilled the requirements of mediation for which it was adopted to become a member of the EU, but if mediation is to move past being a checked measure on paper the conditions for its existence must be assured

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THE INVESTMENT IN HUMAN CAPITAL, AN INTRISIC FACTOR OF THE SUSTAINABLE ECONOMIC GROWTH

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Abstract
The educational system will need to direct its actions and programs towards the identification of the current and future values of the labour market, starting from the existing and potential labour resources, anticipating first and foremost the adjusting of the economy to fast-developing fields and domains, put forward by the State via the Fast-developing Field Strategies or even via the Fast-developing National Strategy. It will accordingly generate a binder between the demands of the labour market as a response to the developing necessities of the economy, and the training/specialization of the labour force as offered by the national syllabus. By these means the educational system would create a labour force compatible with the labour market, which is both a premiss for the increasing level of employment and for the sustainable economic growth. Our task is therefore to provide a concept of education related to technological progress, based on the model of Nelson and Phelps, and a suggestion for investments and education policies.

Keywords: *education, human capital, labour market, technological progress, investment policies*

Introduction

Education and training converge, ultimately, to find a job whose usefulness is maximal in terms of restrictions which refers mostly to the absorbtion of the labour market, labour productivity and economic competitiveness of goods produced.

Currently, education and labour market are two different sets that interact only at the declaratory; action is necessary for interaction through cooperation and coordination, competition in the domestic labour market providing the binder between higher levels of efficiency and competitiveness of the workforce. Education market provides input for the labour market, which would require a training strategy linked to labour market trends and changes at work, on the one hand, and the needs for development of a region / economic zone (economically -entrepreneurial and social-investment), on the other side.

The development of contemporary society, the educational system that will serve the workforce needs of employers and future economy is based on smart growth[1] which requires intensive growth of labour and capital inputs with bonding technology innovation which, combined, increases total factor productivity.

We will exemplify with a model based on Cobb-Douglas production function with returns to scale assumption, $\boldsymbol{Q = A\, K^{\alpha}\, L^{\beta}}$, where K is the capital employed, and L is the volume of labour.

This shows that if the quantities used of the two factors of production, labour and capital, increases in the same proportion, the report of the marginal productivity does not change[2]. However, if L and K show a proportional increase then income growth (Q) is greater or less than proportional,

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[1] William J. Baumol, Robert E. Litan, Carl J. Schramm, *Capitalism bun, capitalism rău şi economia dezvoltării şi a prosperităţii* [Bucureşti: Polirom, 2009], p. 13.
[2] Gilbert Abraham Frois, *Economia politică*, [Bucureşti: Humanitas, 1998], p. 115.

as $\alpha + \beta > 1$ or $\alpha + \beta < 1$. In the theory of production, α and β express the elasticity of production in relation to production factors.

Considering a state of technological capital, what can increase production / productivity is the investment in human capital / education. Therefore, if the volume of capital and labour remains constant, it may get a boost production by increasing the sum of the elasticity of production factors, α and β. If α, the elasticity of production related to capital is considered constant, it is sufficient to increase β, the elasticity of production related to work, to get an $\alpha + \beta > 1$, and hence increased production and increasing returns to scale.

Our task is therefore to provide a concept of education related to technological progress, based on the model of Nelson and Phelps, and a suggestion for investments and education policies. The need of a new concept of education integrated in a model that emphasizes the development of technology is irrepressible.

Education and technological progress: a new perspective on a concept of education

For a concept of education[3], we shall go on studying the formalization of a way explaining the technological progress. The model introduces a specification in the technological factor *A* that separates *practical technology* (used technology) from *the theoretical technology* (the new technology under study to be implemented), which is going to be introduced according to the progress related to education/ skills, considering the gap between technologies[4]. The model aims mainly at explaining the irreducible relation between education/ skills and technologies in the technological progress. The model is a double one, but I shall resume only to the first variant. For simplicity we renounce to the specifications α and β.

Nelson and Phelps consider that human factor is crucial in increasing rate/ level of technological progress. It does not mean that payoff in education (or even modifications at the level of education) is independent to the technological developments- it is trying to correct this situation. They suggest a double model that correlate the diphase time between the moment in which a technology is produced and the time when education is implemented. Thus, output *Q* is a function of *K(t), L(t)* and *A(t)*:

$$Q(t) = F[K(t), A(t)L(t)]. \quad (1)$$

Where *K* stands for capital, and *L* for the labour that use it. *A* indicates the best way of practical use of the given technology. If we name *T(t)* the theoretical level of technology, which is new technology that is studied and is to be implemented, *T(t)* becomes:

$$T(t) = T_o e^{\lambda t}, \lambda > 0 \quad (2)$$

where λ represents the rate with which the theoretical level of technology advances. To find the role that education plays, *A(t)* becomes:

$$A(t) = T(t - w(h)), w'(h) < 0 \quad (3)$$

where *h* indicates the average level of education or intensity of human capital, and *w* – the lag. Tightly reformulated, the above equations 2 and 3 become:

[3] See Diana Apostol, "Knowledge, Education and Technological Progress in the New Economy", Metalurgia International, Issue No.5, Vol. XIV.

[4] Nelson, Richard R. Edmund S. Phelps: "Investment in Humans, Technology Diffusion, and Economic Growth", Cowles Foundation Paper 236, Reprinted from *American Economic Review*, 56(2), 1966.

$$A(t) = T_o e^{\lambda[t-w(h)]} \qquad (4)$$

If *h* is constant, it results that: a) the index of practical technology increases with the same ratio λ, technology theoretical index; and b) the level of technology in practice is a increasing function of *h*, because an increase of *h* shortens the gap between *T(t)* and *A(t)*[5]. Simultaneously, the investment return in education is even higher, faster the theoretical level of technology advanced. Thus, the effect on *A(t)* of a marginal increase of *h* is an increasing function of *λ*, when we have *A(t)*, and it is positive whether λ > 0, which means that rate or theoretical level advances or is higher than zero. It means that:

$$\frac{\partial A(t)}{\partial h} = -\lambda w'(h) T_0 e^{\lambda[t-w(h)]} = -\lambda w'(h) A(t) \qquad (5)$$

The level of the marginal product of education is visible in the base equation and can be formed as it follows considering the relations (1) and (4):

$$Q(t) = F[K(t), T_o e^{\lambda[t-w(h)]} L(t)] \qquad (6)$$

from where:

$$\frac{\partial Q(t)}{\partial h} = \lambda T_0 e^{\lambda[t-w(h)]} L(t)\left[-w'(h)\right] F_2 = -\lambda w'(h) \times Wage \quad Bill \qquad (7)$$

Thus, marginal productivity of education is a increasing function of *λ*, considering *the wage bill*, and it is positive only if *λ > 0*. Nelson and Phelps states that, correctly, this approach is not found in the conventional treatment of education[6].

The second model introduces a correction in the first model, starting with two problems: "It is unreasonable to suppose that the lag of the best-practice level behind the theoretical level of technology is independent of the profitability of the new techniques not yet introduced. Further, it is somewhat unrealistic to suppose that an increase of educational attainments instantaneously reduces the lag"[7]. Thus, the correction implies that the increasing ratio of the technology theoretical level reflected in practical technology depends on the educational level and the gap between the theoretical level of technology and the practical level of technology. In the first model, the inherent difficulties of any lag are not well stressed. But as long as we are interested only in the way in which education and technological progress can be formalized to indicate how the combination between education and technology results in the progress of the technological factor A, we shall not insist on the development that the second model introduces in the first one. The basic equation to say only this can be made up as it follows:

$$A(t) = \Phi(h)[T(t) - A(t)] \qquad (8)$$

Thus, the ratio of technology increase in practice is a function of education and proportional to the lag: *(T(t) – A(t)) / A(t)*[8]

[5] idem, p. 72.
[6] ibid, p. 72.
[7] ibid, p.72-73.
[8] ibid, p. 73.

Generally, the lesson about the model of Nelson and Phelps is like *theoretical technology* or the rate with which the gap between *the theoretical technology and the practical technology*, which is $\lambda > 0$, is reduced, it is a function of the rate with which the education gap *w(h)* is over passed, according to the equation number 4. What is significantly is that *w(h)* is not isolated from the *theoretical technology*, considering the equation number 3. The conventional treatment of labour excludes a differentiated approach on education (ordinary jobs versus jobs with high level of adaptability at other levels) and implies that marginal values of education may stay positive if technology is stationary[9]. Nelson and Phelps make clear that the payoff of education is an increasing function of the *theoretical technology*, which means $\lambda > 0$. Thus, the lesson is that if education high adaptability to change results in more rapid rates of technological progress, the gap *w(h)* or the level of education intensity is also an increasing function of the *theoretical technology*.

In addition, some implications from our analysis, e.g. macroeconomic policies, the future of technology[10] etc. Essential to the implementation of the sustainable economic growth in the society are:

-Macroeconomic stability ensured by a set of macroeconomic policies aimed at implementing prudent fiscal and monetary policies to keep inflation relatively low and stable and to prevent the decrease in economic activity to affect the long-term economic growth;

- technological progress that requires continuous innovation and not reproduction;

- emphasizing the role of human capital to propel the implementation of conditions for sustainable growth;

- identify specific framework of each nation which establish an optimal relationship of proportionality between natural factors, social, political, educational converging towards a system based on a sustainable economic growth, in line with present and future needs of the population;

- identify those occupations and professions which converge to a new level of sustainability of the labour market, result of changing perceptions of entrepreneurship on expectations of workforce training and ability to contribute to increasing productivity and increasing returns of the production function.

Thus, universities can play an important role in shaping the future business. These are centers where there are huge accumulations of specialized knowledge, and students are a valuable resource to explore areas of science and technology already known or even novel, whose impact on the labour market is analyzed differently, depending on societal resources, the degree absorption of labour market and its level of liberalization. University education system has not always come to anticipate the requirements of employers, which makes supply-demand relationship in the labour market to converge to a price not desirable, namely to a coverage of labour market needs as high. Thus, according to societal needs, we can distinguish several types of university programs focused on:

- technologies of the future in the fields of nanotechnology, nanoenergy, biotechnology, neurotehnology, infotehnology;

-incorporation of the knowledge and innovation economy in the behavior of organizations and economic entities in general, considered a convergent force of the economy, democracy, trade and technology leadership that determines the future of nations, business productivity and wealth of individuals, global poverty reduction, promote trade without borders, or democratic reforms[11];

- improving the performance of human capital, effect of investment in convergence areas as nano-bio-IT-neurotehnology which will play a vital role in safeguarding the future evolution of the global economy, creating new jobs, companies or fields[12];

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[9] ibid, pp.69-70.

[10] See Cristina Bălăceanu, *Abordări secvențiale ale economiei României înainte şi după aderare*, [Bucureşti: Universitară, 2010], pp. 99-112.

[11] James Canton, *Promovarea viitorului*, [Bucureşti: Polirom, 2010], p. 62.

[12] idem, p. 94.

- stimulate creativity in the technical areas and entrepreneurship by developing the capacity of young people to innovate, stimulation of free enterprise and create a reward system for motivation;
- innovation is the essential connection between knowledge characterized in an invention and the successful implementation of that invention to market.

Conclusions

Probably, the trump of the model of Nelson and Phelps consists of stressing the irreducible nature of the established report between education and technological progress. Thus, if progress in education results in technological progress, then, in its turn, education exhibits a positive payoff if technology develops permanently. The changes generated by ICT/new technologies at the level of production function results in technological progress and economic growth. Nelson and Phelps clearly state how important the techno-human gaps are in the process of technological change; they cannot be identified but in a strict reciprocal relation. It must go without saying that there is not any better possibility of discussing about increasing the performances of the inputs related to the process of production. At another level this model has implications for public policy. So education and schooling need to be complementary to technological change and productivity in advanced manufacturing and services sectors[13], because of the labour market conditions - are selected workers with high potential productivity largely reflected by the nature and specificity of the education incorporated in the educational system.

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THE ROLE AND THE TECHNIQUES USED BY THE MEDIATOR IN THE MEDIATION PROCESS

SEPTIMIU STOICA *

Abstract
The present work aims to emphasize the complexity of the mediator's activity during the mediation process, as an extra – judicial alternative dispute resolution methodology. Different mediation schools have launched different mediation models in terms of theoretical and practical approach of the matter. So one can note on brief the facilitative, the evaluative, the transformative and the narrative mediation, for example. It is not our goal to praise one of the above mentioned paradigms or to suggest a hierarchy among them. We think that each of these models is valuable and has a potential utility. The most important achievement is to solve the conflicts and to obtain the parties' agreements, based on mediation generated solutions. It seems in this respect that different mediation models fit differently in solving specific cases. To reach the solutions of their conflict, the parties have to follow the mediator through a difficult and complicated route. It can be made easier by the mediator himself if he adapts his role and techniques according to the specifics of the parties and of the case. We assume that he can be more efficient if he will use a proper role from an appropriate model for a definite and concrete conflict or type of conflict. Even he may try to play a multiple role, changing its characteristics dynamically as the mediation process flows. The present work identifies some of the key roles that can be played by the mediator during the mediation process. Only based on these we can select, explain and analyze the specific or common techniques used by a mediator. Our point is that for his new case the efficient mediator must be flexible, knowledgeable and able to decide, select and perform a dedicated role or roles, same time or successively, and accordingly and dynamically use the adequate mediation techniques, which will be also summarized.

Keywords: *Mediator, role, technique, negotiation, solution*

Introduction

The most important aspect of the mediation, as an alternative solution of resolving disputes, its core, is how the mediation process is conceived and applied as such by the mediator. The process is structured, often individualised, conducted by the mediator and consisting in sequences and sub-sequences, with decision points and recurrences. During each stage, the mediator accomplishes specific functions. The functions that the mediator must carry-out are multiple, different, specialised. To carry-out each function supposes to initiate certain actions, using techniques that are appropriate to it, but also to the sequence and subsequence reached.

However, the mediators' activity becomes confusing sometimes. The stages, functions, techniques and actions are frequently mixed up. In complex cases, or when the parties prove to be resistant or not cooperating enough, the mediation tempts to reach a deadlock. This paper refers to the issue of improving the mediator's activity in relation to preparing and conducting the mediation process.

Much talking about the mediation's advantages is more and more present. There are increased expectations and a change of the paradigm is discussed in relation to resolving the conflicts. The development possibilities are huge, also in countries such as Romania, which have adopted just for a short period and quite timidly such solution. But the mediation practice by itself is hardly keeping the pace with the development of this field. The model of the mediator who empirically settles some simple issues is not enough; it relates to the beginnings of such study field. It is necessary to make the step towards maturity. The urgent conception of some new models and techniques is extremely

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important and represents the condition for consecrating the mediation and the mediator in the society. Thus, the aspiration to successfully settle an increasingly larger number of conflicts under mediation is achieved.

This paper intends to offer solutions for the issue mentioned above, by structuring the mediator's activity and by enlarging the mediation concept. We believe that structuring the mediator's activity naturally follows structuring of the mediation process *per se* and is based on the allotment of a role to each function or congruent group of functions carried-out by the mediator. Thus, a range of roles is configured and is available to the mediator. Specific techniques are identified for each role, as taken-over from its performance field and adapted to the specific nature of the mediation. The paper's aspiration is to identify as many roles as possible at a first sight and, for some of these, it formulates even the basic techniques. Formulating a broader concept regarding the mediation, besides its own answers for the issue, allows identifying some additional roles. The suggested technique aims, at practical level, to offer additional instruments to the mediators so they be able prepare, carry-out and conduct the mediation process, and, at doctrinal level, to deepen and refine the mediation concept.

We think that the paper is in harmony with the structured approaches of the mediation process studied in the main existing works of specialty literature. The analysis of the stages used to carry-out the mediation process and the emphasis on the complex activities of the mediator as presented in such manuals are those aspects that drew our attention regarding the multiple roles this one has to play. Starting from this point, our survey has been subsequently developed and may now replenish the scene of a structured process with a structured performance of the mediator, designed and carried-out in correlation, but separately. Also, our suggestion for broadening the mediation concept may complement, if accepted, the range of the existing definitions, having important theoretical and practical consequences.

Role and techniques used by the mediator.

Despite the tradition called upon in various cultures regarding the attempt to conciliate the parties in dispute by open-minded and powerful people in the community (proto-mediators), the mediation in modern society, used as an alternative technique of resolving conflicts, represents a new field of study for assistance granted to the parties in conflict. Neither the time, nor the restraint of some norms succeeded to deplete its freshness. This means and is seen in the diversity of the theoretical and practical approaches, which actually leads to a certain laxity but also, in return, to a useful flexibility.

We believe that this is mainly in favour of the mediation, even only for allowing creative and individualised approaches, depending on the parties and the situations. This entails the mediator's different attitudes, techniques and actions that may not be found in all the sequences of the mediation process or in all mediation cases. Therefore it leads to individualisation.

But how are these going to be selected for a specific case and during a certain case? By intuition? In the more complex cases, the mediation process would then become chaotic. Or, at the opposite pole, based on a generic *master plan*, structured by sequences, of an abstract process? But how would this be in harmony with the diversity of the situations as formulated?

As for our opinion, the solution is to accept the fact that the mediator can and sometimes must accomplish several functions and, therefore, play several roles[1] during the mediation process, and the actions and especially the techniques used are specific for each role separately and are dictated by the same. In general, in public life (or even in private life, although such aspect is not included in this paper's purpose), the activities of the same person may cover several functions (roles, if the related functions are not close connected, but mainly different). To be aware of such aspect and to identify

[1] Moore, Cristopher, *The Mediation Process – Practical Strategies for Resolving Conflict*, 3-rd Edition (San Francisco:Jossey-Bass, 2003), p. 19.

the roles is useful both as analytical approach, and at the practical level, exceeding the experimental, natural approaches, when meticulously preparing and planning the future professional performances.

The paper intends to offer an approach of the mediation from the perspective of the roles likely to be undertaken by the mediator, to identify the most important ones and to underline, for certain aspects presented as examples, the underlined techniques. Based on these ones, a definite structure may be defined for each case and, in particular, the strategic approach, selected to be used, may be designed.

We do not imagine and not believe as being mandatory for a mediator to be able or to try to play in its practice all the possible roles in mediation. There could be professionals who shine only in some, who choose a unique, minimalistic and – maybe efficient – format for carrying-out the process[2]. In the same manner, other mediators have the freedom, as already mentioned, to elaborately tune their instruments to the specific nature of the case, playing several and different roles. Then, even the fact that a role is played does not automatically mean one should excel or use the entire range of its related techniques. Moreover, among the techniques related to an independent abstract role, only some of them are fit to be taken-over in the mediation process.

But the identification of the roles and of their related techniques seems to be, in our opinion, suggestive as regards the instruments and generates clarifications as regards the approach both of the mediation process in general and of the actual cases in particular.

We think that the starting point for the identification of the roles can only be the origin, *id est* the definition of the mediation itself. We'll briefly present some of the valid definitions and then we'll risk our new 0.own definition, for support.

The most concise definitions are similar to:

- Mediation is "a process of assisting the negotiations of others.[3]"

- "Mediation is any process for resolving disputes in which another person helps the parties negotiate a settlement.[4]"

Than, more complex:

Mediation is "the intervention in a negation or a conflict of an acceptable third party who has limited or no authoritative decision – making power, who assists the involved parties to voluntarily reach a mutually acceptable settlement of the issues in dispute.[5]"

According to the Romanian law the mediation represents a voluntarily friendly conflict resolution process based on the assistance of a third party in his mediator capacity, in a neutral, impartial and confidential context.

Of course, it could not be otherwise, because the definitions are correct. But, in our opinion, not complete too. We believe that they do not catch either the novelty, or the essence, or the possibility to extension, or the theoretical developments of the concept, but only its original and immediate expression. We think it is necessary to have a broader, more generous definition, able to cover not only the classical definitions, as a particular case, but also the possibilities of the concept that were already explored or that could follow.

Without claiming to have found the best solution, we venture to suggest a new one, for work purposes. Thus, we see mediation to be **the process for the construction in three of a way to surpass a conflict occurred or a deadlock where the relation between two of them is in**. Obviously, in order to simplify things, we limited to the dispute between two parties.

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[2] Greenwood, Marry, *How to Mediate Like a Pro* (New York: iUniverse, 2008), pp. 3-7.

[3] Frenkel, Douglas et al, *The Practice of Mediation* (New-york: Wolters Kluwer, 2008), p. 2.

[4] Beer, Jenifer et al, *The Mediator's Handbook* 3-rd Edition, Revised and Expanded (Gabriola Island, Canada: New Society Publishers, 2009), p. 3.

[5] Moore, Cristopher, *The Mediation Process – Practical Strategies for Resolving Conflict*, 3-rd Edition (San Francisco:Jossey-Bass, 2003), p. 15.

This is neither the place nor the subject of the discussion to insist on such definition: what does it bring new, how is it related to the previous ones, what are its advantages. This will be probably the topic of a future paper. We refer here only to one of its consequences which is beneficial for our current subject: identification of a more diversified range (and therefore with a higher degree of completeness) of roles in the virtual portfolio owned by the mediator.

The unanimously accepted roles of the mediator are those of a **facilitator/catalyst of the communication** and of a **facilitator of the negotiation**. We'll hold both and we'll add, naturally, the fact that in order to be successful in facilitation, the mediator himself must communicate and negotiate. With the parties, but also on the parties' behalf. Sometimes, not as an accessory to a more important mission, but as part of an independent stage. That means roles of **communicator** and **negotiator**.

However, because it is rightfully deemed that the parties themselves have to communicate and build/negotiate the suitable solution, they must often be encouraged, prepared for such action. It results the mediator's role as an **assistant** of the parties (under its both accepted meanings, of a **trainer** and a **coach**).

A role which is delicate, discussed and debatable from the mediator's main viewpoint, but undeniably efficient, is that as a **persuader** of the parties as regards the acceptance of the options under debate.

Another role generally accepted and played, either consciously or not, by the mediator during the first stages of the mediation is that as a **confessor** and as a **therapist** for the parties, treated individually and not as a group. It is especially the case of the initial releases and venting of strong negative emotions as a result of the conflicting tensions that were accumulated.

The mediation process, as understood in contemporary times, supposes the mediator's assuming the roles of an **organizer** and virtual **host** of the meetings and of a **leader** and **manager** of the entire process. This one becomes more and more complex and specialised, with a structured conception and approach. To the extent it supposes individualization, the mediator may play a role as a **designer** of such individualised structure, as a **guide,** but also as (only) a **companion** of the parties on the designed paths, but also incidentally occurred during mediation.

The roles identified above mostly relate to the canonical approach, with a facilitating nature and understanding of mediation. Our opinion is that in many circumstances such approach must be, if not replaced, at least complemented by evaluative elements. This is congruent with the definition of the mediation itself that we have formulated. Some new roles for the mediator emerge in this complete approach, namely that as an **investigator**, a **diagnostician** (of the case under mediation), an **expert** (in law, but maybe also a technical one in the field of the case analysed or in other related fields), a **consultant** of the parties as a group, a **resolver** of issues (if, at the limit, this would be the case), as **explorer** and **assessor** of the options and solutions. This is, we know, a controversial subject in the mediation theory, but sustainable as long as we agree that the essence of this activity is the search in three of a solution for two.

The mediation practice identifies however other roles too, some of them being conjectural, for the mediators. Thus, we may add the roles as an inter-cultural **interpret/translator** between the parties, as a **supporter** of the parties in difficulty, as person confirming the legitimacy, as provider of additional resources during the process, as agent of reality, as animator and lightning rod, ultimately as scapegoat, etc.

It should be mentioned that to identify a potential role for the mediator does not mean to assimilate the mediation *per se* to the function and activity specific for such role. The fact that the mediator communicates does not mean that the mediation represents just communication, as it does not mean only negotiation, even if it's being assisted. The coincidence that the mediator listens to the parties and allows their feelings to be released does not transform the mediation into psychotherapy. As the mediator makes available to the parties its legal or technical knowledge does not mean that the process represents an assistance procedure or a legal assessment.

Thus, a mediator is not only a facilitator, or a communicator, or a negotiator, etc., but all these as an entirety and even more than that, in a combination of these basic roles, in which the result is more than and different from the amount of the terms.

The meaning of using the roles model and carrying-out the related techniques is that of using various and often non-homogenous instruments by one and only skilled professional in order to reach the target of building an acceptable solution also accepted by the parties. The synthesis itself of such techniques represents the colossal value added by the mediation as a service, which converts it into a unique alternative of indeed resolving in an optimal and individualised manner the conflicts and of surpassing the deadlock.

Among the roles that a mediator may exercise, some roles, very important ones, are specific only to mediation. Thus, there are the roles related to the organisation and management of the process, to the stimulation of formulating options, to their being tested and even the role as a resolver. The others are mostly borrowed but strongly adapted.

In their dynamics during a mediation process, the mediator's different roles:

a) may either follow one another;

b) or are alternative;

c) or coexist.

In the first case, the roles are changing as the process evolves. In the second category, the roles are adopted depending on the mediator's approach (facilitating, evaluating, combined) or on the case. The third one marks the existence of some roles constantly and simultaneously used during the process or in the multiple stages of its development: communicator, facilitator, supporter, negotiator, etc. A survey about these is to be drafted. A map of the techniques used is going to be enclosed thereto, as already mentioned.

The succession of the roles during an actual mediation process depends on the strategy adopted and, naturally, on the tactics used in order to play them. The speciality literature underlines some stages that the mediation process follows. One or several roles impose during each stage. The process may be seen as a series of stages, but also as a series of functions/roles. The stages are assigned to some objectives to be reached, but the roles shape the kind of performance that the mediator must accomplish. The complete plan for carrying-out the process should therefore include the path structured by stages, objectives, **roles**, techniques to be used.

In practice though, it is obvious that the mediator's roles often soften and mingle into a complex performance. At least that is how the parties feel. We believe it is worth that the roles be however individually perceived by the mediator who plays them, not (only) by the systematisation sake, but for allowing a rational, planned preparation and approach both of the professional preparation of the mediator, of its specific training, as well as of carrying-out the mediation process in practical cases.

We are convinced that the short list of roles above may be complemented. The mediator may be and must be someone else in different moments in time. This one plays a role or other roles in the same time. It is important though not to mistake them, to know exactly at any instant who is he at a certain moment, why is he what he is, what and how he has to do accordingly. The specific functions he has to accomplish are related to the role played and it also identifies the techniques available.

We sustain that when studying, but also when practicing, the mediation it is useful **to deconstruct the generic and complex role of the mediator**, as resulted from its definition (according to the classical definition, the person assisting the parties during the negotiation, or, as we suggested, the person building the solution along with the parties) into elementary (sub) roles, which entail their own, specific implementation techniques. We use the term *deconstruction* not according to the meaning given to the text by literary theory sustained by Derrida, but as a mental decomposition of a complex object under analysis into its component elements. In the case at hand, the complex role as a mediator into the fundamental roles forming it and which have constructed it.

We have underlined hereinabove – as in very few professions – more than twenty roles that a mediator can play, in different approaches and stages of the mediation process. Like an athlete of decathlon *sui generis* of the services, mentioning that, at the limit, it must though be able to perform honourably in more than ten disciplines!

For each of these roles, one can identify specific techniques. Trying to cover all of them, to the extent this could be possible, would exceed this paper's size. Therefore, we'll make reference hereinafter to some of the most important techniques available to the mediator, depending on the main roles played during the mediation process.

The mediation is still representing an activity which is not completely formalised, and we repeat that some of its strength and seduction reside in that. Consequently, we do not believe in recipes in this field, but in learning an efficient way to approach the profession, which could be a **multi-role** one. The existence and the acceptance of the roles played by the mediator during the mediation process represent, in our opinion, a technique that can be taken-over (or not) by each professional separately. In case such opinion is accepted, the mediator may chose those roles it deems appropriate for its qualities and possibilities or for the requirements of the case, and then to select and develop certain techniques fitted for the roles under the same circumstances. Not to mention the fact that the same role may be played at different tonalities, with different nuances and objectives. Here begins, even within the same accepted model, the demarcation between the mediators, each one's skill, art, and performance.

It is then, at least and at a first approximation, a question of **method**. We'll be able afterwards to plan an applicative synthesis, but also a specific approach of this field, trying, by the explored consequences of the model suggested, to identify new valences of this field. We also believe that learning to mediate during the professional training of the future mediators as well as to perfect the qualities and skills of the already professionals may be dealt with from such (new) perspective too. Also, we think that the number of the mediation techniques will increase accordingly, as there will be capitalised and included new techniques specific for the new roles identified as to be played by the mediator. There are far few techniques of pure mediation, many being borrowed techniques, because the function of a mediator – as we prove it now – is a synthesis function.

But for this paper, we stop to the importance of the existence of the roles and techniques that may be related thereto. We'll refer hereinafter to some main roles that a mediator may play, namely as an organiser of the mediation process, an investigator, a therapist, a communicator and a facilitator of communication, a supporter of the parties during the process, a persuader, a negotiator and a facilitator of the negotiation, lastly of the leader of the structured mediation process, and we'll try identify some of the techniques that may be used under such circumstances.

Thus, the role of an organiser refers mainly to preparing the mediation meetings, including the technical accessories related thereto. Among the preoccupations related to such role, one may find for example those regarding the optimal arrangement of the participants and the mediator's seat at the negotiation table[6]. A special technique was developed for helping the mediator's strategy, depending on the parties, conflict, status of the conflict, and the way the technique chosen is carried-out during the mediation process. It's about the existence, the size and the form of the negotiation table, the arrangement and the occupation of the seats, the size of the space left between the seats.

There are scientific researches regarding such aspects, which only seem insignificant. The adversaries tend to place themselves on opposite positions, but this keeps them in an animosity condition, accentuating the initial polarity.

Again, for example purposes, we mention some possible options:

- the version of marking the equality, by the symmetrical radial distribution of the parties, but close to one another;

[6] Beer, Jenifer et al, *The Mediator's Handbook* 3-rd Edition, Revised and Expanded (Gabriola Island, Canada: New Society Publishers, 2009), pp. 29-30.

- the version of placing the parties at a certain distance from one another, separated by the mediator;
- the version of giving up the separating table;
- the version of placing the mediator at the head of the table and the parties laterally, facing each other;
- the version of placing the parties close to one another, on the same side of the table;
- the version of placing the parties at right angle from one another;
- the version of arranging the parties on the bias.

All these arrangements create a certain relation between the parties and serve a specific approach of the case by the mediator. Placing and – we'd suggest – re-placing during the process, depending on the successes on the way to reconciliation, thus represent mediation techniques, developed within the mediator's role as an organiser of the meetings with the parties and enclosed thereto. This may influence the dynamics of carrying-out the process and even its results.

As regards the mediator's role as an investigator, this refers mainly to its efforts to obtain and to filtrate the relevant piece of information regarding the parties and the case, beyond what they are willing or deem necessary to offer. We do not think it is still necessary to underline the importance of the information in the mediation process. It is essential for the mediator to understand the case in order to design and carry-out the process. This one cannot work with impressions or with data that are voluntarily or involuntarily distorted. Even if, under such circumstance, some solutions would be found, they could not last in time.

The techniques used for the investigation activity are based on interviews structured and not structured, generally conducted with the parties being separated[7]. Open questions are used as well as closed questions. The questions used refer mostly to subjects not to chronology. The answers are construed, but also the hesitations, the silences. A special technique implemented is the active listening. The non-verbal messages are additionally studied[8].

It is a controlled crescendo in the investigator mediator's technique to seek information from the parties. The start point is open, for example "listen, learn and discover" and then slides to a direct approached, focused on clearly defined subjects and aspects, some of them painful.

Having a particular meaning for the use of the same instrument (the interview)[9] as a technique for playing several roles, we may notice that among the interviewing techniques used during the entire process, several kinds of interviews may be activated: the interview for the mediation seen a support for resolving the issue, the interview as a purely investigation instrument, the interview as a persuasive instrument. That is why not the mediation technique *per se* is important (the interview as such), taken separately, because its contents and finality differ, but the technique within the role undertaken at a certain moment given by time.

One of the most significant aspects of the mediator's role as an investigator is however the disclosure of the parties' hidden interests[10]. This operation is useful not only for the mediator, but for the parties themselves, which sometimes also conceal them, hoping to obtain in this way a better result of the negotiation, but in other situations are purely and simply unable to becoming aware of them. The entailed techniques are related not only to the collection of data, but also to psychological, social, economical aspects, as well as to the capacity to jointly develop arguments. Thus, some direct and indirect procedures may be identified for searching and discovering hidden interests. It is essential to become aware of them, as long as the mediation is focused on interests and not on positions.

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[7] Frenkel, Douglas et al, *The Practice of Mediation* (New-york: Wolters Kluwer, 2008), pp. 149-156.

[8] Beer, Jenifer et al, *The Mediator's Handbook* 3-rd Edition, Revised and Expanded (Gabriola Island, Canada: New Society Publishers, 2009), pp. 68 – 70.

[9] Frenkel, Douglas et al, *The Practice of Mediation* (New-york: Wolters Kluwer, 2008), pp. 131 - 134

[10] Moore, Cristopher, *The Mediation Process – Practical Strategies for Resolving Conflict*, 3-rd Edition (San Francisco:Jossey-Bass, 2003), pp. 252 – 268.

As regards the therapeutic role, especially during its first stages of the mediation, the technique used by the mediator is noticed in order to allow releasing the parties' feelings, paying the attention and undertaking the precaution measures necessary in order not to escalate the conflict. A correct alternation technique of separate meetings (caucases) with the usual common meetings is extremely necessary[11].

To accept and to listen to the parties' stories, their frustrations and positions, the attention, the understanding, the compassion are essential techniques to be used during the process. The techniques are useful for capacitating the complete expression and for sublimating the emotions, in order to prevent violent and aggressive effusions, to control the negative emotions, to develop positive emotions, to overpass wrong representations, the stereotypes and the lack of trust, to change, to open and to transform emotions.

The communicator and communication facilitator's role is probably the most played by the mediator. The entire mediation process is actually based on communication, and the lack of communication or the incomplete communication explains many conflicts. There are things known and generally accepted, so we'll not insist on that. We only mention among the frequently used techniques those based on active listening, underlining the consent points, rewordings, clarifications, productive use of strong emotional moods, deciding and consecrating some basic communication rules.

The role of communicator is often closed to the persuader[12]. In this role, the mediator tries to move the parties away from the area of perceptions based exclusively on the subjective reasons of the conflict and of the inflexible positions. It is the matter of insinuating in their conscience of a standpoint which is alternative from that already conceived. This takes place mostly by suggestions and questions than by enunciations, potentially imperative, or by decisions. Among the persuasion techniques that may be used and thus becoming mediation techniques one may notice the persuasion based on empathy (by role change), persuasion by reconciliation (apologies), persuasion by revealing the actual interests, persuasion by doubt.

As regards the roles, at their turn consecrated, as negotiator and facilitator of the negotiation played by the mediator, there are specific techniques of their basic field also attached to them. One can mainly find among such the competitive negotiation techniques, the integrative negotiation techniques (based on resolving the issues), the methods for surpassing the strategic, psychological and cognitive barriers.

Finally, in the chosen selection of roles, the position of leader of the process [13]is a decisive one for the mediator, especially within the concept of structured negotiation process. Both the control of the dialogue, as well as the evolution during the mediation process, take place upon initiative and on the impulse of the mediator.

Among the process' stages, as well as when passing from one stage to another, the mediator initiates specific actions. Some of these, the non-contingent ones, relate to the generic mediation process and represent general techniques of the mediation as such. Others, the contingent ones, meet the case's requirements and represent special mediation techniques, such as interventions meant to manage the anger break-outs, the bluffing, the negotiation in bad faith, the mistrust, the lack of actual communication, etc.

A special importance for conducting the process has the technique of alternating the usual general meetings with the individual meetings, as well as the management of the deadlock situations, of the blockings[14].

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[11] Beer, Jenifer et al, *The Mediator's Handbook* 3-rd Edition, Revised and Expanded (Gabriola Island, Canada: New Society Publishers, 2009), pp. 84 – 89.

[12] Frenkel, Douglas et al, *The Practice of Mediation* (New-york: Wolters Kluwer, 2008), pp. 227- 243.

[13] Beer, Jenifer et al, *The Mediator's Handbook* 3-rd Edition, Revised and Expanded (Gabriola Island, Canada: New Society Publishers, 2009), pp. 89 – 99.

[14] Frenkel, Douglas et al, *The Practice of Mediation* (New-york: Wolters Kluwer, 2008), pp. 260- 269.

Interesting and spectacular techniques, essential during the process, are related to the core itself of the mediator's activity, to its basic role and not to the borrowed one that were added to it. It is the case, for example, of the stimulation of generating options[15], of their virtual assessment and testing, of their dynamic selection and remodelling. Such techniques become more special as the mediator's implication is higher, combining aspects of facilitative mediation with elements of evaluative mediation, as already presented above[16].

Thus, finally, we have developed and exemplified by the above mentioned our initial assertion according to which the mediator's performance may be analytically studied and planned by first of all identifying the functions (the roles) that this one carries-out during the mediation process, and then adding specific techniques from which result the actions performed by the mediator during the stages of the process and form one stage to another. We believe and try to demonstrate that such model gives a clearer image of the position and complex performance of the professional mediator within the mediation process.

Conclusions

Determining the parties under conflict to meet, to have a conversation, to negotiate, to find together a solution, to accept the solution they've chosen, represents a very difficult process, the more so as it is conducted by one person only. The process is complex, going through different stages and levels, and the mediator's performance is the same. The activities, the attitudes and the techniques used are complex and various, the mediator showing several faces and skills during the process. Starting from this, our analysis under this paper reveals as its main result the possibility for the mediator to play during the mediation process several roles. Becoming aware of this fact and conceiving a start for the survey of roles, as a second result of the research, represents the main approach of the paper.

Starting from the roles, the mediation techniques may be organised by categories and systematised. Moreover, new techniques may be identified and attracted to the process. The paper's result is also the identification, for some of the main roles formulated, of certain representative techniques.

In order to complement the list of the potential roles, the paper suggests and has as a different result a development of the mediation concept with evaluative elements at instance, offering the mediator the possibility to be more actively involved in the selection process or in the construction of the solutions for resolving the conflict or surpassing the deadlock.

The mediators interested in the results of the research under this paper may complement the general view of the structured mediation by structuring the specific performance of the mediator himself. This represents an additional instrument both for conceiving the mediation process to follow, as well as for a better control and exercise of its own activity. Distributing the functions by component elements, these may be better prepared and complemented with new techniques, in the field of reference of the undertaken roles. Also, when approaching a case, appropriate roles are selected as well as their sequence.

In the field of improving the mediators' training, new implications may be foreseen. The improvement may start with or include workshops and specialisations for different roles that must be covered and may rely on acknowledging and exercising their specific techniques.

As regards the doctrine-related aspect of the mediation, both the "theory" of roles as well as the new, broader concept, as suggested, based on the joint search of a built solution may lead, if

[15] Moore, Cristopher, *The Mediation Process – Practical Strategies for Resolving Conflict*, 3-rd Edition (San Francisco:Jossey-Bass, 2003), pp. 269 – 296, 297 – 308.

[16] Frenkel, Douglas et al, *The Practice of Mediation* (New-york: Wolters Kluwer, 2008), pp. 71 – 86.

accepted, to a remodelling of the mediation activity, at its turn with substantial practical effects in increasing the process' chances to succeed.

Future researches may be developed and studied in detail as conceptually described in this paper. Thus, we intend to emphasize in the future the corresponding aspects between the mediation stages and the roles. Also, to create a detailed inventory and as complete as possible of the techniques used or that might be included in the mediation process depending on the mediator's roles.

An interesting aspect is the choice and the configuration of the roles' range and sequence for the mediator, according to the typology of cases under mediation (family, inter-community conflicts, civil disputes, commercial conflicts, labour conflicts, etc.).

Finally, a major field of our future research, as inspired by the above-detailed model of roles and complex functions of the mediator, is the deeper analysis and the development of the mediation concept (optional as compared to the classical ones) that we have suggested herein, based on the active performance of the mediator as regards the construction of the solution and/or the surpassing of the deadlock. We'll try to model and to theoretically ground this second model too, by pleading for the specific plus value this one brings to the parties under dispute, but also to formulate and to fundament its practical use.

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THE SCIENCE OF COMMUNICATION AND NEGOTIATION IN MEDIATION

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Abstract
The present study proposes to contribute in clarifying a subject of great actuality and social importance: why does the contemporary society need such mediation and mediators and what are the psycho-social premises of making the process of mediaton more efficient.
In the first part, this study keeps the track of identifying the connections and the distinctions between communication-negotiation and mediation. The intercession carries forward with the analysis of the communicational and negotiative abilities of the mediator – premises of efficient mediation. The final part consists in an argument towards the imperative need of mediation felt by the contemporary society at all its levels.

Keywords: *communication, negotiation, mediation*

1. Introduction

I communicate, so I exist. We exist as long as we communicate We are constantly facing various problems and in order to solve them we must communicate.

Social life and its existence depend upon human interactions, which is negotiated through communication.

People live amidst multiple communication forms that cover more than 11 hours of the total 24 hours that make up a day. We could state – as Lucien Sfez points out – that everything communicates in nowadays society, which is also known as the *communication society*.

Nowadays we can't imagine the democratic society withought interactions, communications, negotiations and recently mediations.

2. Communication-negotiation-mediation

In *Social organization*, Charles Cooley defines communication as the mechanism through which human relations exist and are developed and which includes all the symbols of spirit and the necessary means to transmit them into the space and to preserve them in time. It is a process that includes facial expression, attitudes, gestures, the tone of voice, words, writing, printing a.s.o.

Etimologically, the term communication comes from the Latin *communis*, which in the XIVth century used to mean "to put together, to share" (Ioan Dragan). Later, in the XVIth century, as the post office services and the roads became more numerous, the term gained a new connotation, i.e. "to transmit".

During the XXth century, the term *communication* gains a new connotation, i.e. "to broadcast" (to transmit through the radio, TV, cinema etc.). J.J. van Cuilenburg, O. Scholten and G.W. Noomen mention three overlapping meanings of the term: "notification, information", "verbal contact within a group or collectivity" and "presentation or occasion that favours exchange of ideas or spiritual relations."[1]

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[1] J.J. van Cuilenburg, O. Scholten and G.W. Noomen, *Stiinta comunicarii*, Bucuresti, Humanitas, 1998, p.25;

Like communication, negotiation is ever-present in human life and in society. It is a "universal activity performed in international businesses, commercial transactions, diplomacy, in internal and international legislation, in the attempt to build social peace within a country/between countries, and it has an interpersonal, inter-group and inter-institutional content."[2]

Negotiation is closely linked to communication, negotiation without communication cannot exist. That is why specialists in negotiation are also specialists in communication. Goodall Jr. considers that negotitation is actually a communication style recommended for mitigating the negative effects of a conflict.[3]

Negotiation must be understood as "a process in which two or more parties, which have common and conflicting objectives, debate the possibilities of coming to a potential agreement."[4]

In other words, negotiation – as Douglas Kennedy remarked – is the process through which we succeed in obtaining what we want from those who want something from us.

Negotiation is the process by which the conflicting parties try to reach a consensus that is advantageous for all the parties involved in this process, discussing about each party's pretention and respecting these pretentions as much as possible; this process should not be finalized by deciding who the winner or loser is.

In conclusion, **negotitation** is a nonconfrontational process by which two or more parties, having contrary but complementary interests and positions, attempt to reach an advantageous agreement, whose terms are known from the very beginning.[5]

M. Hiltrop and S. Udall identify three categories of objectives which negotiation must consider:

- a major objective – the best result ever recorded;
- a secondary objective – the least efficient, but acceptable as a result;
- a target-objective – which is expected to be accomplished in an effective way[6].

When the involved parties cannot jointly negotiate in an efficient way, they can address a mediator to facilitate the negotiation process. Mediation is closely linked to the negotiation and communication processes.

Mediation is often defined as "interference in the negotiation standards and between the conflicting parties, as well as the acceptance of a third party – which has limited powers and cannot adopt any decision authoritatively, but which is meant to assist the involved parties so as to find a mutually advantageous solution in the disputed issues."[7]

The two parties negotiate in the presence of the negotiatior and come to a final agreement. In other words, mediation is an intermediary position, a type of assisted negotiation that is made by a neutral party, known as the mediator.

Mediation is a form of long-term social education that aims to develop communication and conflict mediation skills so that people would directly come to have a good relationship with each other and to solve their problems alone, without having to go to court.[8]

"Mediation is a process of creation and a social life management process, which allows people either to reconnect to social life or to prevent and solve conflicts thanks to an impartial, authoritativeless third party's interposal that guarantees communication between partners."[9]

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[2] M. C. Solarte, *Course on negociation; Theory, Tehniqes and Conflict Management*, Spring 2002; http//hot.ee/ introduccion and_conflict management htm.

[3] H. L. Goodall, Jr., *Small Group Communication in Organizations*, Second Edition, Dubuque, IA.: William C. Brown Company, 1990.

[4] Hellriegel, Slocum, Woodman, 1992, p. 478.

[5] E. Botez, Negocierea afacerilor, Editura Universitatii din Oradea, 2000, pag. 9.

[6] M. Hiltrop, S. Udall, *Arta negocierii*, Editura Teora, 2000.

[7] Christopher Moore, Procesul de mediere: Strategii practice pentru rezol-varea conflictelor, 2nd ed., (San Francisco: Jossey-Bass Publishers, 1996), pag. 15.

[8] Bernard Lamizet, prof. dr. la Institutul de Studii Politice din Lyon.

Kenneth A. Sprang appreciates that mediation offers many important advantages for the parties involved. A more trustful atmosphere, more confidentiality, less emotional traumas, less transactional costs, a more flexible calendar, more application domains, more creative ways of attack, more opportunities for responsibility and recognition, concentration upon the parties' interests – all are a few of the **advantages** offered by mediation.

Mediation – in Solomon Marcus' view – is a paradigm and it represents, as many other paradigms do, - a convergence point for several disciplines which results in "a richer and more diverse understanding of human behaviour."[10]

For civil society, mediation is an instrument that leads to the creation of social links and it imposes fundamental values such as: autonomy, responsibility, the ability to adapt to new situations, solidarity and agreement. Today we can notice that, in the Western world, mediation has become more and more successful and it is preferred to other ways of settling conflicts. In my opinion, the appearance of mediation, as well as its popularity is linked to the change of mentality regarding social justice (a new understanding of human rights as a form of world justice), the social actor (accepting the role of subject in social and political life), the notion of guilt and conflict (adding value to the psychological and sociological perspective) etc. These modifications lead to preferring/chosing to develop and use alternative methods (ADR) to going to court, i.e. mediation, negotation, legal action. The limits and shortcomings of legal action - that is meant to settle conflicts - are more and more mentioned. Such an action is expensive, adversarial and incapable of wholly solving complex cases!

3. Comprehension and non-violence – basic principles in the science of communication and negotiation

After graduating school many of us have discovered that there are different ways of learning and listening. Research workers have identified 4 styles of learning.

- the Auditory Learner: the learner is concerned about and interested in the moods/feelings of the other person. Auditory learners try to find common interests with the others and react to the other's emotions/moods. Listening is common for couples, families and friends.

- the Active Listening style: the listener requires accuracy, correct presentations, no errors and, if possible, an organized presentation. A boss, for example, could ask the representative of a department to make a report about the general situation of the company. He would expect the report to be concentrated and straightforward.

- The Content Style: the listener prefers the information to be complex and provoking. Since this information is, in general, abstract, people might listen to it without being emotionally affected and then assess the information without making value judgements. A physician might, e.g., ask for information from his colleagues as to how a certain patient should be treated. Thanks to his/her training and his/her experience he/she will not find it difficult to understand a complex medical explanation.

- The Time Style: the listener who adopts this style prefers fast and concise interraction with others and he often gives his interlocutor the possibility to know the amount of time the latter has for finishing his argument. Reporters, when working for a TV broadcast programme, must collect information quickly and effectively because they have tight deadlines and, in fact, this is the reason why they belong to the time style category.

The best listeners are able to adapt their listening style to the given circumstances. If they have not learned how to do that, they will encounter problems when interracting with the others. E.g., when a person complains of a work colleague, he/she probably prefers the auditory learner. However, his/her superior has little time at disposal and, consequently, he/she will want this person

[9] Monique Sassier, 2001, Construire la médiation familiale, ed. Dunod, Paris, 2001, pag. 10.
[10] Solomon Marcus, Paradigme universale, Ed. Paralela 45, Piteşti, 2005.

to quickly state the existing problem and then to leave the office – a reaction that will not satisfy the employee, anyway.

When working with people, it is important to take into account their styles as listeners. E.g., if you want some critical decisive reactions as to a document that you have already written, a listener that identifies himself/herself in the style contained by the text will be more useful than the listener that adapts to the listener's style because the latter will not want to hurt your feelings by pointing out the identified mistakes.

Some research works indicate that culture leaves its mark upon the listening style of a person. A study that has compared American, German and Israeli listeners has revealed that Israeli people concentrate more on the accuracy of the sent messages; Germans are the most active listeners, they often ask questions alongside the listening process. [11]

The ideal communication situation implies observing the non-evaluation, non-interpretation and non-systematic questioning principles.

The first basic condition for avoiding a communication blockage is actively listening to the interlocutor. The active listening attitude is defined according to the above mentioned principles to which one can add the comprehension and rephrasing principle.

The comprehension attitude consists in manifesting interest for what the other says and listening to him in order to try to understand him, not in order to judge or evaluate this person. This attitude is manifested as a request for rephrasing the interlocutor's viewpoints and feelings. Comprehension is the only attitude that favours the interlocutor, which creates a relational climate that is ideal for his/her expressing properly in the absence of any imposed direction or form of manipulation. It is not simple to understand the other person's words. We often take understanding for interpreting. However, understanding does not mean interpreting, but deciphering, decoding the other's words, trying to identify the reasons that guide him. Let us learn how to listen, then! "God has given us two ears and a mouth to listen twice and speak once!"

In order to facilitate authentic communication, one has to be more inclined towards the other, to try to understand his/her inner universe, to see the existing situation through his perspective, to discover the significance he/she gives to a particular event. In other words, to be sympathetic. Sympathy implies "determination and the capacity to control your own social and affective reactions, reaction to the other's feelings, and the verbal capacity to communicate this comprehension." (J.Cl. Abric, 2002).

Active listening is linked to sympathy. It involves surpassing the self, forgetting about ourselves and concentrating upon ourselves, which is not a simple task. Quite often, when our interlocutor speaks, we concentrate upon ourselves, we do not think of what he/she says but of what we intend to tell him/her, of the strategies we are going to use in order to impress, convince or seduce him/her. If we happen to listen to him/her, we shall do this in strict connection with our values, feelings and principles.

Understanding is the only factor that places the interlocutor in a privileged position and that creates a relational climate that is proper for expressing deeply. Understanding the other's words is not easy, however. In other words, paraphrasing Marshall B. Rosenberg, the founder of non-violent communication – let us give up "the jackal's years for the giraffe's ones". The giraffe's ears are big, attentive, open, they know how to decipher the need hidden behind words, while the jackal cannot but hear criticism and answer to them accordingly, provoking violence. The jackal's language is the expression of a biased relationship – as the author states – a relationship based upon waiting, control and guilt. Let us adopt, then, the giraffe's language, a language of amiability, non-judgement/

[11] Kievitz, Christian, *et al*., *Cultural differences in listening style preferences: a comparison of young adults in Germany, Israel, and the United States*, in *International Journal of Public Opinion Research*, 9(3), (Fall 1997), 233(15), online: Infotrac, Expanded Academic ASAP).

labelling, of sympathy, through which the interlocutor's deep needs are heard[12]. To achieve this, we must be more inclined towards the other, try to understand his/her inner universe, discover the significance he/she gives to facts, words, events. This implies an effort of surpassing the self, self-forgetfulness – at least for a while, and concentration upon the other person. This is the only way to acquire comprehensive communication.[13]

"Despite of the urging human need to communicate comprehensively, in most of the so-called civilized countries there is an implied non-communication and human relations culture. It does not favour, either within family and school education or in social life, the development of a high relatedness quotient for most individuals."[14]

In such a society the individual's chance to have a high relatedness quotient (RQ) is low because neither school nor society trains the individual for having lively and healthy relationships. Under these circumstances, as the above mentioned author argues, the relatedness quotient (RQ) could be, however, developed by becoming aware of ourselves and by developing the dynamics of our relationships.

Maryse Legrand – French clinical psychologist – states that one can distinguish between relatedness quotient (RQ) - intelligence quotient (IQ) and emotional quotient (EQ); in her opinion, RQ can be evaluated in two ways: in relationship to the self and in relationship to the others. A good relationship, which has a high RQ, implies the existence of kindness and amiability between its members and it makes possible for the other's particular characteristics to be respected, no matter who the person may be.

RQ is linked to the more or less developed capacity of a person to create for her/him and the others relationships that actively contribute to the increase and flourishing thereof. We could state that an individual has a high RQ when he/she encourages and developes energetic, creative and stimulative relationships for himself/herself and the other one. We shall state the RQ is low when it generates infantile, tiring, alienating relationships for the other one and for himself/herself. (Salome, 2004)

RQ is the art of establishing mutually rewarding relationships. A good relationship implies the following needs: the human need to be accepted, to express oneself, to be recognized as a unique human being and the need to be appreciated. This type of relationship ensures the development, openness and accomplishment of the human being.

As the French writer, Olivier Clerc, points out, RQ also refers to a person's capacity to deal with disagreements and conflicting situations without making use of violence. In such a relationship, our physical, affective and relatedness needs can be heard and recognized – however, this does not mean that they are fulfilled. The need to relate refers to the need to express yourself, to be listened to, to enjoy the others' attention, to be appreciated (to feel yourself appreciated and useful), to be intimate to someone (to be able to share personal secrets), to have a sense of belongingness (to feel that you are accepted in a group), to exercise influence (to contribute to the accomplishment/creation of something new). The RQ is developed within those positive meetings that tend to consolidate personal security, the feeling that you are respected and that you have a certain personal value. At the same time, such a relationship will stimulate openness, interest, curiosity ("taste") to the others. RQ will favour aspiration towards being yourself when meeting the other one, trying to offer him/her the best that you can.[15]

Listening is an ability that can be improved by learning the way it functions. In a survey accomplished by over 500 most successful companies, 59% of those questioned answered that they

[12] Marshall B. Rosenberg, *Comunicarea Nonviolenta, un limbaj al vietii*, ...

[13] Elena Francisc Publishing , www.efpublishing ro.

[14] Jacques Salomé, *Minuscules aperçus sur la difficulté d'enseigner*, Editions Albin Michel, 2004, ISBN: 2-226-15337-3.

[15] J. Salome, *Relation d'aide et formation l'entretien*, p. 27, Septentrion.

paid for their employees to be taught listening courses. This interest for improving listening abilities is important because studies reveal that big company's employees spend about 60% of their time listening, while their managers spend about 57% doing this activity. Research workers have found that good listening skills are directly linked to their work results. When employees attended listening courses before going to the IT training class, they were more efficient they those who were not trained for listening. Fig. 3-1 indicates as a percentage the approximate length of time people dedicate to the 4 communication skills: listening (53%), reading (17%), speaking (16%) and writing (14%). Although we spend most of the time listening, this is the least learned skill.[16]

Listening, like any other skill, must be learned and practiced. When research workers questioned 450 economic graduates as to what communication skills are necessary at the workplace, they answered that listening is the most important quality for acquiring success. When they were asked what communication skills they were taught in high-school, they mentioned listening in the first place.[17]

The negotiator's qualities

Bill Scott considers that important negotiations require not only a negotiator but the whole team. He tries to identify the ideal leader's qualities within the negotiators' team. The team leader's professional level is very important. He/she must have the same professional level as the (rival) team's leader. If this condition is not met, i.e. if his/her negotiation abilities are not as good as his rival's abilities, then his/her team will be dominated and induced towards adopting a defensive, counter-aggressive attitude and, moreover, it is likely for such a team not to be able to cope with a situation of this kind.

Besides the professional level issue, the team leader's work style is also important. As to this, one can not mention a work style that is preferred to another one. It is important for the team to work together effectively and this depends upon its members' capacity to act according to the style they adopted.

In a company in which all information is controlled by a single superior, who assumes all managerial decisions, the negotiators' team will have an identical type of leader. During negotiations this will be able to give answers but he will address his colleagues only when asking for advice regarding the encountered situations and the possibilities that exist for solving these problems – possibilities which he will negotitate later on.

In a company in which management tasks are assigned, the leader will be a person who will control the progress of negotiations in a more free way encouraging the team members to have major contributions during the negotiation process.

The team leader's style has to reflect the organization style, which he represents, and there is no style that could be defined as "perfect".

Bill Scott considers that the leader's educational background is not relevant in negotiation. This role can be played by persons who have a degree in finance or trading or by persons who come from the field of production. It would be preferable, though, for this role to be played by those who, during their trainee years, worked in the commercial field and not the academic one.

First of all, the negotiator must have good communication skills, make proof of the art and science that this skill involves and master communication techniques. The negotiator must be a sympathetic and comprehensive listener. Without these inborn qualities that are developed by studying, it is difficult to be successful when negotiating. A clear communication, which is generally understood, leads to a dicrease in number of unwise decisions and of the costs that the conflicting parties must bear. The wrong perception of the message leads to a wrong interpretation and evaluation of the partner, because one is not fully aware of what they do not know about each other.

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[16] Sperry Corporation, Your Personal Listening Profile(Sperry Falls Church, VA:1980), p.4.

[17] Vicent DiSalvo, David C. Larsen, William J. Seiler, *Communication Skills Needed by People in Business, Communication Monographs*, 25, (1976): 274.

In our opinion, surpassing these perception limits is possible if all negotiation components have a clear identity and content and if the relationship is based upon precise language and clear rules.[18]

In "One Minute Portrait", Stefan Prutianu considers that the successful negotiator's main qualities are: honesty, industry, love for the others, inner freedom, persuasion, sense of humor, initiative, diplomacy, inspiration and will.

Even if many people think that artfulness is the key of all successful negotiations, the above mentioned writer argues that the most important quality of a good negotiator is honesty and not artfulness. Only an honest and loyal attitude makes human relationships and relationships between organizations last.

As to the mediator, honesty is the manifestation of neutrality and impartiality, the symbol of remaining confidential in order to avoid conflicts of interest and to obtain the parties' consent. These are qualities provided in the codes of ethics belonging to mediation societies.

Hard work, readiness to make effort on a long term, the patience to accomplish a task are undoubtfully a guarantee for success in negotitation and mediation. Like the negotiator, the mediator has to be ready to come to the mediation process in order to work hard, to survey and check "reality". Common sense, good intuition and introspection are important qualities when one deals with a situation of power unbalance and for ensuring an efficient mediation. The mediator must be ready to be creative and flexible when he deals with mediation.[19]

Humanism, love for people, trust in values and the huge potential of the human being are the most important qualities of the person who wants to be a mediator. "Including humanism among the peremptory moral values is no longer negotiable at the beginning of the IIIrd millenium. Animated with humanist ideals, he/she [the negotiator] respects himself/herself and the negotiation partners. He/she can be generous, but, anyway, he/she is fair. He/she can militate for the free development of the human personality, but, however, not anyhow."[20]

The above mentioned author points out the importance of inner freedom in the negotiation process. The ideal negotiator is an independent and autonomous person who negotiates freely and in an unbiased way. These are the basic conditions upon which one's capacity to be natural and free depends. Inner freedom gives man naturalness, ease, dignity and moral steadiness.

Persuasion is the negotiator's capacity to convince and argue and it is transmitted through the rhetoric of the discourse and the orator's passion. The intelligent, logical but cold discourse does not convince. *Passion* warms up spirit and it makes people enthusiastic. We refer to passion here and not ardour ("as a form of slavery caused by ardour").

Diligence, perseverence, not stuborness, represent another dimension of persuasion. Repetitive messages are recorded by passive memory and become more convincing.

"Optimism is the golden hand of the negotiator. It is to a great extent a matter of self trust, attitude and will. It comes from the inner universe, the trust in one's own force and generosity. Good is above evil even if we do not live in the best of all the possible worlds. Optimism is a miraculous plant that can be grown. An optimistic negotiator is generous and cautious. A part of him strongly believes that partners can benefit of the negotiated solution, while the other part remains vigilent."[21]

Smile and humour are important qualities in the negotiation process. A smile can sometimes be more convincing than the whole argumentation. "The serene and smiling face represents 51% of personal charm." Happy, joyous persons are more pleasant and are offered a concession by their partners more easily. Humour is also tonic, it weakens tensions, it warms up atmosphere and it facilitates the offering of concessions.

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[18] L. P. Zapartan, Negocierea in viata social-politica, Ed. Eikon, Cluj Napoca, 2007, pag. 179.
[19] Robert A. Baruch Bush, Joseph Folger, Promisiunea de mediere, Elveția, Jossey Bass ,1994.
[20] Stefan Prutianu, Manual de comunicare si negociere in afaceri, Ed.Polirom, 2000.
[21] Idem.

Initiative is an ally for the one who proposes, begins and initiates an action. Initiative is an ally of the strong, active ones who make decisions alone and never wait for the others to make a decision. A passive, always expecting person cannot have initiative. The strong negotiator depends upon initiative.

Diplomacy allows for a correct and convenient attitude to be adopted in almost any situation. It requires patience, calm and lucidity. The diplomatic negotiator knows how to address his/her interlocutor - the negotiation partner: he/she is balanced and respectful to the others.

Will is also an important quality for obtaining success in negotiations, it is a characteristic of the strong ones and the winners. For them, the exercise of will is so simple that it requires almost no effort. Will is the psychological function that, consciously, directs the individual towards accomplishing his/her objectives. It focuses energies towards attaining goals. Will often differentiates success from failure. Successful persons are those who adopt strong inner decision and do not give up when obstacles are encountered.

Besides the above mentioned qualities of the good negotiator, Stefan Prutianu also adds competitive spirit, dignity, honour, health, experience and age (30 and 50 years).

Conclusions

Communication, negotiation and mediation are creative and managing social life processes, which allow and facilitate human communication, rebuilding broken communication bridgges, preventing or peacefully settling social conflicts. They are processes meant to reinforce the sensibility of human action, cooperation and solidarity, as well as the sustainable development of societies.

Negotiation and mediation are the most convenient and the cheapest ways to settle disputes. That is why, lately they have been more and more used for solving micro and macro social conflicts.

The frequency of using negotiation and mediation in social relationships reveals the level of democracy and political culture in a society.

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THE ROLE OF INFORMATION TECHNOLOGY IN BUSINESS GROWTH PERFORMANCE IN KOSOVA

AFËRDITA BERISHA-SHAQIRI[1]

Abstract
As a result of rapid development of information technology and its fast application in the economy and business processes, it has come to the transformation of industrial society to information society while the information society is the new feature of human civilization, where services have become universal and increased the role and importance of information and knowledge.
Today the economy is transformed from the classical model in a new model known as the "knowledge economy" or "global economy". In terms of the knowledge economy in order to create competitive advantage, businesses must be innovative in information technology since information technology has become an integral part of organizational strategy and planning processes and the way to create and enhance competitiveness.
Given current trends in the computerization of enterprises worldwide scale is imperative that Kosovo enterprises to transform into computerized enterprise.

Keywords: *information technology, business processes, enterprise, knowledge, competitive advantage.*

1. INTRODUCTION

As a result of the rapid development of information technology and its very fast application in the economy and business processes became the transformation of industrial society to information society and society of information is a new feature of human civilization, where services have become universal and increased the role and importance of information and knowledge.

Today the economy is transformed from the classical model of economics to a new model known as the "knowledge economy" or "global economy". In terms of the knowledge economy has to created a competitive difference between companies, they must be innovative in information technology because information technology has become an integral part of organizational strategy and planning processes and the way to create and enhance competitiveness.

In the XXI century enterprises operating in a competitive business environs, in terms of computerization and information technology application.

Therefore, those should be able to react fast to changes that may occur in the vicinity which could threaten their existence. Companies today are constantly under pressure of competition and are forced to walk in step with the competition to secure existence in the global markets. Even in Kosovo, under the new economy[2] and present process of globalization the link between different companies and observed trends are increasing use of information technology, computerization of enterprises and the growth business in collaboration between business partners with the customer.

Given current trends of information of enterprises in global scale are imperative of the Kosovo's enterprises to transform into computerized enterprise and focus on achieving their economic sustainability. Actual processes of business development in global scale clearly show that sustainable economic development in time which we live comes from their ability to be innovative in

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[2] According to Don Tapscott new economy or the global economy is nothing more than trade in goods, services, working capital and information. For more see: Group of Authors (1998): Selected topics from informatics. Prishtina, 1998.

business processes to gain competitive edge, which is included in terms of better management and achieve success and prosperity in longer period of time.

This is a challenge for many businesses, even for businesses in Kosovo, they need new information technology whose their data processing must be based on the computer, SMEs and their computer systems must be able to respond quickly and timely with market requirements and necessary changes in the organizational structure of business in order to increase their competitiveness. Business in world has changes every day for that needs growth and development information. At the same time computing systems needs to support growth and development.

2. THEORETICAL ASPECTS OF THE COMPUTERIZATION OF ECONOMIES

Computerization of the economy indicates the level of using computers to perform business activities. Computerization of the economies of most developed countries is the result of a very high rate of growth of manufacturing in electronics and huge investment in these devices. In global proportions almost all countries have the features of information societies.[3] More significant are: the U.S., Japan and Germany which invest many times more per capita on computer equipment than other developed countries. Increasing productivity and reducing costs in developed countries comes from computerized production and investment in robotics and in computerization of administrative tasks. Selection technology today helps companies to provide competitive advantage in all stages of business life cycle.

Today, businesses are using information systems and information technology[4] to improve efficiency and effectiveness of business processes to support the decisions and cooperation in the group. In global proportions there be found some examples of successful companies that use this technology. On this occasion we can mention two of them: American Airlines, which create an entirely new business from the previous one by introducing elements of information technology in their services and Baxter Company from using information technology also they were able to create competitive advantage in global markets in the area in which they operate with their activities.

Using information systems as a factor of efficiency and success of a business has contributed for enterprise to have better position in global market. Computerization system is organized as combination of people, hardware, software, network communications, databases and procedures. These components are organized as a whole unique concept which have to help supporting businesses to create competitive advantage and to support the decision making process to provide support business in operational processes.

Most of today's products derive from the SME and the greatest number of opportunities for employment is also created by SMEs. Taking this into account during the last fifteen years in Kosovo was established a significant sector of SMEs which shows a large dynamic registration of new businesses especially in the first three years of the early nineties and after the war. Distribution of SMEs in Kosovo can be viewed in three stages:

- The first phase from 1991 until 1993
- The second phase from 1994 to 2000
- The third phase from 2001 -.

As a result of all this is necessary these enterprises to create an enabling environment to conduct their business.

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[3] Information Society is a new feature of human civilization, where universal service and equality of access to information along with the developed infrastructure systems and electronic communications contribute to sustainable socio-economic development, alleviating poverty and providing the best life standard.

[4] We learn and use IT because it is the vital component of business success and it helps to businesses expand and to compete with competitors.

3. EFFECTS OF COMPUTERIZATION OF THE BUSINESS OF SMES IN KOSOVO

Small and medium enterprises in Kosovo have started their development in the early 1990's. However due to the constant pressure on them by the regime they did not mark a significant development. Their rapid development started only after 1999 when it also began to become the main generator of employment and overall economic development of the country.

86.000 enterprises was the number of SMEs registered on March 31, 2008[5] this is one of the best evidence of the importance of this sector. The trend of establishing new SMEs in the economic development of our country according to the statistics shows a high degree of 7% from year to year and continue and into 2008. In the first quarter of 2009 is viewed a increasing interest in establishing new SMEs. The importance of these enterprises is even greater when it is known that over 98% are micro enterprises that employ from 1 to 9 workers.[6]

Despite positive achievements in recent years, the business environment and their surroundings the business in Kosovo still needs to improve, creating more favorable conditions for development and increase their competitiveness by eliminating barriers that private sector is facing the last decade. Computerization of the enterprises is the main way to increase their ability to compete in the global market. The world economy has changed radically, especially due to the rapid development and rapid application also information technology. To survive in global market conditions where there is high competition where the product life cycle is short and where there is a huge diversity of products and services companies it is necessary to apply this technology. It is encouraging fact that the development of information technology in Kosovo's SMEs every day is increasing. This is the best view because the Kosovar business has already realized that the exploitation and the use as soon as possible of this technology creates competitive advantage compared to the competition. They have realized that information technology and its use is the key to success which opens the door towards the future. The globalization of the economy and open competition will be the push for better organization of the production process and increasing demand for relevant software SMEs in Kosovo. Computerization of enterprises create lot of opportunities to contact quickly and directly with business of different countries and regions it has created new business performance and opened a better opportunity for development of various application of software which helps SME to communication wider and easier.

In general, SMEs in Kosovo, mostly uses the Internet to do business transactions, to introduce price lists and types of goods and services on their web-sites, to make orders for goods on-line, to collect information from all areas of different socio-economic activities, to exchange electronic mail with all those who are connected to the Internet, here we think especially for associates and external consultants who are in different universities of the world, to discuss various topics that are developed on the Internet right now that are related to their business activity to pick up various programs and documents relevant to their activities, etc.. Also, personnel working staff respectively to attend different schools on-line, to read and follow the news from around the world etc..

Given the rapid dynamics of development and application of information technology and communications, Kosovo's enterprises tend to adapt to global business environment that presents a real challenge especially if we consider that the Kosova market is limited size. Thus, restructuring can be done only through development that aims to replace imports with local products and export

[5] 51,258 nga këto biznese janë të vogla dhe të mesme, të tjerët janë biznese individuale (dyqane, kafene, restorante, etj) që nuk kanë karakter të ndërmarrjes.

[6] The ownership structure also confirms their importance in terms of employment where near 92% is individual businesses, while 4.1% are limited liability companies. However, concern remains watching business structure in terms of their economic activity, given that only 17% of them are engaged in productive activities, most of them in the food industry (9.4%) and construction ((5.4) and in agriculture only 1.8%. On the other hand almost half of businesses (47.4%) engaged in wholesale and retail trade, 13.4% with transport services, 9% in catering and tourism, etc.. a direct consequence of this is the unfavorable structure of trade exchanges the country where the degree of coverage of imports by exports is only 6.4% according to data for 2007.

promotion. The importance of SME informatization in Kosovo, illustrated by the fact that the average export in 2008 is significantly higher in computerized enterprises compare with those that are not computerized.

It is important to note that enterprises in Kosovo are the initial stage of development of electronic business transactions via the Internet. Over 46% of SMEs conduct business transactions with each other (Business to Business-B2B), while over 35% of them conduct business transactions with the customer (B2C business-to costumers).

According to research on the development of SMEs in Kosovo since (2008), shows that over 70% of SMEs are equipped with computers that makes us realize that Kosovar business understand the importance of using computer technology and information in business processes and changes which bring the use of this powerful tool of our time. Research has also shown that in addition to increasing the number of SMEs that possess computer, from year to year has increased the average availability of computers for an enterprise. In 2008 (6.7 computers) in comparison with 2003 (4.8 PCs) increase is about 40%. While, as to which sector is more computerized research data show that the trade marks the highest percentage (40%), followed by services sector (34.5%) and manufacturing (25.5%).

Tab. 1. Show using Computer by SMEs in Kosovo

	2005 (%)	**2008 (%)**
Financial Evidence	41.6	33.8
Planning	13.7	14.2
Word processing	14.5	16.0
Market research	14.2	14.2
Leadership production	6.8	10.4
Quality control	5.0	6.6
For something else	4.3	4.6
Total	100.0	100.0

Initially small and medium enterprises have used computer for financial records and as a text processor. Today, the use of computers by SMEs is a qualitative change. In particular, there is a positive dynamic of using computers in the past three years in market research and planning (14.2%). Also, the positive trends recorded using computers for production management (10.4%) and for quality control (6.6%)

4. Conclusion

SMEs are an important factor of economic development because it easily withstands shocks from the market, have close relationship with the customer, are flexible to changes, commit resources and capital at the local level, have great affinities to transition from one program to another, create rapid employment. Effects may be organized according to different shapes and create effects in the implementation of rapid technological innovation, the importance of private economy can best be illustrated by its participation in the social product.

Therefore Kosova enterprises should know that in an economy which is undergoing changes every day, adapting to this new environment and in global markets presents a challenge for them to have to be able to afford. Industry should be restructured and internationalize as soon as possible. Given that the Kosova market is of limited size, restructuring can be done only through development

that aims to export, taking into account the challenges and opportunities offered by the digital economy. This is a scenario that Kosovo as a small state and its enterprises have to face and overcome.

Kosovo SMEs are obviously well equipped with computerization of offices, but they should do more to try to modernize the way of communication, with a view to increasing competition outside national borders. The computerized SMEs are considered as a main driver for innovation, employment and social and regional integration.

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ICT INDUSTRY R&D IN HUNGARY

ADRIENN FEKÓ[1]

Abstract
In this article, the Hungarian ICT Industry related research and development is analysed. The developments and characteristics of the sector are described on one hand on the available statistics and on the other hand on interviews taken with the representatives of leading ICT companies in Hungary. In this short paper in order to have a larger database, we use a more aggregated definition of ICT sector according to European Commission DG JRC, IPTS (NACE rev.1.1). The main objectives of the paper are: to present the main characteristics of the sector and to explore the main causes of relatively low R&D activity of the ICT sector.

Keywords: *research and development, information and communication technologies, ICT-manufacturing, ICT R&D, Hungary,*

Introduction

The ICT sector is one of Hungary's most dynamic sectors but the related R&D activity is relatively low compare to the EU-27 average, however it increased in the last few years. This short paper focuses on ICT R&D activity of the ICT Manufacturing sector of Hungary and presents the main characteristics and the related R&D activity of the sector. We explore the causes of the low R&D activity of Hungary's ICT Manufacturing sector.

The literature distinguishes two categories in the field of internationalisation of R&D[2]: the 'asset-exploiting' and the 'asset-augmenting' strategies. In case of the 'asset-exploiting' strategy, the main aim of the affiliate is to create localised, market-oriented knowledge which helps firms to adapt existing technologies and products to foreign markets and to boost the overall revenue they generate from these assets[3]. The definition of the 'asset augmenting' strategy covers that situation when the R&D and innovation activities of MNEs abroad focus on creating the kind of technological and scientific knowledge that may find application in the whole enterprise group. However asset-exploiting strategies still prevail, asset-augmenting strategies are gaining importance[4] and we can find examples for asset-augmenting strategies in Hungary as well.

In Hungary in the early 90s a number of multinational companies have begun setting up research and development centres.

The typology of foreign R&D units according to Archibugi&Pietrobelli are the following:

- Centre-for-global: a single 'brain' located within the company headquarters concentrates the strategic resources and distributes impulses to the 'tentacles' (that is, the subsidiaries) scattered across host countries. Even when some overseas R&D is undertaken, this basically focuses on adapting products to the needs of the local users.

- Local-for-local: Each subsidiary develops its own technological know-how to serve local needs.

- Local-for-global: This is the case of TNCs (transnational companies) that, rather than concentrating their technological activities in the home country, distribute R&D and expertise in a variety of host locations.

[1] ICEG European Center, (e-mail: afeko@icegec hu)
[2] see also Cantwell and Mudambi 2005; Narula and Zanfei 2005
[3] EC, 2010a
[4] le Bas and Sierra, 2002

The R&D data of the Hungarian ICT companies is not available in many cases, thus we prepared personal interviews with the representatives of the leading ICT Industry companies in Hungary. It was separate research on ICT R&D in manufacturing and in software, however intertwined to a large extent.

THE MAIN CHARACTERISTICS OF ICT INDUSTRY R&D IN HUNGARY

Methodology of the research

The methodology of the paper involves on one hand the available statistics and on the other hand company interviews taken with the representatives of leading ICT companies in Hungary.

The ICT Sector definition is based on OECD ICT sector definition (ISIC Rev. 3.1.), but due to the lack of detailed data for those categories we used an aggregated definition of the ICT sector[5] according to DG JRC-IPTS, European Commission. We used the following NACE codes (NACE rev 1.1):

Manufacturing:

30: Manufacture of office, accounting and computing machinery

32: Manufacture of radio, television and communication equipment and apparatus

33: Manufacture of medical, precision and optical instruments, watches and clocks

Services:

64: Post and telecommunications

72: Computer and related activities

The paper concentrates only on the NACE 30, 32, 33 of Manufacturing and NACE 64 of Services, without NACE 72 (because the Software sector is another separated part of the research)

Information is limited regarding studies on the ICT R&D in Hungary and also the statistical data are not complete. Due to this, we used statistical data to describe the general trends, but the main characteristics of the activity in the field of ICT Industry R&D in Hungary are underpinned by company interviews. We prepared a list of the largest ICT Industry firms in Hungary based on various sources such as the list of the largest ICT companies, consulted membership lists of relevant associations, articles of economic newspapers, balance sheets, etc. We selected the most important actors and interviewed them.Two categories of the companies were: (1) biggest ICT manufacturing and telecommunication companies with R&D activity, and (2) smaller corporate players, owned by Hungarian private persons. The information gained from the interviews is supplemented by data from other, publicly available sources, such as the balance sheets, the data of the Budapest City Council' Registry Court, websites of the given companies and newspaper articles.

The main limitations of our methodology

- Lack of statistical data on R&D in most of the cases.
- Statistical data are not detailed enough (we used a more aggregated definition of ICT Industry sector).
- Regarding the interviews, we had problems of capturing middle sized companies, who are not mentioned among the top players, but on the other hand, they are also not belonging to the group of the most dynamic, fastest growing smaller sized companies to which the media pays special attention. Thus we might have missed some of the medium sized firms in Hungarian ICT Industry R&D.
- The "ininterestedness" of certain companies to register R&D, in spite of the fact that their activities belonged in essence to that group of economic activities. We tried to capture them, but our means were limited.

The main aim of this paper is to analyse the main characteristics of ICT Industry R&D in Hungary and to explore the most important reasons of the low R&D activity in this field.

[5] EC, 2010b: p 129

The main features of the Hungarian ICT sector

However ICT sector is one of Hungary's most dynamic and innovative sectors, the related R&D activity is relatively low.We explore the main reasons of this paradox.

Table 1. ICT R&D expenditure/GDP indicator

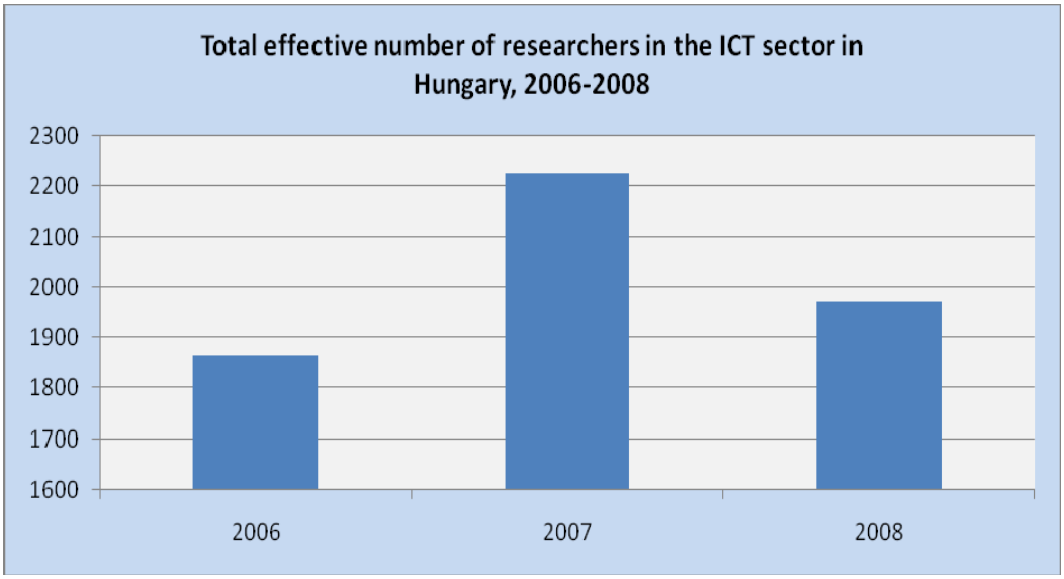
ICT R&D expenditure/GDP (%)	2006	2007	2008
Hungary	0,059	0,067	0,053

Source: CSO, Hungary, DG INFSO

The ICT R&D expenditure proportion in GDP is very low in Hungary, it is approximately 0,05%, in contrary in the EU-27 it is approximately 5% beween 2006-2008.

The effective number of researchers in the ICT sector was 1865 persons in 2006, it increased in 2007 up to 2225 persons, but in 1998 it decreased in Hungary. In the EU-27 ICT sector represents only 3% of total employment[6].

Figure 1. Total effective number of researchers in the ICT sector in Hungary, 2006-2008

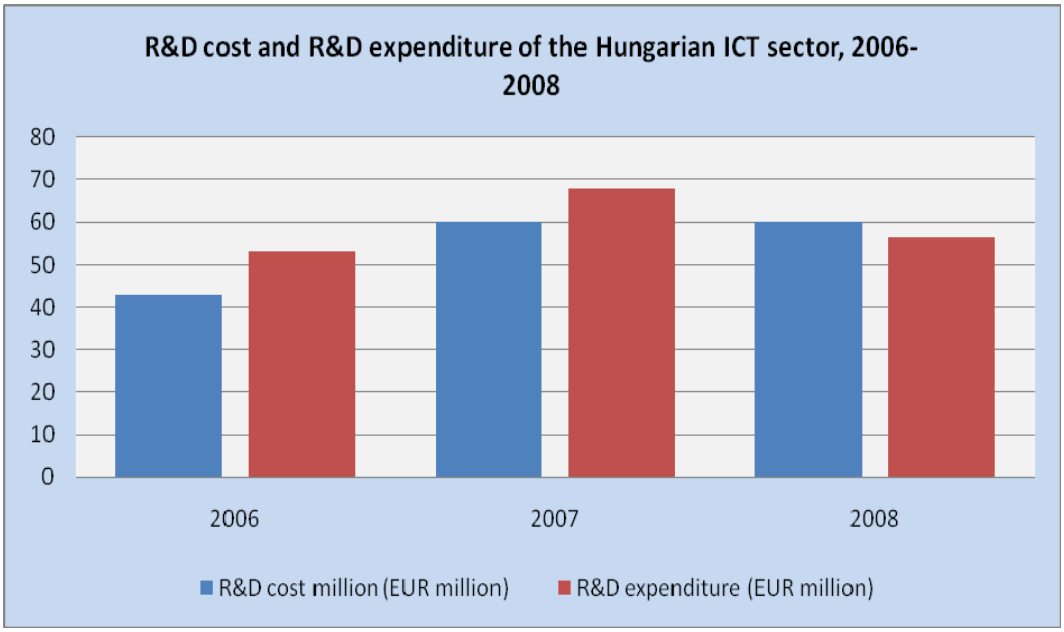


Source: CSO, Hungary

The R&D expenditure of the ICT sector increased between 2006 and 2007 and decreased between 2007 and 2008. The R&D cost also increased in 2006 and stagnated in 2007 and in 2008. The ICT R&D expenditure amounted to EUR 56,56 million in 2008 and the ICT R&D cost amounted to EUR 60,07 million in 2008.

[6] EC, 2010b:31

Figure 2. Total effective number of researchers in the ICT sector in Hungary, 2006-2008



Source: CSO, Hungary

ICT Industry BERD, production, export and import in Hungary

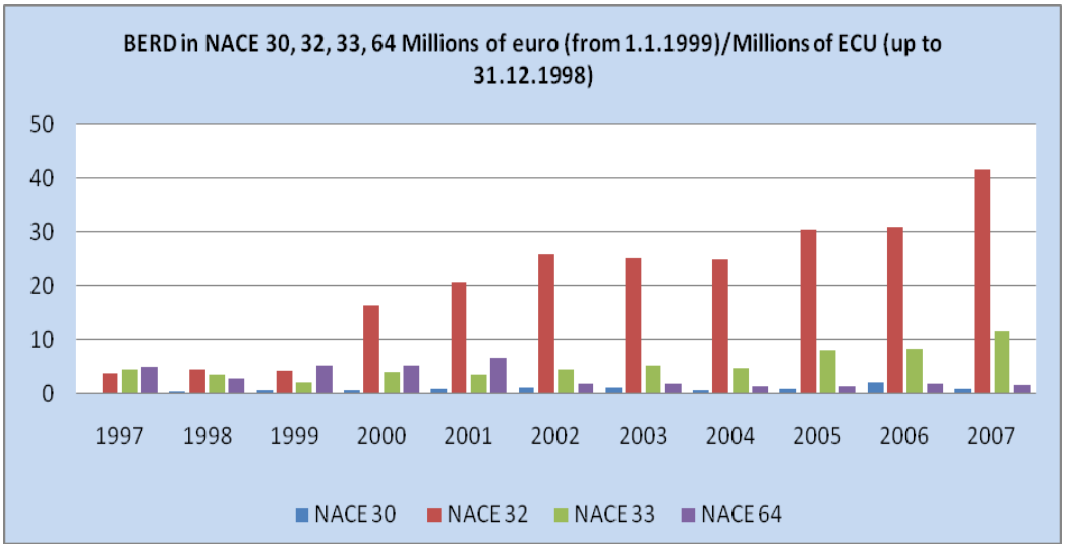
The internationalisation of R&D can be observed in Hungary as well. In the past few years numerous leading ICT industry multinational companies decided to transfer their R&D operations to Hungary. The main reasons of this process are the relatively cheap and relevantly skilled workforce of the country.

In Hungary in 2008 the business sector financed almost the half (48,3%) of the R&D activities[7].

R&D expenditures in NACE 30, 32, 33, 64, have increased significantly between 1997 and 2007; mainly the BERD grew dynamically in these sectors.

[7] CSO, 2009

Figure 3. Business enterprise R&D expenditure in NACE 30, 32, 33, 64 from 1997-2007

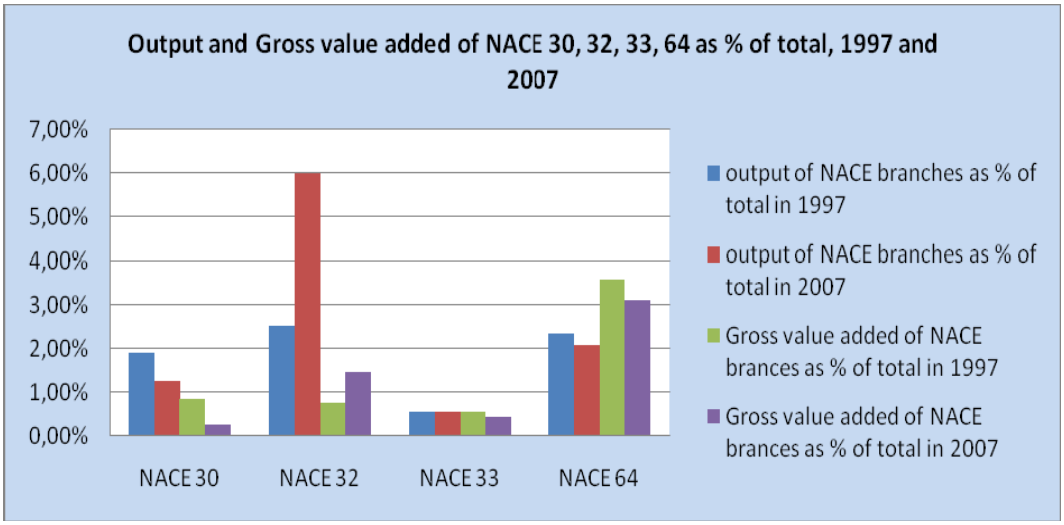


Source: Eurostat

ICT BERD gained importance between 1997 and 2007. ICT BERD (in NACE 30, 32, 33 and 64) was amounted to 11.27% of the business enterprise R&D expenditure of all branches and 5.67% of total R&D expenditures in 2007 in Hungary.

Regarding the production only the NACE 32 sector could increase its share in output and value added. All the other analysed NACE sectors (30, 33, 64) lost some percentage point shares between 1997 and 2007. In 1997 the share of all the analysed NACE categories (30, 32, 33, 64) was 7.28% in total output, in 2007 this grew up to 9.81%. Their share in gross value added decreased between 1997 and 2007, from 5.67% up to 5.22%.

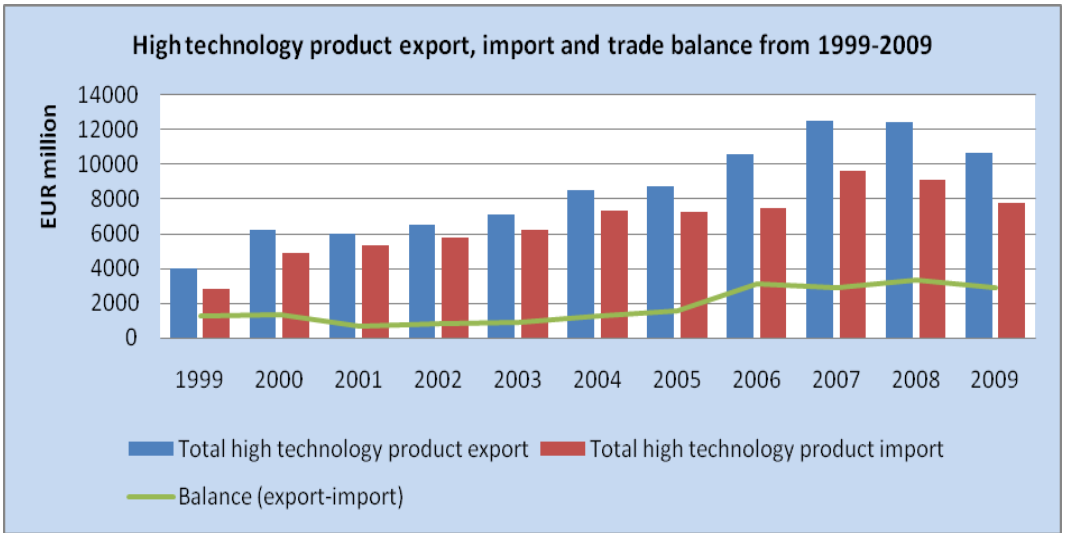
Figure 4. Output and Gross value added of NACE 30, 32, 33 and 64 as %of total



Source: CSO 2008

Figure 5 represents the Hungarian ICT Industry export and import to and from EU 27 in the 75, 773, 776, 76, 874 SITC categories according to SITC classification. Between 1999 and 2007 the high technology product export and import increased dynamically, in 2008 and 2009 the high-tech export and import started to decrease, due to the economic crises. The balance is also increased, stagnation can be observed in 2009.

Figure 5. High technology product export, import and trade balance



Source: Eurostat and United Nations (Comtrade database), own compiliation

ICT Industry R&D in Hungary, main characteristics and list of biggest spenders

Table 2 shows our ICT Industry R&D company ranking based on the interviews and available data. Besides the actors of the ICT Manufacturing sector (IT hardware companies, system integrators, automotive companies), we have taken interviews with the representatives of ICT R&D service sectors, e.g. telecommunication (NACE 64). We had a longer list of several companies out of which we have taken interviews with 11 companies of the 13 presented in our estimated raking. Our estimated ranking includes besides the foreign owned affiliates of the biggest ICT industry R&D spenders some smaller actors, companies with Hungarian private owners. In order to provide a real picture, we involved these companies as well.

Table 2. Ranking of ICT Industry companies in Hungary based on their R&D spending

Ranking	Name of the company	Ownership structure	Sales (2008) in HUF thousand (thousand EUR[2])	R&D spending in 2008 in thousand HUF (thousand EUR[2])	Location of Headquarters in Hungary	Location of R&D centres, labs
1.	Audi Hungary Motor Ltd.	AUDI AG, Ingolstadt (Germany)	1 408 650 210 (5 606 568)	74 118 750 (295 000)	Győr	Győr
2.	Robert Bosch Electronics Ltd.	Robert Bosch Investment Nederland B.V. (Netherlands)	24 459 899 (97 353)	10 101 600 (36 000[1])	Hatvan	Budapest
3.	Nokia Siemens Networks Ltd	Nokia Siemens Network BV (Netherlands) (100 %)	12 324 650 (49 053)	6 606 506 (2009) (26 295[1])	Budapest	Budapest
4.	Knorr Bremse Ltd.	Knorr Bremse Systeme für Nutzfarhzeuge GmbH (Germany)	31 012 000 (123 431)	3 268 141 (13 007)	Kecske-mét	Budapest Kecske-mét
5.	GE Hungary Ltd.	GE Holdings Hungary Ltd. (USA) (100%)	667 443 000 (2 656 490)	1 264 000 (5 031)	Budapest	Budapest, Budaörs, Oroszlány
6.	AVL Autókut Ltd.	AVL Holding Gmbh (Austria)	1 356 251 (5 398)	1 085 000 (4 318)	Budapest	Budapest
7.	Magyar Telecom Telecommuni-cations Plc.	MagyarCom (the 100% owner of MagyarCom is Deutsche Telekom A.G.)	500 804 000 (1 993 250)	721 000[1] (2 870)	Budapest	Budapest
8.	NI Hungary Ltd.	Enterprise International Holding B.V. (Netherlands)	56 691 708 (225 639)	566 917 (2 256)	Debrecen	Debrecen

9.	Meditech Ltd	Hungarian private owners	445 089 (1 772)	280 931 (1 118)	Budapest	Budapest
10.	ThyssenKrupp Presta Hungary Ltd	ThyssenKrupp Presta München/ Esslingen GmbH (100%) (Germany)	2 187 077 (8 705)	200 000 (796)	Budapest	Kecske-mét
11.	ThalesNano INC	Hungarian private owners predominant-ly	1 410 136 (5 613)	86 229 (3432)	Budapest	Budapest
12.	BULL Hungary Information System Ltd.	BULL International SA France (France) (100%)	4 058 954 (16 155)	46 044 (183)	Budapest	Budapest
13.	Externet Plc.	Birdcom Consulting Ltd. (Hungary)	2 198 535 (8 750)	10 000 (40)	Szolnok	Budapest

[1] in 2009

[2] Average exchange rate in 2008: 251.25, in 2009: 280.6.

The ownership structure, sales, headquarters and R&D centres

The dominance of the subsidiaries of multinational companies is significant in the estimated ranking; ten of the estimated first thirteen are foreign owned companies, and only three of them are Hungarian owned. Regarding the ownership structure the proportion of companies with Hungarian private owners in the list is only 23,08%, the remaining proportion involves company owners from Germany (30,77%), from Netherlands (23,08%), from USA (7,69%), from Austria (7,69%) and from France (7,69%).

Regarding the amount of companies's sales: Audi Hungary Motor Ltd is the first, GE Hungary Ltd is the second, and Magyar Telecom is the third in the ranking.

The location of headquarters of the biggest R&D spenders is predominantly Budapest, but we can find important ICT Industry companies' locations also in other Hungarian cities such as: Győr, Hatvan, Kecskemét, Debrecen and Szolnok.

The R&D centres and labs are usually at the same place where the headquarters are located.

R&D spending

Many companies (predominantly in the software sector, but some of them also in the ICT Industry sector) declared that they do not have R&D, but further investigation revealed that their task involves R&D activities. We tried to deal with that problem, but understandably, our means were limited.

Among the biggest R&D spenders we can find Audi Hungary Motor Ltd, Robert Bosch Electronic Ltd and Nokia Siemens Networks Ltd.

Main characteristics of the Hungarian ICT Industry R&D

The selected companies are from various ICT fields, but the dominance of telecommunication operators and automotive industry is typical. It can be explained by their rapidly growing R&D activity.

Among the foreign owned companies there are formerly state-owned, privatised companies, for example Matáv, AVL Autokut or GE. The Magyar Telekom Telecommunications PLC was established in 1990 after the split into three firms of the Hungarian Post by the Hungarian Ministry of Transportation, Communication, Information and Architecture, under the name of Matáv Hungarian Telecommunication Company and it remained state owned until 1993. In 1993 the Hungarian Telecommunication Act entered into force and the privatization of Matáv has been launched. Today the majority owner of the company is MagyarCom, and Deutsche Telekom is 100% owner of MagyarCom. Similarly, AVL AUTOKUT is a result of privatisation, and part of the GE affiliate in Hungary was also established through the acquisition of a formerly state-owned company (Tungsram).

Based on the interviews the main motives of foreign companies to establish Hungarian affiliates in R&D are mainly the high quality expertise of Hungarian employees.

The main destinations where ICT R&D results in the case of the interviewed companies were exported are the following:

- Mother company and other affiliates of it (Knorr Bremse, Audi, AVL Autókut, NI Hungary);
- Domestic market (Magyar Telecom Plc, Bull Hungary Ltd, Externet,);
- Clients from all over the world (GE).

In the first group R&D results are mainly exported; export/sales ratio is between 70 to 100%. This underlines the vertical nature of these projects and the fact that R&D activities in Hungary are highly embedded into the "R&D-network" of the parent company.

R&D units of the second group are more of horizontal nature and carry out R&D mainly with the aim of adaptation of the products of the given company to the local market.

In the case of GE (third group), the Hungarian R&D unit can be considered as a globally oriented plant where certain R&D activities of the multinational company are concentrated.

The ICT R&D activities of the companies can be related to the production. Usually it can be observed that production centres could attract R&D (NI, Knorr Bremse, Audi). Based on the interviews in the case of Knorr Bremse the Budapest R&D centre became a stronghold for Knorr Bremse through allocating certain core R&D tasks here. In case of NI, manufacturing activity of the company takes place in Austin and in Debrecen, but the bigger proportion of the production (90%) is carried out in Hungary. At the time of establishment, the main profile of NI Hungary was hardware production, because Hungary offered cheap environment (cheap labour) to this activity. After the initial period of gaining experience, the Hungarian subsidiary could take over high value added activity from the parent company and from other European companies, because of the high quality of human resources. In 2001 manufacturing of loaded electronic boards has started in Debrecen and at the end of 2004 the production of the site represented 70% of NI total. Today 90% of production takes place in Hungary. This concentration of production to one site understandably brought over some related R&D as well.

We also examined some small firms which have Hungarian private owners, such as Externet Plc, ThalesNano Inc., Meditech Ltd. These companies are also important actors of the ICT R&D market. Their relative share in ICT R&D is low but they have outstanding results which are worth to mention.

As far as the geographical location is concerned, headquarters of the affiliates are mainly located in Budapest but certain R&D units or other units are hosted by cities near Budapest, or by bigger cities in the countryside.

Conclusions

The main aim of this paper is to analyse the main characteristics of ICT Industry R&D in Hungary. Based on the company interviews it is most probable that R&D expenditures and the number of R&D employees in the sector are underestimated. Due to the fact that some companies have no interest in registering these neither at the Central Statistical Office nor in their balance sheets.

The most important actors in the field of ICT Industry R&D are the Hungarian subsidiaries of multinational companies (mainly from Germany, but there are actors also outside Europe), in the internationalisation of R&D process the high quality expertise of Hungarian employees is dominant. In the ICT Industry sector among the leader R&D spenders we can find only foreign companies, because it is difficult to Hungarian companies to appear among leaders. Strong concentration and structural duality can be seen: some foreign owned bigger companies (Audi, Robert Bosch, NSN, Knorr Bremse) provide the significant proportion of ICT Industry R&D spending in Hungary, Hungarian companies are only smaller players.

The increasing amount of ICT R&D in Hungary is related to the outsourcing/relocation of R&D activities of multinational companies, which is an international tendency.

Regarding the geographical location, the R&D centres are mainly located in Budapest, but in case of ICT Industry R&D there are centres also in other biggest cities, because the R&D is attracted by the production.

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EXTRACTING KNOWLEDGE FROM DATA - DATA MINING

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Abstract
Managers of economic organizations have at their disposal a large volume of information and practically facing an avalanche of information, but they can not operate studying reports containing detailed data volumes without a correlation because of the good an organization may be decided in fractions of time. Thus, to take the best and effective decisions in real time, managers need to have the correct information is presented quickly, in a synthetic way, but relevant to allow for predictions and analysis.
This paper wants to highlight the solutions to extract knowledge from data, namely data mining. With this technology not only has to verify some hypotheses, but aims at discovering new knowledge, so that economic organization to cope with fierce competition in the market.

Keywords: *data mining, date warehouse, database, analysis, decisions, information*

Introduction

Because the present policy makers in an organization is facing an avalanche of data, data systematic data yet unexplored, but also because computing, informatics, information technology has been developed in to an alert, the skyrocketed and the need to use new methods for information discovery, knowledge that is "hidden" in the data, information that can not be "discovered" by traditional means or by using just the human factor.

Data mining (data mining) sometimes called knowledge discovery in databases (Knowledge Discovery in its Bases - KDD) is a new technology, a young technology, technology "growing" but that seems to be on the verge of reaching a "key technology.

As with other technologies there are many understandings of information technology on the definition of this technology but also in terms of the roots, interdisciplinary nature of this technology. This paper wants to emphasize to point out these two issues, to highlight what "borrow" the process of data mining in other disciplines that cross over, but intense relationship between Data Mining and Business Intelligence. This paper aims to discuss this topic because there are now a number of companies that have field activity data mining applications and this is due to increasingly larger data mining services for example, the economic and financial market (we can give examples of areas like Business Intelligence, Business Performance Management - BPM, Customer Relationship Management - CRM and others).

Data mining has been defined as the automatic analysis of large and complex data sets as its main objective the development of new significant patterns or trends without using this technique could remain "unidentified." Because of recent research in data mining have developed more efficient methods FST for finding these new patterns, as well as huge volumes of data into knowledge based on effective methods of classification to clustering, analysis of frequent patterns, sequential or structural.

Basically data mining is one of the most recent technologies for data analysis with OLAP, data warehouse concept, text mining or web mining.

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The interdisciplinary character of Data Mining Technology

The concept of data mining has emerged in the 80s and in that time and represented the process by which only applied to algorithms for extracting knowledge from large data collections. Year 1994 is another year of reference in terms of data mining technique, so in 1994 the company launched the SPSS data mining program called "Clementine," which proved later to be widely used and widely spread at that time. Another reference date is the data mining industry in 1996 with funds allocated by the Commission shall draw European design methodology CRISP-DM (Cross Industry Standard Process for Data Mining).

Over the years, the concept of data mining has evolved, so has been interpreted in a broader process that is taking place extracting knowledge from databases based on some information requirements and to validate the information obtained. This is the approach that has been accepted more and more lately.

Because now we are facing an avalanche of information in electronic text, data mining has seen a new specialization, namely to help *text mining* automatic extraction of knowledge from text.

Date mining became known in the '90s, when speaking of data mining *or mining the data "in* many environments, whether it is academic whether the business.

In 1997 Pregibon - Research Scientist Google Inc.., Says *that "Data mining is a mixture of Statistics, IA (Intelligence Artificial) and database research"* (D. Pregibon, Data Mining, Statistical Computing and Graphics Newsletter, 7, p.8, 1997).

We say that data mining is an interdisciplinary, as in disciplines such as statistics, database technology and artificial intelligence, has borrowed techniques and terminology work. It is very difficult to define each of these disciplines, but it is equally difficult to delimit the boundaries between data mining and each [one] of them. (Figure)

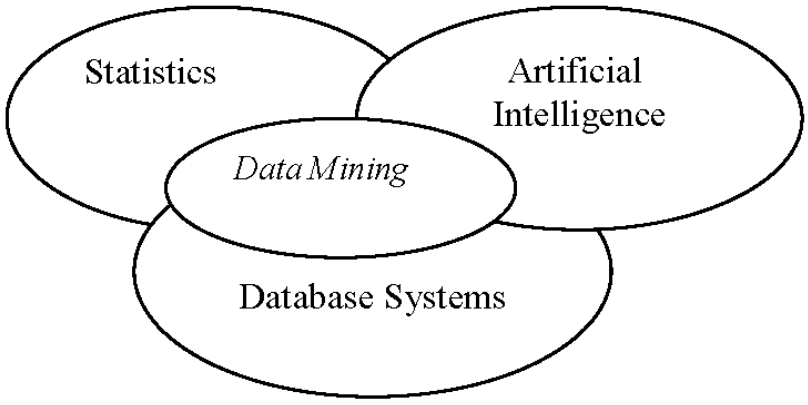

Figure: Data mining interdisciplinary nature of art

Statistics - Data Mining (DM) used in defining statistical techniques that are found in the literature as the *exploratory data analysis (EDA - Exploratory Data Analysis).* EDA is used to establish the systematic relationship between different variables in a situation where we have sufficient information on their nature. Among the best known and EDA techniques can be used to name [two:]

- *Computational methods:* descriptive statistical (repairs, CALS statistical parameters (mean, median, the lead standard), correlations), multivariate statistical methods (clustering, factor analysis, discriminate function analysis, classifications and regression trees, linear and nonlinear regression models;

- Because *data visualization* allows you to view information in visual form, is one of the best and used data mining methods. Among the most commonly used techniques can include: histograms, graphs rectangular, scatter graphs, contour graphs, charts, graphics array.

Artificial Intelligence *(AI - Intelligence Artificial)* Data Mining is its contribution in providing information processing techniques based on human reasoning.

Database Systems *(DBS - Database Systems),* is that the third discipline that provides material that must be operated using the methods mentioned above.

Like *statistics*, data *mining* is a business solution, it is just a technology[4] . In contrast to statistical analysis, *data mining* analyzes all relevant data from the database and extract models (patterns) hidden.

The term "data mining" is used in particular by organizations concerned with information processing companies, financial analysts, in marketing, fraud detection, but lately it has become increasingly used in scientific research scientific, extract information from large volumes of data.

Data mining is a complex process, taking roots in the learning process, a process that can achieve the following levels:

- Facts - definition of reality;
- Concepts - a concept represents a set of objects having certain common symbols SPECIFICATIONS;
- Procedures - a procedure consists of a series of actions performed to achieve an objective;
- Principles - Principles are underlying truths to other truths.

Practical data mining analysis are focused on the discovery of new knowledge from data.

Information obtained by using data mining techniques to be valid. The accuracy and completeness are the two characteristics of the underlying validity of the data. This information should not only be valid and the data mining process itself.

Looking for Data mining definition

In the literature there are many definitions for data mining / knowledge discovery in data base because it is a relatively new technology.

Gray and Watson believe that "data mining allows analysts and store managers to find the answers to company data, which they have not even put"[5]. Data mining has been described as *"the science of extracting useful information from large volumes of data and database"*[6].

Data mining in relation to economic resources planning is the statistical analysis and logical data volumes of transactions, looking for patterns that can help decision-making process.

The data mining process of extracting means knowledge bases or data warehouses, knowledge previously unknown, valid and operational at the same time[7].

Data mining seeks not only verify the hypotheses, but aims at discovering new knowledge, information totally unknown until then. Thus, the results are very valuable.

Extracting knowledge from data performed correctly, the following benefits:

- Helps reduce costs for decision-making processes;
- assist managers in making business decisions faster and better quality;
- Services to business customers an improved knowledge signified;

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[4] Tudor Irina, Cărbuneanu Mădălina, *Utilizarea tehnicilor de data mining în comunitățile de învățământ virtual,* Conferința Națională de Învățământ Virtual, ediția a V-a, 2007;

[5] H. Mannila, P. Smyth , *Principls of Data Mining,* Mit Press, Cambrige, ISBN 0-262-08290-X, 2001;

[6] Gray P. H.J. Watson (1996) The new DSS: Data Warehouses, OLAP, MDD and KDD;

[7] Ellen Mank, Bret Wagner, *Concepts in Enterprise Resource Planning,* Second Edition, Thomson Cours, Tehnology, Boston, MA, ISBN – 0-619-21663-8, 2006;

We can say that the whole company management knows an improved significantly.

The main features presented by data mining systems are as follows[8]:

- Findings generated by the system have a very high probability; can be considered "safe";
- compared with information held by the user or system, the resulting information is not trivial;
- discovered user models are represented in a comprehensible form.

Data mining process can be used, in principle, any type of database. It is used in particular in data warehouses because to be accurate and reliable results, the data mining process is applied to data of high quality that is to be cleansed, integrated, selected and processed. Such data are found to meet these conditions within the data warehouse.

Data mining and Business Intelligence

Smooth running of an organization is provided by the decisions be taken in time, decisions that are correct as long as they are based on data and information on which to base those decisions. Thus, it is necessary that managers take into account all available information sources, both within the firm, the information system and beyond.

The main purpose of business intelligence is to obtain information from available data, data that may come from scattered sources or stored in a warehouse date. A correct decision based on accurate information.

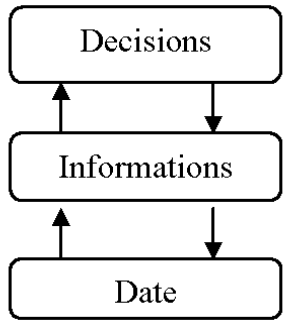

Figure data, information and decisions

Stages of processing data into information and information into decisions then form part of a cyclical process. Substantiation decisions require information and information resulting from the data. Apart from a context, no data are valuable information. To make the information, data should be in particular business contexts.

Using data mining analysis will identify new knowledge without being required human intervention. Basically, data mining analysis is aimed at discovering new knowledge.

Using applications of Business Intelligence (BI) offers users a number of significant advantages especially for those who have to make decisions about the good of the organization[9]

- Because the design and to develop business intelligence applications based on economic progress and requirements processes in organizations, the company will benefit because these applications;

[8] Bodea, C., Inteligența artificială și sisteme expert, București, Editura Inforec, 1998;

[9] Kimball R. Și colectiv, *The Microsoft Data WarehouseToolkit with SQL Server 2005 and Microsoft Business Intelligence Toolset*, John Wiley & Sons, 2006;

- Business Intelligence applications using large volumes of processed data and information from the process are made available to a large number of users;
- Mechanisms for calculating the indicators of business performance analysis and are easily integrated business intelligence applications;
- In the design and development of Business Intelligence applications can be trained, usually decision makers within the firm.

And processed data from various sources are loaded into the data warehouse and then using OLAP and Data Mining technology data are converted into information, information that is presented to the beneficiaries in the form of report. A Model of Business Intelligence in the firm's decision making is presented in the following figure[10] :

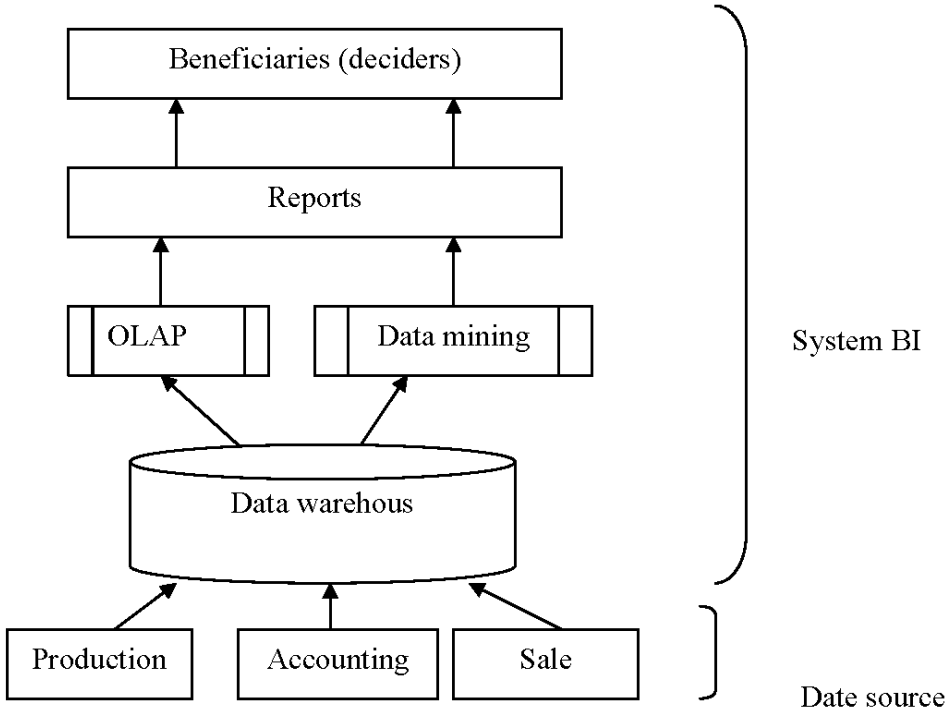

Figure: Business Intelligence in decision-making firm.

With data mining tools are analyzed all links between data characteristics. Also, data mining tools to solve problems of data inconsistency. Although systems containing integrated data source, cleaned and valid, they may contain data about the real world that is not true. These data are called noise and may as a result of human error in the input of data and information systems.

Also, the data may contain patterns (patterns) or trends that would be true only for a small subset of data. This can be examined from two points of view, which, in statistical terms but unattractive business point of view this is perhaps the most interesting customers serum due to their behavior. These types of sets are called local effects.

Using data mining techniques, data are analyzed from several angles simultaneously, which can help eliminate attributes that are considered singular and thus does not seem relevant.

[10] Giovinazzo, W. 2002 , Internet – Enabled Business Intelligence, Prentice Hall.;

Interdependencies between attributes are those that allow the extraction of data to information that is relevant.

Data mining is the process through which one or more machine learning techniques can extract hidden knowledge from data. The process of data mining is to identify trends and patterns in data sets.

The steps of extracting knowledge from data

Typically, when referring to the process of extracting knowledge from data refer only to the application stage, the different methods and data mining techniques, but do not pay attention to the steps needed for the process.

Main stages of extracting knowledge from data are:

1. Defining the problem - at this stage of acquisition of knowledge about the initial state, but also about setting goals and purpose of the application;
2. Building the database - making a single database where data are cleaned and stored to provide the necessary support for building (making) an appropriate model, also reduce the size of the data store, eliminating noise and finding how to replace the data missing;
3. Use of data - is the phase in which the data understanding, viewing them, but also the development of pivot tables to provide a clear view of the database consistency
4. Preparation is the stage when there is data to identify those variables that will constitute the components of the predictive model, you might like to consider all variables to ensure the best predictions. It is still quite difficult to achieve this because a large number of variables increases the time needed to build the model prediction and the decreased ability of the model results;
5. Building the model - is a process interactive as to Jung CAE better option, certain steps in the development process will be repeated, and it will also modify the data. The model can be considered final when there is completion of the training and testing.
6. Assessment model - considering the accuracy of results. Model is given by increasing the efficiency of certain indicators.
7. Interpretation of model results and improvement. This is the stage when the decision to the user based on the results it can decide to replay one or more phases of the project.

All the knowledge extraction process is centralized around an object on the problems encountered in the economic field, problems involving the identification, discovery of knowledge to help solve them.

We can say that the whole process of knowledge extraction is an iterative process, because during the course of this process, shows steps are executed repeatedly, sometimes by taking back some of them.

Although methods and techniques for extracting knowledge from data are applied in automatic mode, the data mining process requires considerable human effort, especially in the stages of analysis, but also in what the validation results.

Conclusions

Data mining is the process of discovering some models of knowledge or information of the user data stored in data warehouses usually type database or data warehouse, as well as advanced data analysis techniques used to discover these patterns.

Data mining has occurred because of developments in information technology, the avalanche of data produced by human society from its their activities and because of the need to transform data into information and knowledge for wide applications in analysis and production control, market analysis, detection fraud but also for medicine.

Data mining involves an integration of techniques from many fields. We can say that it is an interdisciplinary field that intersects the main subjects is technology database, data warehouse technology, statistics, business intelligence, digital technology.

We say that data mining is an advanced analytical processing of data is superior to limited analytical process of database systems and data warehouse analysis because data specific techniques more advanced.

Information that is discovered data mining process are used to substantiate decisions is made by the directors of a company.

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- www.Wikpedia ro/datamining.

A RELATION BETWEEN WEB PAGES

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Abstract
In this paper we define a relation on the set of web pages from a web application. With the help of this relation, we obtain a partition of this set into subsets. Verifying and testing the web application will be accomplished by testing only one representative in each subset. We present two algorithms, one for verifying the relation between two web pages and one for determining which pages to test.

Keywords: *Relation, Equivalence Class, Object Relational Diagram*
2000 Mathematics Subsect Classification: Prinary 68U35; Secondary 68M11, 68N03, 65Q60.

1. Introduction

Web applications are made up of a large variety of files. Among these, the ones built from tags (e.g. htm or html files) are very numerous and of great importance. We now want to group these files based on similarity. For illustration purpose we will use a practical example (built using [12]). Grouping the set of web pages in a web application into subsets leads to a reduced number of files needed for testing.

Testing the files can be done using various validators (e.g. [8], [9], [10]) and test applications presented in paper like [6] and [11].

In section 3 we present an equivalence relation between the web pages of a web application.

In section 4 we describe an algorithm for verifying if two web pages are in the relation described in section 3. In section 5 we present a way of partitioning the web pages of a web application using this relation. In section 6 we present an algorithm which produces the partition and determines a representative for each subset (used for testing and verification).

2. Introducing a web application

In order to understand the notions that are to be introduced in the next sections, we need a concrete web application. For this, we chose an application which contains a photo album. In most cases, such an application is formed from two categories of web pages:

- Index page (1)
- Zoomed in picture page (2)

Moreover, the index pages can be divided in three categories:

- Beginning index page
- Ending index page
- Interior index page

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Figure 1

Similarly, the zoomed in pictures pages can be divided in three categories:
- Beginning zoomed in picture page
- Ending zoomed in picture page
- Interior zoomed in picture page

Figure 2

From an object oriented point of view, the web application contains two types of objects, corresponding to the pages (1) and (2). We will note pi_0 the beginning index page, pi_1, pi_2, ..., pi_k the interior index pages and pi_{k+1} the ending index page. Next, the beginning zoomed-in picture page will be noted with pm_0, then pm_1, pm_2, ... , pm_h the interior zoomed in picture pages and with pm_{h+1} the ending zoomed-in index page. We will consider that an index page contains n pictures (in the example in figure 3, n=4, k=2, h=13).

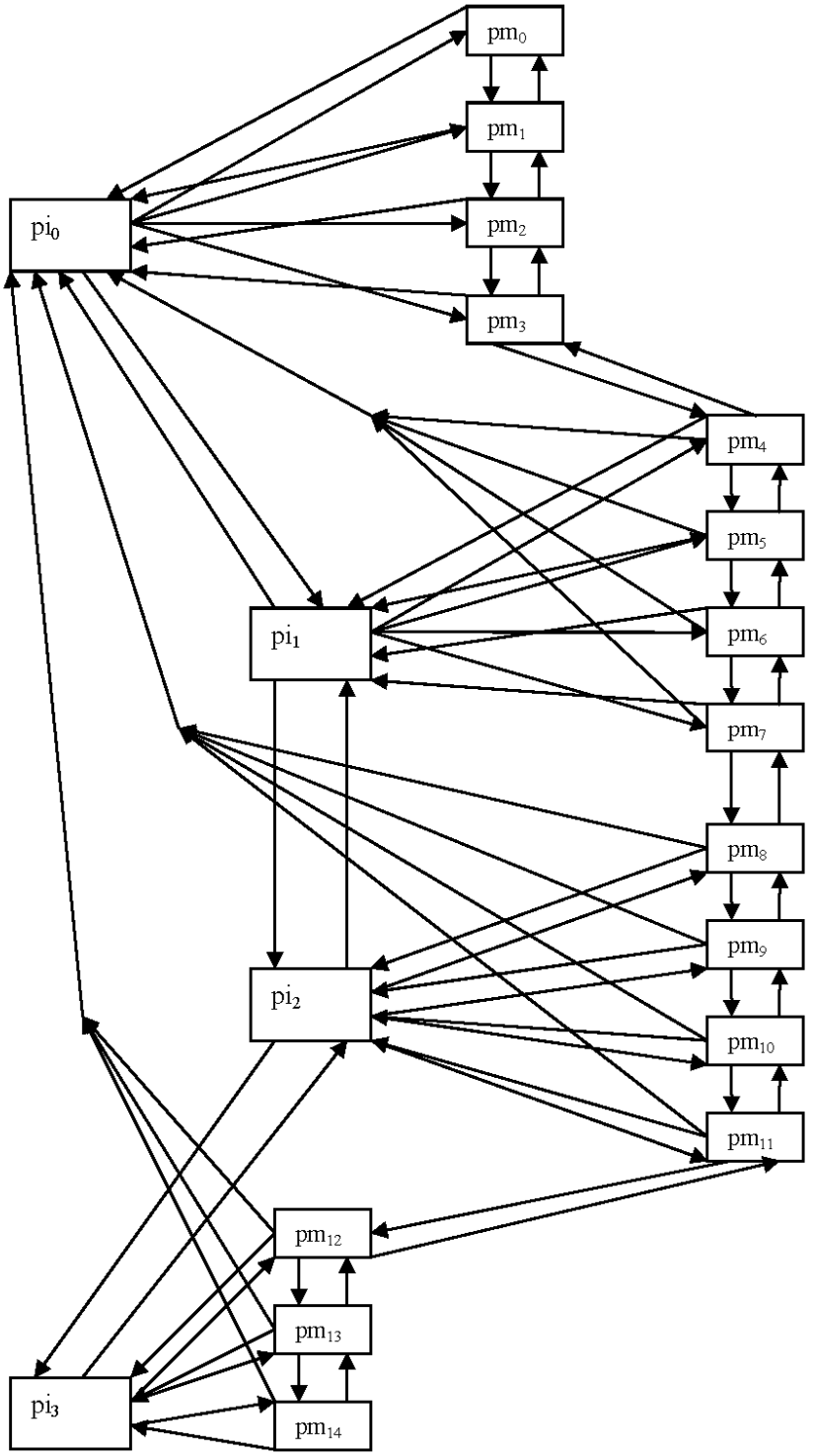
pm0
pm1
pi0
pm2
pm3
pm4
pm5
pi1
pm6
pm7
pm8
pm9
pi2
pm10
pm11
pm12
pm13
pi3
pm14

Figure 3

The relations among the objects are relations of navigating between:
index page - index page
index page - zoomed in picture page
zoomed in picture page - zoomed in picture page
The ORD (Object Relational Diagram) of the web application is a directed graph
where the set of vertices is $V=\{pi_0, pi_1, pi_2, ..., pi_k, pi_{k+1}, pm_0, pm_1, pm_2, ..., pm_h, pm_{h+1}\}$. The edges of the ORD are given by the navigation relations:
(pi_j, pi_{j+1}), j=0,1, ..., k
(pm_j, pm_{j+1}), j=0,1, ..., h
(pi_{j+1}, pi_j), j=0,1, ..., k
(pm_{j+1}, pm_j), j=0,1, ..., h
(pi_j, pm_{jn+a}), j=0,1, ...,k, a=0,1,...,n-1
(pi_{k+1}, pm_j), j=(k+1)·n+a, ...,h.

The ORD for the application, with n=4, k=2, h=13 is represented in figure 3.

3. The equivalence relation for the components of a web application

For an application formed of n web pages: $p_1, p_2, ..., p_n$ we can define a relation ~ like this:
$p_i \sim p_j$ if and only if p_i and p_j have the same structure, [1], [3]. (3)
We can state that two web pages have the same structure if they are composed of the same scripts and tags, in the same order and with the same attributes. It can be easily shown that the relation ~ is an equivalence relation. We can define for a page p_i its equivalence class: $C(p_i)=\{p_j \mid p_i \sim p_j, j=1,2, ...,n\}$.
This way, using the equivalence classes, we can obtain a partition of the set $\{p_1, p_2, ..., p_n\}$.
For the example in section 2, the partition is composed of 6 equivalence classes:
$C_1=\{pi_0\}$
$C_2=\{pi_3\}$
$C_3=\{pi_1, pi_2\}$ (4)
$C_4=\{pm_0\}$
$C_5=\{pm_{14}\}$
$C_6=\{pm_1, pm_2, ...,pm_{13}\}$.

A similar way of establishing an equivalence relation can be obtained for other components as well.

4. Algorithm of verifying the ~ relation

We will now consider two web pages p and q of a web application. The following algorithm goes through the source codes of p and q only once, sequentially and simultaneously and determines if the pages are similar. More precisely, we have:
Algorithm - Testing if two web pages are in the ~ relation
found ← true
WHILE (not end of file p) and (not end of file q) and (found)}
  Tp ← current tag in file p
  Tq ← current tag in file q
  IF Tp ≠ Tq THEN
        found ← false
  ENDIF
ENDWHILE
IF there is a tag in p or q's source code that has not been verified THEN

```
  found ← false
ENDIF
IF found THEN
  WRITE p and q are in the ~ relation
ELSE
  WRITE p and q are not in the ~ relation
ENDIF
```

Observation

The complexity of the algorithm is O(u+v), where u is the number of characters in file p and v the number of characters in file q, respectively.

5. Reducing the number of components that have to be verified and tested in a web application

Using the partition of the components of a web application defined in section 3, we can reduce the verification and testing only to one representative of each component. The functionality and correctness of a component from an equivalence class determines the functionality and correctness of all its components.

Proposition 5.1

Let us consider the set M of the components of a web application and an equivalence relation, denoted as ~, defined on M. If C_1, C_2, …, C_k are the equivalence classes of the relation ~ on M, then:

1) $C_1 \cup C_2 \cup ...C_n = M$

2) $C_i \neq \varnothing, \quad i \in \{1,2,...,n\}$.

Proof

The demonstration is immediate, using the properties of the relation ~ and the way of defining the sets C_i.

Proposition 5.2

Let us consider the application formed of n web pages: p_1, p_2, …, p_n and a relation ~, defined by (3). If C is an equivalence relation of p_i, p_i being correct and functional, then every web page p_j in C is correct and functional.

Proof

Find p_j from C. Due to the way of defining C, results that $p_j \sim p_i$, meaning that p_j contains the same scripts and tags, in the same order. Since p_i is correct and functional, it results that all its scripts and tags are correct and functional. Thus, p_j is also correct and functional.

Proposition 5.3

Let us consider an application formed of n web pages: p_1, p_2, …, p_n and a relation ~, defined by (3). If C_1, C_2, ..., C_k are the equivalence classes obtained from the relation ~ and $q_1 \in C_1$, $q_2 \in C_2$, …, $q_k \in C_k$ are correct and functional, then the application is correct and functional.

From $q_i \in C_i$, i=1,2, …, k and proposition proposition 5.2, it results that any web page from C_i is correct and functional. Now, using proposition proposition 5.1, it follows that p_i is correct and functional, for i=1, 2, …, n. This way, it results that the entire web application is correct and functional.

Remark

For our example, using proposition 5.3 and the equalities (4), we may deduce that in order to verify the correctness and functionality of the web application it is necessary and sufficient to test the functionality of the web pages: pi_0, pi_3, pi_1, pm_0, pm_{14}, pm_1.

6. Algorithm for determining the components that have to be verified and tested in a web application

Let $P = \{p_1, p_2, \ldots, p_n\}$ be the set of web pages in a web application. Using the algorithm from the section 4, we can construct a boolean method, named RELATION, which takes as parameters two web pages p_i and p_j (in practice, we can only take the indexes i and j as parameters) and returns true or false, depending on the result of the verification of the $\sim$ relation.

Algorithm - Determining the web pages that have to be verified and tested

```
FOR i=1 to n DO
  class[i] ← i
ENDFOR
FOR i=1 to n-1 DO
  IF class[i] = i THEN
        FOR j=i+1 to n DO
              IF RELATION(i,j) THEN
                    class[j] ← i
              ENDIF
        ENDFOR
  ENDIF
ENDFOR
FOR i=1 to n DO
  IF class[i] = i THEN
        WRITE i
  ENDIF
ENDFOR
```

Remark

The complexity of the algorithm is $O(u \cdot n^2)$, where u is the maximum number of characters of a web page from web application.

The algorithm outputs the index of one page in each equivalence class. These pages can be used for testing.

6. Conclusions

Generally, web applications contain many web pages. Their verification and testing is usually realized by using different verifications. As many components of a web application have the same structure, it results that the time of verifying and testing can be substantially reduced if we verify only one representative from each set of web pages having the same structure. In the future, we intent to realize a complex application that determines the web pages needed to be verified. We will concentrate on finding new selection criteria of the web pages that will considerably reduce the number of pages to be verified (using ideas like the ones in [2], [4], [5] and [6]).

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COLLABORATION SYSTEM IN VIRTUAL ORGANIZATION

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Abstract
The purpose of this work is to provide a collaboration support for small and medium enterprises which cannot or do not want to fulfill a major contract alone. In that case, in order to better meet a higher external demand, the managers are willing to subcontract parts of their contracts even to competitors.
This approach is illustrated by a business-to-business interaction, being proposed a sample scenario where partners are autonomous gas stations grouped in a virtual organization.

Keywords: *SME, B2B interaction, subcontracting, cooperation, collaboration.*

Introduction

Recent advances in the information technology have made possible the development of a new type of organization, the virtual organization. Taking into account the connection between the new communication technologies and the relationships between the industrial organizations, two main directions are distinguished. The first direction considers the Internet and the Informatics as being the main technologies that facilitate the communication between persons. The second direction, more visionary, is focused not only on the communication but mainly on the modalities that allow the information technologies to coordinate in an efficient fashion and with minimal effort requirements the activities of individuals.

Related to the second direction, the concept of "virtual enterprise" or "network of enterprises" has emerged to identify the situation when several independent companies decided to collaborate and establish a virtual organization with the goal of increasing their profits.

Given this general context, the objective of the present paper is to develop a conceptual framework and the associated informational infrastructure that are necessary to facilitate the collaboration activities and, in particular, the negotiations between independent organizations that participate in a virtual alliance.

The starting point in the development of this work was the goal to support small and medium enterprises that are not able or are not willing to perform alone a large contract since in this situation the association in a virtual alliance provides the opportunity to subcontract the tasks of the contract to other partners within the alliance. To achieve this goal, research was dedicated to the development of a model to coordinate the negotiations that take place within an inter-organizational alliance. Our research was focused on the topics of virtual alliances, automation of the negotiations and of coordination aimed to provide the mechanisms for coordinating the negotiations that take place among autonomous enterprises that are grouped in a virtual alliance.

Assuming that the nature of the roles that may be played in a negotiation are similar in multiple approaches, the number of participants involved at the same time in the same negotiation is considerably different.

Depending on the number of participants involved in a negotiation, we may distinguish various negotiation types: *bilateral negotiation (one-to-one)*; *one-to-many negotiation; many-to-many negotiation*.

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Taking into account the complexity of the negotiations modeled by multi-agent system, we can state that to conduct in an efficient fashion one or many negotiations that involve a large number of participants and to properly account for all negotiation dimensions, it is necessary to develop a coordination process that is defined outside of the specific constraints of a given decision mechanism or communication protocol.

The negotiation process was exemplified by scenarios tight together by a virtual alliance of the autonomous gas stations. Typically, these are competing companies. However, to satisfy the demands that go beyond the vicinity of a single gas station and to better accommodate the market requirements, they must enter in an alliance and must cooperate to achieve common tasks. The type of alliance that we use to define their association emphasizes that each participant to this alliance is completely autonomous i.e., it is responsible of its own amount of work and the management of its resources. The manager of a gas station wants to have a complete decision-making power over the administration of his contracts, resources, budget and clients. At the same time, the manager attempts to cooperate with other gas stations to accomplish the global task at hand only through a minimal exchange of information. This exchange is minimal in the sense that the manager is in charge and has the ability to select the information exchanged. Taking into account the constraints imposed by the autonomy of the participants and also the fact that the participants are initially competing, the only means to distribute the information or the resources are provided by the negotiation process.

When a purchasing request reaches a gas station, the manager analyses it to understand if it can be accepted, taking into account job schedules and resources availability. If the manager accepts the purchasing request, he may decide to perform the job locally or to partially subcontract it, given the gas station resource availability and technical capabilities. If the manager decides to subcontract a job, he starts a negotiation within the collaborative infrastructure with selected participants. In case that the negotiation results in an agreement, a contract is settled between the subcontractor and the contractor gas station, which defines the business process outsourcing jobs and a set of obligation relations among participants [1].

The gas station alliance scenario shows a typical example of the SME virtual alliances where partner organizations may be in competition with each other, but may want to cooperate in order to be globally more responsive to market demand.

The collaborative infrastructure, that we describe, should flexibly support negotiation processes respecting the autonomy of the partners. We are briefly describing in section 2 the architecture of the collaboration system in which the interactions take place [2].

The main objective of this paper is to propose a collaboration framework in a dynamical system with autonomous organizations. In Section 3 we define the Coordination Components that manage different negotiations which may take place simultaneously. In Section 4 we present how the structure of the negotiation process can be used by describing a particular case of negotiation. Finally, Section 5 concludes this paper.

The Collaborative Infrastructure

The collaborative infrastructure offers generic mechanisms to support different activities, especially negotiation activities, in a distributed environment. This infrastructure is structured in four main layers: Manager, Collaborative Agent, Coordination Components and Middleware. A first layer is dedicated to the Manager of each organization of the alliance. A second layer is dedicated to the Collaborative Agent who assists its gas station manager at a global level (negotiations with different participants on different jobs) and at a specific level (negotiation on the same job with different participants) by coordinating itself with the Collaborative Agents of the other partners through the fourth layer, Middleware [3]. The third layer, Coordination Components, manages the coordination constraints among different negotiations which take place simultaneously.

Figure 1 shows the architecture of the collaborative system:

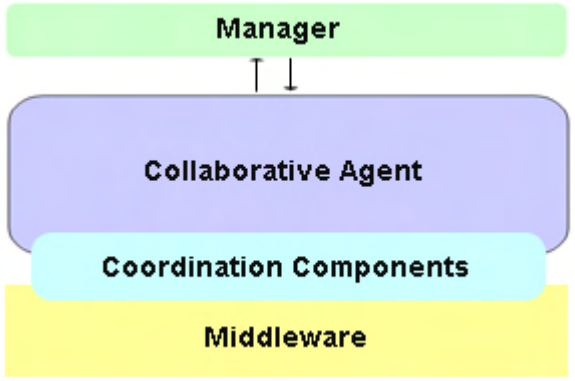

Figure 1. The architecture of the collaborative system

A Collaborative Agent aims at managing the negotiations in which its own gas station is involved (e.g. as initiator or participant) with different partners of the alliance.

Each negotiation is organized in three main steps: initialization; refinement of the job under negotiation and closing [4]. The initialization step allows to define what has to be negotiated (Negotiation Object) and how (Negotiation Framework) [5]. A selection of negotiation participants can be made using history on passed negotiation, available locally or provided by the negotiation infrastructure [6]. In the refinement step, participants exchange proposals on the negotiation object trying to satisfy their constraints [7]. The manager may participate in the definition and evolution of negotiation frameworks and objects [8]. Decisions are taken by the manager, assisted by his Collaborative Agent [9]. For each negotiation, a Collaborative Agent manages one or more negotiation objects, one framework and the negotiation status. A manager can specify some global parameters: duration; maximum number of messages to be exchanged; maximum number of candidates to be considered in the negotiation and involved in the contract; tactics; protocols for the Collaborative Agent interactions with the manager and with the other Collaborative Agents [10] [11].

Coordination Components

In order to handle the complex types of negotiation scenarios, we propose five different components:

- *Subcontracting* (resp. *Contracting*) for subcontracting jobs by exchanging proposals among participants known from the beginning;
- *Block* component for assuring that a task is entirely subcontracted by the single partner;
- *Divide* component manages the propagation of constraints among several slots, negotiated in parallel and issued from the split of a single job;
- *Broker*: a component automating the process of selection of possible partners to start the negotiation;
- *Transport* component implements a coordination mechanism between two ongoing negotiations in order to find and synchronize on the common transport of both tasks.

These components are able to evaluate the received proposals and, further, if these are valid, the components will be able to reply with new proposals constructed based on their particular coordination constraints [12].

From our point of view the coordination problems managing the constraints between several negotiations can be divided into two distinct classes of components:

Coordination components in closed environment**:** components that build their images on the negotiation in progress and manage the coordination constraints according to information extracted only from their current negotiation graph (*Subcontracting, Contracting, Block, Divide)*;

Coordination components in opened environment: components that also build their images on the negotiation in progress but they manage the coordination constraints according to available information in data structures representing certain characteristics of other negotiations currently ongoing into the system (*Broker, Transport).*

Following the descriptions of these components we can state that unlike the components in closed environment (*Subcontracting, Contracting, Block, Divide)* that manage the coordination constraints of a single negotiation at a time, the components in opened environment (*Broker, Transport)* allow the coordination of constraints among several different negotiations in parallel [13].

The novelty degree of this software architecture resides in the fact that it is structured on four levels, each level approaching a particular aspect of the negotiation process. Thus, as opposed to classical architectures which achieve only a limited coordination of proposal exchanges which take place during the same negotiation, the proposed architecture allows approaching complex cases of negotiation coordination. This aspect has been accomplished through the introduction of coordination components level, which allows administrating all simultaneous negotiations in which an alliance partner can be involved.

The coordination components have two main functions such as: i) they mediate the transition between the negotiation image at the Collaboration Agent level and the image at the Middleware level; ii) they allow implementing various types of appropriate behavior in particular cases of negotiation. Thus we can say that each component corresponding to a particular negotiation type.

Following the descriptions of this infrastructure we can state that we developed a framework to describe a negotiation among the participants to a virtual alliance. To achieve a generic coordination framework, nonselective and flexible, we found necessary to first develop the structure of the negotiation process that helps us to describe the negotiation in order to establish the general environment where the participants may negotiate. To develop this structure, we proposed a succession of phases that are specific to different stages of negotiation (initialization, negotiation, contract adoption) that provided a formal description of the negotiation process. The advantage of this structure of the negotiation process consists on the fact that it allows a proper identification of the elements that constitute the object of coordination, of the dependencies that are possible among the existing negotiations within the alliance, as well as the modality to manage these negotiations at the level of the coordination components.

The structure of the negotiation process

The various coordination components in open or closed environment, which we just defined, highlight the main features implemented in this negotiation process: distributive and parallelism.

Coordination schemes, which are implemented in coordination distribution through the components, can be executed in parallel by the proposed infrastructure.

According to our approach regarding the negotiation, the participants to a negotiation may propose offers and each participant may decide in an autonomous manner to stop a negotiation either by accepting or by rejecting the offer received. Also, depending on its role in a negotiation, a participant may invite new participants to the negotiation.

In order to illustrate this approach, we present a schematic example of a negotiation process using negotiation and coordination mechanisms that we proposed in this paper.

Negotiation process that we present in Fig.2 is divided into five parts (initialization, choice of tactics, choice of partners, negotiation and adoption). Judicial proceedings aimed at defining the steps to be followed and the establishment of the necessary components to coordinate implementation of the negotiation process involving multiple concurrent negotiations.

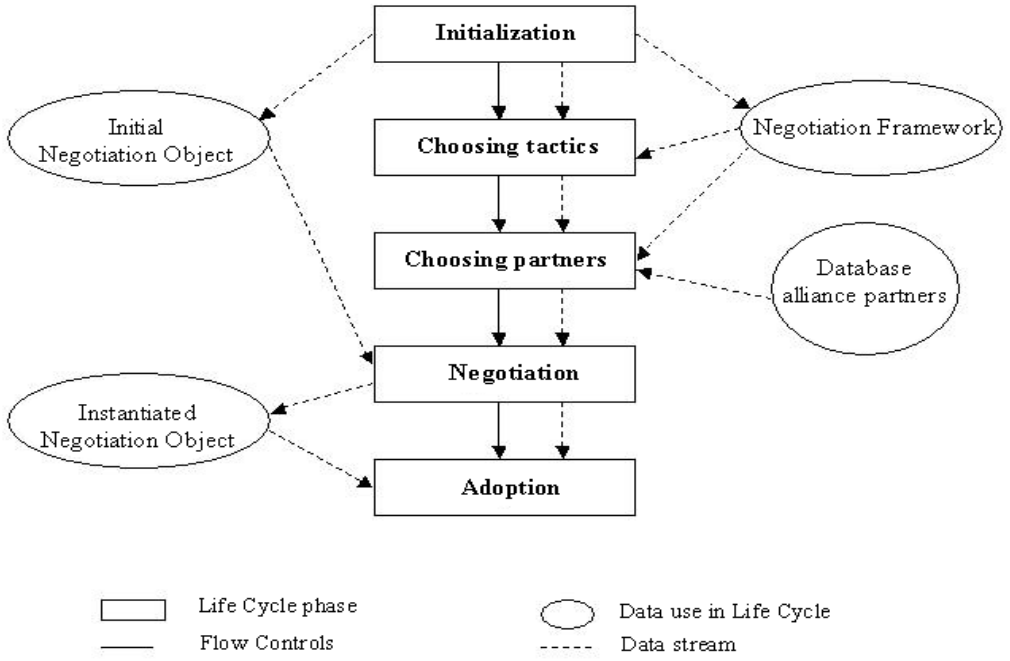

Figure 2 – The structure of the negotiation process

Initialization. The Manager initiates a subcontracting of a task, defining and communicating to the Collaborative Agent the properties and the constraints of the negotiation object and the negotiation framework. The negotiation process begins by creating an instance of the component Subcontracting. This instance will initiate other stages of negotiation, based on constraints provided by the Manager: the invitation of the coordination components (*Contracting*, *Broker*, etc.). Moreover, this instance will conduct negotiations in terms of construction and evaluation of proposals for subcontracting proposed task.

Choosing tactics. Using the tactics of negotiation specified in the negotiation framework, the coordination is decomposed into several coordination schemes. We considered three tactics that correspond to three coordination schemes: Block, Divide and Transport.

Choosing partners. We have two choices of partners:

i) among known partners – The Manager who initiating the outsourcing can specify any constraints on the set of possible alliance contractors. To do this, the manager uses the description of the job that follow to be subcontracted and also the database alliance partners and/or the different adhesion contracts which they signed [14];

ii) among unknown partners - in this case, the entire research activity of the potential partners is managed by the infrastructure through Broker component.

Negotiation. At this stage, during exchanges of proposals, the negotiation object evolves according to the constraints imposed by the manager on negotiated attributes of the subcontracting task. The final objective of the negotiation process is to build an Instantiated Negotiation Object[1]

[1] An Instantiated Negotiation Object is a negotiation object whose attributes have been accepted by the all partners.

from initial specification of negotiation object [15]. After that, this object will be used to establish a contract.

Adoption. In the final negotiation phase, the negotiation properties are fixed values. In this case, the Collaborative Agent asks Manager to validate the result of negotiation and makes contact with other partners' agents. Depending on the answers obtained, the Manager may decide to: i) to restart or to suspend negotiations; ii) to enable the contracting phase, which allows reaching an agreement [16].

The negotiation process involves several parties (for several bilateral negotiations), each having different criteria, constraints and preferences that determine their individual areas of interest [17]. Criteria, constraints and preferences of a participant are partially or totally unknown to the other participants. The job under negotiation is described as a multi-attribute object. Each attribute is related to local constraints and evaluation criteria, but also to global constraints drawing dependencies with other attributes [18].

In conclusion, the proposed architecture provides the following features:

- to define the negotiation process structure: participants, interaction protocol, negotiation protocol, tactics and coordination components, the negotiation object and the negotiation strategies;
- the modeling all negotiations for a gas station in the form of a set of bilateral negotiations, which the agent can operate independently;
- the modeling of the coordination among the negotiations based on a set of coordination components and the synchronization mechanisms at the middleware level.

Thus, we can say, that we have proposed an infrastructure that manages, in a decentralized manner, the coordination of multi-phase negotiations on a multi-attribute object and among a lot of participants.

Conclusions

The functioning of this kind of alliance suppose task achievement, which cannot be individual treated, by a single participant for better adjustment of the clients requirements.

The proposed infrastructure aims to help the different SMEs to fulfill their entire objectives by mediating the collaboration among the several organizations gathered into a virtual alliance.

A specific feature that distinguishes the negotiation structure proposed in this work from the negotiations with imposed options (acceptance or denial) is that it allows the modification of the proposals through the addition of new information (new attributes) or through the modification of the initial values of certain attributes (for example, in the case of gas stations the gasoline price may be changed).

The business-to-business interaction context in which our activities take place forces us to model the unexpected and the dynamic aspects of this environment. An organization may participate in several parallel negotiations. Each negotiation may end with the acceptance of a contract that will automatically reduce the available resources and it will modify the context for the remaining negotiations.

In the current work we've described in our collaboration framework only the interactions with the goal to subcontract or contract a task. A negotiation process may end with a contract and in that case the supply schedule management and the well going of the contracted task are both parts of the outsourcing process.

In order to illustrate our approach we have used a sample scenario where distributed gas stations have been united into alliance. Take into consideration this scenario, one of the principal objectives was related to the generic case and means that this proposed infrastructure can be used in other activity domains.

Regarding research perspective continuation, one first direction which can be mentioned is the negotiation process and the coordination process taking into consideration the contracts

management process. In this way the coordination can administrate not only the dependence between the negotiations and the contracts which are formed and with execution dependences of those contracts.

Another perspective is to deliver to the user one instrument which allows him negotiation protocol definition according with the restrained negotiation interactions possibilities. Consequent, this will be a problem of coordination on which the infrastructure must solve on negotiation protocol administration and protocol build perspective.

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